

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 VERIZON<sup>1</sup>**

The Maine Public Utilities Commission (“MPUC”) urges the Commission to find that the competitive checklist in 47 U.S.C. § 271 requires Bell Operating Companies (“BOCs”) to provide line sharing and dark fiber. But the text of Checklist Items 4 and 5 — which the MPUC never addresses — does not extend to either line sharing or dark fiber. In addition, the Commission has already ruled that requiring the unbundling of these elements discourages investment, deployment, and innovation. Therefore, even if there were any ambiguity in the statute — which cannot be read unambiguously to compel BOCs to provide line sharing or dark fiber — the most reasonable interpretation is that § 271 imposes no such obligations, consistent with the Commission’s prior findings that mandatory unbundling of line sharing and dark fiber is affirmatively harmful to competition.

Since the Commission’s rulings eliminating unbundling obligations for line sharing and dark fiber under § 251(c)(3), providers of all types have invested massively to deploy fiber and other high-capacity broadband platforms, and competitive LECs are offering integrated voice

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

and data services over entire copper loops obtained from incumbent LECs. Reimposing unbundling obligations for line sharing and dark fiber — even under § 271 rather than § 251(c)(3) — would undermine those investments and hamper Congress’s and the Commission’s policy of encouraging greater broadband deployment.

## DISCUSSION

### I. THE TEXT OF SECTION 271 DOES NOT REQUIRE LINE SHARING OR DARK FIBER

A. The MPUC asks the Commission to declare that the § 271 competitive checklist requires BOCs to unbundle line sharing and dark fiber loops, entrance facilities, and transport. As the Supreme Court has repeatedly made clear, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>2</sup> That requirement is particularly applicable here, because Congress specifically prohibited the Commission from “extend[ing] the terms used in the competitive checklist.” 47 U.S.C. § 271(d)(4). Despite this, the MPUC’s petition for declaratory ruling is entirely silent about the text of Checklist Items 4 and 5, which are the provisions of § 271 it claims require BOCs to provide line sharing and dark fiber. In fact, the terms of those checklist items impose no such obligation.

Checklist Item 4 requires a BOC that has obtained long-distance authority to provide access to “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from . . . other services.” 47 U.S.C. § 271(c)(2)(B)(iv). Verizon satisfies this requirement by offering to other providers access to transmission over an entire local loop, which those providers may use to provide numerous services, including DSL. Nothing in the text of

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<sup>2</sup> *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, (2004) (internal quotation marks omitted).

Checklist Item 4 requires a BOC to provide access to only a portion of the loop spectrum, rather than to an entire “[l]ocal loop.”<sup>3</sup>

Dark fiber loops also are not encompassed within the text of Checklist Item 4. Dark fiber cannot provide any “transmission,” because it is a piece of glass incapable of transmitting anything until electronics are attached to it. *See TRO*<sup>4</sup> ¶ 201 n.628. In addition, because dark fiber is not connected to a switch or a customer’s premises, it cannot — without attaching the necessary electronics — provide transmission “from the central office to the customer’s premises,” as the text of Checklist Item 4 requires.

The analysis of Checklist Item 5 is largely the same. That checklist item requires a BOC to provide access to “[l]ocal transport from the trunk side of a wireline local exchange carrier switch.” 47 U.S.C. § 271(c)(2)(B)(v). Dark fiber does not qualify as “transport” because it cannot transport anything without attaching the necessary optical electronics. Nor can dark fiber, without modifications, provide transport “from the trunk side of a wireline local exchange carrier switch,” because it is not connected to any switch.<sup>5</sup>

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<sup>3</sup> *See Dieca Communications v. Florida Pub. Serv. Comm’n*, 447 F. Supp. 2d 1281, 1288 (N.D. Fla. 2006) (holding that Checklist Item 4, “[o]n its face,” only requires access to “an entire local loop”).

<sup>4</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*” or “*TRO*”), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.).

<sup>5</sup> For similar reasons, it is irrelevant whether a carrier wants to use dark fiber for transport between an incumbent’s switches or as an entrance facility to connect one of its switches to an incumbent’s switch; in either event, dark fiber cannot — without modification — provide “transport” from the trunk side of a switch. The MPUC itself previously recognized this point, conceding that dark fiber entrance facilities “do not fit squarely within” the language of Checklist Item 5, because they “do not connect directly to the [incumbent’s] switch.” Order, *Verizon-Maine, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Services* 43, Docket No. 2002-682 (Me. P.U.C. Sept.

