Legal Department

MEREDITH E. MAYS
Senior Regulatory Counsel
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0750

November 19, 2004

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040601-TP

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition to Covad's Cross Motion for Reconsideration and Request for Oral Argument, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith E. Mays

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

559653

CERTIFICATE OF SERVICE
Docket No. 040601-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 19th day of November, 2004 to the following:

Adam Teitzman
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6175
ateitzma@psc.state.fl.us

Charles E. (Gene) Watkins
Covad Communications Co.
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
Tel. No. (404) 942-3492
gwatkins@covad.com

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Tel. No. (850) 222-2525
Fax No. (850) 222-5606
vkaufman@mac-law.com
Atty. for Covad

Meredith E. Mays

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996	)))))))	Docket No.: 040601-TP Filed: November 19, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO COVAD'S CROSS MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") opposes Covad's Cross Motion for Reconsideration. While Covad and BellSouth obviously have different views of the FCC's recent *Verizon Order,* a fair reading of that order together with the material the FCC relied upon in making its decision shows that Covad's Cross Motion should be denied. BellSouth also opposes Covad's Request for Oral Argument. BellSouth does not believe that oral argument concerning reconsideration of a matter the Commission has already discussed with the parties is necessary. If the Commission decides otherwise, BellSouth will, of course, comply. BellSouth has confidence, however, that this matter can be appropriately decided as a matter of law without oral presentation.

DISCUSSION

I. Covad Mischaracterizes both the *Verizon Order* and Commissioner Martin's Separate Statement.

Covad criticizes BellSouth's view of the *Verizon Order* and suggests that Commissioner Martin acknowledged the existence of a Section 271 line sharing obligation. Covad's suggestion is misplaced. Commissioner Martin's separate statement states "[s]ince line-sharing was

included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from *any* section 271 obligation with respect to line sharing." (emphasis supplied). The use of the word *any* belies Covad's contention that line sharing is clearly a section 271 obligation.

Covad also claims that line sharing was not specifically addressed in the petitions for forbearance filed by Verizon and BellSouth. Covad completely ignores n. 6 to the *Verizon Order,* however. At n. 6, the FCC explained "[a]lthough Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c)." The FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. BellSouth includes Verizon's March 26, 2004 *ex parte* letter and relevant attachment as Exhibit 1 to this response.

Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II,* Verizon stated:

> [t]he court reached similar conclusions with respect to *other broadband elements.* . . . *with respect to line sharing,* the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.'

(emphasis supplied). In light of the FCC's explanation, this Commission does not need to accept Covad's arguments concerning any implicit grant of forbearance to deny its cross motion for reconsideration. The FCC noted that the broadband relief requested under Verizon's petition was ambiguous, and then made clear that it was relying upon Verizon's March 26, 2004 filing for the specific details. That March 26, 2004 filing, which discussed line sharing, demonstrates

that any line sharing obligation was included in the request for forbearance relief as a broadband element (and, obviously, simply as a precaution since line sharing is not and has never been a checklist item 4 requirement). The FCC has chosen to forbear from applying any independent section 271 unbundling obligations to broadband elements, which includes line sharing as a matter of law.

II. The Commission Should Reject Covad's Request to Include Language adopted by the Louisiana Commission, But Should Accept Covad's Concession Concerning A Mandatory True-Up.

Covad's Cross Motion cites to a transcript from the Louisiana Public Service Commission's November 10, 2004 agenda, explaining that it would not object to such an order.[1] BellSouth objects to this Commission adopting the quoted language in its entirety, which refers to the recommendation of a Louisiana Administrative Law Judge, which decision the Louisiana Commission apparently adopted with modifications. If this Commission acts upon any recommendation, it should rely on that of its staff, which is both well reasoned and correct.

As to the reference to the *Verizon Order* as well as the true-up language, BellSouth continues to believe that most appropriate action on reconsideration would be to eliminate any requirement that it continue to provide Covad access to new line sharing customers. It is Covad, rather than BellSouth, that prefers to ignore the practical impact of the *Verizon Order*. Note 6 to the *Verizon Order* and the March 26, 2004 Verizon filing demonstrate that access to new line sharing customers is not required. In the alternative, however, if the Commission declines to reconsider its order it should at a minimum *mandate* a true-up, which Covad apparently does not object to. This clarification can occur by including the following language in an amendatory order:

[1] The Louisiana Public Service Commission has not yet issued a written order memorializing the events decided at the November 10, 2004 agenda. BellSouth assumes, however, that Covad is suggesting that this Commission adopt as its own order the quoted language from pages 12-13 of Covad's cross-motion.

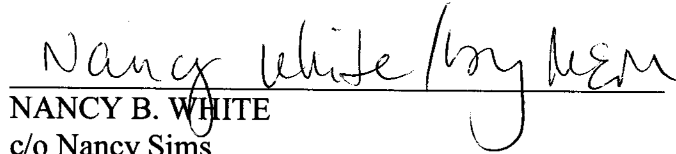
On October 27, 2004, the Federal Communications Commission issued an order grating BellSouth's Petition for Forbearance in WC Docket 04-48. Based upon conflicting statements issued by FCC Chairman Michael Powell and FCC Commissioner Kevin Martin, this Commission desires a more clearly articulated statement of national policy before requiring the parties to amend their current interconnection agreement. The parties have extended the arbitration window relating to the current agreement through January 12, 2005. The Commission will hold this proceeding in abeyance until either: (1) January 12, 2005; or (2) the FCC articulates more clearly its national policy concerning line-sharing, whichever occurs first. In either instance, the Parties shall true-up the rates for line sharing retroactive to the effective date of the Triennial Review Order.

CONCLUSION

Covad's Cross Motion for Reconsideration should be rejected. The *Verizon Order* provides no reasonable basis to require BellSouth to continue to provide Covad access to line sharing as though it were a Section 251 UNE nor does it require the Commission to make a pronouncement concerning Section 271. Instead, the Commission should require Covad to accept the line sharing transitional mechanism set forth in the *Triennial Review Order*. If the Commission does not require Covad to include the transitional plan into the parties' current agreement it should consider issuing an amendatory order that includes BellSouth's proposed language as set forth above.

Respectfully submitted, this 19th day of November 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

R. DOUGLAS LACKEY
MEREDITH E. MAYS
BellSouth Center – Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 335-0750

Dee May
Vice President
Federal Regulatory

1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2529
Fax 202 336-7922
dolores.a.may@verizon.com

March 26, 2004

Ex Parte

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

Re: WC Docket No. 01-337, 01-338, 02-33 and 02-52

Dear Ms. Dortch:

Verizon is providing the attached as a follow up to its March 18, 2004 meeting with representatives from the Office of General Counsel and the Wireline Competition Bureau. Please let me know if you have any questions.

