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DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 01-338
	)	
SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 03-235
	)	
Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 03-260
	)	
BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 04-48

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2004 **Released:** October 27, 2004

By the Commission: Chairman Powell, Commissioners Abernathy, and Martin issuing separate statements; Commission Adelstein concurring in part, dissenting in part and issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we forbear from enforcing the requirements of section 271, for all four petitioners (the Bell Operating Companies (BOCs)), with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent reconsideration orders (collectively, the "*Triennial Review* proceeding"). These elements are fiber-to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).[1] We therefore grant the Verizon Petition[2] and BellSouth Petition,[3] and grant in part the SBC Petition[4] and Qwest Petition.[5]

[1]These elements are defined in our *Triennial Review Order*, *Triennial Review MDU Reconsideration Order*, and *Triennial Review FTTC Reconsideration Order*. *See 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 (continued....)

2. In its petition, Verizon requests that the Commission forbear from applying the independent section 271 unbundling obligations enumerated in the *Triennial Review* proceeding to the broadband elements the Commission removed from unbundling under section 251.[6] BellSouth seeks "the same relief requested by Verizon in its Petition for Forbearance."[7] The SBC and Qwest petitions request broader relief, essentially asking the Commission to forbear from applying the independent access obligations of section 271 to all network elements that the Commission determined need not be unbundled under section 251.

II. BACKGROUND

3. *Statutory Requirements*. The Telecommunications Act of 1996[8] requires that incumbent local exchange carriers (incumbent LECs) provide unbundled network elements (UNEs) to other

(Continued from previous page)
Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*); Order on Reconsideration, FCC 04-191 (rel. Aug. 9, 2004) (*Triennial Review MDU Reconsideration Order*); Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) (*Triennial Review FTTC Reconsideration Order*). In response to the D.C. Circuit's vacatur of certain *Triennial Review Order* unbundling rules, the Commission issued an *Interim Order and NPRM*, setting forth a six-month interim unbundling framework with respect to those network elements, and seeking comment on permanent unbundling rules that would respond to the *USTA II* decision. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) (*Interim Order and NPRM*).

[2]*See* Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (filed Oct. 24, 2003) (Verizon Oct. 24 *Ex Parte* Letter or Verizon Revised Petition); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, Public Notice, 18 FCC Rcd 22795 (2003) (subsequent history omitted) (Verizon Revised Petition Public Notice).

[3]*BellSouth Telecommunications, Inc. Petition for Forbearance*, WC Docket No. 04-48 (filed Mar. 1, 2004) (BellSouth Petition).

[4]*SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235 (filed Nov. 6, 2003) (SBC Petition).

[5]*Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260 (filed Dec. 18, 2003) (Qwest Petition).

[6]Although Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c). *See* Verizon Revised Petition; Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52, Attach. at 1-8 (filed Mar. 26, 2004) (Verizon Mar. 26 *Ex Parte* Letter).

[7]BellSouth Petition at 1.

[8]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "1996 Act" or the "Act."

telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with ... the requirements of this section and section 252."[9] Section 251(d)(2) of the Act describes two standards that the Commission should use in determining which network elements must be made available to requesting telecommunications carriers.[10] For network elements that are not proprietary in nature, section 251(d)(2)(B) requires the Commission to determine "at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[11] The Commission has determined that most network elements (including the elements at issue) are nonproprietary in nature, and are thus governed by the section 251(d)(2)(B) "impair" standard.

4. Section 271 establishes both the procedures by which a BOC may apply to provide interLATA services in its in-region states and the substantive standards by which that application must be judged. In particular, section 271(c)(2)(B) of the Act requires the BOCs to satisfy a fourteen point "competitive checklist" of access and interconnection requirements demonstrating that the local market is open to competition before they are permitted to provide in-region, interLATA services.[12] The section 251(c) obligations are referenced and incorporated as obligations of the BOCs under checklist item number two.[13] Four of the other checklist items require BOCs to provide competitors with "unbundled" access to specific network elements.[14] Specifically, item four of the competitive checklist requires the BOCs to provide competitive providers with access to local loop transmission from the central office to the customer's premises.[15] Item five requires the BOCs to provide access to local transport from the trunk side of a wireline local exchange carrier switch.[16] Item six requires the BOCs to provide access to local switching[17] and item ten requires the BOCs to provide nondiscriminatory access to databases and associated signaling.[18]

5. *Triennial Review Proceeding*. The Commission last year released the *Triennial Review Order*,[19] which reexamined the issues presented in implementing the unbundling requirements of section 251 of the Act. The Commission redefined the "impair" standard governing which nonproprietary network

[9] 47 U.S.C. § 251(c)(3).

[10] 47 U.S.C. § 251(d)(2).

[11] 47 U.S.C. § 251(d)(2)(B).

[12] 47 U.S.C. § 271(c)(2)(B).

[13] 47 U.S.C. § 271(c)(2)(B)(ii).

[14] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

[15] 47 U.S.C. § 271(c)(2)(B)(iv).

[16] 47 U.S.C. § 271(c)(2)(B)(v).

[17] 47 U.S.C. § 271(c)(2)(B)(vi).

[18] 47 U.S.C. § 271(c)(2)(B)(x).

[19] *See generally Triennial Review Order*, 18 FCC Rcd 16978.

elements the incumbent LECs should be required to unbundle under section 251(c)(3).[20] The Commission concluded that a requesting telecommunications carrier is impaired when lack of access to an incumbent LEC network element poses barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic.[21] In considering whether the sum of the barriers to entry was likely to make entry uneconomic, the Commission made clear that it is necessary to take into account any countervailing advantages that a requesting carrier may have.[22] With regard to loops, transport, switching and signaling/databases, the Commission, while limiting access to certain aspects of the elements, did find varying degrees of impairment and continued to require some unbundling of all of the elements at issue.[23]

6. The Commission distinguished new fiber networks used to provide broadband services for the purposes of its unbundling analysis. Specifically, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including FTTH loops in greenfield situations, broadband services over FTTH loops in overbuild situations, the packetized portion of hybrid loops, and packet switching.[24] The Commission based its determinations with regard to these

[20] *Triennial Review Order*, 18 FCC Rcd at 17021-85, paras. 61-169, *corrected by Triennial Review Order Errata,* 18 FCC Rcd at 19020, paras. 5-6.

