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

REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

USTelecom respectfully submits these Reply Comments to the Commission's Public Notice of January 15, 2010 in the docket referenced above.

More than a decade ago, the Commission made clear that it—and it alone—was responsible for interpreting and enforcing the obligations imposed on Bell Operating Companies ("BOCs") pursuant to Section 271 of the Telecommunications Act of 1996. In furtherance of this responsibility, the Commission established detailed procedures for the resolution of complaints alleging that a BOC was no longer meeting its obligations under section 271.[1] Nonetheless, competitive providers have regularly sought to end-run the Commission's authority by selectively appealing to state commissions for

[1] 47 C.F.R. § 1.736 (implementing the provisions of § 271(d)(6) requiring that the Commission resolve such complaints within 90 days). *See, e.g., 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*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 at para. 452 (December 22, 1999) ("The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute.").

interpretations of section 271 that are squarely at odds with Commission orders. As with the current dispute, those efforts have been consistently struck down by the federal courts.[2]

The Commission is now being asked to enable another end-run around its own established procedures by way of a request that it reverse its own significant precedent through issuance of a declaratory ruling.[3] This it cannot and should not do. First, as persuasively detailed by Verizon, FairPoint and AT&T, line sharing and dark fiber simply cannot be found to be encompassed by the plain language of Section 271(c)(2)(B) of the Act. Second, even if there were ambiguity on this question, a declaration that dark fiber and line sharing are required to be made available under Section 271 would run squarely counter to previous Commission precedent rejecting such obligations in the context of granting applications for entry into the interLATA services market. Finally, putting aside the legal barriers, a decision forcing only the BOCs to crack open their networks (but not cable, fixed wireless or competitive fiber providers) would be contrary to the Commission's goal of encouraging investment in facilities-based competition wherever possible. Besides being one of the guiding principles of the Telecommunications Act of 1996, that policy has been successful in encouraging enormous investment in new networks by incumbents and competitors across technology platforms.

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[2] *See, e.g., Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7 (1st Cir. 2007) (state PUC claim of authority to implement or enforce section 271 "is at odds with the statutory language, history and policy of section 271 and most of the relevant precedent."); *Illinois Bell Tel. Co., Inc. v. Box*, 548 F.3d 607, 613 (7th Cir. 2008); *Southwestern Bell Tel. v. Mo. Pub. Ser. Comm'n*., 530 F.3d 676 (8th Cir. 2008); *Qwest Corp. v. Ariz. Corp. Comm'n*, 567 F.3d 1109 (9th Cir. 2009); *BellSouth Telecomms., Inc. v. Ga. Pub. Ser. Comm'n*, 555 F.3d 1287 (11th Cir. 2009).

[3] *See, Qwest Corp. v. Ariz. Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077 (D. Ariz. 2007) (stating that the Commission's complaint procedures are the "sole means of enforcement of Section 271(c)'s requirements…").

For all these reasons, the Commission should decline to grant the request to issue a declaratory ruling concluding that either line sharing or dark fiber are elements required to be provided under Section 271.

DISCUSSION

Recently, the Commission has been asked in a number of different contexts to reverse previously settled rulings that have facilitated the rapid deployment of broadband facilities over the past decade. One of the most troubling aspects of each of these proceedings is that they are premised upon having the Commission return to an antiquated and rejected view of the industry based upon "silos" of providers and technologies. As the Commission focuses on forward-looking policies designed to achieve the ambitious goals of the National Broadband Plan, policy decisions that would perpetuate the silo approach, while simultaneously discouraging investment in new broadband infrastructure, simply make no sense. But a decision to expand the obligations of BOCs alone to provide line share and dark fiber under section 271 would achieve just such a result.

1. The Statute and Commission Policy Favor Limiting the Scope of Unbundling.

USTelecom member companies FairPoint, AT&T and Verizon explain in convincing detail why, as a legal matter, the Commission cannot find that dark fiber and line sharing are elements that BOCs must make available pursuant to section 271.[4] But even if the Commission could legally reach the opposite conclusion, doing so would run directly contrary to the goals of the statute and the Commission of encouraging facilities-based competition. As the D.C. Circuit has emphasized, "the purpose of the Act…is to

[4] *See* FairPoint Comments at pp. 9-16; AT&T Comments at pp. 2-10; Verizon Comments at pp. 2-6.

stimulate competition—preferably genuine, facilities-based competition."[5] Indeed, the Commission has repeatedly recognized that making these facilities available on an unbundled basis pursuant to section 251 would create disincentives to facilities-based competitions. The Commission expressly found that "making dark fiber available on an unbundled basis would undermine CLEC's incentive" to deploy their own facilities.[6] And with respect to line sharing, stated in no uncertain terms that continuing to require BOCs to unbundle would "discourage innovative arrangements" and "run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets."[7]

Moreover, the Commission has emphasized that the same policy concerns are applicable to the unbundling obligations under both sections 251 *and* 271. In particular, the Commission's decision to grant forbearance from unbundling of broadband elements under section 271 was done in recognition of "the disincentives associated with regulated broadband unbundling…"[8]

2. <u>The Commission's Limits on Unbundling Have Incented Broadband Investment</u>.