Sincerely,

Dee May

Attachments

cc: P. Arluk
M. Carey
J. Dygert
T. Hanbury
T. Navin
A. Schlick
P. Silberthau
J. Stanley
D. Weiner

THE RECENT D.C. CIRCUIT DECISION AFFIRMING THE BROADBAND PORTIONS OF THE *TRIENNIAL REVIEW ORDER* PROVIDES FURTHER STRONG SUPPORT FOR GRANTING VERIZON'S PETITION FOR FORBEARANCE FROM ANY SECTION 271 UNBUNDLING OBLIGATIONS FOR BROADBAND

As Verizon discussed in its October 24 *ex parte* submission and its reply comments,[1] the findings underlying the elimination of section 251 broadband unbundling requirements in the *Triennial Review Order* establish the complete legal and factual predicate for forbearance from any stand-alone section 271 broadband unbundling requirement under section 10(a) of the Communications Act, 47 U.S.C. § 160(a). As Part I of this white paper explains, the D.C. Circuit's recent opinion in *United States Telecomm. Ass'n v. FCC*, No. 00-1012, slip op. (D.C. Cir. Mar. 2, 2004) ("*USTA II*"), provides further strong support for the same conclusion, both by upholding the broadband portions of the *Triennial Review Order* generally and, more specifically, by affirming the Commission's conclusion that, in the already competitive broadband market, the interests of competition and consumers, both in the near term and in the long term, will best be served by refraining from imposing unbundling obligations. Those conclusions are directly relevant to, and dispositive of, the inquiry required under the forbearance criteria set out in section 10(a) of the Act. Part II of this white paper then briefly refutes arguments, raised in a recent *AT&T ex parte* letter,[2] principally that section 10(a)(1) somehow requires the continued enforcement of broadband unbundling obligations for hybrid loops simply to promote AT&T's private interests even though, as the Commission and D.C.

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[1] Letter from Susanne A. Guyer, Verizon, to Chairman Michael Powell and Commissioners, CC Docket No. 01-338, (filed Oct. 24, 2003) ("*Verizon Ex Parte Letter*"); Reply Comments of Verizon, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (filed Nov. 26, 2003) ("*Verizon Reply Comments*").

[2] Letter from David Lawson, AT&T, to Marlene Dortch, CC Docket. Nos. 01-338 *et al.*, (filed March 3, 2004) ("*AT&T Letter*").

Circuit have found, enforcement of those obligations would harm consumers and competition overall.[3]

I. *USTA II* CONFIRMS THAT SECTION 10(a) IS SATISFIED

A. As discussed in Verizon's previous filings, the *Triennial Review Order*—which holds unequivocally that ILECs "do not have to offer unbundled access" to broadband facilities[4]—adopts all of the legal and factual findings needed to meet the forbearance criteria of section 10(a) for broadband elements, including fiber-to-the-premises ("FTTP") loops, packet switching, and the packetized functionality of hybrid loops.

As an initial matter, consistent with its own conclusion that broadband constitutes a separate product market,[5] the Commission's *Triennial Review* Order correctly evaluated

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3 This white paper addresses issues arising only under section 10(a). Verizon relies on its previous submissions with respect to AT&T's arguments concerning section 10(d) or any other provision.

4 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; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978 ¶¶ 7, 23 (2003) ("*Triennial Review Order*").

5 The FCC has consistently found that broadband services are in a separate market from traditional narrowband telephone services. *See, e.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd. 11857, ¶ 18 (2000); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd. 2398, ¶ 48 (1999) ("*First Advanced Services Report*"). This finding has likewise been echoed by the Department of Justice and the Federal Trade Commission. *See* Department of Justice, Antitrust Division Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176 (D.D.C. filed May 25, 2000); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd. 6547, ¶ 63 (2001); Federal Trade Commission Complaint ¶ 21, *American Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000).

impairment with respect to the broadband market, and took into account the "state of intermodal competition" for broadband service. *Triennial Review Order* ¶¶ 288, 292. In doing so, the Commission heeded the injunction of *USTA I* that the impairment inquiry must focus on "specific markets or market categories," and, in the broadband market, must "consider the relevance of competition in broadband services coming from cable" and other technologies. *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415, 426; 428 (D.C. Cir. 2002) (*"USTA I"*). Based on that analysis, the Commission concluded that there simply was no impairment with respect to most of the broadband capabilities of the ILECs' networks. *See Triennial Review Order* ¶¶ 273-276 (no impairment with respect to the broadband capabilities of "fiber-to-the-home" loops); *id. at* ¶ 537-538 (no impairment with respect to packet switching); *id.* at ¶¶ 258-260 (no impairment with respect to high frequency portion of the loop). As the Commission later explained to the D.C. Circuit (*see* Brief for Respondents, No. 00-1012, at 50 (D.C. Cir. filed Dec. 31, 2003)), it found some limited evidence of impairment only with respect to "hybrid" loops, but noted that "this impairment at least partially diminishes with the increasing deployment of fiber," and determined that access to copper subloops "adequately addresses" any limited impairment that may exist. *Triennial Review Order* ¶ 286, 291.

In addition, the Commission went further and considered two additional factors that caused it to conclude that declining to impose unbundling obligations ultimately would best serve the interests of competition and therefore consumers. *First*, consistent with the Court's directive in *USTA I*, the Commission paid particular attention to "the state of intermodal competition for broadband service," and the fact that "broadband services [] are currently provided in a competitive market." *Triennial Review Order* ¶ 292. In particular, the Commission emphasized that cable companies have "a leading position in the marketplace," with

by far the largest share of the broadband market, and that cable's rate of growth "continues to outpace" the rate of growth of local telephone companies' broadband services. *Id.*; *see also id.* ¶ 262 ("cable modem service is the most widely used means by which the mass market obtains broadband services," and "the gap between cable modem and ADSL subscribership continues to widen"). Under these circumstances, the Commission explained, the potential benefit of unbundling "appears to be obviated to some degree by the existence of a broadband service competitor with a leading position in the market place." *Id.* ¶ 292. The Commission also pointed out that it consistently "has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines." *Id.* ¶ 263.[6] In the

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[6] The Commission repeatedly has found that the broadband market is developing on a competitive basis and the preconditions for monopoly are absent. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Report, 14 FCC Rcd. 2398, ¶ 48 (1999) *"First Advanced Services Report"*) ("The preconditions for monopoly appear absent . . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio"); Inquiry *Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd. 2844, ¶¶ 79-88 (2002) (describing development of intermodal competition in broadband market); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd. 22,745 ¶ 5 (2001) ("[T]he one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report and Order and Memorandum Opinion and Order, 15 FCC Rcd. 11857, ¶¶ 17, 19 (2000) (noting with approval "a continuing increase in consumer broadband choices within and among the various delivery technologies," which indicates that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the broadband

Commission's judgment, "the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" unbundled access to the broadband capabilities of local telephone company networks. *Id.*

Second, in addition to concluding that unbundling was unnecessary, the Commission also found that imposing unbundling obligations was affirmatively harmful in that it would discourage investment in and deployment of broadband facilities and services by ILECs and CLECs alike to compete with the dominant cable providers. As the Commission explained, imposing unbundling obligations "would blunt the deployment of advanced telecommunications infrastructure by *incumbent* LECs and the incentive for *competitive* LECs to invest in their own facilities." *Triennial Review Order* ¶ 288 (emphasis added). In contrast, declining to impose unbundling obligations "gives *incumbent* LECs an incentive to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings. *Id.* ¶ 290 (emphasis added). Likewise, "by prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate *competitive* LEC deployment of next-generation networks, . . . including the deployment of their own facilities necessary for providing broadband services to the mass market." *Id.* (emphasis added). The Commission therefore concluded that "the costs associated with unbundling these packet-based facilities outweigh the potential benefits," *id.* at ¶ 295, and that "[t]he end result" of removing those unbundling obligations "is that consumers will benefit from this race to build

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market, face "significant actual and potential competition from . . . alternative broadband providers").

next generation networks and the increased competition in the delivery of broadband services." *Id.* ¶ 272.

