

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

In the Matter of the)
Interpretation of Section 271 of the)
Telecommunications Act of 1996 As)
To Whether the Statutory Listing of)
Loops and Transport Includes the)
Requirement That Existing Dark Fiber)
Be Made Available to Competitors)

WC Docket No. 10-14

**COMMENTS OF ALPHEUS COMMUNICATIONS, L.P. AND BIDDEFORD
INTERNET CORPORATION D/B/A GREAT WORKS INTERNET**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
I. Introduction and Summary	2
II. The Competitive Checklist In Section 271 Affirmatively Requires The BOCs To Provide Access To Dark Fiber And Line Sharing.....	6
A. The Text of the Act and the Commission’s Section 271 Decisions Require the BOCs to Provide Access to Dark Fiber Loops, Dark Fiber Transport and Line Sharing.....	6
B. Section 271 Also Obligates the BOCs to Provide Access to Dark Fiber Entrance Facilities.....	13
III. The Commission’s Grant of Forbearance from Section 271’s Requirement to Provide Access to Broadband Elements Demonstrates the Continuing Obligation to Provide Access to Dark Fiber.....	14
IV. The BOC Obligations Under Section 271 Are Independent of Any Obligations Under Section 251(c)(3).	15
A. The Plain Language of the Act Confirms that the BOC Obligation to Provide Checklist Elements Exists Independent from any Obligation to Provide UNEs Pursuant to Section 251.....	15
B. The BOCs’ Section 271 Duty To Provide Dark Fiber To Requesting Carriers Was Not Disturbed By The <i>TRRO</i>	16
1. The Commission’s Definition of Local Loops under § 271(c)(2)(B)(iv) Remains Unchanged.	16
C. The Commission’s Orders Do Not Conflate the Section 271 Checklist with the Independent Section 251 Obligations to Provide UNEs.....	17
V. The Public Interest Requires the Commission to Affirm its Orders Requiring the BOCs to Provide Access to Dark Fiber Under § 271 Expeditiously.....	19
A. The Omaha Order Further Stresses the Independence of Section 271 from Section 251 and the Policy Need for Maintaining Access Under Section 271.....	19
B. Dark Fiber Unbundling is in the Public Interest.	21
VI. Conclusion	23

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Alpheus Communications, L.P. and Biddeford Internet Corporation d/b/a Great Works Internet, respectfully submit their Joint Comments in response to the Commission’s Public Notice,¹ requesting parties to comment on the petition filed by the Maine Public Utilities Commission asking the FCC to “determine whether line sharing, certain dark fiber loops, dark fiber transport and dark fiber entrance facilities are facilities falling within items four and/or five of the ‘competitive checklist’ found in 47 U.S.C. § 271(c)(2)(B)(iv),(v).” The Commission should expeditiously confirm, consistent with long-standing precedent, that dark fiber and line sharing, as features, functions and capabilities of checklist items four and five, are squarely within the ambit of checklist items four and five and therefore the BOCs must provide requesting carriers access to these elements at just and reasonable rates as a condition of continuing to provide in-region interLATA services authorized by the Commission pursuant to Section 271 of the Communications Act.

¹ Public Notice, *Comment Sought On Maine Public Utilities Commission, Petition For Declaratory Ruling Regarding Section 271 Access To Dark Fiber Facilities And Line Sharing*, DA 10-94, WC Docket No. 10-14 (rel. January 15, 2010).

I. Introduction and Summary

Section 271 of the Communications Act governs Bell Operating Company (“BOC”) entry into the long distance service market. Under § 271, a BOC cannot gain authorization to provide in-region long distance service without first providing access and interconnection to requesting carriers.² This access or interconnection must satisfy a checklist of 14 requirements under § 271(c)(2)(B) that the BOC must continue to satisfy even after receiving § 271 approval.³

Pursuant to the checklist requirements, in § 271(c)(2)(B), BOCs are required to provide requesting carriers with access to specifically-enumerated network elements including loops, transport, switching and call-related databases (“§ 271 network elements”). This obligation is wholly independent of any duty to offer UNEs pursuant to § 251(c)(3). Section 271 of the Act requires BOCs (as so defined in Section 3 of the Act⁴) to provide “Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁵ Similarly, BOCs are obligated to provide “Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.”⁶ Under the Commission’s rules, BOCs are required to offer these network elements at rates that are just, reasonable and nondiscriminatory,⁷ either under “binding agreements that have been approved under § 252” or

² See 47 U.S.C. § 271(c)(2)(A).

³ 47 U.S.C. § 271(d)(6).

⁴ 47 U.S.C. § 153(4).

⁵ 47 U.S.C. § 271(c)(2)(B)(iv).

⁶ 47 U.S.C. § 271(c)(2)(B)(v).

⁷ *In the Matter of 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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17389 ¶ 662 (2003) (“TRO”) *aff’d in part, vacated and remanded in part sub nom. USTA v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (“USTA II”),

under a “statement of terms and conditions ... [that] has been approved or permitted to take effect by the State commission under § 252(f)”⁸

Since enactment of Section 271 as part of the 1996 Act, the Commission has enforced the BOCs’ § 271 obligations primarily through proceedings evaluating BOC applications for authority to provide in-region long distance service. In such cases, the Commission has evaluated BOC compliance with the checklist, addressed the terms on which BOCs may obtain long distance authority and has since granted each BOC such authority in each state where that BOC provides service.