[21] *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

[22] *Id.*

[23] Regarding loops for mass market customers, the Commission held that incumbent LECs are required to offer unbundled access to stand-alone copper loops, line splitting and subloops for the provision of narrowband and broadband services. *Triennial Review Order*, 18 FCC Rcd at 17128-32, paras. 248-54, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19020-21, paras. 9-10. The Commission also required incumbent LECs to offer unbundled access to hybrid/copper loops for narrowband services. *Id.* at 17153-54, paras. 296-97. For enterprise customer loops, the Commission required incumbent LECs to offer unbundled access to dark fiber loops, DS3 loops and DS1 loops subject to more granular reviews by the state commissions. *Id.* at 17155-83, paras. 298-342, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 12-13. The Commission further ruled that incumbent LECs must provide unbundled access to dark fiber, DS3 and DS1 dedicated transport subject to more granular reviews by state commissions. *Id.* at 17199-237, paras. 359-418, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, para. 15. With regard to switching for mass market customers, the Commission found that competing carriers are impaired without unbundled incumbent LEC local circuit switching because of barriers associated with the incumbent LEC hot cut process. *Id.* at 17265-85, paras. 464-85, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19021, paras. 17-18. The Commission therefore asked the state commissions to approve loop cut-over processes that accommodate high volume cut-overs, or make detailed findings demonstrating that such a process is not necessary. *Id.* at 17286-90, paras. 487-92. The state commissions were also asked to determine whether there is any other impairment in a particular market and whether such impairment can be cured by requiring unbundled switching on a rolling basis, rather than making unbundled switching available for an indefinite period of time. *Id.* at 17310-12, paras. 521-24. The Commission determined that both unbundled signaling and call-related databases must be unbundled for competitive carriers that are purchasing the incumbent LEC's local circuit switching. *Id.* at 17323-34, paras. 542-60.

[24] For FTTH loops, the Commission relieved incumbent LECs from unbundling FTTH loops in greenfield situations. In overbuild circumstances, the Commission required incumbent LECs to either keep the existing copper loop for competitive use, or provide unbundled access to a 64 kbps transmission path. However, incumbent LECs are relieved from any requirement to unbundle broadband services over overbuild FTTH loops. *Id.* at 17142-45, paras. 273-77. As discussed below, the Commission extended the FTTH unbundling relief initially to FTTH loops serving predominantly residential MDUs, and then to FTTC loop facilities, as well. *See infra* nn. 27-28 and accompanying text. The Commission also relieved incumbent LECs from the requirement to unbundle the next generation, (continued....)

elements on the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for all carriers, including the incumbent LECs, to invest in broadband facilities.[25] The Commission concluded that although it was relying on its impairment standard in determining whether these elements should be subject to unbundling, it had discretion under its section 251(d)(2) "at a minimum" authority to consider other factors.[26] Accordingly, the Commission considered the statutory goals outlined in section 706 in concluding that those broadband elements would not be subject to unbundling nationwide. In the *Triennial Review MDU Reconsideration Order*, the Commission determined that these same section 706 considerations justified extending the *Triennial Review Order*'s FTTH unbundling relief to encompass FTTH loops serving predominantly residential multiple dwelling units (MDUs).[27] In the subsequent *Triennial Review FTTC Reconsideration Order*, the Commission found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH.[28]

7. The Commission also considered the relationship between sections 251 and 271 of the Act. Specifically, the Commission considered the relationship between checklist item two (which references section 251) and checklist items four through six and ten (which do not). The Commission concluded that checklist items four through six and ten constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements that does not necessarily hinge on whether those elements are included among those subject to section 251(c)(3)'s unbundling requirements.[29] Accordingly, the Commission stated that even if it concluded that requesting telecommunications carriers are not "impaired" without access to one of those elements under section 251, section 271 would still require the BOC to provide access.[30] However, under that circumstance, the pricing standard would not be determined under section 252(d)(1), but would be governed by the "just and reasonable" standard established under sections 201 and 202.[31]

8. The United States Court of the Appeals for the District of Columbia Circuit recently reviewed the Commission's conclusions in the *Triennial Review Order*.[32] Although the court vacated and remanded many of the Commission's impairment findings, including those relating to mass market

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packetized capabilities of their hybrid loops for the provision of broadband services to the mass market. *Id.* at 17149-53, paras. 288-95. Finally, the Commission found that competitive LECs were not impaired without unbundled access to packet switching, and declined to require the incumbent LECs to unbundle such facilities. *Id.* at 17321-23, paras. 537-41, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26.

[25] *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44.

[26] *Id.* at 17121, para. 234.

[27] *Triennial Review MDU Reconsideration Order*, paras. 7-9.

[28] *Triennial Review FTTC Reconsideration Order*, paras. 9-19.

[29] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd at 19022, paras. 30-33.

[30] *Id.* at 17384, para. 653.

[31] *Id.* at 17386-89, paras 656-64, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33.

[32] *See generally USTA II*, 359 F.3d 554.

switching and local transport, the court affirmed the Commission's decisions to relieve incumbent LECs from broadband unbundling obligations.[33] The court also affirmed the Commission's conclusions related to the section 271 obligations.[34]

9. *Petitions for Forbearance.* During the pendency of the *Triennial Review* proceeding described above, Verizon filed a petition requesting that the Commission forbear from applying items four through six and ten of the section 271 checklist once the corresponding elements no longer need to be unbundled under section 251(d)(2).[35] Immediately prior to the Commission's statutory deadline to rule on its petition, Verizon submitted a letter requesting that the Commission limit the pending forbearance petition to the broadband elements that the Commission found on a national basis in the *Triennial Review* proceeding do not have to be unbundled under section 251.[36] The Commission denied that petition,[37] and Verizon sought judicial review of the Commission's order. In an opinion released in July 2004, the Court of Appeals for the D.C. Circuit found that the Commission had failed adequately to explain its decision not to grant Verizon's original petition, and remanded the matter to the Commission.[38]

10. BellSouth, SBC and Qwest then filed petitions seeking similar relief to that sought by Verizon. While BellSouth seeks forbearance from the same broadband elements as sought by Verizon,[40] SBC and Qwest request forbearance from the section 271 independent access obligation for all elements—both narrowband and broadband—that are not required to be unbundled under section 251(d)(2).[41] SBC and Qwest argue that once an element no longer meets the section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required by section 10.[42] SBC and Qwest further maintain that the rationale for forbearance is especially persuasive with regard to the broadband elements the Commission relieved from unbundling in the *Triennial Review* proceeding.[43]

11. *Forbearance Standard.* The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."[44] An integral part of this framework is the

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[33] *Id.* at 578-85.

[34] *Id.* at 588-90.

[35] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 (filed July 29, 2002).

[36] Verizon Revised Petition.

[37] Verizon Revised Petition Public Notice.

[38] *Verizon Telephone Companies v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

[40] BellSouth Petition at 1.

[41] SBC Petition at 4-8; Qwest Petition at 3-14.

[42] SBC Petition at 5-6; Qwest Petition at 11-13.

[43] SBC Petition at 8-14; Qwest Petition at 14-15.

