



INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

March 15, 2010

Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Interpretation of Section 271 of the Telecommunications Act of 1996 as to Whether Statutory Listing of Loops and Transport Includes the Requirement that Existing Dark Fiber Be Made Available to Competitors*
WC Docket No. 10-14

Dear Ms. Dortch:

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits these letter comments in the above-captioned proceeding. ITTA is an alliance of mid-size telephone companies that collectively serve 24 million access lines in 44 states, and which offer subscribers a broad range of high-quality wireline and wireless voice, data, Internet, and video services. ITTA members, which include carriers classified as Bell Operating Companies (BOCs), are actively deploying advanced services networks throughout the Nation. ITTA urges the Commission to ensure deregulatory policies that promote network investment and deployment.

The Maine Public Utilities Commission (MPUC) Petition¹ arises out of *Verizon New England, Inc. v. Maine Public Utilities Commission*, et al.² In that proceeding, the court addressed the issue of “whether the states can require the ROBCs to provide to competitors unbundled elements that have been delisted under Sections 251-52 and are not within the list of elements required under Section 271.” The court ultimately ruled that the states named in the consolidated proceeding could not “require elements that the FCC has delisted and are not enumerated in section 271 . . . [a]s to line sharing and dark fiber, the matter should be resolved after the FCC’s views have been solicited.”³ The court explained, “[t]he arguments are complicated and technical and, in the first instance, they are matters that ought to be resolved by the expert agency charged with administering section 271, namely, the FCC.”⁴

¹ See, *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: Amended Petition of the Maine Public Utilities Commission*, WC Docket No. 10-14 (filed Dec. 2, 2009) (Petition).

² *Verizon New England, Inc. v. Maine Public Utilities Commission*, et al, Nos. 06-2151, 06-2429, 509 F.3d 1 (1st Cir. 2007) (*Verizon*).

³ *Verizon*, 509 F.3d at 12.

⁴ *Verizon*, 509 F.3d at 11.

In furtherance of the ruling, the MPUC filed the instant Petition with the Commission, requesting an affirmative determination that items four and five of the Section 271 "competitive checklist" require FairPoint Communications (successor in interest to Verizon in Maine) to make certain dark fiber loops, dark fiber transport, dark fiber entrance facilities, and line sharing available to competitors in Maine. As described below, ITTA opposes the MPUC petition, and urges the Commission to affirm previously-articulated policies that promote both incumbent and competitive investment in broadband and advanced services networks.

Parties submitting initial comments on the Petition, including AT&T Inc., FairPoint, and Verizon subsidiaries, set forth numerous legal bases upon which the Commission can rely to reject the Petition.⁵ ITTA focuses its comments to the public policy considerations that must attend the Commission's review of this matter.

Section 706 of the Telecommunications Act of 1996 charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . ."⁶ The imposition of unbundling obligations, by contrast, would create disincentives to investment and would be contrary to sound public policy. The Commission has previously recognized this axiom.

In 2002, Verizon requested the Commission to forbear from applying checklist items four, five, six, and ten to BOCs "once the corresponding elements no longer need to be provided under section 251(d)(2)."⁷ The Commission initially denied Verizon's request, but in 2004, the Court of Appeals for the D.C. Circuit ruled that the Commission had not adequately explained its denial of the petition, and remanded the matter to the Commission.⁸ Subsequently, BellSouth Telecommunications, Inc., Qwest Communications International, Inc., and SBC Communications, Inc., each filed individual petitions seeking relief similar to that sought by Verizon. Ultimately, the Commission granted the Verizon and BellSouth petitions, and granted in part the Qwest and SBC petitions. In pertinent part, the Commission ruled that it would not impose unbundling obligations "with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order*. . ."⁹

⁵ See, generally, *Comments of AT&T, Inc.; Comments of FairPoint Communications, Inc.; and Comments of Verizon*.

⁶ 47 U.S.C. 157 nt.

⁷ *Petition for Forbearance of Verizon*, CC Docket No. 01-338, at 3 (filed Jul. 29, 2002).

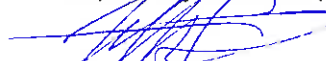
⁸ *Verizon Telephone Companies v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

⁹ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)* (WC Docket No. 01-338); *SBC Communications, Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)* (WC Docket No. 03-235); *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)* (WC Docket No. 03-260); *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)* (WC Docket No. 04-48); *Memorandum Opinion and Order*, 19 FCC Rcd 21496, FCC 04-254 at para. 1 (2004) (*BOC Forbearance Order*), citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*) corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert denied* 125 S.Ct. 313, 316, 345 (2004).

The Commission noted in the *BOC Forbearance Order* the consequence of “investment disincentives associated with unbundling obligations.”¹⁰ Those adverse effects were initially recognized by the Commission in the *Triennial Review Order* when it granted local exchange carriers (LECs) relief from Section 251 unbundling obligations; that decision was supported by the Commission’s intent to “encourage the deployment of new fiber technologies by incumbent LECs and their competitors alike. . . .”¹¹ When the Commission subsequently extended similar relief to the BOCs, it declared, “We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.”¹²

The Commission is poised to release the National Broadband Plan, which will undoubtedly contemplate the significant costs associated with ubiquitous broadband deployment, and the critical role that private investment will play in achieving that goal. The Commission must not use this instant proceeding as an opportunity to regress from the ambitions of the National Broadband Plan. The imposition of unbundling requirements will result in disincentives for network investment on the parts of both incumbents and competitors. In the Commission’s words, the Commission’s mandate under Section 706 of the Act is to “provide incentives for all carriers, including the incumbent LECs, to invest in broadband facilities;”¹³ there is no competitive benefit where “section 271 unbundling obligations discourage the BOCs from building next generation networks in the first place.”¹⁴ ITTA urges the Commission to incorporate its prior findings and refrain from imposing requirements that are inapposite to widely-embraced goals of ubiquitous deployment of new advanced networks. The Commission’s restraint will encourage investment and deployment, and lead more readily to the fulfillment of National broadband goals.

Respectfully submitted,



Joshua Seidemann
Vice President, Regulatory Affairs

¹⁰ *BOC Forbearance Order* at para. 21.

¹¹ *BOC Forbearance Order* at para. 24, citing *Triennial Review Order* at para. 272.

¹² *BOC Forbearance Order* at para. 34.

¹³ *BOC Forbearance Order* at para. 6 citing *Triennial Review Order* at paras. 242-44.

¹⁴ *BOC Forbearance Order* at para. 27.