In sum, the text of § 271 does not mandate the unbundling of line sharing or dark fiber. For that reason alone, the Commission should deny the MPUC's petition.<sup>6</sup>

**B.** Although the Commission has never squarely confronted the question whether Checklist Items 4 and 5 require BOCs to unbundle line sharing or dark fiber, numerous Commission orders are consistent with the plain reading of the statute set out above.

**1.** The first such Commission orders are those granting the petitions by Verizon (then Bell Atlantic) and AT&T (then SWBT) to provide long distance service in New York and Texas, respectively. Those § 271 applications were filed *before* the Commission's rules requiring line sharing or dark fiber to be unbundled under § 251(c)(3) took effect. In granting Verizon's application for New York, the Commission expressly "disagree[d] with commenters that contend that," in order to meet Checklist Item 2,<sup>7</sup> Verizon must provide "access to . . . dark fiber" or "line sharing" as UNEs precisely because those UNE rules were not in force when Verizon filed its application.<sup>8</sup>

The Commission also rejected the argument that Checklist Items 4 and 5 imposed separate, independent requirements to unbundle line sharing and dark fiber. At least one party

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13, 2005), *available at* [http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb\\_docview&docid=38895&img\\_rng=169297&vol\\_id=1](http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_docview&docid=38895&img_rng=169297&vol_id=1).

<sup>6</sup> The MPUC concludes its Amended Petition (at 4-5) with the assertion that it "reserves" various rights to enforce § 271 against the BOC operating in Maine. Every federal court of appeals that has considered the issue, however, has concluded that the power to enforce § 271 resides exclusively with this Commission; therefore, there is no authority that the MPUC could reserve. *See, e.g., Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1119-20 (9th Cir. 2009) (joining the First, Seventh, and Eleventh Circuits, and more than a dozen federal district courts).

<sup>7</sup> *See* 47 U.S.C. § 271(c)(2)(B)(ii) ("Checklist Item 2") (requiring BOCs to demonstrate their compliance with the unbundled network element ("UNE") requirements imposed under § 251(c)(3)).

<sup>8</sup> *New York 271 Order* ¶ 31 n.70 (internal quotation marks omitted).

asserted that they did — and that the line sharing and dark fiber UNE rules simply “embod[ie]d statutory requirements . . . [found in] the terms of the competitive checklist” — but the Commission expressly “disagree[d] with [that] argument.” *New York 271 Order* ¶ 31 n.72. The Commission reached the same conclusion in approving AT&T’s application to provide long distance in Texas.<sup>9</sup>

These decisions conflict with any claim that Checklist Items 4 and 5 require BOCs to unbundle line sharing and dark fiber. The Commission “shall not approve” an application under § 271 “unless it finds” that the “petitioning Bell operating company has . . . fully implemented the competitive checklist.” 47 U.S.C. § 271(d)(3)(i). Therefore, if Checklist Items 4 and 5 required a BOC to unbundle line sharing or dark fiber, the Commission would have been obligated to investigate Verizon’s and AT&T’s provisioning of line sharing and dark fiber irrespective of the fact that the Commission’s UNE rules as to those elements had not taken effect. By approving the New York or Texas applications without requiring the BOC to make such a showing, the Commission effectively concluded that Checklist Items 4 and 5 do not encompass line sharing or dark fiber.

2. The Commission’s later decisions eliminating line sharing and most dark fiber as UNEs are a second set of orders consistent with the reading of Checklist Items 4 and 5 set forth above. After concluding that line sharing and most dark fiber should not be mandated as UNEs under § 251(c)(3), the Commission adopted “transition regimes” and addressed how providers could continue to obtain access to “alternative facilities” after the end of the transition periods.<sup>10</sup>

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<sup>9</sup> See Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 32 (2000).