[44] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.[45] Specifically, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[46] In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), 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]

III. DISCUSSION

12. For the reasons described below, we grant all BOCs forbearance from section 271's independent access obligations with regard to the broadband elements the Commission, on a national basis, relieved from unbundling under section 251: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. As required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3) in the *Triennial Review* proceeding.[48] In arriving at this determination, we find that the checklist portion of section 271 has been "fully implemented" in all states, and that the three-pronged forbearance test has been met with respect to these broadband elements. With regard to SBC's and Qwest's broader forbearance requests, we decline to address those issues in this Order.[49]

A. "Fully Implemented"

13. As a threshold matter, we must consider whether section 10(d) prohibits the forbearance sought by the BOCs in this proceeding. As stated above, section 10(d) prohibits the Commission from forbearing from the requirements of section 271 until it determines that those requirements have been "fully implemented."[50] In our recent order denying Verizon's forbearance petition from the separate operating, installation, and maintenance functions of section 272 (*OI&M Order*),[51] the Commission

[45]47 U.S.C. § 160(a).

[46]47 U.S.C. § 160.

[47]47 U.S.C. § 160(d).

[48]The forbearance relief granted in this Order in no way modifies the obligations of the BOCs under section 251(c) to continue to provide access to UNEs as specified in the *Triennial Review Order*. For example, in the *Interim Order and NPRM*, the Commission established six-month, interim unbundling rules. *Interim Order and NPRM*, paras. 18-29.

[49]We note that the one-year statutory period for considering these requests runs to November 5, 2004 with respect to SBC, and December 17, 2004 with respect to Qwest.

[50]47 U.S.C. § 160(d).

[51]*See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance* (continued....)

concluded that the section 272 separate affiliate requirements, which are referenced in section 271(d), are not "fully implemented" until three years after a BOC has obtained section 271 authority to provide in-region interLATA services in a particular state.[52] In arriving at that conclusion, the Commission noted that section 272 specifically requires that the BOCs maintain the separate affiliate structure for at least three years after grant of a section 271 application in a particular state.[53]

14. AT&T argues that the *OI&M Order* prohibits the Commission from finding that section 271 is fully implemented until a minimum of three years after long distance authority has been granted in a particular state.[54] Other commenters have argued that the Commission should adopt a market-based test and only find section 271 "fully implemented" when markets are deemed competitive.[55] The BOCs counter that the checklist of section 271 has already been determined to be "fully implemented" because the BOCs have received section 271 authority in all of their states.[56]

15. We find that the checklist portion of section 271(c) is "fully implemented" once section 271 authority is obtained in a particular state. Accordingly, because the BOCs have obtained section 271 authority in all of their states, we find that the checklist requirements of section 271(c) are "fully implemented" for purposes of section 10(d) throughout the United States.

16. This interpretation is the most reasonable reading of the statute. Once the checklist requirements have been met and the BOC is granted authority to provide interLATA services under section 271(d), there is nothing further the Commission or the BOC needs to do in order to implement the checklist. Certainly, the Commission continues to have enforcement authority under section 271(d)(6), but this assumes that the checklist has been implemented and that the BOC has received section 271 authority in a given state. This determination is consistent with the language in section 271(d)(3)(A)(i) stating that a BOC has met the requirements of section 271(c)(1) if among other obligations it has "fully implemented" the competitive checklist.[57] It is the most logical interpretation that the words "fully implemented" would have the same meaning when used in section 271, as when referring to section 10(d)'s requirement that section 271 be "fully implemented" prior to forbearance.

17. Accordingly, we reject suggestions by commenters that section 271(c)(1)(B) is only "fully implemented" once a certain competitive threshold in the market has been met. By interpreting the "fully implemented" language to include competitive thresholds, we would be creating inquiries redundant with

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Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149, Memorandum Opinion and Order, 18 FCC Rcd 23525 (2003) (*OI&M Order*).

[52]*OI&M Order*, 18 FCC Rcd at 23530, para. 7. The Commission also initiated a rulemaking regarding the "operate independently" requirement of section 272. *See Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, Notice of Proposed Rulemaking, 18 FCC Rcd 23538 (2003).

[53]*OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

[54]*See, e.g.*, AT&T Comments at 11 (Verizon Petition).

[55]*See, e.g.*, MCI Comments at 18 (Verizon Petition); PACE Coalition Comments at 5 (Verizon Petition); Sprint Comments at 8-9 (Verizon Petition); Covad Comments at 6 (Verizon Petition).

[56]Verizon Reply at 26-29; SBC Petition at 8; Qwest Petition at 17-18.

[57]*See* 47 U.S.C. § 271(d)(3)(A)(i).

those forbearance requirements, since section 10(b) of the Act already requires the Commission to consider the competitive market conditions, including whether a grant of forbearance will enhance competition in making its determination.[58] Instead, we believe section 10(d) is reasonably interpreted as a threshold standard, limiting the Commission from granting forbearance until it has determined that the BOC satisfies the section 271(c) competitive checklist.

18. Our finding in the *OI&M Order* regarding application of section 10(d) to section 272 in no way prevents us from reaching this conclusion. Indeed, the Commission specifically stated in the *OI&M Order* that its determination with regard to section 272 does not address whether any other part of section 271, such as the section 271(c) competitive checklist, is "fully implemented."[59] The "fully implemented" language of section 10(d) must be read in light of the particular requirements at issue, and section 272 requirements are distinct from the other requirements of section 271: the separate affiliate obligations of section 272 continue for at least a three-year period after the BOC is authorized to provide interLATA telecommunications services under section 271(d), while the section 271(c) competitive checklist lacks any such statutorily mandated timeframe. Accordingly, we conclude that the "fully implemented" standard that we have applied to section 272 should not be applied to the checklist obligation of section 271(c).

B. Forbearance from Section 271 Independent Access Obligations for Broadband Elements

19. As discussed below, we find that the BOCs have demonstrated that they satisfy the criteria set forth in section 10 with respect to the broadband elements for which the Commission provided unbundling relief on a national basis in the *Triennial Review* proceeding: FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching. Therefore, as required by section 10, we forbear from applying the section 271 access obligations to those broadband elements to the same extent that the Commission relieved those elements from unbundling under section 251(c)(3).

20. We apply our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.[60] Indeed, the Commission previously has considered "the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives," and concluded that the Act "directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[61] The analysis below is informed by that congressional direction, and we believe that our conclusions are faithful to Congress's intent.

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[58] 47 U.S.C. § 160(b).

[59] *OI&M Order*, 18 FCC Rcd at 23529-30, para. 6.

[60] Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (1996 Act Preamble); Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

[61] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998) (*Advanced Services Order and NPRM*) (subsequent history omitted) (discussing the relationship between section 10 and section 706).