Accordingly, based on its comprehensive analysis of conditions in the broadband market, the Commission concluded that the interests of competition and consumers would best be served by declining to impose unbundling obligations on the broadband capabilities of ILECs' networks.

B. The D.C. Circuit's recent decision in *USTA II* strongly reinforces these conclusions and, as discussed below, takes them one step further.

In their challenge to the broadband portions of the *Triennial Review Order,* AT&T and other CLECs focused principally on the Commission's findings with respect to hybrid loops, and argued that the Commission was barred from considering factors such as the impact of unbundling on investment incentives so long as *any* degree of impairment is present. More specifically, they urged that the Commission "may not tolerate an impairment of competition today in order to create incentives for investment" that it predicts will benefit "consumers of tomorrow." *USTA II,* slip op. 37, 39a. The court squarely rejected those arguments. It reasoned that, while the statutory provision at issue there, section 251(d)(2), *does* require consideration of impairment, it is only the "minimum" consideration that must be taken into account. Accordingly, the court found that the Commission properly considered the broader impact of unbundling obligations when it determined that the interests of competition and consumers ultimately would best be served by declining to impose unbundling obligations. *Id.* at 37-40. In particular, the court found that "an unbundling order's impact on investment" must be considered given the Act's goal of "'boosting competition in broader markets,'" as well as section 706's

goal of moving beyond "competition piggy-backed on ILEC facilities . . . [by] removing barriers to infrastructure investment." *Id.*

Having dispatched the argument that formed the principal basis for AT&T's challenge, the court then proceeded to affirm each of the Commission's broadband-related rulings. For example, in the context of hybrid loops, the court endorsed the Commission's conclusion that declining to impose an unbundling requirement would provide ILECs with "greater incentives . . . to deploy the additional electronic equipment needed to provide broadband access over a hybrid loop" and that, "because deployment of fiber feeder is the first step toward FTTH," declining to unbundle those "fiber facilities increases incumbents' incentives to develop and deploy FTTH". *Id.* at 39-40.[7] And the court also affirmed the Commission's "conclusion that unbundling hybrid loops would deter *CLECs* themselves from investing in deploying their own facilities, possibly using different technology, "whereas declining to impose an unbundling obligation could be "effective in stimulating investment in all-fiber loops." *Id.* (emphasis in original).

Significantly, the court expressly affirmed the Commission's authority to balance competing considerations in determining what ultimately is in the best interest of competition and consumers. Thus, the court pointedly noted that, even if "the Commission's judgment entails increasing consumer costs today in order to stimulate technological innovations" that may benefit consumers tomorrow, "there is nothing in the Act barring such trade-offs." *Id.* at 40. In the context of the competitive broadband market, however, the court affirmed the Commission's

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7 Notably, the CLECs did not even challenge the Commission's decision that packet switches generally need not be unbundled, but instead challenged that conclusion only as it relates to the packet-switched capabilities of hybrid loops.

conclusion that any such concerns are largely obviated in any event, because "any damage to broadband competition from denying unbundled access to the broadband capacities of hybrid loops is likely to be mitigated by the availability of loop alternatives or intermodal competition." *Id.* at 41. This is true, moreover, even if the various loop alternatives available to CLECs are only a "partial substitute" that will "mitigate, not eliminate CLEC impairment." *Id.* As the court put it, *"[m]ore important*, we agree with the Commission that robust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% – means that even if all CLECs were driven from the broadband market, *mass market consumers will still have the benefits of competition between cable providers and ILECs.*" *Id.* (citation omitted) (emphasis added).

The court reached similar conclusions with respect to other broadband elements. For example, with respect to FTTH loops, the court concluded that the Commission would have been justified in declining to impose an unbundling obligation even if CLECs were impaired to some degree given that "deployment is still very limited," that "both the costs and potential benefits of deployment are high," and that "ILECs and CLECs face similar entry barriers." *Id.* at 44. Under these circumstances, an unbundling requirement is "likely to delay infrastructure investment," while the absence of unbundling "will give all parties an incentive to take a shot at this potentially lucrative market." *Id.* And with respect to line sharing, the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the "substantial intermodal competition from cable companies" that, "at least in the future, line sharing is not essential to maintain robust competition in this market." *Id.* at 45-46.

In sum, therefore, the court upheld the Commission's decision that *not* imposing an unbundling obligation for any of these broadband elements was in the best interest of competition and consumers, *"in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband."* *Id.* at 46 (emphasis added).

C. Although the court's analysis focused on the unbundling standards of section 251(d)(2), the same focus on what ultimately is in the best interest of competition and consumers is all the more appropriate to the broader inquiry required by section 10(a). And even apart from the breadth of that provision on its own terms, section 706 independently reinforces the need to perform such an inquiry, both because it incorporates Congress's considered judgment that the interest of consumers will best be served by encouraging deployment of broadband capabilities, and because, in furtherance of that judgment, it directs the Commission to "remove barriers to infrastructure investment" in order to "promot[e] competition" for broadband services. Indeed, in the *Advanced Services Order*, the Commission made clear that section 706 "direct[s] the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[8] Accordingly, just as the *Triennial Review Order* and *USTA II* confirm that section 706 is relevant to the broadband unbundling analysis,[9] the *Advanced Services Order* confirms that section 706 is relevant to the Commission's application of section 10. Because section 10 allows the Commission even

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[8] *Advanced Services Order* ¶ 69.

[9] *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

greater flexibility than section 251(d)(2) to remove unbundling obligations that would harm competition overall, the D.C. Circuit's decision in *USTA II* confirms the Commission's authority to forbear from any stand-alone broadband unbundling obligations under section 271.

This conclusion is further reinforced by an analysis of the specific requirements of section 10. Section 10(a)(1)-(3) provides that the Commission "shall forbear from applying any regulation or any provision of this Act" to any "telecommunications carrier" if it determines that: (1) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" by that carrier for a telecommunications service "are just and reasonable and are not unjustly or unreasonably discriminatory;"[10] (2) enforcement is not "necessary for the protection of consumers" in those or other respects; and (3) forbearance would be "consistent with the public interest."[11] As the D.C. Circuit's decision strongly confirms, each of these criteria is abundantly satisfied here.

1. Section 10(a)(1) is satisfied because enforcement of any unbundling obligations that may apply to broadband elements under section 271 is not necessary to ensure that charges, practices or classifications are just and reasonable. As an initial matter, while this provision does

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[10] 47 U.S.C. § 160(a)(1).

[11] These statutory inquiries are closely related, and each logically builds on its predecessor. Therefore, the fact that the third criterion in the statutory standard may be sufficiently broad to encompass the first two, or that the second criterion may be sufficiently broad to encompass the first, does not render the first two criteria superfluous. On the contrary, reading the criteria in the order they were included in the statute by Congress shows that the analysis merely progresses from certain specific considerations that must be taken into account to more general considerations. Moreover, there will be circumstances under which one or both of the first two criteria are not relevant, but where the subsequent criterion or criteria are. For example, if the requirement at issue is one designed to protect consumer privacy, the first criterion addressing rates would not be relevant, but the latter two criteria would. Or, if the requirement is one affecting law enforcement access to communications, the first two criteria would not necessarily be relevant, but the third presumably would.

not specify what particular charges are the subject of its inquiry, the obvious focus here is on charges in the competitive broadband market, and ultimately the analysis must focus on charges to consumers.[12] Indeed, the very theory of regulation is that it exists to protect the interests of consumers, and the Communications Act is no different in this respect. The Act itself provides that its purpose is to make available to "*the people* of the United States . . . communication service with adequate facilities at reasonable charges. . . . " 47 U.S.C. § 151 (emphasis added).