<sup>10</sup> See *TRO* ¶ 264 (line sharing); Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*

With respect to line sharing, the Commission identified three alternative ways that providers could continue to provide DSL over incumbents' loops — leasing the full loop, entering a line-splitting arrangement with another provider that had leased the full loop, or through a “negotiated” line-sharing agreement — and “strongly encourage[d] . . . parties to commence negotiations” for such commercial arrangements. *TRO* ¶ 265.<sup>11</sup> With respect to dark fiber, the Commission recognized that providers that had been obtaining dark fiber UNEs would have to “migrate to alternative fiber arrangements, including self-deployed fiber.” *TRRO* ¶¶ 144, 197. In neither order, however, did the Commission suggest that one “alternative” was to obtain line sharing or dark fiber from BOCs pursuant to a statutory unbundling mandate in § 271, a telling omission that conflicts with the MPUC's position here.

3. In urging the Commission to find that Checklist Items 4 and 5 require BOCs to unbundle line sharing and dark fiber, the MPUC relies exclusively on § 271 orders that the Commission issued while line sharing and dark fiber *were required* as UNEs under § 251(c)(3). *See* Amended Petition at 2-3. At that time, however, a BOC's line sharing and dark fiber offerings were relevant to whether it satisfied Checklist Item 2, which incorporates the Commission's § 251(c)(3) UNE rules. The Commission, therefore, had no occasion to consider whether Checklist Items 4 and 5 independently required the BOC to unbundle line sharing or dark fiber, because compliance with the Commission's UNE rules satisfied whatever § 271

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*Carriers*, 20 FCC Rcd 2533, ¶ 142 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”) (dark fiber), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>11</sup> *See also Dieca*, 447 F. Supp. 2d at 1291 (noting that, in adopting this transition regime, “the FCC made clear that line sharing was to end,” and explaining that this aspect of the transition regime provided “strong support for the conclusion that the FCC does *not* now view line sharing as an independent § 271 requirement”).

obligations might exist under other checklist items.<sup>12</sup> Therefore, the Commission orders cited in the MPUC's petition are inapposite.<sup>13</sup>

**II. EVEN IF THE TEXT OF CHECKLIST ITEMS 4 AND 5 WERE AMBIGUOUS, THE COMMISSION SHOULD CONSTRUE THOSE PROVISIONS NOT TO REQUIRE LINE SHARING OR DARK FIBER, CONSISTENT WITH ITS PRIOR DETERMINATIONS THAT UNBUNDLING THOSE ELEMENTS HARMS COMPETITION**

A. As explained above, the best reading of § 271 is that Checklist Items 4 and 5 do not require BOCs to unbundle line sharing or dark fiber. But even if the Commission were to find that Checklist Items 4 and 5 are ambiguous — there is no colorable argument that Checklist Items 4 and 5 unambiguously *require* BOCs to unbundle line sharing and dark fiber — the Commission should find that the most reasonable interpretation is that those checklist items do not require unbundling of line sharing or dark fiber. That interpretation best accords with the procompetitive purposes of the Act and the Commission's prior determinations that mandating unbundling of line sharing and dark fiber discourages investment, deployment, and innovation, thereby harming competition and consumers.

As the D.C. Circuit has emphasized, “the purpose of the [1996] Act . . . is to stimulate competition — preferably genuine, facilities-based competition.”<sup>14</sup> In resolving any ambiguity

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<sup>12</sup> As the MPUC notes in its Amended Petition (at 2-3), the Commission often addressed a BOC's compliance with its then-effective UNE obligations for line sharing and dark fiber under headings titled Checklist Items 4 or 5. The MPUC is wrong, however, to suggest that the Commission's organization of its orders — which was for administrative convenience, as otherwise virtually all of the discussion in those orders would have appeared under Checklist Item 2 (compliance with § 251(c)(3)) — is tantamount to a substantive decision. *Cf. Smith v. Doe*, 538 U.S. 84, 94-95 (2003) (legislature's organizational decision to codify certain statutory provisions in one place and other provisions elsewhere not dispositive of legislative intent).

<sup>13</sup> *See also Dieca*, 447 F. Supp. 2d at 1290 (holding that the Commission orders relied on by the MPUC here provide “little support” for the view that the Commission “made a considered decision” that line sharing is a Checklist Item 4 requirement).

<sup>14</sup> *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004).

in Checklist Items 4 and 5, therefore, the Commission should adopt an interpretation that furthers Congress's goals. Here, the Commission has already recognized that mandating unbundling of line sharing and dark fiber, in the absence of impairment, impedes facilities-based competition and undermines the purposes of the 1996 Act.