While § 271 applies to the BOCs, § 251(c) of the Act governs interconnection for all incumbent local exchange carriers (“ILECs”), including BOCs and other non-BOC ILECs.

Under § 251(c)(3), an ILEC has the duty:

to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, 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 terms and conditions of the agreement and the requirements of this section and section 252.

Under § 251, in order for an unbundled network element (“UNE”) to be available, the Commission must determine 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.”⁹

(citing *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3905 ¶ 470 (1999) (“*UNE Remand Order*”) (*aff’d in part, remanded in part USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“*USTA I*”), *cert. denied sub nom. WorldCom, Inc. v. USTA*, 538 U.S. 940 (2003) citing 47 U.S.C. §§ 201-202.).

⁸ 47 U.S.C. § 271(c)(1)(A), (B).

⁹ 47 U.S.C. § 251(d)(2)(B).

The Commission has confirmed that the BOC obligation to provide nondiscriminatory access to network elements under § 271 is independent of its obligation to provide unbundled access to network elements under § 251, because the “plain language and structure” of the § 271 checklist establish an independent and ongoing access obligation under § 271.¹⁰

Clearly, § 251(c) applies to all ILECs, whereas § 271 only applies to BOCs.¹¹ Further, while UNEs under § 251 are only available where requesting carriers are impaired,¹² § 271 imposes on the BOCs a permanent duty to provide access to the items enumerated on the competitive checklist even where requesting carriers are not impaired.¹³

The Commission’s orders approving BOC Section 271 applications clearly articulated that the BOCs were required to provide dark fiber and line sharing, the elements at issue in the Maine PUC’s petition, pursuant to Section 271. These Section 271 orders required the BOCs to provide access to all the features, functions and capabilities of the checklist items and stated that dark fiber and line sharing were such features, functions or capabilities.¹⁴ The Commission created no exception for dark fiber or line sharing when it approved the BOC Section 271 applications in the (2000-2003) time frame, nor should it create one now.

Despite the plain meaning of the independent obligation to provide checklist elements under § 271 and despite the Commission’s clear decisions including dark fiber and line sharing within the ambit of checklist items four and five, the BOCs continue to deny their obligation to

¹⁰ See *TRO*, 18 FCC Rcd at 17384-85 ¶¶ 653-654.

¹¹ See *id.* at 17385-86 ¶ 655.

¹² See 47 U.S.C. § 251(d)(2)(B).

¹³ See *USTA II*, 359 F. 3d at 588 (emphasis added).

¹⁴ See *Joint Application by BellSouth Corporation, Bellsouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9144 ¶ 218 n. 852 (2002) (“*FCC Georgia and Louisiana 271 Order*”).

provide these elements. Their denial has manifested itself primarily in state commission proceedings, and federal court litigation of the resulting state commission orders, which themselves were a response to the Commission's failure to enforce its own § 271 orders vigorously.

The Commission has had ample opportunity over the last several years to consider the scope of the BOC obligation to provide access to network elements pursuant to Section 271(c)(2)(B) — the “competitive checklist.” While the Commission made clear in the *TRO* in 2003 that a BOC's obligation to provide access to elements encompassed within the competitive checklist continued even after the BOC was no longer required to provide the corollary element under Section 251(c)(3) of the Act,¹⁵ it has failed to clarify the scope of that obligation when such issues have been laid before it. For instance, the Commission has had pending for nearly four years a petition asking for it to set rates regarding such elements.¹⁶ In the face of the Commission's failure, state commissions expended significant resources to fill the gaps by requiring BOCs to enter into agreements to provide competitors access to checklist elements and setting just and reasonable rates for those elements consistent with the applicable pricing standard.¹⁷ The BOCs vigorously resisted these efforts and have successfully litigated state commission authority to issue such decisions throughout the federal courts.¹⁸

In the face of the Commission's silence, the BOCs have been emboldened to deny competitors access to checklist items even though their obligation to do so is forcefully spelled

¹⁵ See *TRO*, 18 FCC Rcd at 17385-86 ¶ 655.

¹⁶ *In the Matter of Georgia Public Service Commission's Petition For Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 28, 2006).

¹⁷ See *TRO*, 18 FCC Rcd at 17389 ¶¶ 662-663.

out in black in white in binding Commission decisions. In the proceedings in the Maine federal court and at the First Circuit, Verizon New England mounted numerous attempts to deny the plain language of the Commission's Section 271 orders. These arguments, as discussed below in these comments, have no merit.

Because the First Circuit determined that the Commission, as the "expert agency charged with administering Section 271," should address whether the BOCs are obligated to provide dark fiber and line sharing under the "competitive checklist," the Commission can no longer remain silent.¹⁹ It must now expeditiously issue the order requested by the Maine PUC affirming that its previous Section 271 orders require the BOCs to provide dark fiber and line sharing under the checklist, independent of any section 251 obligation for the same elements and that the Commission now affirms those decisions as binding on all BOCs that have received Section 271 authority.