In that respect, the forbearance provision reflects the basic antitrust principle that the government should intervene in the marketplace only "for the 'protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Commission has long identified that same principle with the 1996 Act more generally. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd. 15499, ¶ 618 (1996) (local competition rules should be, as "Congress intended, *pro-competition*" rather than "*pro-competitor*"); Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd. 6153, 6195 (Dec. 22, 2000) ("Consumers are and should be the ultimate beneficiary of the 1996 Act"). Similarly, the purpose of section 10 is not to favor the private interests of particular carriers, but "to allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

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[12] To be sure, there may be some instances in which wholesale rates to other carriers are also relevant to this analysis, particularly to the extent those rates may effect the charges ultimately borne by consumers. There is no issue as to wholesale rates that is implicated here, however. Rather, whether and on what terms carriers have an obligation to provide wholesale broadband services to other carriers is currently under consideration in separate proceedings.

Here, the interest of ensuring reasonable rates for consumers in the broadband market is adequately protected without imposing unbundling obligations under *Section 271* for the same reasons that the Commission and the D.C. Circuit concluded that the interests of consumers would best be served by declining to impose unbundling obligations under *Section 251*.

First, the market forces produced by robust intermodal competition guarantee that consumers will have access to broadband services at just and reasonable terms. As the Commission itself has previously recognized in conducting the section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[13] Following that principle, the Commission recently concluded that Verizon's, SBC's, and BellSouth's request for forbearance with respect to their international directory assistance services satisfied section 10(a)(1) because these carriers "would be new entrants in the market for [these services]" and, [a]s such, . . likely would face competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services."[14] The Commission also found it highly relevant that there was "no indication that the petitioners have used, or could use, their ownership interests in dominant foreign carriers to control access by other domestic carriers to directory listing information for the countries where those carriers operate." *SBC IDA Order* ¶ 19.

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[13] Memorandum Opinion Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory* Assistance, 14 FCC Rcd. 16252, ¶ 31 (1999) ("*US West NDA Order*").

[14] Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, FCC 04-67 ¶ 16 (rel. Mar. 19, 2004) ("*SBC IDA Order*").

That reasoning applies with at least as much force here, because Verizon likewise "do[es] not exercise control over the components used to provide" (*id.* ¶ 20) the broadband services of its intermodal competitors and because it faces competition in the broadband market at least as rigorous as that found in the international directory assistance market. According to the Commission's most recent *High-Speed Services Report*, as of June 2003, cable providers controlled more than two-thirds of all high-speed lines provided to residential and small-business customers,[15] which is the segment of the broadband market that cable operators target.[16] As of that same date, cable also controlled more than *83 percent* of the most rapidly growing segment of mass-market broadband lines—those capable of over 200 kbps in both directions.[17] More recent data confirm that cable has continued to extend its lead; in the second half of 2003, cable providers added just over two million subscribers, compared to only 1.6 million added by DSL providers.[18]

As discussed above, moreover, the Commission and the D.C. Circuit themselves have emphasized the importance of intermodal competition in the broadband market. For example, the Commission emphasized that broadband services are "currently provided in a competitive

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15 Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2003) ("*High-Speed Services Report*").

16 *Compare id.* at Table 3 (Cable provides 13,660,541 high-speed lines to residential and small-business customers) *with id.* at Table 1 (Cable provides a total of 13,684,225 high-speed lines).

17 *See id.* at Table 4. Residential and small-business high-speed lines capable of over 200 kbps in both directions represented 85 percent of all residential and small-business high-speed lines added between June 2002 and June 2003, and 78 percent of all high-speed lines added during that same period. *See id.* at Tables 1, 3 & 4.

18 J. Hodulik & A. Bourkoff, UBS, *High-Speed Data Update for 3Q3* at Table 3 (Dec. 1, 2003).

market," that cable companies have "a leading position in the marketplace," and that cable's rate of growth "continues to outpace" the growth of telephone companies' broadband services. *Triennial Review Order,* ¶ 292. The Commission also emphasized the important potential of other intermodal platforms and technologies. *Id.* at ¶ 262. Likewise, the D.C. Circuit emphatically "agree[d] with the Commission that robust intermodal competition from cable providers . . . means that even if all CLECs where driven from the broadband mass market, *mass market consumers will still have the benefits of competition between cable providers and ILECs.*" *USTA II*, slip op. at 41 (emphasis added). And, of course, the fact that "intermodal competition from cable ensures the persistence of substantial competition in broadband," *id.* at 46, ultimately provides, in the Commission's own words, "the most effective means of ensuring that . . . charges . . . are just and reasonable," *U S West NDA Order,* ¶ 31.

Second, in addition to the existence of vigorous intermodal competition, the *Triennial Review Order* also found that the interests of consumers, including their interest in reasonable rates, would be further protected by other alternatives that remain available to CLECs. For example, the *Order* determines that, because "competitive LECs retain alternative methods of accessing loop facilities in hybrid loop situations," including "unbundled access to incumbent LEC copper subloops," and "broad availability of TDM-based loops," *Triennial Review Order* ¶¶ 291 & n.839; 295, they will have "a range of options for providing broadband capabilities." *Id.* at ¶ 291. In addition, as noted above, the *Order* also finds that any impairment with respect to hybrid loops "diminishes with the increasing deployment of fiber." *Id.* ¶ 286.

Of course, the existence of intermodal competition is relevant in this respect as well. This is so because, in addition to directly ensuring that rates will be just and reasonable, intermodal competition also creates the incentive for ILECs to provide wholesale service

offerings over their next-generation networks on negotiated, commercially reasonable terms. *See Triennial Review Order* ¶ 253. Because ILECs face intense intermodal competition from the more prevalent cable modem platform, they will need to find ways to keep traffic "on-net" to cover their enormous capital investments, including through the provision of wholesale service offerings to independent providers. As Verizon previously explained at length,[19] such market-based services are entirely distinct from the *unbundling requirements* at issue here, which would subject ILECs to as-yet undefined and (if experience is any guide) constantly shifting regulatory prescriptions as to what must be unbundled and at what price, accompanied by "the tangled management inherent in shared use of a common resource." *USTA I*, 290 F.3d at 429. As AT&T itself told the Commission scarcely three years ago, "fundamental economic truths" establish that "[n]egotiated agreements, rather than government mandates, are the most appropriate means for creating and defining access relationships."[20] Those truths still hold.

Third, even in a *different* case where the combination of intermodal competition and other alternatives were *not* present to ensure competitive rates in the near term, the Commission nonetheless would be entitled to balance any potential short term risks against the longer term benefits of promoting investment in and accelerating deployment of innovative services at reasonable rates. Indeed, the Commission has squarely held that such short-term effects impose no bar to forbearance where, "*on balance*, the pro-consumer benefits of [forbearance] . . .

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[19] Verizon Reply Comments at 14-15.

