

**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

REPLY COMMENTS OF AT&T INC.

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION.....	1
I. The Plain Language of 47 U.S.C. § 271 Precludes the Commission From Requiring BOCs To Provide Access to Dark Fiber and Line Sharing	1
II. The Commission Has Not Previously Concluded that Checklist Items Four and Five Require BOCs To Provide Access to Dark Fiber and Line Sharing	7
III. Even if the Checklist Permitted the Commission To Require Access to Dark Fiber or Line Sharing, It Would Not Be in the Public Interest To Do So	10
IV. Rates for Dark Fiber and Line Sharing are Outside the Scope of this Proceeding.....	11
CONCLUSION.....	12

INTRODUCTION

AT&T explained in its initial comments that requiring the Bell Operating Companies (“BOCs”) to offer competitive local exchange carriers (“LECs”) access to dark fiber and line sharing under 47 U.S.C. § 271 would be contrary to the plain language of the statute, this Commission’s precedent, and sound public policy. A few competitive LECs have tried to argue the contrary in this proceeding, but their comments lack merit and are unpersuasive. AT&T shall take this opportunity briefly to respond to some of their arguments. For the reasons presented below and in AT&T’s initial comments, the Commission should rule that section 271 does not apply to either dark fiber or line sharing.

DISCUSSION

I. The Plain Language of 47 U.S.C. § 271 Precludes the Commission From Requiring BOCs To Provide Access to Dark Fiber and Line Sharing

As AT&T explained in its initial comments, neither dark fiber nor line sharing falls within the scope of the competitive checklist. Dark fiber, by definition, is not “[l]ocal loop transmission”¹ within the terms of checklist item 4 because it is incapable of transmitting a signal until optical electronic equipment is attached and the fiber is no longer “dark.”² For the same reason, dark fiber – including a dark fiber entrance facility – does not provide “[l]ocal transport” within the meaning of checklist item 5;³ until it is “lit” by the necessary equipment, fiber cannot

¹ 47 U.S.C. § 271(c)(2)(B)(iv).

² See Comments of AT&T Inc. on the Petition of the Maine Public Utilities Commission at 2, *Maine Public Utilities Commission Petition for Declaratory Ruling Regarding Section 271 Access to Dark Fiber Facilities and Line Sharing*, WC Docket No. 10-14 (FCC filed Mar. 1, 2010) (“AT&T Comments”); see also Comments of Verizon at 3, *Maine Public Utilities Commission Petition for Declaratory Ruling Regarding Section 271 Access to Dark Fiber Facilities and Line Sharing*, WC Docket No. 10-14 (FCC filed Mar. 1, 2010) (“Verizon Comments”).

³ 47 U.S.C. § 271(c)(2)(B)(v).

“transport” a signal of any kind. Moreover, because dark fiber is not connected to “the trunk side of a wireline local exchange carrier switch,”⁴ it cannot provide the transport described in checklist item 5.⁵

The plain language of the competitive checklist also prohibits mandating access to line sharing. Checklist item 4 requires BOCs to provide access and interconnection to transmission over the “[l]ocal loop.”⁶ But in a line sharing arrangement, a competitive LEC has access only to a “portion of the loop” – namely, “the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions.”⁷ The high-frequency portion of the loop (“HFPL”) is not the same thing as the “local loop” itself.⁸

A number of commenters take issue with these statutory arguments, but their position is unsustainable.

1. Alpheus Communications and Great Works Internet argue that because dark fiber and line sharing are “features, functions, and capabilities” of the local loop, a BOC must provide them whenever it is required to provide access to the local loop itself.⁹ But section 271 does not require BOCs to provide access to the local loop as a “network element,” which by definition would include all “features, functions, and capabilities” provided by such an element.¹⁰ The

⁴ *Id.*

⁵ See *AT&T Comments* at 3; *Verizon Comments* at 3.

⁶ 47 U.S.C. § 271(c)(2)(B)(iv).

⁷ 47 C.F.R. § 51.319(a)(1)(i).