II. The Competitive Checklist In Section 271 Affirmatively Requires The BOCs To Provide Access To Dark Fiber And Line Sharing.

A. The Text of the Act and the Commission's Section 271 Decisions Require the BOCs to Provide Access to Dark Fiber Loops, Dark Fiber Transport and Line Sharing.

The BOCs' ongoing, affirmative obligation to provide access to loops and transport under § 271 clearly encompasses dark fiber and line sharing. The BOCs' contention that neither line sharing nor dark fiber fall within the ambit of checklist item 4 covering local loops and that dark fiber does not fall within the ambit of checklist item five concerning local transport²⁰ is incorrect

¹⁸ See e.g. *Verizon New England, Inc. v. Me. Pub. Utils. Comm'n*, 509 F.3d 1, *reh'g denied* 509 F.3d 13 (1st Cir. 2007).

¹⁹ See *Verizon New England*, 509 F.3d at 11.

²⁰ Brief of Verizon New England, *Verizon New England v. Maine Public Utils. Com'n*, Case No. 06-2151 at 51 (Oct. 10, 2006) ("Verizon 1st Cir. Br.").

based on a clear historical record. Under the competitive checklist in § 271, and explicit language in the Commission’s Orders pursuant to its authority under § 271, BOCs have the duty to provide dark fiber under checklist items four and five and line sharing under checklist item four.

The Commission has repeatedly emphasized that § 271 checklist access includes all features, functions, and capabilities of the particular element.²¹ Under checklist item No. 4, for example, the FCC defined the “local loop” “as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises” and expressly stated that “[d]ark fiber... [is] among the features, functions, and capabilities of the loop.”²² The Commission could not have been more clear that BOCs must provide dark fiber pursuant to the checklist.²³ Since dark fiber is a “functionality” of the local

²¹ *Application by SBC Communications Inc., Michigan Bell Telephone Company and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Michigan*, Memorandum and Order, 18 FCC Rcd 19024, 19182, App. C ¶ 49, (2003) (for checklist item four the BOC must provide “access to any functionality of the loop requested by a competing carrier,”) and 18 FCC Rcd at 19183 App. C ¶ 53 n. 170 (under checklist item 5, the BOC must provide all “technically feasible transmission capabilities”) (“*FCC 2003 Michigan 271 Order*”); *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18480 ¶ 246, n.697 (2000) (“*FCC Texas 271 Order*”).

²² *FCC Georgia and Louisiana 271 Order*, 17 FCC Rcd at 9144 ¶ 218 n.852 (emphasis added); see also *In the Matter of Application of Verizon New England, Inc. et al. for Authorization To Provide In-Region, InterLATA Service in New Hampshire and Delaware*, 17 FCC Rcd 18660, 18911-12, App. F at ¶¶ 48-49 (2002); *In the Matter of Joint Application of SBC Communications, Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin*, 18 FCC Rcd 21543, 21632-33 ¶¶ 144-145 and 21797 App. F, ¶¶ 48-49 (2003); *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in Arizona*, 18 FCC Rcd 25504, 25585-86 at App. C, ¶¶ 48-50 (2003) (“*FCC Arizona 271 Order*”).

²³ *FCC 2003 Michigan 271 Order*, 18 FCC Rcd at 19099-19100 ¶ 132 (evaluating the BOC’s compliance in providing dark fiber loops under the “requirements of checklist item 4.”)

loop, the Commission *already* requires the BOCs to provide access to dark fiber under checklist item No. 4.²⁴

The BOCs maintain that neither checklist item four nor five encompasses dark fiber, and that § 271 does “not specifically mandate the provision of every conceivable type of local transport.”²⁵ Obviously, the checklist items do not “explicitly” refer to *any* specific type or capacity of loop or transport facility; the statute places no limits on the types of loops or functionality a CLEC may obtain.²⁶

The argument that the BOCs are only obligated to provide an element in a form specifically enumerated under the checklist would lead to absurd results. A BOC could argue that offering “tin cans and strings” complies with the local loop requirement, since there is no explicit statement that the loop must be able to transmit electromagnetic signals; or, conversely,

²⁴ The FCC has similarly explained that the HFPL is a “capability of th[e] loop.” *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20293, ¶ 17 (1999) (“*Line Sharing Order*”) *remanded USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

²⁵ Verizon 1st Cir. Br. at 51.