[20] Comments of AT&T Corp., *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket 00-185, at 80 (filed Dec. 1, 2000). Whether these voluntary service offerings would be subject to traditional common carriage obligations is a separate question presented in the Commission's pending inquiry into wireline broadband obligations. *See* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019 ¶ 51 (2002).

outweigh any potential competitive advantage that may accrue to [the carrier requesting forbearance]."[21] The D.C. Circuit likewise has made this same point. For example, in *USTA II* itself, the court pointedly noted that even if the Commission's judgment resulted in some "increas[e] [in] consumer costs today in order to stimulate technological innovations" to benefit consumers tomorrow, "there is nothing in the Act barring such tradeoffs." *USTA II,* slip op. at 40. Likewise, the D.C. Circuit previously has concluded that this principle extends to determining what policies will best promote deployment of innovative services at reasonable rates. Thus, in *Consumer Electronics Ass'n v. FCC,* 347 F.3d 291, 301-03 (D.C. Cir. 2003), the D.C. Circuit upheld a Commission rule that required all televisions of a certain size to include a DTV tuner, notwithstanding the fact that some consumers would have to pay more for a feature they do not need. In doing so, the court deferred to the Commission's predictive judgment that its rule would ultimately "bring digital tuners to the market in quantity and at reasonable prices," because it would "increase production volumes and, through economies of scale, lower the price of digital tuners for all television purchasers." *Id.* at 301. It also expressly rejected complaints that this might require consumers who do not need these tuners to bear some of "the cost of

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21 *U S West NDA Order* ¶ 44. The Commission reasoned:

> Although U S WEST will retain its advantageous use of the 411 dialing code until its local markets are open to competition, we do not find it necessary to prohibit its use of the code until this time. Rather, we find that, on balance, the pro-consumer benefits of permitting U S WEST to use the 411 or 1-411 dialing during this time outweigh any potential competitive advantage that may accrue to U S WEST. Moreover, we find that prohibiting U S WEST from using the 411 dialing code for nonlocal directory assistance service for a finite period of time, and then reinstating its use of such code after section 271 authority has been granted, would not only be unduly disruptive to U S WEST's provision of directory assistance service, but would likely cause significant customer confusion.

Id.

making the tuners more affordable," holding that this balancing of interests is "well within the authority of the responsible agency." *Id.* Similarly, in *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), the D.C. Circuit held that whether charges and practices meet the "just, reasonable, and nondiscriminatory" standard in the first place depends on the degree of competition in the market, and that, in conducting that analysis, "the Commission [is] 'entitled to value the free market, the benefits of which are well-established.'" *Id.* at 420 (*quoting MCI WorldCom v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)).

Fourth, the Commission's authority to take a long view of the policy considerations relevant to the forbearance inquiry is strongly reinforced by the Commission's overarching obligation under section 706 to resolve statutory ambiguities in a way that promotes the long-term deployment of greater broadband infrastructure.[22] Here, as noted, forbearance is needed to give both ILECs and CLECs appropriate incentives to build out broadband facilities of their own to compete with the dominant cable providers. Thus, just as the Commission is entitled to take the long view in requiring digital tuners to be included in every television because it ultimately will bring digital tuners to "the market in quantity and at reasonable prices," *Consumer Electronics Ass'n.*, 347 F.3d at 301, so too is it entitled to conclude that declining to impose

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[22] *See* 47 U.S.C. § 157; *Advanced Services Order* ¶ 69. Forbearance here is also consistent with the Commission's decision to forbear from applying tariffing requirements to SBC's provision of advanced services through its affiliate, ASI. Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd. 27000 (2002). In that order, the Commission concluded that tariff regulation is not "necessary for ensuring that the rates, terms, and conditions for ASI's advanced services are just, reasonable, and are not unjustly or unreasonably discriminatory," instead finding that "the better policy is to allow ASI to respond to technological and market developments without our reviewing in advance the rates, terms, and conditions under which ASI provides service." *Id.* ¶ 22.

unbundling obligations on broadband will best ensure reasonable prices because "consumers will benefit from this race to build next-generation networks and the increased competition in the delivery of broadband services." *Triennial Review Order* ¶ 272. And this is all the more true where promoting investment in broadband infrastructure will further the Act's goal of "?boosting competition in broader markets.'" *USTA II,* slip op. at 36 (quoting *USTA I*). Here, encouraging investment will promote competition both for broadband Internet access services and, in the case of new fiber networks in particular, for video services that cable also dominates. Accordingly, promoting investment also will help to ensure reasonable rates in those "broader markets" as well.

Finally, any determination made in the context of a forbearance petition necessarily requires the Commission to make a predictive judgment as to whether the requirement at issue is necessary under current and future market conditions. Any such predictive judgment obviously is entitled to great deference. *See, e.g., Consumer Electronics Ass'n,* 347 F.3d at 300. Moreover, precisely because that judgment is inherently predictive, it also is subject to being revisited in the event that actual experience provides evidence of a demonstrable market failure that warrants regulatory intervention. But the fact that the Commission cannot know with absolute, metaphysical certainty how future market conditions will develop cannot justify retaining requirements that the Commission has found to be both unnecessary and affirmatively harmful. Indeed, as Chairman Powell has explained, government regulation is a "fundamental intrusion on free markets and potentially destructive, particularly where innovation and

experimentation are hallmarks of an emerging market."[23] Accordingly, "[s]uch interference should be undertaken only where there is weighty and extensive evidence of abuse."[24] In the extremely unlikely event that market experience provides evidence of abuse, therefore, the Commission can intervene to address it. But imposing anticipatory regulations in the absence of such evidence is fundamentally destructive to the very innovation that the Commission and Congress have concluded will best serve consumers.

That is all the more true here, given the weighty burden of other anticipatory regulations that local telephone companies' broadband services already must bear. Those services today remain subject to the full gamut of Title II regulations that were designed for a different market in a different era. These range from tariffing requirements, to cost-plus regulation of rates, to archaic requirements imposed under the *Computer II* and *Computer III* decisions that require telephone companies to offer transmission components of their broadband services separately, under tariff, at regulated rates, and to unbundle those services into any component parts. And these regulations continue to apply today only to telephone companies and not to the dominant cable companies with whom they compete. Accordingly, while we believe the Commission should move promptly to remove these other requirements in separate proceedings now underway, there simply is no basis to impose still further obligations such as those at issue here.

2. Section 10(a)(2) and (3) are satisfied as well: *i.e.*, continued unbundling is unnecessary to protect consumers (with respect to non-rate issues as well as rates), *see* 47 U.S.C.

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[23] Remarks of Michael K. Powell, Chairman, FCC, at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," p. 4 (Feb. 8, 2004).

[24] *Id.*

§ 160(a)(2), and forbearance is in the public interest, 47 U.S.C. § 160(a)(3). Indeed, while we need not belabor the point, the analysis outlined above makes it abundantly clear that these provisions are satisfied for the same reasons that section 10(a)(1) is satisfied. Just as the Commission concluded in its *SBC IDA Order* that forbearance satisfied both of these provisons because the petitioners' "entry into the market . . . likely will increase competition in the provision of these services," which, in turn, "is likely to benefit consumers," *SBC IDA Order* ¶¶ 20-21, forbearance here is clearly in the public interest. In short, these criteria are satisfied for the simple reason that the Bell companies "are unlikely to make the enormous investment required [by broadband deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Triennial Review Order* ¶ 3.[25] The Commission's and D.C. Circuit's analysis of investment incentives, *see, e.g., USTA II* slip op., 37, 41, reinforce that conclusion. As discussed above, Section 706 provides still further support by singling out broadband for special attention and by "direct[ing] the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services." *Advanced Services Order* ¶ 69.