⁸ See *AT&T Comments* at 2-3; *Verizon Comments* at 2-3.

⁹ Comments of Alpheus Communications, L.P. and Biddeford Internet Corporation d/b/a Great Works Internet at 7, 10, *Maine Public Utilities Commission Petition for Declaratory Ruling Regarding Section 271 Access to Dark Fiber Facilities and Line Sharing*, WC Docket No. 10-14 (FCC filed Mar. 1, 2010) (“*Alpheus Comments*”).

¹⁰ 47 U.S.C. § 153(29).

commenters confuse the mandate under section 251, which requires the unbundling of particular “network elements,”¹¹ with the quite distinct requirement under section 271 to ensure only that competitors are given access to “[l]ocal loop transmission” and “local transport” unbundled from “other services.”¹² Thus while section 251 (and checklist item 2, which expressly incorporates the requirements of section 251) requires access to particular network elements, including their features, functions, and capabilities, checklist items 4 and 5 require access only to particular services.¹³ Whether dark fiber and line sharing are “features, functions, and capabilities” of the local loop “network element” is simply not relevant to whether they fall within the definition of “local loop transmission” or “local transport” under checklist items 4 and 5.

The Commission has never suggested otherwise. Alpheus and Great Works erroneously assert that the Commission, in various orders approving BOCs’ section 271 applications, “repeatedly emphasized that § 271 checklist access includes all features, functions, and capabilities of a particular element.”¹⁴ But the cited orders do not support that contention. As AT&T argued in its initial comments, the Commission’s analysis in those orders was limited to the question whether the BOCs had satisfied their obligation to make the local loop available as an unbundled network element under section 251; given the unbundling obligations applicable at the time, the Commission never had reason to analyze the distinct question whether checklist

¹¹ *Id.* § 251(c)(3).

¹² *Id.* § 271(c)(2)(B)(iv)–(v).

¹³ AT&T has explained this distinction in greater detail elsewhere. *See, e.g.,* Opposition of AT&T Inc. to the Petition of the Section 271 Coalition at 12-13, *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 (FCC filed Jan. 12, 2010) (“*AT&T 271 Opposition*”).

¹⁴ *Alpheus Comments* at 7.

items 4 and 5 independently mandated access to dark fiber or line sharing.¹⁵ Nor has the Commission ever held, as the Section 271 Coalition suggests in its comments, that the definition of “loop” for purposes of section 271 is “‘coterminous with its definition under Section 251.’”¹⁶ The commenters never explain how access to “local loop *transmission*” means the same thing as access to the “local loop” itself.

2. Alpheus and Great Works also misunderstand the word “access” in section 271. Misquoting the statute, they insist that by requiring BOCs to provide “access to local loop transmission,” the mandate under checklist item 4 is somehow broader than if it had required BOCs merely to provide “local loop transmission”; similarly, they insist that requiring BOCs to provide “access to local transport” is broader than a requirement merely to provide “local transport.”¹⁷ First, checklist items 4 and 5 do not, in fact, require BOCs to provide “access to” particular services. Rather, they require that the “[a]ccess or interconnection provided or generally offered” by BOCs through their interconnection agreements or statements of generally available terms and conditions include “[l]ocal loop transmission” and “[l]ocal transport” unbundled from other services.¹⁸ But the access that BOCs need to provide or generally offer is to “local loop transmission” and “local transport,” not to the network elements used to provide these services. Alpheus and Great Works argue that the checklist requires BOCs to provide

¹⁵ See *AT&T Comments* at 7-10.

¹⁶ Comments of the Section 271 Coalition and One Communications Corp. at 6-7, *Maine Public Utilities Commission Petition for Declaratory Ruling Regarding Section 271 Access to Dark Fiber Facilities and Line Sharing*, WC Docket No. 10-14 (FCC filed Mar. 1, 2010) (“*Coalition Comments*”) (quoting Order at 23, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682 (Me. Pub. Utils. Comm’n Sept. 13, 2005)).

¹⁷ See *Alpheus Comments* at 10-11.