1. Just and Reasonable Charges and Practices

21. Section 10(a)(1) requires that we determine whether applying the independent section 271 unbundling obligation to the broadband elements of the BOCs is necessary to ensure that the "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[62] Although in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong,[63] we find that, under the particular circumstances relevant to the instant analysis, it is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market. Specifically, the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest—particularly at the retail level—and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted.[64] We are mindful of the disincentive effects of unbundling on BOC investment, and believe that the beneficial effect of unbundling is small given the particular characteristics of this retail market. Accordingly, our section 10(a)(1) analysis considers the effects of forbearance from section 271's broadband unbundling requirements on the BOCs' rates and practices, considering the overall state of competition in the developing broadband market and the investment disincentives associated with unbundling obligations. For the following reasons, we agree with the BOCs' petitions that their relative position in the emerging broadband market would not lead to unreasonable or discriminatory practices in the absence of a section 271 obligation to unbundle their broadband facilities.[65]

22. The broadband market is still an emerging and changing market, where, as the Commission previously has concluded, the preconditions for monopoly are not present.[66] In particular, actual and

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[62] 47 U.S.C. § 160(a)(1).

[63] *See, e.g., Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27009-13, paras. 17-22 (2002).

[64] *Cf. Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18065-68, paras. 67-71 (*WorldCom/MCI Order*) (finding loss of wholesale market of concern only to the extent that it had negative effects in the retail market).

[65] *See* Verizon Reply at 7-9; BellSouth Petition at 7; SBC Petition at 13-14; Qwest Petition at 15-16.

[66] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2423-24, para. 48 (1999) ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd 2844, paras. 79-88 (2002) (*Section 706 Third Report*) (describing development of intermodal competition in broadband market); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747-48, para. 5 (2001) ("[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Third Report and Order (continued....)

potential intermodal competition informs rational competitors' decisions concerning next-generation broadband technologies.[67] From the BOCs' perspective, cable providers play an especially significant role in the emerging broadband market. The Commission's most recent High Speed Services Report, as well as other data in the record of this proceeding, indicates that cable modem providers control a majority of all residential and small-business high-speed lines.[68] The record demonstrates that cable operators have had success in acquiring not only residential and small-business broadband customers, but increasingly large business customers as well.[69] Further, in the *Triennial Review Order*, the Commission observed that "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for . . . wireline broadband service."[70] The Commission recognized in the *Triennial Review Order* the "important broadband potential of other

(Continued from previous page)
and Memorandum Opinion and Order, 15 FCC Rcd 11857, 11864, 11865, paras. 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9867, para. 116 (2000) (finding that cable operators, despite having a commanding share of the broadband market, face "significant actual and potential competition from . . . alternative broadband providers").

[67]*See generally United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market share is imperfect measure of competitive constraints and must be examined in light of access to alternative supplies); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (stating, in discussing competition to cable systems, that "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition"); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3308, para. 68 (1995) ("market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities") (quoting *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Order, 6 FCC Rcd 5880, 5890, para. 51 (1991)).

[68]Industry Analysis and Technology Division, Wireline Competition Bureau,, *High-Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2003) (*High-Speed Services Report Dec. 2003*); Verizon Mar. 26 *Ex Parte* Letter, Attach. at 1-8 (citing broadband market data through "the second half of 2003"); Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-337, 01-338, 02-33, 02-52 at 9 (filed May 3, 2004) (Verizon May 3 *Ex Parte* Letter) (same).

[69]*See* Verizon Mar. 26 *Ex Parte* Letter at 24-25 & Attach. We note that AT&T argues that forbearance should not be granted because cable providers tend not to serve business customers, allowing the BOCs to retain monopoly power for those services. *See* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed May 12, 2004) (AT&T May 12 *Ex Parte* Letter). In response, Verizon cites evidence that cable providers are currently serving some small business customers and are increasingly offering services to such customers. Letter from Dee May, Vice President – Federal Regulatory, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed May 17, 2004) (Verizon May 17 *Ex Parte* Letter). However, the availability of intermodal competition specifically from cable operators is only part of our analysis. Because competitive LECs can still obtain access to network elements under section 251 to serve business customers, and because of actual and potential intermodal competition from other services, we find that forbearance from section 271 is warranted, notwithstanding that the evidence regarding cable competition for business customers is not as powerful as residential customers. *See infra* para. 26. We therefore reject AT&T's argument.

[70]*Triennial Review Order*, 18 FCC Rcd at 17127, para. 246.

platforms and technologies, such as third generation wireless, satellite, and power lines."[71] Ku-band satellite service and fixed wireless service are available to provide high-speed Internet access across large parts of the country, and the Commission has a pending proceeding addressing broadband over power lines and has also created a task force on wireless broadband.[72] The record here likewise demonstrates the existence of numerous emerging broadband competitors.[73]

23. We also note that, in the *USTA II* decision, the D.C. Circuit upheld the Commission's findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a national basis for the broadband elements at issue.[74] In affirming these findings, the court noted the presence of robust intermodal competition from cable operators and concluded that the Commission was correct to take into account the BOCs' lesser penetration of the broadband market when compared with cable broadband providers.[75] The D.C. Circuit further agreed with the Commission that the emerging nature of the broadband market, along with the availability of alternative loop facilities,[76] mitigated any potential harm from removing access to these facilities.[77]

24. Given the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices for broadband services, we also weigh the value of the BOCs' own competitive role in the emerging broadband market as part of our overall section 10(a)(1) analysis.[78] As the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[79] The section 271 unbundled access obligations for broadband have the effect of discouraging BOC investment in this emerging market, diminishing their potential effectiveness as competitors today and in the future, to the detriment of the goals of section 10(a)(1). We

[71] *Id.* at 17136, para. 263.

[72] *Section 706 Third Report*, 17 FCC Rcd at 2875, 2877, paras. 72, 78; *Carrier Current Systems, including Broadband Over Power Line Systems*, ET Docket Nos. 03-104, 04-37, Notice of Proposed Rulemaking, 19 FCC Rcd 3335 (2004); *FCC Chairman Michael K. Powell Announces Formation of Wireless Broadband Access Task Force* (rel. May 5, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246852A1.pdf.

[73] *See, e.g.*, Verizon Mar. 26 *Ex Parte* Letter, Attach. (describing existing and potential competition from cable modem providers, power lines, fixed wireless, 3G mobile wireless, and satellite).

[74] *See USTA II*, 359 F.3d at 578-85.

[75] *Id.* at 582.

[76] In the *Triennial Review Order*, the Commission found that competitive LECs could deploy FTTH loops, had widely deployed their own packet switches, and continued to have access to other elements of the incumbent LECs' network. *Triennial Review Order*, 18 FCC Rcd at 17143, 17151, 17321-22, paras. 275, 291, 538.

