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 VERIZON[1]

As Verizon and others have demonstrated, the text of Checklist Items 4 and 5 does not extend to either line sharing or dark fiber. The Maine Public Utilities Commission ("MPUC") did not argue otherwise in its petition, and those few commenters filing in support of the MPUC's petition offer no plausible interpretation of the statutory text that would warrant a different conclusion. Nor do those commenters identify any prior orders in which the Commission has interpreted these checklist items to require either line sharing or dark fiber. On the contrary, as Verizon and others have shown, the Commission's orders are consistent with the plain terms of the statute. But even if the statutory text were ambiguous, the Commission's own decisions demonstrate that it would be unreasonable — and contrary to the procompetitive purposes of the 1996 Act — to interpret those checklist items to mandate that Bell Operating Companies ("BOCs") provide line sharing and dark fiber as 271 elements.

The Commission should reject the MPUC's petition in its entirety. Any other result would undermine providers' incentives to invest in and deploy new broadband networks, in

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

conflict with the procompetitive purposes of the 1996 Act, while also artificially skewing the broadband marketplace by burdening only one among many types of providers with unbundling obligations.

DISCUSSION

I. SECTION 271 DOES NOT REQUIRE LINE SHARING OR DARK FIBER

A. The Text of Section 271 Does Not Require Line Sharing or Dark Fiber

1. *Line Sharing.* As Verizon and AT&T have explained, the text of Checklist Item 4 — requires a BOC 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) — does not encompass line sharing. *See* Verizon Comments 2-3; AT&T Comments 2-3. To require line sharing, that statutory text would instead have to require a BOC to provide access to a "[l]ocal loop" *for the* "transmission" of a CLEC's service that is"[]bundled" *with* a BOC's retail local telephone service. But that is not what Checklist Item 4 says, and courts routinely reject statutory interpretations that "impermissibly rearrange[] the statutory language." *Limtiaco v. Camacho*, 549 U.S. 483, 490 (2007). Moreover, when the Commission first held that line sharing could be required as a UNE under § 251(c)(3), it did so on the ground that line sharing "meets the statutory definition of a network element" because the high frequency portion of the loop is a "capability of th[e] loop."[2] Checklist Item 4, however, does not use the statutory term "network element," nor does it require access to a "capability" of a loop.

Dark Fiber. As Verizon and AT&T have explained, Checklist Items 4 and 5 do not encompass dark fiber loops, transport, or entrance facilities. *See* Verizon Comments 3; AT&T

[2] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶¶ 17, 25 (1999), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

Comments 2, 3-4. Checklist Item 4 does not include dark fiber loops because dark fiber cannot "transmit" anything — much less provide "transmission from [a] central office to [a] customer's premises," as the statute specifies — without the addition of electronics. *See* Verizon Comments 2-3; AT&T Comments 2-3. Checklist Item 5 similarly does not require dark fiber transport or dark fiber entrance facilities, because dark fiber cannot "transport" anything without the attachment of electronics. 47 U.S.C. § 271(c)(2)(B)(v). Nor is dark fiber connected to "a wireline local exchange carrier switch," and therefore cannot provide "transport from the trunk side" of such a switch, as the statute specifies. *Id.*

2. Although the MPUC's petition ignored the text of § 271, some of the MPUC's supporters suggest that the statute's terms encompass line sharing and dark fiber. Those arguments lack merit.

One commenter focuses on the phrase "access to" in Checklist Items 4 and 5, suggesting that this phrase means that BOCs must provide line sharing and dark fiber. *See* Alpheus Comments 10-12. But the phrase "access to" does not answer the question "Access to what?" As explained above, Congress answered that question by requiring access to "[l]ocal loop transmission" between two specific points, and "[l]ocal transport" from a specific point on a BOC's network. The fact that Congress required "access to" those services cannot change or expand the underlying services — namely, "[l]ocal loop transmission" and "[l]ocal transport" — to which BOCs must provide access. That is, one provides access to a thing by providing the thing itself; not by providing some other, arguably related thing. Because neither "[l]ocal loop transmission" nor "[l]ocal transport" encompasses line sharing or dark fiber, as explained above, the obligation to provide "access to" those services cannot expand them to include either line sharing or dark fiber.