²⁶ Verizon’s argument in its brief filed at the First Circuit (pp. 52-54) regarding the FCC’s early 271 orders is misleading and also fails. In its First Circuit brief, Verizon claimed that the Commission’s order approving 271 applications for “New York and Texas, ... did not require the BOCs to demonstrate that they provided ... dark fiber.” In both cases, however, the FCC required the BOC to “provide access to any functionality of the loop.” *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4095-4096, ¶ 271 (1999) (“*FCC New York 271 Order*”). The fact that the FCC, in the *NY 271* and *FCC Texas 271* orders did not consider the BOCs’ compliance with the dark fiber obligation was due to the fact that the FCC at that point had not yet determined that dark fiber was a “feature function or capability” of the loop or transport element. Rather, the FCC had only recently recognized dark fiber as among the features, functions and capabilities of loops. *See FCC Texas 271 Order*, 15 FCC Rcd at 18,368, n.70. Despite not evaluating the applicants’ compliance, the FCC expected the BOCs to provide access prospectively. *See FCC New York 271 Order*, 15 FCC Rcd at 3967 ¶ 31.

it could claim to be in compliance by offering only an extremely expensive type of high-capacity loop that no customer would ever order. The Commission, however, has made clear that to satisfy the checklist the BOC “must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.”²⁷

In the appellate courts, the BOCs asserted that the ruling of the U.S. District Court of the Northern District of Florida in *Dieca Communications, Inc.*,²⁸ undermines the claim that dark fiber falls within the ambit of both checklist items four and five.²⁹ The *Dieca* decision was based, in large part, on that court’s mistaken view that the Commission never issued a clear decision about whether line sharing was required (or not) under Checklist Item 4 and never addressed whether the BOCs were obligated to provide dark fiber under § 271.³⁰ The Commission’s position on this matter, however, is evident from the wealth of Commission precedent in its § 271 decisions that consistently held that checklist item four includes “any functionality of the loop,”³¹ and that dark fiber³² and the HFPL is a “feature, function, and capability” of the local loop.³³ Further, the *Dieca* court’s conflation of section 251(c)(3) impairment and § 271 checklist items is plainly contradictory to the Commission’s clear holding

²⁷ *FCC Arizona 271 Order*, 18 FCC Rcd at 25585-86, App. C, ¶ 49 (emphasis supplied).

²⁸ *Dieca Communications, Inc. v. Florida Pub. Serv. Comm’n*, 447 F. Supp. 2d 1281 (N.D. Fla. 2006).

²⁹ Verizon 1st Cir. Br. 55.

³⁰ *Dieca Communications*, 447 F. Supp. 2d at 1289 (claiming that there was “no explicit indication of whether the FCC does or does not regard line sharing as an independent obligation under § 271, separate and apart from any line sharing obligation under § 251(c)(3).”).

³¹ 18 FCC Rcd at 19182, App. C ¶ 49.

³² *Id.* at 19181, ¶ 48 n.162.

³³ *Line Sharing Order*, 14 FCC Rcd at 20293, ¶ 17.

in the *TRO* (affirmed by the D.C. Circuit) that the BOCs' obligation to provide UNEs under § 251 is wholly independent of their obligation to provide checklist items 4 and 5.³⁴

Such a cramped interpretation of checklist item 4 proves too much. It would confine CLECs using § 271 to the resale of pre-existing BOC lit service. For example, it would also appear to bar CLECs from using copper loops obtained under § 271 to provide xDSL services and Ethernet over copper. Like dark fiber, the copper loop itself provides no pre-existing "lit" transmission; it is only when the CLEC attaches the copper loop to a switch, DSLAM, or other equipment that the CLEC can provide service over the bare facility.

The Commission has rightly rejected this cramped interpretation of the statute advanced by the BOCs because there would be no way for competitive carriers to use the BOC facilities and still innovate, as the only functionality presented to the customer would be whatever functionality the BOC had already selected.³⁵ Fortunately, the Commission has not adopted the BOC interpretation and should continue to refrain from doing so.

The § 271 requirement that BOCs provide competitors with "any functionality of the loop" also undermines the BOC claim that because dark fiber does not provide "transmission," it falls outside the scope of the checklist.³⁶ The Commission has never adopted such a cramped reading of the statute that would effectively nullify the well-settled "features, functions, and capabilities" standard.³⁷ The BOC argument mischaracterizes the statutory text. Checklist item four does not require the BOCs to provide transmission, but "access to" local loop transmission, for checklist item four and access to "local transport" under item five. By providing a CLEC

³⁴ See *TRO*, 18 FCC Rcd at ¶ 654 *aff'd sub nom USTA II*, 359 F.3d at 588.

³⁵ See e.g. *FCC Georgia and Louisiana 271 Order* 17 FCC Rcd at 9144 ¶ 218 n. 852.

³⁶ See *Verizon First Cir. Br.* at 51.

³⁷ See e.g. *FCC Georgia and Louisiana 271 Order* 17 FCC Rcd at 9144 ¶ 218 n. 852.

with a dark fiber loop, a BOC is clearly providing “access to” the native transmission capability of the loop, allowing the CLEC to provide transmission where it otherwise would not be able to do so. The same analysis applies to dark fiber as “local transport” under item five — the CLEC would have “access to” the inherent transport capacity of the fiber.