3. Moreover, actual market experience provides concrete evidence demonstrating that section 10(a)'s criteria are met. Market activity since the Commission's adoption of the *Triennial Review Order* in February 2003, when it announced that it would remove any

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[25] *See Triennial Review Order* ¶ 272 ("consumers will benefit from [the] race to build next generation networks and the increased competition in the delivery of broadband services"). The same is necessarily true of the section 10(b) mandate to consider whether forbearance will promote "competitive market conditions." 47 U.S.C. § 160(b).

unbundling obligations for broadband elements, confirms that removing unbundling obligations results in reasonable, competitive rates, spurs competition with cable and thereby benefits consumers and the public interest generally. In the intervening year, Verizon alone has invested more than $600 million to increase the availability of its DSL services, such as by adding more than 10 million extra DSL-qualified lines.[26] Verizon also slashed DSL prices, increased output, and introduced new and improved service offerings. For example, in May 2003, Verizon lowered its monthly DSL rate by 30% to $34.95, increased its download speed from 768 kbps to 1.5 Mbps, and also has since introduced new symmetrical services tailored to the needs of business customers.[27] As described further below and in the accompanying fact report, these same trends are observed throughout the industry.

Moreover, this and similar moves by other companies have prompted cable companies to respond in kind by reducing prices, offering new promotional or discount rates, improving the speed of their own services, and expanding aggressively to target small and medium businesses with services tailored to their needs. All of this is but a taste of things to come. Presuming that the Commission's rules are conducive to further investment, Verizon intends to devote one billion dollars this year alone to the service networks capable of challenging cable in its core video market, as well as in the broadband Internet access market. And for their part, cable

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[26] Letter from William P. Barr, Verizon, to Chairman Michael Powell, CC Docket No. 01-338, at 2 (filed Jan. 7, 2004).

[27] Transmittal No. 311 and 317, filed April 14 and 28, 2003. *See also* G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update: The Latest on Broadband Data and VoIP Services in North America* at Table 4 (Nov. 3, 2003) ("*Merrill Lynch 3Q03 Broadband Update*"); J. Hodulik & A. Bourkoff, UBS, *High-Speed Data Update for 3Q03* at 9 (Dec. 1, 2003) ("*UBS High-Speed Data Update*"); A. Breznick, *Major MSOs Scramble To Boost Cable Modem Download Speeds*, Communications Daily at 6 (Dec. 15, 2003); S. Emling, *Battle for Broadband Is on as Phone Industry Cuts Prices*, Cox News Service (May 21, 2003).

companies are expanding aggressively in the voice telephone market. Indeed, as detailed in the accompanying fact report, cable companies already offer voice telephone service to more than 15 percent of U.S. households and have announced plans that would increase that figure to 35 percent by the end of this year alone. Removing remaining barriers to infrastructure investment will further the virtuous cycle of investment, innovation and competition.

II. THE ARGUMENTS SET FORTH IN AT&T'S EX PARTE LETTER ARE MERITLESS

1. In its recent *ex parte* letter, AT&T argues that, under section 10(a)(1), the Commission's limited impairment finding for hybrid loops precludes the Commission from exempting those loops from any stand-alone section 271 unbundling requirement.[28] This argument is just a warmed-over version of the same argument the D.C. Circuit dismissed in *USTA II*. As discussed above, AT&T there argued that, upon any finding of "impairment," the Commission must single-mindedly protect the private interests of particular *competitors* as "an end in itself" rather than promoting the public interest in *competition* generally. *USTA II*, slip op. at 36 (internal quotes omitted). The D.C. Circuit squarely rejected that argument, observing, among other things, that section 706 and the Act's overarching goals require the Commission to "boost[] competition in broader markets" by "removing barriers to infrastructure investment," *id.* (internal quotes omitted), and by attaching due weight to the overwhelming market share of cable modem providers. *See* Part I, *supra*. As the court held, "impairment" is indeed the "touchstone" of the analysis under section 251(d)(2), but the Act more broadly mandates

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[28] By resting its section 10(a)(1) argument on the Commission's qualified impairment findings with respect to hybrid loops, AT&T presumably concedes that section 10(a)(1) provides no bar to forbearance from broadband elements (such as fiber to the premises) as to which the Commission found *no* impairment. *See Triennial Review Order* ¶ 273.

countervailing consideration "of factors such as an unbundling order's impact on investment." *USTA II*, slip op. at 37.

It follows *a fortiori* that a finding of "impairment"—particularly the highly qualified finding at issue here—is even less dispositive under section 10(a), which does not even mention that concept, than under section 251(d)(2), where it features prominently. AT&T nonetheless contends that, because there is no "at a minimum" clause in section 10, "no such balancing is permitted under section 10(a)(1)," and the Commission is rigidly constrained to protect individual CLECs even when doing so will harm competition and consumers. AT&T Letter at 9. This makes no sense. As explained above, just as the *Triennial Review Order* makes clear that section 706 is relevant to the broadband unbundling analysis,[29] the *Advanced Services Order* unequivocally confirms that section 706 is relevant to the Commission's application of section 10, which is at least as subject to interpretation as section 251(d)(2). There is no plausible basis for second-guessing that determination here.

AT&T's interpretation of section 10(a)(1) also suffers from fatal circularity. That provision directs the Commission to consider whether continued application of "any regulation" to a particular telecommunications service is "necessary to ensure that the charges [and] practices" associated with that service "are just and reasonable." 47 U.S.C. § 160(a)(1). Significantly, however, Verizon is not seeking forbearance from the terms of a "service" it will otherwise provision. To the contrary, Verizon is seeking forbearance from an underlying

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[29] *See Triennial Review Order* ¶ 288 (broadband unbundling obligations would stand "in direct opposition to the express statutory goals authorized in section 706" because they would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities").

facilities-unbundling obligation. If, as Verizon argues, there should be no such unbundling obligation to begin with, section 10(a)(1) can impose no barrier to forbearance on the grounds that the rates for *that* "service" need to be regulated to ensure they are just and reasonable. AT&T, however, appears to read section 10(a)(1) to mean that the Commission may never forbear from a requirement to unbundle particular elements on particular terms unless it finds that, if the requirement were eliminated, the exact same elements would still be unbundled on those same terms. Nothing in section 10(a)(1) compels that absurd interpretation, which would effectively read section 10 out of the Act as it relates to unbundling obligations.

2. AT&T argues that the Commission may not forbear from these broadband unbundling obligations because ILECs do not "fac[e] effective competition in broadband markets." AT&T Letter at 11. This, too, is a retread of the same argument that AT&T unsuccessfully pressed in the *Triennial Review Proceeding* and on appeal in *USTA II*. Indeed, as discussed above, the elimination of broadband-related section 251 unbundling requirements is premised on findings by the Commission and the D.C. Circuit that cable modem providers have a wide and still-expanding lead over DSL providers in the broadband market.