[77] *USTA II*, 359 F.3d at 581-82.

[78] In addition, the investment disincentives associated with broadband unbundling obligations also are a factor in our more general analysis of consumer protection, as discussed below. *See infra* para. 32.

[79] *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Petition of U S WEST Communications, Inc., for Forbearance*, CC Docket No. 97-172, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999).

recognized when we relieved the incumbent LECs from unbundling obligations under section 251(c) that the elements used to provide access to next-generation networks are more recently developed technologies, and generally represent upgrades to incumbent LECs' loop plant.[80] Indeed, by granting relief from the similar broadband unbundling obligations of section 251, the Commission's intention was to encourage the deployment of new fiber technologies by incumbent LECs and their competitors alike, and increase the broadband services being offered to consumers in the near future.[81]

25. We conclude that investment disincentives also arise from section 271 unbundled access requirements. Those disincentives are attributable to not only the prospect that regulated unbundling will diminish the compensation BOCs receive from users of their broadband facilities, but also the costs of constructing BOC broadband facilities in a fashion that will allow the BOC to satisfy whatever access requirements might foreseeably be imposed under section 271, as well as the significant costs that can be associated with regulatory proceedings themselves.[82] In light of the competitive benefit of the BOCs' continued investment in fiber-based broadband facilities, the disincentives associated with regulated broadband unbundling under section 271 support our decision to grant forbearance from those requirements. We conclude that removing those disincentives will promote just and reasonable charges and practices through the operation of market forces.

26. With regard to the potential impact of forbearance specifically on the wholesale broadband market, as raised by certain competitive LEC commenters,[83] the evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business. Verizon plausibly claims that because the BOCs face intense intermodal competition, even in the absence of section 271 unbundling they will need to find ways to keep traffic "on-net," which we conclude would likely include the provision of wholesale offerings.[84] Although we acknowledge that the question is not entirely susceptible to resolution with evidentiary proof, and a degree of informed prediction is required, we conclude in light of the evidence before us that even if the BOCs were not required to provide competitors unbundled access to the broadband elements at issue under section 271, competitive LECs would still be able to access other network elements to compete in the broadband market or take

[80] *Triennial Review Order*, 18 FCC Rcd at 17126, para. 243.

[81] *Id.* at 17141, para. 272.

[82] *See Id.* at 17127, 17145, 17153, paras. 244, 278, 295. We note that, even if we were not correct about the disincentive effects of unbundling requirements under section 271, that would not necessarily suggest that forbearance is inappropriate under section 10(a). If section 271 did not discourage investment, the most obvious reason would be that competitive forces impose equivalent (or more severe) constraints on BOC pricing and offerings. In that situation, application of the section 10(a) criteria likely would lead to the same conclusion that forbearance is required.

[83] *See, e.g.*, Sprint Comments at 14 (Verizon Petition); AT&T Comments at 21 (Verizon Petition); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 9 (filed Mar. 3, 2004) (AT&T Mar. 3 *Ex Parte* Letter).

[84] Verizon March 26 *Ex Parte* Letter at 15.

advantage of the opportunities presented by the developing market situation to build their own facilities or obtain access to facilities from other suppliers.[85]

27. We also note that, where section 271 unbundling obligations discourage the BOCs from building next generation networks in the first place, competitive LECs derive no access benefit from those obligations. Competitive LECs cannot provide broadband services using a BOC network that is unable to support broadband services. Moreover, as discussed above, we take into account the effect that terminating wholesale access under section 271 would have on retail customers.[86] Given our analysis of the characteristics of the retail broadband market, coupled with the potential for section 271 unbundling obligations to deter the BOCs from becoming more vibrant broadband competitors (and thereby spurring other providers as well), we find that the requirements of section 10(a)(1) are satisfied here.[87]

28. We reject the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments.[88] Forbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied.[89] Furthermore, the competitive LECs' reading of section 10 conflicts with the D.C. Circuit's

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[85]We note that our judgment here is based on our determination that because the broadband market is a developing market, we should not presume, nor do we have any evidence, that the BOCs will act in an unreasonable or unreasonably discriminatory manner without evidence of such actions. To the extent our predictions about the broadband market and the BOCs' actions are incorrect, carriers can file appropriate petitions with the Commission and, of course, the Commission has the option of reconsidering this forbearance ruling. *See CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998); *see also Petition of SBC Communications Inc. For Forbearance From Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request For Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004) (*International Directory Assistance Order*). For these reasons and the reasons given in the text, we reject the premise of AT&T's argument that granting the forbearance authority at issue here involves an impermissible "'trade off' between short-term consumer harms and longer-term policy benefits." AT&T May 12, 2004 *Ex Parte* at 2. We conclude, instead, that market forces and regulatory safeguards will adequately protect against the short-term consumer harms AT&T hypothesizes in the absence of section 271 unbundling requirements for certain broadband elements.

[86]*See WorldCom/MCI Order*, 13 FCC Rcd at 18065, para. 68.

[87]This situation has parallels to the one the Commission recently addressed in the *International Directory Assistance Order*, in which the Commission concluded that because the BOCs would be new entrants into the international directory assistance market, and would face competition from interexchange carriers, they would be unable to impose unjust, unreasonable, or unjustly or unreasonably discriminatory charges or practices on other carriers. *See International Directory Assistance Order*, 19 FCC Rcd at 5221-23, paras. 15-19.

[88]For instance AT&T argues that because the BOCs allegedly have monopolistic power in the broadband markets, forbearance from the access obligations of section 271 would permit them to either charge supracompetitive prices for wholesale access to their broadband facilities, or deny access altogether. *See, e.g.*, AT&T Mar. 3 *Ex Parte* Letter; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, at 1-5 (filed Apr. 15, 2004) (AT&T Apr. 15 *Ex Parte* Letter).

[89]*See Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1467-68, 1470-72, paras. 138, 146-54 (1994) (concluding that market need not be "fully competitive" to permit forbearance under section 332(c)(1)(A) and describing constraints on anti-competitive practices by duopoly providers).

USTA II decision which held, in the section 251 context, that "the Commission cannot ignore intermodal alternatives" when evaluating wholesale unbundling obligations.[90] The D.C. Circuit likewise required a "confrontation of the issue [of investment disincentives] and some effort to make reasonable trade-offs" when considering unbundling pursuant to section 251.[91] We disagree with commenters who argue that the Commission is precluded under our forbearance authority from considering factors relating to unbundling policy pursuant to section 271 that we are required to consider pursuant to section 251. If section 10(a)(1) were read as the competitive LECs propose, no amount of intermodal retail competition or investment disincentives could ever warrant forbearance if there was not also a fully competitive wholesale market that would continue in the absence of unbundling.