Moreover, the Commission has already rejected a similar argument. When the Commission required the BOCs to lease dark fiber in their special access tariffs in the early 1990s, the BOCs resisted, claiming that dark fiber is “a mere physical facility”³⁸ that “has no communications capacity until after a customer adds its own electronics,”³⁹ and thus does not constitute “wire communications” under the Act.⁴⁰ The Commission rejected this argument, finding that leasing of dark fiber fell within the definition of “wire communication,” which “clearly encompasses any carrier offering which permits the transmission of information between two or more points by means of electronic communications facilities, including all instrumentalities, facilities, apparatus and services incidental to such transmission.”⁴¹ Even after the *Dark Fiber Order* was remanded on other grounds in 1994,⁴² the Commission confirmed that this principle applied equally under the 1996 Act, explaining that “under traditional common carrier law, the ordinary leasing of network facilities is a communications service.”⁴³

³⁸ See *Dark Fiber Order*, 8 FCC Rcd 2589, 2592, ¶ 13 (1993), *remanded on other grounds sub nom. Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Dark Fiber Order*, 8 FCC Rcd at 2593, ¶ 17.

⁴² See *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

⁴³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Doc. No. 96-149, Second Order on Reconsideration, 12 FCC Rcd 8653, 8683, n.110 (1997) (finding that “leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service.” *Id.* at 8682, ¶ 54).

Further, the United States District Court of Massachusetts recognized that because the Commission found that “leasing of dark fiber constituted the offering of a communication instrumentality, facility or apparatus, it qualified as ‘wire communication,’ and was, therefore, a form of communication service falling within the FCC’s jurisdiction.”⁴⁴ As the District Court found, the “FCC does treat the leasing of dark fiber as the provision of telecommunications service,”⁴⁵ and the D.C. Circuit’s remand of the *Dark Fiber Order* left “untouched the Commission’s determination that the leasing of dark fiber constituted the provision of a communication service.”⁴⁶

Because providing dark fiber is a “carrier offering which permits the transmission of information between two or more points by means of electronic communications facilities” providing access to dark fiber falls within the ambit of providing “access to ... local loop transmission,” when the dark fiber is deployed between the customer premises and the central office. It thus follows that dark fiber would qualify as “wire communication,” “transmission” and “transport” under the Commission’s interpretation of the statute. A similar analysis would apply to line sharing, as it provides competitors with “access to” the HFPL, certainly within the ambit of “a communication instrumentality, facility or apparatus,” that would qualify as “wire communication,” and is “therefore, a form of communication service.”⁴⁷

In addition, the BOCs conveniently ignore the term “unbundled from ...other services” in both checklist items four and five. The BOCs are required to provide not only access to loop and transport elements unbundled from local switching, but also to provide such access unbundled

⁴⁴ *Global NAPS, Inc., v. New England Telephone and Telegraph*, 156 F. Supp. 2d 72, 78 (2001).

⁴⁵ *Global NAPS*, 156 F.Supp.2d at 80.

⁴⁶ *Id.*

from “other services.”⁴⁸ With respect to dark fiber loops and dark fiber transport, those “other services” are the services the BOCs provide when they provision lit services over the fiber. When a requesting carrier seeks access to dark fiber, it is asking the BOC to offer the raw transmission capability of that facility separate and apart from any “other service” the BOC may choose to provide over similar facilities.

Taken together, these arguments clearly show that the text of checklist and the Commission’s unequivocal decisions, require the BOCs to provide dark fiber loops and dark fiber transport under checklist items four and five respectively and line sharing under checklist item four.

B. Section 271 Also Obligates the BOCs to Provide Access to Dark Fiber Entrance Facilities.

As discussed above, the BOCs are required to provide competitors access to dark fiber transport under checklist item number five. The Commission has made clear that checklist item five requires the BOC to “provide all technically feasible transmission capabilities.”⁴⁹ In addition to interoffice dark fiber between BOC switches or wire centers, dark fiber “entrance facilities” are included within the definition of transport under checklist item five and BOCs must provide access to such entrance facilities pursuant to checklist item number five.

Specifically, as the Commission has stated, a BOC must:

provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carrier points of presence (POPs); between tandem switches and SWCs,

⁴⁷ *Global NAPS*, 156 F.Supp.2d at 78.

⁴⁸ 47 U.S.C. § 271(c)(2)(B)(iv) and (v).

⁴⁹ *FCC 2003 Michigan 271 Order*, 18 FCC Rcd at 19183, App. C ¶ 53 n. 170.

end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers.⁵⁰

Therefore, it is plain that BOCs have a duty to provide requesting carriers access to both interoffice dark fiber and dark fiber entrance facilities under checklist item number five.

III. The Commission's Grant of Forbearance from Section 271's Requirement to Provide Access to Broadband Elements Demonstrates the Continuing Obligation to Provide Access to Dark Fiber.

The Commission's decisions granting the BOCs certain limited exceptions from these dark fiber unbundling obligations under Section 271 clearly show that the BOCs were subject to dark fiber unbundling obligations under Section 271 and that apart from those limited exceptions, that duty remains. Said another way, if there were no obligation to provide dark fiber under § 271, there would have been no need for the Commission to forbear from enforcing that obligation under specific circumstances.

In the *TRO*, the Commission relieved the ILECs of an unbundling obligation "for *dark* or lit fiber loops serving residential customers that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) in new build or "greenfield" situations."⁵¹ The Commission further extended these rules to loops deployed to primarily residential multi-dwelling units.⁵² In

⁵⁰ *Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, Memorandum Opinion and Order, 18 FCC Rcd 21543, 21798, App. F ¶ 53 n. 170 (2003)(emphasis supplied); *see also Application by Verizon Maryland Inc., Verizon Washington, D. C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance) NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc. to Provide In-Region, InterLATA Services in Maryland, Washington, D.C. and West Virginia*, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5255 ¶¶ 71-72 (2003).