¹⁸ 47 U.S.C. § 271(c)(2)(B).

access to “the native transmission capability of the loop” and “the inherent transport capacity of the [dark] fiber.”¹⁹ But they are making this up; those terms are found nowhere in section 271. Checklist items 4 and 5 only require BOCs to give competitive carriers access to local loop transmission and local transport services. Both of these services can be provided without also providing access to either dark fiber or line sharing. That is all the checklist requires.

3. Alpheus and Great Works also claim that, because the Commission has held that dark fiber falls within the definition of “wire communication,” dark fiber must also constitute local loop transmission and local transport within the meaning of checklist items 4 and 5.²⁰ For many reasons, this argument lacks merit. First, the term “wire communication” does not appear in section 271. Whether a particular facility or service constitutes “wire communication” is relevant for determining the scope of this Commission’s regulatory authority;²¹ it has no bearing on the entirely separate question of whether a BOC must provide unbundled access to that facility or service. Second, the Act’s definition of “wire communication” expressly includes not only transmission but also “all instrumentalities, facilities, apparatus, and services . . . *incidental to such transmission.*”²² Indeed, the district court opinion cited by Alpheus and Great Works recognized that the Commission had held that dark fiber fell within the definition of “wire communication” because it was a facility incidental to transmission, not because it provided

¹⁹ *Alpheus Comments* at 11.

²⁰ *See id.* (quoting Memorandum Opinion and Order, *Southwestern Bell Telephone Company et al. Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 To Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589, ¶ 13 (1993) (“*Dark Fiber Order*”), remanded, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), after remand, Order on Remand, *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, 23 FCC Rcd 569 (2008) (vacating *Dark Fiber Order* and closing proceeding)).

²¹ *See* 47 U.S.C. § 201.

²² *Id.* § 153(52) (emphasis added).

transmission itself.²³ In any case, the Commission has since vacated its *Dark Fiber Order* and closed the proceeding.²⁴ The order cited by Alpheus and Great Works is a nullity.

4. Finally, Alpheus and Great Works argue that AT&T's position cannot be correct because it would preclude access under checklist item 4 to the copper loop itself; like dark fiber, they argue, a copper loop does not provide "transmission" until it is attached to other equipment, such as a switch or a DSLAM.²⁵ But BOCs are not required under the checklist to provide access to copper facilities per se; as AT&T has pointed out, checklist items 4 and 5 require BOCs to provide access to local loop transmission and local transport services, whatever facilities may be used to provide such services. If copper loops are the method BOCs choose to provide such services, then access to those copper loops will be required. Where copper loops are not available, BOCs may have to satisfy the checklist obligation to provide access to local loop transmission or local transport by providing access to an equivalent transmission path over fiber facilities. But in no event does either checklist item 4 or 5 mandate that a BOC provide access to copper loop facilities. BOCs have an obligation to provide certain services under these checklist items, and dark fiber – just like "dark" copper – is not a service.

²³ See *Global NAPS, Inc. v. New England Tel. & Tel. Co.*, 156 F. Supp. 2d 72, 78 (D. Mass. 2001) ("[T]he FCC found that the leasing by the BOCs of dark fiber . . . fit within the statutory 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.'" (quoting *Dark Fiber Order* ¶ 17, emphasis in court opinion).

²⁴ See Order on Remand, *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 23 FCC Rcd 569 (2008) (vacating *Dark Fiber Order* and closing proceeding). The Commission closed the proceeding because the record evidence related only to BOCs' late 1980s and early 1990s dark fiber offerings and "shed little light on the variety of ways in which BOC may actually offer dark fiber today." *Id.* ¶ 6.

²⁵ See *Alpheus Comments* at 10.