The same commenter suggests further that, because Checklist Items 4 and 5 require BOCs to provide certain 271 elements "unbundled from . . . other services," they necessarily require dark fiber. Alpheus Comments 12-13. The term "other services," however, makes clear that what these checklist items require — whether "transmission" between two points, or "transport" from one point — are themselves "services." But dark fiber — which, by definition, is incapable of "transmit[ting]" or "transport[ing]" anything — is not a "service." Therefore, the requirement to provide transport "unbundled from . . . other services" does not include dark fiber, which is a glass strand unbundled from *all* services.

B. The Commission's Previous Decisions Are Consistent with the Conclusion that Section 271 Does Not Require Line Sharing or Dark Fiber

1. As Verizon and others explained, although the Commission has not squarely confronted the question the MPUC presents, Commission decisions touching on this question are consistent with the plain meaning of the statute's text, which does not require line sharing or dark fiber. *See* Verizon Comments 4-5; AT&T Comments 4-7; FairPoint Comments 9-10.

In particular, the Commission issued two § 271 orders — for New York[3] and Texas[4] — ruling on applications filed *before* the Commission's rules requiring line sharing and dark fiber to be unbundled under § 251(c)(3) took effect. The Commission approved those applications *without* requiring the BOCs in those states to demonstrate that they provided line sharing and dark fiber in compliance with Checklist Items 4 and 5 — and, in fact, disagreed with the argument that Checklist Items 4 and 5 required the BOCs to unbundle line sharing and dark

[3] *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 (1999) ("*New York 271 Order*").

[4] *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 (2000) ("*Texas 271 Order*").

fiber.[5] If those checklist items actually required a BOC to provide line sharing or dark fiber as 271 elements, the Commission could not have granted those orders without confirming that the BOCs provided those elements consistent with § 271. *See* 47 U.S.C. § 271(d)(3)(A)(i).

Moreover, after concluding that line sharing and most dark fiber should not be mandated as UNEs under § 251(c)(3), the Commission adopted transition regimes that contain no suggestion that BOCs retain ongoing obligations under § 271 to provide line sharing or dark fiber.[6] In discussing the "alternative" ways that a CLEC could obtain line sharing or dark fiber once they were not available as UNEs, the Commission urged competitive LECs to enter voluntary, commercial negotiations for line-sharing agreements and to self-deploy fiber facilities.[7] The Commission did not, however, state that one "alternative" was to demand line sharing and dark fiber from BOCs as a compelled service pursuant to § 271.

2. Only one commenter addresses the Commission's New York and Texas 271 orders, claiming they do not contain an implicit finding that line sharing and dark fiber are not 271 elements because the Commission "had not yet determined" that those were "a 'feature function or capability' of the loop or transport element." Alpheus Comments 8 n.26. But the phrase "features, functions, and capabilities" appears only in the statutory definition of "network element," 47 U.S.C. § 153(29), which is a term that appears in § 251(c)(3) — "network element" does *not* appear in Checklist Item 4 or 5. Instead, those checklist items refer specifically to

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[5] *See New York 271 Order* ¶ 31 & n.70; *Texas 271 Order* ¶ 32.

[6] *See* 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, ¶ 264 (2003) ("*TRO*") (line sharing), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 142 (2005) ("*TRRO*") (dark fiber), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[7] *See TRO* ¶ 265; *TRRO* ¶¶ 144, 197.

"local loop transmission" and "local transport." Therefore, any determination that line sharing or dark fiber meets the definition of "network element" in § 153(29) is irrelevant for purposes of construing Checklist Items 4 and 5.[8] Nor could the Commission rely on the statutory definition of the term network element to "extend the terms" that Congress actually "used in the competitive checklist." 47 U.S.C. § 271(d)(4) (prohibiting the Commission from doing so).

Some commenters, like the MPUC, rely on the Commission's decisions approving § 271 petitions that BOCs filed *after* the Commission's rules mandating unbundling of line sharing and dark fiber as UNEs under § 251(c)(3) took effect. *See* Alpheus Comments 7; COMPTEL Comments 3-4 & n.9; Section 271 Coalition Comments 5-8. When line sharing and dark fiber were UNEs, however, a BOC satisfied its § 271 obligations under a number of checklist items — including Checklist Items 4 and 5 — by demonstrating its compliance with Checklist Item 2, which incorporates the Commission's § 251(c)(3) UNE rules.[9] Thus, while line sharing and dark fiber were still UNEs, the Commission had no need to consider (let alone decide) whether § 271 imposed independent obligations to provide line sharing or dark fiber.