In the *Triennial Review Order*, the Commission found that mandating line sharing “skew[s] competitive LECs’ incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering” that utilizes the entire loop (rather than only its high-frequency portion). *TRO* ¶ 261. The Commission emphasized that carriers should be encouraged, where possible, to purchase stand-alone loops and to take advantage of “the full functionality of the loop.” *Id.* ¶ 258. Mandatory line sharing, moreover, “would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs’ and the competitive LECs’ offerings”; “such results would run counter to the statute’s express goal of encouraging competition and innovation in all telecommunications markets.” *Id.* ¶ 261. Thus, the Commission “expressly reject[ed] [its] earlier finding that ‘line sharing will level the competitive playing field.’”<sup>15</sup>

Similarly, in the *Triennial Review Remand Order*, the Commission emphasized that, by refusing to mandate unbundling of most dark fiber, it would “force[] competing carriers to find alternative facilities in the areas where competitors have deployed or could deploy such facilities.” *TRRO* ¶ 134. And the Commission rejected its earlier conclusion that “competitive

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<sup>15</sup> *TRO* ¶ 261 (quoting Third Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, ¶ 35 (1999)).

LECs were impaired without unbundled access to entrance facilities,” including dark fiber entrance facilities, based on evidence of extensive “self-deployment.” *Id.* ¶ 138 & nn.385 & 387.

Moreover, in the *271 Broadband Forbearance Order*,<sup>16</sup> the Commission granted forbearance from the unbundling obligations in § 271 to the extent they required unbundling of broadband elements. Here, too, the Commission noted “the disincentives associated with regulated broadband unbundling under section 271,” which the Commission found to support its “decision to grant forbearance from those requirements.” *271 Broadband Forbearance Order* ¶ 25. In particular, the Commission was “mindful of the disincentive effects of unbundling on BOC investment.” *Id.* ¶ 21. The D.C. Circuit affirmed this decision, concluding that the Commission’s “predictions about the development of new broadband technologies and about the incentives for increased deployment (and, in turn, increased competition) flowing from an absence of unbundling are well within the agency’s area of expertise.” *EarthLink*, 462 F.3d at 12.

In the *Wireline Broadband Order*,<sup>17</sup> the Commission again recognized that unbundling obligations — there, the *Computer Inquiry* rules — “constrain[ed] technological advances and deter[red] broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services.” *Wireline Broadband Order* ¶ 19.

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<sup>16</sup> Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004) (“*271 Broadband Forbearance Order*”), *petition for review denied, EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

<sup>17</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”), *petitions for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 208 (3d Cir. 2007).

All of these decisions recognize the disincentive effects of unbundling on investment and deployment, and are consistent with Justice Breyer’s recognition that “[i]t is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.”<sup>18</sup>

**B.** Although the Commission eliminated unbundling requirements for line sharing in 2003 and for most dark fiber in 2005 — and the First Circuit suggested that the Commission was the proper forum to resolve a dispute about the scope of Checklist Items 4 and 5 in 2007<sup>19</sup> — the MPUC, in filing this petition in 2010, ignores the extensive competitive developments that have occurred in the meantime. Indeed, in the absence of rules mandating line sharing and the unbundling of most dark fiber, facilities-based competition has flourished, as a direct result of the Commission’s decisions not to mandate unbundling of these, and other, elements.

BOCs, knowing that other providers could not free-ride on their investments, increased their capital expenditures on broadband from \$7.2 billion to \$11.9 billion between 2006 and 2008 — a 65 percent increase.<sup>20</sup> Between 2003 and 2007, incumbent LECs deployed more than 280,000 kilometers of fiber.<sup>21</sup> Verizon alone has committed more than \$23 billion in investment

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<sup>18</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in relevant part).

<sup>19</sup> *See Verizon New England Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 11 (1st Cir. 2007). However, that dispute arose before the First Circuit only because of the MPUC’s erroneous view that it had authority to implement § 271, which led it to attempt to construe Checklist Items 4 and 5. As explained above, the courts of appeals have since uniformly rejected the MPUC’s view of state commission authority with respect to § 271. *See supra* note 6.