29. Finally, and consistent with the foregoing analysis, we specifically reject the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators.[92] Again, we refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable and nondiscriminatory rates, terms and conditions for these services. As explained above, broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.

2. Protection of Consumers

30. Section 10(a)(2) of the forbearance analysis requires us to determine whether the independent section 271 access obligation for broadband elements is necessary to protect consumers.[93] For reasons similar to those that persuade us that the independent section 271 unbundling obligation for the broadband elements is not necessary within the meaning of section 10(a)(1), we also determine that the obligation is not necessary for the protection of consumers. As we concluded above, the BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market. BOCs are not even the largest

[90] *USTA II*, 359 F.3d at 572-73.

[91] *USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (*USTA I*).

[92] *See* AT&T Mar. 3 *Ex Parte* Letter at 11-12; *see also* CLEC Coalition Comments at 6-7 (Verizon Petition). AT&T also incorrectly focuses on the existence of competition with respect to particular facilities, such as hybrid loops. AT&T Mar. 3 *Ex Parte* Letter at 9. We need not evaluate competition separately with respect to each type of facility in the BOCs' networks that can be used to offer broadband services when, as discussed above, there is both existing and potential competition in the emerging broadband market from a wide range of facilities and platforms (including incumbent LEC facilities that must be unbundled under section 251).

[93] 47 U.S.C.§ 160(a)(2).

provider of broadband services to consumers—many more consumers receive broadband through cable modem services.[94]

31. Therefore, as discussed above, we believe that forbearance from these requirements will provide an increased incentive for the BOCs to deploy broadband services and compete with cable providers, which will in turn increase competition and benefit consumers.[95] As the Commission stated in the *Triennial Review Order*, relieving the incumbent LECs from the section 251 unbundling requirements for broadband elements will benefit consumers "from this race to build next generation networks and the increased competition in the delivery of broadband services."[96] The *USTA II* decision recently upheld the Commission's approach, finding that the Commission lawfully may focus on future consumer benefits anticipated by its current policy decisions.[97] We believe that forbearance from the section 271 independent unbundling obligations for the broadband elements is consistent with these findings and will further this result.

32. Accordingly, we reject the arguments of competitive LECs that the section 271 independent access obligation is necessary under section 10(a)(2) to ensure that competitive LECs will also have the ability to provide broadband services, thereby offering consumers additional choices.[98] We believe this argument is faulty because in this context forbearance provides competitive carriers as well as BOCs with increased incentives to invest in the broadband market. As we concluded in the *Triennial Review Order*, removing unbundling obligations for broadband services will result in increased choices for consumers in two ways. First, once incumbent LECs are certain that their broadband networks will be free from unbundling requirements, we expect that they will expand their deployment of these networks, and provide increased choices to consumers.[99] Second, we expect that competitive LECs will seek "innovative network access options" to continue to provide broadband services to consumers and to compete with the incumbent LECs.[100]

3. Public Interest

33. With respect to the third criterion for forbearance, we conclude that relieving the BOCs from the section 271(c) access obligation for the broadband elements is in the public interest. Section 10(b) directs the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services," and states that such a determination may be the basis for finding that forbearance is in the public interest and thus meets section 10(c).[101] As we concluded above, given that

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[94] *High Speed Services Report Dec. 2003* at Table 2.

[95] *See* Verizon Petition at 7-10; SBC Petition at 8-10; Qwest Petition at 10-11.

[96] *Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

[97] *USTA II*, 359 F.3d at 581.

[98] *See, e.g.*, AT&T Comments at 23-25 (Verizon Petition); Sprint Comments at 15-17 (Verizon Petition).

[99] *Triennial Review Order*, 18 FCC Rcd at 17141-42, para. 272.

[100] *Id.*

[101] 47 U.S.C. § 160(b).

these broadband elements generally involve new network investment on the BOCs' part, and that the BOCs are subject to significant intermodal competition in providing broadband services, relieving the BOCs of unbundling obligations will encourage BOCs to further invest in, and deploy broadband technologies. In turn, we believe these investments will promote increased competition in the market for broadband services.

34. Our analysis of the public interest is informed by section 706 of the 1996 Act, which – as noted above – directs us to promote the timely and comprehensive deployment of broadband facilities. Moreover, we take note of the BOCs' arguments that the unbundling obligation of section 271 imposes a costly requirement of designing the broadband network to create access points for the various components.[102] The Commission intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.[103]

35. In making these determinations, we reject the arguments of certain competitive carriers that section 271(d)(4), which 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) of this section," precludes the relief the BOCs seek here.[104] Such a reading is inconsistent with the plain terms of the statute. As an initial matter, as we have found above, the competitive checklist of section 271 is "fully implemented" when a BOC receives authorization to provide interLATA service under section 271. Subsequent forbearance from the checklist cannot thus be considered to "limit or extend" its terms: the Commission applied the checklist when it completed its section 271 inquiry and may then exercise forbearance, consistent with its obligations under section 10. Indeed, the opposite reading would place entirely too much weight on section 271(d)(4), to the detriment of the clear statutory directive in section 10. Forbearance neither limits nor extends the terms of any statutory provision. Rather, the decision to forbear represents the conclusion that under the statute, we are prohibited from applying a particular provision at all to specific telecommunications carriers or services. Granting forbearance in this circumstance, therefore, would not alter the terms used in the checklist, but instead suspend their ongoing enforcement in a discrete set of circumstances. Had Congress intended the prohibition on "limit[ing] or extend[ing]" the checklist to bar forbearance as well, it would have addressed that specific statutory procedure in section 271(d)(4).[105]

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[102] *See, e.g.*, Verizon Petition at 9-10.

[103] We disagree with MCI's argument that Verizon's offering competitive carriers access to transmission services as part of its Packet at the Remote Terminal Services (PARTS) proves that the unbundling difficulties that Verizon and the other BOCs present do not exist. MCI Comments at 13-14 (Verizon Petition). As Verizon explained in its reply comments, the PARTS service was designed to provide competitive LECs access to xDSL service over hybrid facilities and does not contemplate unbundling of full fiber networks. Verizon Reply at 13.

[104] *See, e.g.*, AT&T Comments at 8 (Verizon Petition); Sprint Comments at 6-7 (Verizon Petition).

[105] *See, e.g.*, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations and citations omitted).

36. The BOCs have therefore satisfied section 10(a)'s three-pronged test with regard to section 271(c)(2)(B)'s independent access obligations for the particular broadband elements at issue in this decision. Accordingly, we forbear from enforcing those requirements.