These commenters nevertheless point to the structure of the Commission's § 271 orders issued after the *Texas 271 Order*, in which it discussed line sharing under the heading of Checklist Item 4 and dark fiber under the headings of Checklist Items 4 and 5. *See* Alpheus Comments 6-8; Section 271 Coalition Comments 6-7. As Verizon and others have explained, these groupings were purely for administrative convenience and have no substantive

[8] For the same reasons, commenters err in relying on the Commission's statement in a later 271 order that dark fiber is "among the features, functions, and capabilities of the loop." Alpheus Comments 7-8 (internal quotation marks omitted); *accord* COMPTEL Comments 3-4 & n.9; Section 271 Coalition Comments 5-8.

[9] *See* 47 U.S.C. § 271(c)(2)(B)(ii) ("Checklist Item 2") (requiring BOCs to demonstrate their compliance with the UNE requirements imposed under § 251(c)(3)).

significance. *See* Verizon Comments 6-7 & n.12; AT&T Comments 7-9. Indeed, the Commission also routinely limited its discussion under the heading of Checklist Item 2 — which covers a BOC's provision of *all* UNEs — to TELRIC pricing, operation support systems, and UNE combinations.[10] If the Commission's structure of its discussion were substantive — as these commenters suppose — it would follow that copper loops and DS1 transport, to take just two examples, were *not* UNEs at the time the Commission issued these various orders, which was plainly not the case.

Some commenters instead suggest that isolated statements in various orders constitute express holdings that line sharing or dark fiber are 271 elements. For example, the so-called "Section 271 Coalition" (at 7) points to the Commission's statement in the *Massachusetts 271 Order* that, because the Commission concluded in the *Line Sharing Order* that the "high-frequency portion of local loops [is] a UNE that must be provided . . . pursuant to section 25l(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271." *Massachusetts 271 Order* ¶ 163. Far from supporting the MPUC's petition, this statement confirms the conclusion the Commission necessarily reached in the *New York 271 Order* and the *Texas 271 Order* — when line sharing is *not* a UNE under § 251(c)(3), as was the case at the time of those orders and has

[10] *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, 17 FCC Rcd 25650 ¶¶ 15-103 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, Bellsouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, ¶¶ 21-200 (2002); Memorandum Opinion and Order, *Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, ¶¶ 16-120 (2001) ("*Massachusetts 271 Order*").

been the case since 2003, line sharing is *not* required under either Checklist Item 2 or 4.[11] This statement cannot be read as a holding that § 271 requires line sharing *independent* of the Commission's (later vacated) finding that line sharing must be provided as a UNE under § 251(c)(3).

Similarly, Alpheus asserts (at 14-15) that, because the Commission granted forbearance from the obligation to provide both dark and lit FTTP loops in the *271 Broadband Forbearance Order*,[12] the Commission must have concluded that § 271 requires the provision of dark fiber. Alpheus is wrong. Verizon sought forbearance from § 271 "out of an abundance of caution" and on the assumption that § 271 required provision of various services that no longer were required as UNEs under § 251(c)(3).[13] As the D.C. Circuit has made clear, the Commission may grant such "conditional" forbearance petitions without first confirming that the regulatory obligations at issue actually apply.[14] Nowhere in the *271 Broadband Forbearance Order* did the Commission suggest that it first determined that § 271 required the elements at issue before granting forbearance. Indeed, the Commission made only a passing reference to dark fiber, which it relegated to a background footnote that described the still-existing UNE obligations under the *Triennial Review Order* for non-FTTP dark fiber loops and dark fiber transport.[15]

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[11] As noted above, the Commission found in the *Line Sharing Order* that line sharing meets the statutory definition of "network element," a term found in § 251(c)(3), but *not* in Checklist Item 4.

[12] Memorandum Opinion and Order, *Petitions for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160*, 19 FCC Rcd 21496 (2004) ("*271 Broadband Forbearance Order*").

[13] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338, at 2 (filed July 29, 2002).

[14] *See AT&T Inc. v. FCC*, 452 F.3d 830, 834-37 (D.C. Cir. 2006).

[15] *See 271 Broadband Forbearance Order* ¶ 5 n.23.