⁵¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, 20295 ¶ 6 (2004) ("*MDU Reconsideration Order*") (emphasis supplied).

⁵² *See generally id.*

granting the BOCs this unbundling relief under § 251, the Commission specifically referred to dark fiber, retaining the definition of an FTTH loop as a “local loop consisting entirely of fiber optic cable, dark or lit.”⁵³ Thus, the *TRO* read in conjunction with the *MDU Reconsideration Order*, established a limited exception to the ILECs’ obligation under §251 to provide dark fiber loops.

Then, in the *Broadband 271 Forbearance Order*,⁵⁴ the Commission granted the BOC petitions for forbearance from § 271 unbundling to the extent the Commission had relieved the ILECs of a § 251 unbundling obligation for FTTH/FTTC loops. In doing so, the Commission thus relieved the BOCs of their duty to provide dark fiber loops, although only to the same extent their dark fiber loop unbundling obligations had been modified by the *TRO*, the *FTTC Reconsideration Order* and the *MDU Reconsideration Order*. Thus, the Commission granted partial forbearance for FTTH/FTTC dark fiber loops under § 271, but did not forbear from the remaining § 271 dark fiber requirements applicable in markets where the *TRO* (read together with the *MDU Order*) left a dark fiber unbundling obligation intact.

IV. The BOC Obligations Under Section 271 Are Independent of Any Obligations Under Section 251(c)(3).

A. The Plain Language of the Act Confirms that the BOC Obligation to Provide Checklist Elements Exists Independent from any Obligation to Provide UNEs Pursuant to Section 251.

The Commission has confirmed that the BOC obligation to provide nondiscriminatory access to network elements under § 271 is independent of the obligation to provide unbundled

⁵³ 47 C.F.R. § 51.(a)(3)(i)(A) (2005).

⁵⁴ *In the Matters of 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, 19 FCC Rcd 21496 (2004)

access to network elements under § 251, because the plain language and structure of the § 271 checklist establish an independent and ongoing access obligation under § 271.⁵⁵ As the Commission explained,

“[c]hecklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning § 251 ... [T]o conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.”⁵⁶

Clearly, § 251(c) applies to all ILECs, whereas § 271 only applies to BOCs.⁵⁷ Further, while UNEs under § 251 are only available where requesting carriers are impaired,⁵⁸ § 271 imposes on the BOCs a permanent duty to provide access to the items enumerated on the competitive checklist, although not necessarily under the same prices, terms, and condition.

In *USTA II*, the D.C. Circuit agreed with the Commission’s conclusion that BOCs’ § 271 obligations are not dependent on a § 251 obligation, finding that

[t]he FCC reasonably concluded that checklist items 4, 5, 6 and ten imposed unbundling requirements for those elements *independent* of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market.⁵⁹

- B. The BOCs’ Section 271 Duty To Provide Dark Fiber To Requesting Carriers Was Not Disturbed By The *TRRO*.**
 - 1. The Commission’s Definition of Local Loops under § 271(c)(2)(B)(iv) Remains Unchanged.**

⁵⁵ See *TRO*, 18 FCC Rcd at 17384-85 ¶ 654.

⁵⁶ *Id.*

⁵⁷ *TRO*, 18 FCC Rcd at 17385-86 ¶ 655.

⁵⁸ See 47 U.S.C. § 251(d)(2)(B).

⁵⁹ *USTA II*, 359 F.3d at 588 (emphasis added).

The Commission's definition of local loop transmission under the § 271 checklist remains valid law, even though the Commission has substantially reduced the availability of UNEs under § 251. The *TRO*, *USTA II*, and the *Triennial Review Remand Order* ("*TRRO*")⁶⁰ do not alter this definition in any way and do not purport to override the BOC obligation to provide checklist elements to competitive carriers. As discussed above, these obligations are wholly independent, and § 271 obligations continue unabated even where the Commission finds that CLECs are not impaired without access to analogous element under § 251. While the *TRRO* changed the conditions under which the BOCs are obligated to provide unbundled access to dark fiber at TELRIC rates, under § 251, the Commission did not change the definition of a local loop, including dark fiber, nor did it modify the definition of the local loop element BOCs are required to provide under § 271(c)(2)(B)(iv). The changes in the BOC obligations under § 251 were based solely on the Commission's consideration of impairment and other factors that apply only to § 251 availability and are not relevant to the § 271 checklist. Thus, while the requirement to provide unbundled access to dark fiber under § 251 at TELRIC pricing has been modified, the requirement that BOCs provide access to dark fiber under § 271 remains undisturbed.

C. The Commission's Orders Do Not Conflate the Section 271 Checklist with the Independent Section 251 Obligations to Provide UNEs.