IV. CONCLUSION

37. Based on the foregoing discussion, we conclude that section 271(c)(1)(B) has been fully implemented for all of the BOCs in all of the states in which they are providing service. Moreover, we find that section 10(a)'s three-pronged test for forbearance has been met with respect to section 271(c)(1)(B)'s independent access obligation for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching for all of the affected BOCs to the extent such broadband elements were relieved of unbundling on a national basis under section 251(c). Accordingly, we grant Verizon's and BellSouth's petitions for forbearance, and we grant in part the SBC and Qwest petitions.

V. EFFECTIVE DATE

38. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 22, 2004.[106] The time for appeal shall run from the release date of this order.[107]

[106] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute), and 47 C.F.R. § 1.103(a).

[107] *See* 47 C.F.R. §§ 1.4 and 1.13.

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Verizon Telephone Companies' Revised Petition for Forbearance IS GRANTED.

40. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), SBC Communications Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

41. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Qwest Communications International Inc.'s Petition for Forbearance IS GRANTED to the extent described herein.

42. IT IS FURTHER ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), BellSouth's Petition for Forbearance IS GRANTED.

43. IT IS FURTHER ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. 160, and section 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on October 22, 2004. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In my separate statement to the *Triennial Review Order* and in countless other statements during my seven years at the Commission, I have emphasized that "[b]roadband deployment is the most central communications policy objective of our day." Today, we take another important step forward to realize this objective.

By removing 271 unbundling obligations for fiber-based technologies - and not copper based technologies such as line sharing - today's decision holds great promise for consumers, the telecommunications sector and the American economy. The item eliminates barriers to companies that provide customers with an assortment of new services and applications including interactive educational content, improved telecommuting, life saving telemedicine applications, real-time two-way sign language conversations with people with disabilities, and enhanced video-on-demand services in competition with cable operators.

This Commission has a comprehensive approach to bringing faster broadband connections to consumers. Many have complained that the United States ranks 11th in the world. Today's action represents an effort to close that gap. The networks we are considering in this item offer speeds of up to 100 Mbs and exist largely where no provider has undertaken the expense and risk of pulling fiber all the way to a home. And companies are responding to the Commission's efforts to create a stable regulatory environment for new investment. For example, just this week Verizon announced its plans to double its fiber-to-the-premises (FTTP) deployment rate next year, bringing FTTP to 2 million additional locations. This represents a 566 percent increase over the number of existing FTTP subscribers. SBC has committed to serve 300,000 households with a FTTH network while BellSouth has deployed a deep fiber network to approximately 1 million homes. Other carriers are taking similar actions. And there are important ancillary benefits to this activity. It is estimated that Verizon's efforts will generate between 3,000 and 5,000 new jobs. These are positive developments for consumers and our nation's economy. All of these facts demonstrate that the Commission has a clear plan that has generated clear results.

My mission is to continue to stimulate investment in next generation architectures, apply a light hand and let entrepreneurs bring the future to the people. This item demonstrates that we are one step further along.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48

In the Triennial Review Order and subsequent reconsideration orders, the Commission took the bold step of fencing off next-generation broadband facilities from unbundling obligations. This forbearance decision is an important component of that deregulatory policy, and it will help deliver the promise of broadband networks and IP-enabled services to Americans throughout all parts of the country.

The Commission declined to subject broadband facilities to unbundling obligations under section 251 to encourage greater investment in deep-fiber networks — investment that is massive in scope and carries no assurance of profit. While curtailing unbundling requirements undeniably creates challenges for wireline competitors, the Commission was rightly concerned that new broadband investment would be severely chilled if incumbents were required to share the fruits of their labors on terms and conditions set by regulators. Moreover, in a broadband marketplace where cable operators enjoy a significant lead over wireline incumbents, it is difficult to justify saddling the less-dominant platform — but not the market leader — with unbundling obligations.

Forbearance from unbundling obligations imposed under section 271 is necessary to ensure that the Commission's broadband relief has its intended effect. The Commission has determined that the costs of unbundling outweigh its benefits in the broadband context, and that determination warrants relief from unbundling irrespective of which statutory provision it arises under. While access obligations under section 271 have been argued to be less burdensome than those imposed under section 251 (because the TELRIC standard is inapplicable under section 271), unbundling in all events "spread[s] the disincentive to invest in innovation and create[s] complex issues of managing shared facilities." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

Notably, the Commission retains regulatory authority to ensure that consumers will be protected if robust broadband competition fails to live up to its potential. I do not expect such an outcome, but the Commission stands ready to act if a market failure occurs. In addition, this grant of forbearance is without prejudice to our ongoing proceeding regarding the *Computer Inquiry* nondiscrimination provisions, so the Commission will have a full opportunity to determine the extent to which those separate requirements remain necessary.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c),* Memorandum Opinion and Order (WC Docket Nos. 01-338, 03-235, 03-260 & 04-48)

The mismatch between the Commission's broadband rhetoric and reality reaches new heights with today's decision. The reality is that the International Telecommunications Union reports that the United States is now ***thirteenth*** in the world in broadband penetration. This is a fall even from our sobering perch at eleven that the Commission reported just a few months ago. It's an ominous trend when we recall that just two-and-a-half years ago the Commission reported that the United States ranked number four in the world in broadband penetration.

While the country experiences broadband freefall, the Commission has embarked on a policy of closing off competitive access to last mile bottleneck facilities. In the *Triennial Review*, the majority restricted access to fiber-to-the-home loops. Last summer, the majority extended this exemption from competition to facilities serving "primarily residential" buildings, an action that clouded the line between mass market and small business customers. The result: millions of small businesses located in buildings where there are also residential units are shut off from the benefits of having competitive broadband options. Last week brought another onslaught when the majority insulated fiber-to-the-curb architectures from competition. This action further restricted broadband choice for residential consumers and further tightened the noose on small businesses seeking competitive broadband services.

Today, the majority pounds another nail into the coffin it is building for competition. In all prior decisions, the majority used Section 251 to restrict access to last mile facilities. But to ensure at least the possibility of access and the possibility of competition—even though it might be at higher prices—the Commission unanimously required continued access to these facilities under the less stringent requirements of Section 271. In *USTA II*, the D.C. Circuit upheld this approach. But in today's decision, the majority casts aside the court's holding and moves on to slash even the residual bare requirements of Section 271 access. As a result, there is now absolutely no obligation to provide competitive access to any broadband facilities—from fiber-to-the-home to fiber-to-the curb to packetized functions of hybrid loops to packetized switching capabilities—at just and reasonable rates. The majority accomplishes this final feat using the Commission's Section 10 forbearance authority to shut off any obligation to provide fair access to last mile bottleneck facilities. In doing so, they replace their will for that of Congress, finding that competition is not required for just and reasonable charges or for the protection of consumers. They conclude that the public interest is served by retreating to a policy of non-competition and last mile monopoly control. I cannot support such conclusions nor the underlying analysis.