Finally, Alpheus suggests that the Commission's conclusion in its 1993 *Dark Fiber Order*[16] that dark fiber is "wire communication" for purposes of Title II supports reading Checklist Items 4 and 5 to require dark fiber. Neither Checklist Item 4 or 5, however, uses the term "wire communication," so the Commission's interpretation of that term is not relevant to its interpretation of those checklist items. As noted above, the Commission cannot "extend" the terms that Congress actually used in the competitive checklist. *See* 47 U.S.C. § 271(d)(4).

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 MANDATORY UNBUNDLING OF THOSE ELEMENTS HARMS COMPETITION

A. Requiring Line Sharing or Dark Fiber Under § 271 Would Undermine the Procompetitive Purposes of the Act and the Commission's § 251(c)(3) Unbundling Decisions

Even if the text of Checklist Items 4 and 5 were ambiguous, the Commission should not interpret them to require 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. Indeed, as Verizon has explained, the Commission's elimination of line sharing and dark fiber from § 251's unbundling regime led to an explosion in facilities-based deployment and competition among a wide variety of broadband platform providers. *See* Verizon Comments 10-14. Reversing course under § 271 would undermine those incentives to invest in and deploy new broadband networks, in conflict with the

[16] 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 (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).

procompetitive purposes of the 1996 Act, while also artificially skewing the broadband marketplace by burdening only one among many types of providers with unbundling obligations. *See* Verizon Comments 13-14; AT&T Comments 11.

Moreover, there is hardly a pressing or compelling need to issue the ruling the MPUC seeks now. As Verizon explained, the Commission eliminated unbundling requirements for line sharing in 2003 and for most dark fiber in 2005; broadband investment and facilities-based competition have flourished ever since. *See* Verizon Comments 10-14. Therefore, even if the statute were ambiguous, the Commission should deny the MPUC's petition in its entirety.

B. Commenters' Arguments to the Contrary Lack Merit

None of the commenters supporting the MPUC petition addresses the overwhelming evidence that the Commission's decisions not to mandate unbundling of line sharing and dark fiber have spurred investment and competition in the broadband marketplace. Instead, the Section 271 Coalition attempts to add to this docket issues that are not presented in the MPUC's petition but which it presented in its own petition for rulemaking (WC Docket No. 09-222) — namely, the asserted need for extensive rules governing the prices of 271 elements. *See* Section 271 Coalition Comments 3-4, 9. The MPUC's petition, however, says nothing about pricing and asks only for a declaration as to whether line sharing and dark fiber are, in fact, 271 elements. Similarly, the Coalition's petition proposed no rules defining the specific elements that are 271 elements.[17] The Commission should not permit the Coalition to expand the scope of this proceeding and, thereby, to duplicate the Commission's work by raising the same issues in multiple dockets.

[17] *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 (filed Nov. 9, 2009).

In all events, for the reasons that Verizon and others have stated in the responding to the Coalition's petition, the Commission should reject the Coalition's proposal to mandate TELRIC (or near-TELRIC) rates for 271 elements.[18] Briefly stated, the Coalition's petition — which is, in reality, a thinly disguised effort to obtain through § 271 rules the exact same relief the Coalition members seek through their filings in the Commission's *Special Access NPRM* — is squarely foreclosed by the text of the Act, prior Commission decisions, and the decisions of the Supreme Court and multiple courts of appeals. For example, both the Seventh and Eleventh Circuits have (correctly) read the Commission's previous orders to hold that providers "are permitted to charge market rates for section-271 elements."[19]

Finally, the Commission should reject out of hand the suggestion that § 271 must require dark fiber because it supposedly "would otherwise lay fallow." Alpheus Comments 22. Fiber is not deployed with the intention that it remain dark. To the contrary, in order to avoid repeatedly laying fiber to serve additional customers in the same area, providers routinely deploy enough fiber to serve both today's broadband customers and those expected to sign up in the future. Such long-sighted investment decisions are hardly a "waste," *id.*, and do not provide a basis in the statute or sound policy to grant competitive LECs license to free-ride on the efforts of companies subject to § 271.

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[18] *See* Comments of Verizon, WC Docket 09-222 (filed Jan. 12, 2010); Opposition of AT&T Inc. to the Petition of the Section 271 Coalition, WC Docket 09-222 (filed Jan. 12, 2010); Comments of Qwest Communications Int'l, Inc., WC Docket 09-222 (filed Jan. 12, 2010).

[19] *Nuvox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330, 1335 (11th Cir. 2008); *accord Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 612-13 (7th Cir. 2008).

CONCLUSION

The Commission should deny the MPUC's petition.

Respectfully submitted,

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