The BOCs further claim that the Commission's definition of the local loop and transport elements under the § 271 checklist are not dispositive. The BOCs claim that the Commission's definition of loop and transport in its pre-*TRO* § 271 Orders reflects the Commission's view in those orders that, to show compliance with the 271 checklist, a BOC had to show compliance

⁶⁰ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2615-16 ¶ 149 (2005) *aff'd Covad Communications Company v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

with the Commission’s then-existing § 251 unbundling rules.⁶¹ In other words, the BOCs claim that the Commission’s analysis of checklist items four and five in its § 271 approval orders was redundant with its analysis of compliance under checklist item 2, which requires the BOC demonstrate its compliance with § 251(c)(3).

This argument fails for several reasons. First, in each of its § 271 orders, the Commission examined the BOC applicant’s compliance with checklist items four and five separately from those regarding checklist item 2.⁶² The Commission could not conduct its § 271 application analysis any other way because:

“checklist item two by its terms requires only [n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) – it says nothing suggesting that the requirements of those sections also apply to the *independent unbundling requirements* imposed by the other items on the § 271 checklist.”⁶³

In addition, the BOCs claim that the definition of dedicated transport and local loops under § 271 is linked to the Commission’s impairment determination regarding those elements.⁶⁴ This is not correct. While the Commission has narrowed the list of elements that ILECs must provide on an unbundled basis and at TELRIC pricing pursuant to § 251(c)(3) based on its impairment analysis, the Commission has retained the definition of those same elements since the *UNE Remand Order*. These are the same definitions the Commission adopted under § 271. For example, in the *TRRO*, the Commission did not eliminate “entrance facilities” from its definition of transport. Instead, the Commission re-adopted the transport definition it established

⁶¹ *Id.*

⁶² See e.g. *FCC Georgia and Louisiana 271 Order* 17 FCC Rcd at 9144 ¶ 218 n. 852 (emphasis added); see also *FCC 2003 Michigan 271 Order*, 18 FCC Rcd at 19099-19100 ¶ 132.

⁶³ *USTA II*, 359 F.3d at 589.

⁶⁴ See *Verizon 1st Cir. Br.* 54-56.

in the *UNE Remand Order*, which is the same definition the Commission uses under § 271, and made its impairment determination without altering the well-settled definition of the element. The BOCs are again attempting to link the availability of an element at §251 TELRIC pricing with the definition of an element under §271. There is no basis for such linkage and the Commission has never adopted such a view.

V. The Public Interest Requires the Commission to Affirm its Orders Requiring the BOCs to Provide Access to Dark Fiber Under § 271 Expeditiously.

The Commission’s rejection of Qwest’s petition (“Qwest Petition”) for forbearance from Section 271 requirements in the Omaha Metropolitan Statistical Area squarely addresses the independence of Section 271 and the continued public interest benefit gained from § 271 unbundling. In addition, the Commission’s unbundling decisions, explain the significant public interest benefits derived from the promotion of competition through the availability of unbundled dark fiber.

A. The Omaha Order Further Stresses the Independence of Section 271 from Section 251 and the Policy Need for Maintaining Access Under Section 271.

The Commission’s rejection of the Qwest Petition, as it relates to Section 271, squarely addresses the independence of Section 271 and the continued public interest benefit gained from § 271 unbundling.⁶⁵ In *Omaha*, Qwest sought relief from competitive checklist items four through six, which establish “independent and ongoing obligations for BOCs to provide wholesale access to loops, transport, and switching, irrespective of any impairment analysis under section 251 to provide unbundled access to such elements.”⁶⁶ Qwest’s request for relief included “legacy elements,” which the Commission defined as the loop, transport and switching

⁶⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 ¶ 1 (2005) *aff’d* *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

elements no longer required to be unbundled under §251(c)(3), but that still are subject to unbundling pursuant to § 271(c).⁶⁷ The Commission denied that aspect of the petition, finding that forbearance with respect to wholesale loops, transport, and switching under § 271 would not be in the public interest and would likely harm competition.⁶⁸

In declining to forbear from Qwest’s obligations to provide access to “legacy elements,” the Commission reasoned that § 271’s unbundling requirements formed an essential regulatory “backstop” to prevent harm from lack of competition after elimination of the BOC’s § 251 unbundling obligation.⁶⁹ The Commission recognized that in its efforts to provide competitors with an incentive to self-provision facilities, its findings of non-impairment under § 251 were necessarily over-inclusive and that self-provisioning of those facilities would not be economically feasible in all instances.⁷⁰ The Commission recognized that:

It sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission’s rules without access to such facilities. In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, ‘the construction of local loops generally takes between six to nine months absent unforeseen delay.’ In order to provide service to customers, competitive LECs therefore may require wholesale access to Qwest’s network on a temporary basis while they construct their own facilities to their customers’ premises. If carriers lacked wholesale access to Qwest’s network elements in

⁶⁶ *Id.* at 19465 ¶ 100.

⁶⁷ *Id.* at 19466 ¶ 102.

⁶⁸ *Id.* at 19465 ¶ 100.

⁶⁹ *Id.* at 19466-67 ¶ 103 (“We find that while section 10(a) is satisfied with respect to forbearance from certain section 251(c)(3) unbundling requirements for loops and transport, that measure of deregulation is predicated upon the availability of other regulatory protections that function as a backstop to prevent harm from competition – including, most notably here, Section 271(c).”)