<sup>20</sup> Robert C. Atkinson & Ivy E. Schultz, Columbia Inst. For Tele-Info., *Broadband in America: Where it is and Where it is Going* 30, Table 5 (Nov. 11, 2009) (“*CITI Report*”); *see also id.* at 11 (“Market researchers and investment analysts recently estimated that as much as two-thirds of current investments are being made to provide and expand wired and wireless broadband, and the trend over the past few years has been growing.”) (footnote omitted). The BOCs’ broadband investments are estimated to be \$12.5 billion in 2010 and \$14 billion in 2011 — an expected 18 percent increase between 2008 and 2011. *See id.* at Table 5.

<sup>21</sup> *See* FCC, ARMIS Infrastructure Report, FCC Report 43-07, Table II. The cited figure (280,000 kilometers) refers to “sheath kilometers” of fiber. Given that one sheath may contain

to its all-fiber FiOS network, which currently offers up to 50 Mbps download speeds — as well as small business plans providing up to 35 Mbps symmetrical upload and download speeds — to roughly 15.4 million premises. That all-fiber network will ultimately reach millions of additional premises and support much higher broadband speeds, thus enabling application developers to create, and customers to enjoy, new applications and services that take advantage of these ever increasing broadband speeds.

Competitive LECs and cable companies have also deployed hundreds of thousands of miles of their own fiber. For example, Optimum Lightpath has “invested more than \$1 billion” to build a “100% fiber optic network” — comprising more than 3,800 route miles (or 201,000 fiber miles) and connecting more than 3,500 buildings — that provides “voice, data, Internet and video services to business customers,” in what it describes as “the world’s most competitive marketplace.”<sup>22</sup> Comcast has deployed “[o]ver 145,000 route miles of national fiber,” which it uses to serve business customers in 39 states, including “18 of the top markets.”<sup>23</sup> By the end of the year, Comcast also plans to offer speeds of 100 Mbps and higher over the cutting-edge DOCSIS 3.0 platform.<sup>24</sup> Others, such as Covad, are offering voice and DSL service over entire copper loops obtained from incumbent LECs.<sup>25</sup>

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multiple strands of fiber, this number may actually *understate* the total amount of fiber that incumbent LECs have deployed.

<sup>22</sup> Optimum Lightpath, *The Network*, [http://www.optimumlightpath.com/ourNetwork\\_main.shtml](http://www.optimumlightpath.com/ourNetwork_main.shtml); Optimum Lightpath, *About Optimum Lightpath*, <http://www.optimumlightpath.com/aboutus.shtml>.

<sup>23</sup> Comcast Business Class, *Fiber-Optic Network*, <http://business.comcast.com/about/network.aspx>.

<sup>24</sup> See Comments of Comcast Corp., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 37-39 (filed June 9, 2009).

<sup>25</sup> See Comments of Covad Communications Co. on National Broadband Plan Notice No. 6 at 2, GN Docket Nos. 09-47, 09-51, 09-137 (filed Oct. 23, 2009) (stating that Covad’s

In addition, mobile<sup>26</sup> and fixed wireless<sup>27</sup> providers are investing heavily in high-capacity broadband platforms that provide competitive alternatives to fiber. The four largest wireless providers invested \$10.4 billion in their broadband capabilities in 2008 and \$11.8 billion in 2009.<sup>28</sup> In addition, Clearwire advertises its 4G WiMAX service — which offers average download speeds of 3-6 Mbps — as “offer[ing] speeds comparable to cable and DSL for home and up to 4x faster than you can get with mobile broadband from a cellular company.”<sup>29</sup> By the end of the year, Clearwire’s 4G network will cover 120 million people in 100 markets.<sup>30</sup>

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“integrated voice and data communications services . . . are currently available across the nation in 44 states and 235 Metropolitan Statistical Areas (‘MSAs’) and can be purchased by more than 58 million homes and businesses”).

<sup>26</sup> For example, Verizon Wireless intends to extend 4G coverage to roughly 100 million customers in 30 different markets in 2010; by 2013, Verizon’s entire footprint will have 4G coverage. See Marguerite Reardon, CNet News, *Verizon Completes Initial 4G Wireless Test*, (Aug. 14, 2009), [http://news.cnet.com/8301-1035\\_3-10310232-94.html](http://news.cnet.com/8301-1035_3-10310232-94.html). Sprint already provides 4G service to 27 markets and plans to expand coverage to Boston, Houston, New York, San Francisco, and Washington, DC in 2010. See News Release, Sprint, *Sprint 4G Rollout Blazes on with Maui Launch* (Dec. 1, 2009), available at [http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle\\_newsroom&ID=1360459](http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1360459).