AT&T's submission that "in many areas the Bells' DSL offerings face no cable competition," AT&T Letter at 11, is also simply false as an empirical matter. JP Morgan has estimated that, as of December 2003, three-quarters of all U.S. households were able to choose between cable modem and DSL or could receive cable modem but not DSL, while only 5 percent

of households were able to receive DSL but not cable modem.[30] AT&T's claim that "[c]able is not generally available in business districts at all" (AT&T Letter at 11-12) similarly misses the mark. Five of the six largest cable system operators (which, collectively, represent over 90 percent of consumer cable modem subscribers) already offer broadband services specifically tailored to small businesses.[31] Indeed, these cable operators already have been very successful in attracting small-business subscribers.[32] Several recent studies—including a March 2004 study commissioned by the Small Business Administration and a December 2003 study by In-Stat/MDR—confirm that cable modem service is now the *most used* broadband technology by small businesses.[33] In fact, as detained in the accompanying fact report, cable has moved well beyond small businesses to provide service to large and enterprise businesses as well.

The most recent competitive offerings and promotions from DSL and cable operators also belie AT&T's claim that "at best," there is duopoly competition where "both participants . . . have the incentive and ability to maintain prices above competitive levels rather than attempting

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30 J. Bazinet, *et al.*, JP Morgan, *Broadband 2003* at Figure 9 (Dec. 5, 2002). *See also* Kevin J. Martin, Commissioner, FCC, *FCC: Looking Forward*, presentation before the NARUC Telecommunications Committee at 11 (July 28, 2003) (citing JP Morgan).

31 *See* M. Lauricella, *et al.*, Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

32 *See, e.g.*, *A Snapshot of the Cox Business Strategy*, Interview with Coby Sillers, Vice President and General Manager for Cox Business Services, Xchange Mag. (June 1, 2003) ("Cox Business Services now serves more than 65,000 business customers, and the company's business efforts have grown in the past three years from less than 1 percent of Cox's overall revenue to just more than 5 percent of Cox's consolidated revenue."); J. Barthold, *Small Business, Big Money, No Guarantees*, Telephony Online (Aug. 12, 2002) (Kevin Curran, senior vice president of marketing and sales for Cablevision Lightpath: Cablevision "can't keep up with demand" for Cablevision's Business Class Optimum Online service for small businesses).

33 Telenomic Research, LLC, *A Survey of Small Businesses' Telecommunications Use and Spending* (Mar. 2004) (finding that for all three categories of small businesses studied, both penetration and monthly expenditures are higher for cable modem service than for DSL).

to ruthlessly compete with [each] other." AT&T Letter at 11. In the past few months, as Verizon's own experience described above exemplifies, each of the Bell companies has cut its national DSL prices considerably.[34] A study by Current Analysis "shows that nationwide average consumer DSL service prices plunged to their lowest levels ever . . . dropping below average cable modem service prices for the first time in broadband's history."[35] Cable operators have responded with promotional and targeted price reductions, and, more broadly, by increasing data speeds that effectively offer consumers more bandwidth at a lower price than those operators' previous offerings.[36] And because these price wars began *after* the Commission's decision to phase out line-sharing, they also vindicate the Commission's recent finding in the *Triennial Review Order* that propping up intramodal DSL competition is both unnecessary and

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34 *See* G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update: The Latest on Broadband Data and VoIP Services in North America* at Table 4 (Nov. 3, 2003); D. Barden, *et al.*, Banc of America Securities, *SBC Communications Inc.* at 2 (Feb. 2, 2004).

35 Current Analysis Press Release, *Current Analysis Finds Average DSL Prices Have Dropped Below Those of Cable Modem Service for the First Time Ever* (Sept. 15, 2003) (noting results of Current Analysis Broadband MarketTrack quarterly study).

36 *See, e.g.*, AT&T Business, *Small & Medium Business: DSL Internet Service*, http://businessesales.att.com/products_services/dslinternet_available.jhtml?_requestid=76704; Road Runner, *Products & Services: Access*, http://www.rrbiz.com/products/acc.asp; Road Runner Business Class, *Pricing & Services*, http://www.roadrunnerbiz.com/packages.shtml (pricing for 1.5-2 Mbps downstream/384 kbps-1.5 Mbps upstream packages); Comcast Business Communications, *Comcast Workplace*, http://work.comcast.net/workplace.asp#pricing; Lightpath, *Internet: BusinessClass Optimum Online*, http://www.lightpath.net/solutions/internet/business/bcinfo.html; Lightpath, *Internet: BusinessClass Optimum Online*, http://www.lightpath.net/solutions/internet/business/pricepage.html; *see also Merrill Lynch 3Q03 Broadband Update* at 2 (cable operators "are increasingly moving 'off the rate card,' with market-specific pricing and increased use of promotional and bundled-price discounts specific to certain markets").

counterproductive.[37] In short, prices have plummeted, output has soared, and AT&T's claim that this market bears the hallmarks of "cozy duopoly" is wholly untenable.[38]

There is also no merit to AT&T's claim that "continued unbundling of broadband loops is necessary to protect competition for consumers that increasingly demand *bundles* of voice and data services." AT&T Letter at 10 (emphasis in original). First, the Commission has properly defined the relevant market, for purposes of assessing the need for any unbundling of broadband-specific elements, as the *broadband market*, *see, e.g.*, *Triennial Review Order* ¶¶ 212-13; 292, and, as discussed above, that market is indisputably subject to fierce competition, *id.* at ¶ 292.

Second, contrary to the claim that cable telephony "is available to only a small percentage of customers," AT&T Letter at 10, this service is already available to more than 15 million U.S. homes—approximately 15 percent of the mass market. And cable telephony will become even more widely available in the near future, reaching some 35 percent of U.S. homes this year alone (as shown in the accompanying fact report), as every major cable operator throughout the country has either begun commercial deployment of IP telephony services or has announced aggressive plans to do so in the immediate future.[39] Many smaller cable operators

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37 *See Triennial Review Order* ¶ 263.

38 These observations likewise undermine MCI's absurd contention that forbearance from broadband unbundling obligations would "expose[] consumers to the unchecked market power of an incumbent LEC." Letter from Richard Metzger *et al.* to Marlene Dortch, CC Docket No. 01-338 *et al.*, at 4 (Mar. 23, 2004).

39 *See* J. Halpern, *et al.*, Bernstein Research Call, *US Telecom & Cable: Faster Roll-Out of Cable Telephony Means More Risk to RBOCs; Faster Growth for Cable* at 2 (Dec. 17, 2003) ("*Bernstein Cable Telephony Report*") ("Nearly every major cable MSO has indicated over the past month that it will offer cable telephony service to every or nearly every household in its footprint by 2005, with Time Warner Cable and Cablevision targeting year-end 2004"); *Merrill Lynch 3Q03 Broadband Update* at 9 ("In the third quarter, all of the major cable operators continued to push ahead with their VoIP plans and deployments.").

have done so as well.[40] In light of these developments, analysts now expect "all the major MSOs to offer cable telephony to nearly 100% of their in-franchise homes over the next two to three years."[41] Investment analysts have pointed to cable companies' rollout of cable telephony as "the largest risk to Bell fundamentals over the next 5 years," noting that "the impact on margins is increasingly evident today."[42]

Third, cable modem service can serve as a platform for high-quality voice applications *even if the cable provider itself does not provide them*. As AT&T's CEO David Dorman has noted, voice is the "killer application for broadband . . .and will be the biggest driver of broadband adoption in the next couple of years."[43] Evidence to date shows that cable is attracting the vast majority of customers that use their broadband connection for voice. For example, Vonage reports that 70 percent of its subscribers use cable, compared to only 30 percent that use DSL.[44] AT&T recently announced that, in 2004, it will deploy IP telephony

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40 BrightHouse Networks plans to deploy IP telephony commercially in 2004. Insight and Mediacom also have trials planned for 2004. *See* M. Stump, *MSOs, AT&T Set Table for VoIP Rollouts*, Multichannel News (Dec. 15, 2003). Adelphia will conduct IP telephony trials in 2004, and plans a commercial launch for 2005. *See Bernstein Cable Telephony Report* at 5.