⁷⁰ *Id.*

such cases, they sometimes would not be able to provide service to that customer.⁷¹

Similarly, the *Omaha Order* affirms the principle in the *Section 271 Broadband Forbearance Order*,⁷² that eliminating access to elements under § 271 is not warranted where lack of access to “other network elements” would close a competitive door the Commission always contemplated remaining open.⁷³ Because the Commission has eliminated the dark fiber loop unbundling obligation under § 251 and the residential FTTH loop unbundling obligation under § 271, the only “other network element” available to use as a substitute for § 251 dark fiber in the business market is § 271 dark fiber for business market customers.

B. Dark Fiber Unbundling is in the Public Interest.

The Commission’s most recent unbundling decisions explain the significant public interest benefits derived from the promotion of competition through the availability of unbundled dark fiber. Although the Commission discussed these benefits while justifying unbundling of dark fiber at TELRIC-based rates, similar benefits accrue when the dark fiber is priced at just and reasonable rates under § 271.⁷⁴

⁷¹ *Id.*

⁷² *Id.* at 19468-69 ¶ 106; see also *Section 271 Broadband Forbearance Order*, 19 FCC Rcd. 21496 (2004).

⁷³ *Id.* at 19468-69 ¶ 106.

⁷⁴ The BOCs’ refusal to comply with their Section 271 dark fiber unbundling obligation is detrimental to the public interest. For that reason, Alpheus and GWI respectfully urge the Commission, after it confirms that dark fiber is within the ambit of the checklist, to implement a process so that competitors can access dark fiber and line sharing (and other Section 271 checklist elements) without further delay. *See e.g. In the Matter of Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act*, WC Docket No. 09-222 (filed November 9, 2009).

First, the § 271 dark fiber unbundling obligation allows for “very efficient use of facilities that incumbent LECs have already deployed but that would otherwise lay fallow.”⁷⁵ As the Commission seeks to foster the deployment of broadband capacity so that 100 million Americans can have access to 100 Mbps broadband,⁷⁶ it would be folly to allow unused capacity to lay fallow when it can be put to good use. This is especially true where new fiber deployments can be extremely intrusive to consumers and business. Maximizing the use of already deployed fiber “prevents the unnecessary excavation of the streets that would be necessary if competitors were required to lay their own alternative fiber to every location, regardless of economic efficiency.”⁷⁷ Additionally, allowing the waste of this fiber serves only to create scarcity in the market, resulting in higher prices for business and consumers, contrary to the public interest.

Second, requesting carriers using unbundled dark fiber “can operate more efficiently than when using lit” services “because the competing carrier itself engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber.”⁷⁸ This provides competitors the ability to seamlessly integrate service provided over unbundled dark fiber with services provided over their own facilities. Further, the ability to control the services provided over the fiber offers competitors the ability to control their services and denies the BOC the ability to blunt innovation, as it is the CLEC that controls the equipment used to “light” the fiber and thus controls what communications services are provided over the fiber facility. This benefits consumers far more than mere resale of BOC “lit” services.

⁷⁵ *TRRO*, 20 FCC Rcd at 2608-09 ¶ 135.

⁷⁶ Julius Genachowski, Chairman, FCC, Broadband: Our Enduring Engine for Prosperity and Opportunity, NARUC Conference Washington, DC (Feb. 16, 2010).

⁷⁷ *See TRRO*, 20 FCC Rcd at 2608-09 ¶ 135.

⁷⁸ *Id.*

Finally, the public benefits from the availability of dark fiber, because it requires competitors to make substantial investments in order to use the dark fiber. Competitors using dark fiber provided under Section 271 would still have to “deploy significant facilities, including optronic equipment and collocation arrangements in incumbent LEC offices, in order to light the dark fiber and connect it to their own networks.”⁷⁹ These investments in turn benefit the economy by promoting job creation and economic growth. The Commission has already explained that “this investment advances the facilities deployment goals of the Act.”⁸⁰ Forcing a “resale-only” model denies the public these benefits.

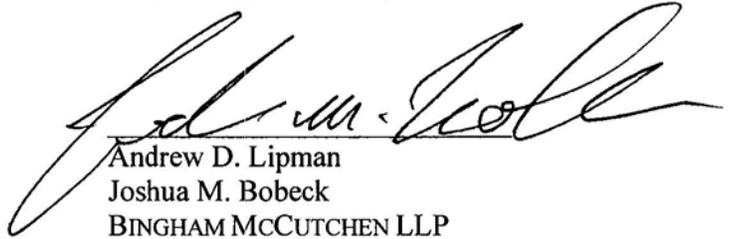
VI. Conclusion

The Commission should expeditiously issue the order requested by the Maine PUC clarifying that its previous Section 271 orders require the BOCs to provide dark fiber and line sharing under the checklist, independent of any section 251 obligation for the same elements and that the Commission now affirms those decisions as binding on all BOCs that have received Section 271 authority.

⁷⁹ *Id.*

⁸⁰ *Id.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew D. Lipman" and "Joshua M. Bobeck", is written over a horizontal line.

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