The majority attempts to assure us that today's action is part of an effort to promote local competition. They contend that in the broadband market preconditions for dominance are not present because promising technologies are flooding the marketplace. But broad rhetoric about the power of competition does not make it happen. And choosing to ignore the Commission's own data does not help the weak analytical structure on which this decision is built.

The facts are clear. This Commission's most recent report on high-speed services shows that the residential and small business market is a duopoly. Our data show that new satellite and wireless technologies—exciting though they are—together serve only 1.3 percent of this market. Broadband over powerline does not yet even register. Yet the majority chooses to ignore the Commission's statistics, preferring instead sweeping rhetoric about regulatory relief and broadband competition.

One problem here is that the majority gets so carried away with its vision of the country's telecom future that they act like it is already here, that competition is everywhere flourishing, and that intermodal competition is already ubiquitous reality. But their cheerful blindness to stubborn market reality actually pushes farther into the future the kind of competitive telecom world they say they want.

The lack of analysis in this proceeding—and in the Commission's approach to broadband generally—amounts to a regulatory policy of crossing our fingers and hoping competition will somehow magically burst forth. With the international economy increasingly dependent on broadband facilities, faith-based approaches to advanced telecommunications are insufficient. We cannot afford to wait. As *Business Week* recently made clear: "If the U.S. is not to lose out in the global race of the next-generation Internet and the new businesses it can spawn, change is needed. The country must create vigorous competition to drive the low prices and high speeds that can usher in a prosperous broadband economy." I agree. There may not be a "one-sized-fits-all" competition policy out there, but if we want to enter the brave new world of broadband, we need to move away from our current course. The facts show we are headed in the wrong direction at warp speed. I dissent.

STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. Sec. 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. Sec. 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. Sec. 160(c)

For the past year, I have called on the Commission to take quick action to clarify that the section 271 rules do not trump the regulatory relief we provided in our recent broadband decisions. I am pleased that today's action continues the commitment not to saddle next-generation broadband networks and facilities with unbundling obligations established for legacy networks. This decision should encourage the rapid deployment of new investment in the high-speed broadband networks and facilities that will provide American consumers with more 21st century advanced services.

I join my colleagues in support of today's decision to forbear from enforcing the requirements of section 271, with regard to all the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent broadband decisions. The elements are fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, packet switching, and line-sharing.

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing.[1] Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

[1] *See, e.g., Verizon Petition for Forbearance*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, 04-48

I concur in part and dissent in part to this decision to relieve the Bell Operating Companies from the unbundling requirements of Section 271 for high-speed fiber loops capable of delivering advanced data, video and voice service to the mass market. I am disappointed, however, that this expert agency fails to back up many of the assertions in this item with hard data and in-depth analysis. With the U.S. ranked 13th in the world in broadband penetration, this Order should be based on a careful, comprehensive and independent analysis of the broadband marketplace. Unfortunately, this Order makes bold predictions about broadband competition but fails to apply the careful and thorough analysis requisite to our delicate forbearance authority.

Particularly with respect to the capital-intensive investments required to deploy new fiber networks to customers' premises, I have taken the view that we should carefully balance the costs and benefits of unbundling, a view affirmed recently by the D.C. Circuit Court of Appeals.[1] In past Orders, that approach has led me to support measured unbundling relief for broadband investment in so-called "greenfield areas," where there is no existing loop plant and competitors and incumbents stand on equal footing.

For similar reasons, I again support the lifting of unbundling requirements for greenfield deployments of fiber-to-the-home facilities used to serve mass market customers.[2] In reaching this decision, I acknowledge the extraordinary investment required to bring high-speed fiber to mass market customers' premises and the consumer benefits that will result, including the potential for new competition in the video marketplace. Given these benefits, granting providers additional incentives to build these next generation networks through targeted unbundling relief is warranted.

I can only concur in my support, however, because I believe that this Order falls far short in providing the careful market analysis required under the statute and Commission precedent.[3] Under current case law, we must presume that the petitioners exercise market power in their provision of

[1] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[2] In past Orders, I have supported relief for the deployment of functionally equivalent facilities, such as fiber to the curb and fiber to multi-dwelling units, to serve mass market customers in greenfield areas. My support for the unbundling relief in this Order extends similarly to these investments.

[3] *See* 47 U.S.C. § 160 (enumerating forbearance criteria and directing the Commission to consider "competitive market conditions"); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001) (describing the Commission's approach to market definition and market power analysis).

advanced services, in the absence of a finding of non-dominance.[4] In previous Orders, the Commission has carefully considered the ability of such carriers to use market power to affect the reasonableness of rates for consumers. Yet, the Commission makes little serious attempt in this Order to evaluate specific product or geographic markets, the competitive market conditions in all areas of the country, or the petitioners' abilities to exercise market power for broadband services. In my view, the Commission should have conducted the requisite market analysis first.[5] The Commission could have then lifted unbundling requirements in markets in which we determined the carrier does not exercise market power. This sort of careful review would help allay concern about the impact of Section 10 forbearance on the ability of State commissions to ensure just and reasonable wholesale rates where competitive alternatives are lacking.

A decision based on the statutory forbearance criteria requires us to make reasoned judgments to ensure the protection of consumers and competition consistent with the public interest. This undertaking requires a comprehensive and rigorous review to ensure that we do not inadvertently harm the very communities and burgeoning competition that we are trying to protect. Despite the Order's lack of in-depth market analysis, I must nonetheless make a determination on the petitioners' forbearance requests based on the best information available. My support for measured unbundling relief here recognizes that the petitioners currently have less market share than the leading provider in the rapidly developing, but still emerging, market for mass market broadband services, albeit on a national basis. Should we find in the future that circumstances are changed, the Commission's approach here may well need to change.

My support for targeted relief here does not signal that the Commission need not remain vigilant about the evolution of this marketplace to ensure that consumers continue to gain the benefits of lower prices and increased bandwidth offerings. Similarly, the Commission should move to address distinctions between the mass market and the enterprise market, given the importance of competitive choice to small businesses throughout the nation.

I note that my support for this Order does not speak to the different context of access to networks provided to information service providers under our rules. Any reconsideration of those rules, which have served to ensure the open character of the Internet, may involve a very different set of considerations than those faced here.

For these reasons, I concur in part and dissent in part.

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[4] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, FCC 02-340, CC Docket 01-337 (2002) (*Advanced Services Forbearance Order*).

[5] I note that the Commission opened an as-yet-uncompleted proceeding to conduct precisely this sort of market analysis almost three years ago. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001).