<sup>27</sup> See, e.g., Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, ¶ 48 (2007) (recognizing “fixed wireless offers the potential of being a cost-effective substitute for fiber as a last-mile connection to commercial buildings”); see also U.S. Telecom, *High-Capacity Services: Abundant, Affordable, and Evolving* 16-17 (July 2009), available at [http://ustelecom.org/uploadedFiles/News/News\\_Items/High.Capacity.Services.pdf](http://ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf) (businesses “can use fixed wireless to obtain access to voice and high-speed data services, and other carriers can often use fixed wireless to extend their existing fiber networks quickly and efficiently”); *id.* at 19 (FiberTower executive stated that with fixed wireless “[y]ou can literally cover over a hundred miles and you’re talking less than \$100,000 in equipment rather than the millions to put in fiber.”) (internal quotation marks omitted).

<sup>28</sup> See *CITI Report* at 66, Table 15.

<sup>29</sup> See CLEAR, Unlimited Mobile Internet FAQs, <http://www.clear.com/shop/services/mobile?id=226&market=42>.

<sup>30</sup> See Clearwire, News Room, *Clearwire Reports Fourth Quarter and Full Year 2009 Results* (Feb. 24, 2010), <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1394718&highlight=>.

Clearwire had nearly 400,000 4G subscribers at the end of 2009 and expects to have approximately 1.2 million 4G subscribers by the end of 2010.<sup>31</sup>

As a consequence of this investment boom, broadband penetration has nearly tripled since 2003, from 23 percent of households to 66 percent of households.<sup>32</sup> The number of high-speed Internet lines (including both business and residential customers) increased nearly six-fold between 2003 and 2008, from 23 million to 132.8 million.<sup>33</sup> In September 2003, fewer than 200,000 premises were passed by fiber; by September 2009, more than 17.2 million premises were passed by fiber.<sup>34</sup> These increases in broadband investment and deployment are directly traceable to the Commission's deregulatory decisions.<sup>35</sup>

Interpreting Checklist Items 4 and 5 to require the unbundling of line sharing and dark fiber would artificially skew competition in the broadband marketplace by imposing a unique — and significant — burden on only one class of providers, among the many broadband platform providers that exist today. In a marketplace where all providers are making large and risky

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<sup>31</sup> *See id.*

<sup>32</sup> *See CITI Report 25-26.*

<sup>33</sup> *See* FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008*, Table 1 (July 2009).

<sup>34</sup> *See* Comments of Telecommunications Industry Association and the Fifth Council North America at 9 & n.38, WC Docket No. 09-223 (filed Jan. 22, 2010) (citing Michael C. Render, Presentation: Fiber-to-the-Home Council N.A., North American FTTH/FTTP Status (Sept. 2009)).

<sup>35</sup> *See* Thomas W. Hazlett & Anil Caliskan, *Natural Experiments in U.S. Broadband Regulation*, 7 *Rev. of Network Econ.* 460, 477 (2008) (“The evidence in U.S. broadband markets suggests that efficiency gains from deregulation. Cable modem services held nearly a two-to-one market share advantage when DSL carriers were most heavily obligated to provide ‘open access’ to competing ISPs. Once the FCC eliminated a key provision of that access regime, ending line sharing in a February 2003 ruling, DSL subscribership increased dramatically. By year-end 2006, DSL subscribership was 65% higher — more than 9 million households — than it would have been under the linear trend established under ‘open access’ regulation.”).

investments in deploying new networks and facilities, it makes no sense to saddle only *one* set of providers with a costly unbundling mandate. *See, e.g., Wireline Broadband Order* ¶¶ 44-45.

In sum, the Commission's determination that the elimination of unbundling mandates for these elements would spur competition and benefit consumers has proven correct. Therefore, even if the Commission were to find the statutory text ambiguous, the most reasonable interpretation of Checklist Items 4 and 5 — and the one most consistent with the procompetitive purposes of the 1996 Act — is that they do not require BOCs to unbundle line sharing and dark fiber.

### CONCLUSION

For the foregoing reasons, the Commission should deny the MPUC's petition.

Respectfully submitted,

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