II. The Commission Has Not Previously Concluded that Checklist Items Four and Five Require BOCs To Provide Access to Dark Fiber and Line Sharing

Some commenters have reiterated the Maine Public Utilities Commission's ("MPUC") argument that the Commission has already held dark fiber and line sharing to be required by checklist items 4 and 5, and that the declaratory relief sought by the petition would simply reaffirm that holding. But as AT&T explained in its initial comments, requiring dark fiber and line sharing under checklist items 4 and 5 would require the Commission to reverse course from its previous orders. Competitive LEC commenters cite a number of orders in which the Commission analyzed BOCs' compliance with these checklist items in part by looking to their dark fiber and line sharing offerings. But those orders were all issued while dark fiber and line sharing were unbundled network elements ("UNEs") under section 251, and therefore already part of the competitive checklist.²⁶

The orders that shed light on the Commission's understanding of whether BOCs have an independent obligation to provide dark fiber and line sharing are the ones issued before the section 251 unbundling orders took effect. AT&T in its initial comments cited the orders approving BOCs' entry into the interLATA markets in New York and Texas and noted that the Commission did not require any showing as to dark fiber or line sharing in concluding that the competitive checklist had been satisfied in those states.²⁷ Similarly, two years earlier, the Commission found that BellSouth had satisfied checklist item 5 in its second application for

²⁶ See 47 U.S.C. § 271(c)(2)(B)(ii).

²⁷ See *AT&T Comments* at 4-7.

section 271 authority in Louisiana, *without* mentioning dark fiber or listing it as one of the BOC's "obligations with respect to [shared or dedicated] transport."²⁸

None of the commenters explain how the Commission could have found the BOCs in compliance with the checklist if checklist items 4 and 5 require provision of dark fiber and line sharing. The Commission has authority to grant a section 271 application only if the BOC applicant has "fully implemented the competitive checklist."²⁹ And the Commission may not limit the terms used in the competitive checklist.³⁰

Alpheus and Great Works attempt to brush aside the New York and Texas orders by noting that, when those decisions issued, the Commission "had only recently recognized dark fiber as among the features, functions and capabilities of loops."³¹ But what the Commission had "only recently" done was conclude that dark fiber was a network element that had to be unbundled under section 251.³² Indeed, the new unbundling rules had not yet taken effect at the time of the New York order³³ or at the time that Southwestern Bell filed its application for

²⁸ See Memorandum Opinion and Order, *Application of BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶¶ 201-202 & nn.651-52 (1998).

²⁹ 47 U.S.C. § 271(d)(3)(A)(i).

³⁰ *Id.* § 271(d)(4).

³¹ *Alpheus Comments* at 8 n.26.

³² See Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 174, 325 (1999) ("*UNE Remand Order*") (unbundling dark fiber loops and transport under § 251(c)(3)), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 413 (D.C. Cir. 2002).

³³ See Memorandum Opinion and Order, *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, ¶ 31 (1999) ("*New York 271 Order*"), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

section 271 approval in Texas.³⁴ Therefore, access to dark fiber was not yet required under checklist item 2. Accordingly, the Commission refrained from assessing the BOCs' dark fiber offerings. As Alpheus and Great Works note, the Commission pointed out that the BOCs would have to provide access to dark fiber prospectively.³⁵ But it was simply noting that such access would now be mandated under section 251 and, therefore, under checklist item 2.³⁶

Alpheus and Great Works do not even attempt to harmonize their position on line sharing with the Commission's treatment of that service in the New York and Texas orders. And the Section 271 Coalition's brief effort to do so is unavailing. The Coalition claims that "[i]n every Commission order granting an RBOC Section 271 interLATA operating authority since the advent of line sharing, the Commission has placed line sharing in Checklist item (iv)."³⁷ But, as AT&T explained in its initial comments, the fact that the Commission did not require a BOC to demonstrate that it provided either dark fiber or line sharing at any time prior to the orders establishing them both as UNEs means that the Commission did not view either of them as independent requirements under checklist items 4 or 5.³⁸

³⁴ 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, ¶¶ 30-32 (2000).

³⁵ See *Alpheus Comments* at 8 n.26.

³⁶ See *New York 271 Order* ¶ 31 ("Of course, the Commission expects that Bell Atlantic will comply with the new *UNE Remand* rules once they take effect.").

³⁷ *Coalition Comments* at 8.