The Commission's expectations about the positive public benefits of minimal unbundling have indeed proven true.

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[5] *United States Telecom Association v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004).

[6] Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, para. 183 (2005) ("TRRO"), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[7] 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, para. 261 (2003) ("Triennial Review Order"), *petitions for review denied in part, United States Telecom Ass'n v. FCC* (D.C. Cir. 2004).

[8] 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), *petition for review denied, EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

The pro-competition and pro-investment environment of recent years has encouraged significant growth in broadband network deployment. By some estimates, cumulative capital expenditures by broadband providers from 2000-2008 were over half a trillion dollars.[9] Private capital investment grew consistently from 2003 through 2008.[10] Annual capital investment throughout the industry has consistently amounted to approximately $60-70 billion annually between 2007 and 2009.[11]

Incumbent local exchange providers, including the BOCs, have been particularly aggressive in reinvesting in the deployment of broadband networks. ILEC spending on wireline networks alone has accounted for *nearly half of all broadband providers' annual infrastructure spending in the U.S.*[12] And in order to compete with ILEC investment in

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[9] *See* United States Department of Commerce, National Telecommunications and Information Administration (NTIA), *Networked Nation: Broadband in America 2007* (January 2008), pp. 32-34. The NTIA data include payments for wireless spectrum licenses. Wireless, capital expenditures for 2000-2002 were derived by taking the difference of cumulative capital expenditures published by the Federal Communications Commission in its *Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* (FCC-05-173) (Rel. September 30, 2005) at Table 1, p. 80.

[10] *See id*.

[11] Patrick Brogan, United States Telecom Association, *The Economic Benefits of Broadband and Information Technology* in New York Law School Media Law & Policy, Volume 18, Number II (Spring 2009) at Figure 7, p. 168 (citing Yankee Group Research, Inc.) and Robert C. Atkinson and Ivy E. Shultz, Columbia Institute for Tele-Information, *Broadband in America* (November 11, 2009) ("*Broadband in America*") at Table 15, p. 66.

[12] *Broadband in America* at Table 15, p. 66. ILECs accounted for 47% of 2008 capital expenditures. These figures are only for the ILECs' wireline investment. Additionally, AT&T and Verizon reported wireless network investment of $5.6 billion and $7.2 billion, respectively, in 2009. The two other national wireless providers, Sprint and T-Mobile, reported wireless network investment of $1.2 billion and $3.7 billion, respectively, in 2009. *See* AT&T, Inc. *United States Securities and Exchange Commission Form 10-K for the Fiscal Year Ended December 31, 2009* (February 25, 2010) at p. 23; Verizon Communications, Inc., Excel Workbook, *Historical Financial Information as of December 31, 2009* at "Selected Statistics-Qtrly & YTD" tab available at http://investor.verizon.com/ (visited March 12, 2010); Sprint Nextel News Release, *Sprint Nextel Reports Fourth Quarter and Full Year 2009 Results* (February 10, 2010) at p. 11, available at http://investors.sprint.com/phoenix.zhtml?c=127149&p=irol-quarterlyearnings (visited February 10, 2010); and T-Mobile News Release, *T-Mobile USA Reports Fourth Quarter and Full Year 2009 Results* (February 25, 2010) at p. 8, available at http://www.t-mobile.com/Company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations (visited March 12, 2010).

more robust broadband networks, the cable industry has responded by investing $14.4 billion in 2009—or about 24% of the overall U.S. broadband investment.[13]

Even adjusting for size, ILEC broadband network investment has been dramatic in light of the Commission's light-touch regulatory policies. A recent analyst report calculates that for the twelve-month period ending September 30, 2009—including much of the height of the economic downturn—BOCs AT&T, Verizon and Qwest reinvested an average of 16.2% of their wireline revenues back into their wireline networks.[14]

Simply put, the Commission's policies rewarding actual network investment have, in fact, incented more such investment. Retreating from this approach by allowing competitors to have unnecessary and cheap access to those networks would just as clearly have the opposite effect.

3. **The Commission Should Avoid "Silos" and Apply the Same Regulatory Treatment to All Competitors Regardless of Technology.**

As a result of this massive private investment in infrastructure, the United States now has one of the most competitive broadband markets across one of the largest geographic spans in the world. An overwhelming majority of Americans today can choose among multiple broadband platform providers. Specifically:

- Over 90% of U.S. households can choose from either a wireline or a cable broadband service and approximately four-fifths of U.S. households have access to both.[15]

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[13] National Cable & Telecommunications Association (NCTA) at http://www.ncta.com/Statistics.aspx (visited March 12, 2010). Cable operators' $14.4 billion capital expenditures in 2009 account for 24% of the estimated $60.3 billion in broadband provider capital expenditures in 2009 (*See, Broadband in America* at Table 15, p. 66.).