³⁸ See, e.g., *New York 271 Order* ¶ 31 (concluding that Bell Atlantic need not prove compliance with new rules governing dark fiber because the new rules established in the *UNE Remand Order* "will not take effect until some time after release of this order"); *id.* ¶ 31 n.70 ("For similar reasons, we do not require Bell Atlantic to demonstrate that it complies with the *new rules relating to unbundled network elements* established in the Commission's recent advanced services order requiring 'line sharing.'") (emphasis added).

Finally, the Commission's decision to forbear from enforcing the requirements of section 271 with regard to certain broadband elements that are not section 251 UNEs does not in any way suggest, as Alpheus and Great Works contend, that dark fiber is otherwise subject to section 271. The Commission did not specifically analyze dark fiber anywhere in that order.³⁹ Indeed, its only mention of dark fiber was in a footnote describing how most dark fiber remained subject to unbundling under section 251.⁴⁰ The Commission nowhere even hinted that it intended to decide that dark fiber was a requirement under competitive checklist. Rather, the Commission merely pointed out that most dark fiber was subject to section 251 and, therefore, required under the checklist regardless of the order's decision.

III. Even if the Checklist Permitted the Commission To Require Access to Dark Fiber or Line Sharing, It Would Not Be in the Public Interest To Do So

AT&T also explained in its initial comments that, even if the Commission *could* read the competitive checklist to require access to dark fiber or line sharing, it *should* not do so.⁴¹ Mandatory unbundling provides a powerful disincentive for competitive LECs to invest in and deploy their own facilities, thereby undermining the goal of the Act to “encourage the innovation and investment that come from facilities-based competition.”⁴² In particular, requiring BOCs to provide access to the next-generation facilities in their networks, such as dark fiber and the

³⁹ See Memorandum Opinion and Order, *Petitions for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(C)*, 19 FCC Rcd 21496 (2004), *aff'd*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

⁴⁰ See *id.* ¶ 5 n.23.

⁴¹ See *AT&T Comments* at 10-11.

⁴² Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶¶ 2, 66, 146 (2005) (“*Triennial Review Remand Order*”), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

HFPL, would discourage competitive LECs from building the very facilities that the Commission is trying to encourage them to invest in.

Competitive LEC commenters do not substantively address these points. Alpheus and Great Works cite a lone paragraph of the *Triennial Review Remand Order*, in which the Commission found that, for a subset of dark fiber transport, unbundling is efficient.⁴³ But to the extent dark fiber remains a UNE, then competitive carriers are entitled to access it not only under section 251 but also under section 271 checklist item 2. The commenters ignore the weight of the Commission's analysis in the *Triennial Review Remand Order*, in which the Commission removed dark fiber loops, dark fiber entrance facilities, and a significant portion of dark fiber transport from section 251's unbundling requirements, precisely because of the undesirable incentives created by unbundling requirements.⁴⁴

IV. Rates for Dark Fiber and Line Sharing are Outside the Scope of this Proceeding

Finally, the Commission should not entertain the Section 271 Coalition's improper request to address in this proceeding the appropriate rates for facilities or services provided pursuant to the section 271 competitive checklist.⁴⁵ Questions of pricing are well outside the scope of the MPUC's petition and the public notice seeking comment thereon. The Coalition is attempting to insert into this docket matters that the Commission is already addressing in other proceedings.⁴⁶ The Coalition's arguments are also contrary to the Commission's well-

⁴³ See *id.* ¶ 135.

⁴⁴ See *id.* ¶ 5.

⁴⁵ See *Coalition Comments* at 9.

⁴⁶ See *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; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25.

established policy that services required under section 271 should be provided at market rates.⁴⁷

But regardless of the merits of the Coalition's request, it is not an appropriate issue for the Commission to consider here.

CONCLUSION

For the reasons discussed above and in AT&T's initial comments, the Commission should conclude that the competitive checklist does not require BOCs to show that they are providing or offering access to dark fiber or line sharing.

Respectfully submitted,

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⁴⁷ See *AT&T 271 Opposition* at 10-12.