[14] JSI Capital Advisors, *Annual Capex Analysis* in Phone Numbers, Volume 3, Issue 2 (February 2010) at p. 3. USTelecom's non-BOC publicly traded member companies were reported as nearly all having reinvestment rates exceeding 10% of revenues. *Id.* By comparison, Sprint—one of the companies most aggressively seeking low-cost access to ILEC networks from the Commission—reinvested a mere 5.3% of revenues in capital expenditures on its own network during the same period. Even looking only at investment in their wireless networks, AT&T and Verizon invested at a rate more than twice as high as Sprint: 11.3% and 11.6% of revenues for AT&T and Verizon, respectively, versus 5.3% for Sprint. *Id.*

[15] NCTA states that cable modem service was available to 92% of U.S. households as of September 2009. *See*, http://www.ncta.com/Statistics.aspx (visited March 12, 2010). The Commission estimates that, as of

- Cable modem service is available to more than 90% of households and the vast majority of small and mid-size business customers.[16] With wide-spread deployment of DOCSIS 3.0, cable companies will be able to offer service of more than 50 Mbps. Indeed, cable companies continue to have the majority share of residential broadband subscribers.[17]

- More than 95% of the United States population can choose from three or more mobile broadband networks, and more than 90% of the population can choose from four or more mobile networks.[18] Satellite broadband also is available to any household in the country within view to the satellite, *i.e.*, nearly all of the country.

- Competitive fiber suppliers have deployed fiber facilities in all of the top 50 metropolitan statistical areas, with an average of 6 such competitors per MSA.[19]

The wide availability of multiple platforms creates broad-based, sustainable competitive incentives to upgrade networks to increasingly powerful technologies, such as the wireline deployment of fiber, the cable industry deployment of DOCSIS 3.0, and wireless network deployments of WiMAX and LTE.

Nonetheless, this petition—like others recently filed with the Commission—asks for competition-skewing rules to be imposed on just one group of providers…and a group of providers that does not even have a majority of broadband subscribers. As Public

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the end of December 2008, ADSL was available to 84% of U.S. households. *See* Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2008* (February 2010) ("*FCC High-Speed Internet as of December 31, 2008*") at Table 19, p. 43. Today, ADSL or fiber is likely available to more households than it was at the end of 2008.

[16] NCTA at http://www.ncta.com/Statistics.aspx (visited March 12, 2010). Also *see* Reply Comments of the United States Telecom Association and Petition to Dismiss as Procedurally Defective in the Matter of Cbeyond, Inc. Petition for Expedited Rulemaking To Require Unbundling of Hybrid, FTTH and FTTC Loops Pursuant To 47 U.S.C. §251(c)(3) (WC Docket No. 09-223) (January 22, 2010) at pp. 23-24.

[17] *FCC High-Speed Internet as of December 31, 2008* at Table 3, p. 11.

[18] Michael J. Copps, Acting Chairman, Federal Communications Commission, *Bridging Broadband to Rural America* (May 22, 2009) at p. 12 and FCC, *Thirteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC DA 09-54 (rel. January 16, 2009) at p. 6.

[19] Patrick Brogan, United States Telecom Association, and Evan Leo, Kellogg, Huber, Hansen, Todd, Evans & Figel P.L.L.C., *High-Capacity Services: Abundant, Affordable, and Evolving* (July 2009) at p. 24.

Knowledge eloquently stated in a recent report, the FCC must "recognize that silo specific regulation merely sets traps on the path towards convergence."[20]

In short, whatever policy benefits that could possibly be asserted from unbundling network infrastructure investment (and we strongly assert there are none), there simply is no rational argument for imposing such obligations on one group of competitors and not others. The Commission has, in fact, acknowledged in several contexts the importance of a level regulatory playing field. Indeed, a unanimous Commission found just two years ago that "[i]n an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling…"[21] The Commission should follow through on that approach in this context by rejecting efforts to expand regulatory obligations on a small group of providers in this extremely competitive marketplace.

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[20] Gigi B. Sohn and Michael Weinberg, Public Knowledge, "An FCC For the Internet Age: Recommendations for Reforming the Federal Communications Commission" (March 5, 2010) at p. 8.

[21] Report and Order, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 08-87 at para. 5 (March 21, 2008); *see also*, Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, FCC 06-180 (March 5, 2007) (Separate Statement of Commissioner Robert M. McDowell, "I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor.").

CONCLUSION

For the reasons stated above, and in the Comments of FairPoint, Verizon and AT&T, the Commission should deny the request to find that line sharing and dark fiber facilities are encompassed by the obligations of section 271.

Respectfully submitted,

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