41 *Bernstein Cable Telephony Report* at 1; *id.* at 4 ("We now believe that by 2006, roughly 82% of total US households will be cable telephony marketable, up from a prior forecast of approximately 70%); *see also UBS High-Speed Data Update* at 12 ("By the end of 2005/2006" the four major "cable operators will have rolled out a cable telephony service across substantially all of their respective footprints, representing total homes of approximately 70 million.").

42 John Hodulik, *Cable Telephony Competition: Who Gets It?*, UBS Investment Research, at 1 (Aug. 7, 2003).

43 *Creation of Regulatory Distinctions in VoIP said to Concern AT&T*, Comm. Daily (Feb. 12, 2004).

44 T. Hearn, *Cable Companies Accustomed to Large Capital Outlays Are in for a Pleasant Surprise*, MultiChannel News (Feb. 16, 2004), http://www.vonage.com/corporate/press_news.php?PR=2004_02_16_0 (citing Vonage CFO John Rego).

service to residential and business consumers in the top 100 MSAs.[45] AT&T expects to have at least one million customers by 2005.[46] Vonage already serves at least 124,000 VoIP subscribers, and is adding "over 4,000 lines . . . every week."[47] And these services are capable of being delivered *today* to 85 percent of U.S. homes that have access to cable modem services, a figure that will increase to 90 percent this year alone.[48]

Fourth, in addition to cable and DSL, there are numerous additional platforms and technologies already competing in or poised to enter the broadband mass market, including power lines, fixed wireless, 3G mobile wireless, and satellite.[49] Indeed, many of these technologies are already being used to provide service offerings that are competitive with DSL and cable modem services, both for residential and small business customers. For example, the Commission has estimated that residential fixed wireless Internet access is already available in

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[45] Cathy Martine, SVP Internet Telephony & Consumer Product Management, AT&T, *Voice over IP* at 27 (Feb. 25, 2004).

[46] *Id.*

[47] C. Haley, *Vonage Goes Courting for Cable*, InternetNews (Mar. 10, 2004).

[48] *See* J. Halpern, *et al.*, Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* at Exhibits 1 & 6 (Mar. 10, 2004) (cable broadband available to 92.3 percent of total cable homes passed; 110.0 million U.S. households in 2003); NCTA, *Industry Overview: Statistics and Resources*, http://www.ncta.com/Docs/PageContent.cfm?pageID=86 (102.9 million occupied homes passed by cable as of Dec. 2003).

[49] *See, e.g.*, Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 17 FCC Rcd. 2844 ¶¶ 79-88 (2002); *Triennial Review Order* ¶ 263 ("[T]he Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.") (*citing Third Section 706 Report 2002*, 17 FCC Rcd. 2844 ¶¶ 79-88 (2002)); R. Mark, *Broadband over Power Lines: FCC Plugs In*, Internetnews.com (Apr. 23, 2003), http://dc.internet.com/news/article.php/2195621 (Chairman Powell: "[t]he development of multiple broadband-capable platforms – be it power lines, Wi-Fi, satellite, laser or licensed wireless – will transform the competitive broadband landscape").

counties that contain approximately 62 million people, or 22 percent of the U.S. population.[50] Independent industry analysts estimate that "[Broadband over Power Line] will encompass six million power lines by 2006, promising revenues of $3.5 billion."[51] Satellite is another broadband alternative that has begun a resurgence. As one industry observer has recently noted, "satellite broadband will be on the upswing again in 2004."[52]

3. AT&T contends that Verizon cannot satisfy either section 10(a)(2) or (3) because "there could be no sustainable finding that the unbundling imposed by section 271 would have a material, negative impact on the Bell's investment incentives," AT&T Letter at 12. Here again, however, the Commission has *already concluded*, with the D.C. Circuit's approbation, that unbundling requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology," *Triennial Review Order* ¶ 3, and that relief from broadband unbundling requirements is thus necessary to "promote investment in, and deployment of, next-generation networks." *Id.* ¶ 272. As the Commission has observed, "incumbent LECs are unlikely to make the enormous investment required [by broadband

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50 Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd. 14783, A-4 at n.709 (2003).

51 *At CompTel Fall 2003: What's The Next Big Thing*, Comm. Today (Oct. 13, 2003) (citing Gartner Group research).

52 R. Brown, et al., *Smooth Sailing or the Perfect Storm?*, CED (Jan. 1, 2004); *see also ISCE Panelists See Big Satellite Broadband Growth*, Satellite Week (Aug. 25, 2003) ("Michael Agnostelli, SES Americom vp-business strategy, said that for the first time DBS TV services cost less . . . than cable TV. 'There's no reason satellite broadband can't cost less than [DSL or cable modem],' he said: 'The technology is well positioned to hit the cost point and performance point that consumers are looking for'"). One of the two main broadband satellite providers – Hughes Network Systems – reported 177,000 customers for its DIRECWAY service as of third quarter 2003. *See* Hughes Electronics Corp., Form 10-Q (SEC filed Nov. 7, 2003) (residential and small office/home-office customers in North America).

deployment] if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Id.* ¶ 3.

Application of a section 271 unbundling requirement to Verizon's broadband elements would create the same investment disincentives that the Commission intended to eliminate in the *Triennial Review Order*, even though the pricing of those elements would be governed by yet-to-be-determined standards under section 201 rather than TELRIC. As the D.C. Circuit has recognized, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA I*, 290 F.3d at 427. These concerns are most pronounced in the case of next-generation networks because, as Verizon explained in its October 24 *ex parte* (at 9-13), that is the context in which research and development costs are most forbidding and where "the tangled management inherent in shared use of a common resource," *USTA I*, 290 F.3d 429, is most problematic.[53]

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[53] *See also Verizon Communications Inc. v. Law Offices of Curtis Y. Trinko, LLP*, No. 02-682, slip op. 8 (U.S. Jan. 13, 2004) ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of the antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in relevant part, dissenting on other grounds) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious.") (citing 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988)); 3A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 773b1 at 204 (revised ed. 1996) ("competition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities"); *id.*, ¶ 771b, at 175 (when the government "order[s] the [owner] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether").

Unbundling obligations would further undermine investment incentives by subjecting Verizon to a shifting range of regulatory requirements. As demonstrated by Verizon's experience in the context of its section 251 obligations, any unbundling requirement evolves over time as it is interpreted and applied, and thus requires carriers to continually modify both their underlying networks and the accompanying network operations and support systems in order to comply with the changing regulations. Applying an unbundling obligation to broadband facilities would add another layer of uncertainty and financial risk that would depress the investment incentives of any rational business. An unbundling requirement also would subject Verizon to the threat of intrusive state regulation,[54] as well as investment-deterring litigation over the pricing of elements. In sum, for all these reasons, AT&T's claim that imposing broadband unbundling obligations under section 271 would not have a negative impact on investment is specious.

[54] As noted in Verizon's October 24 *ex parte*, although the Commission clarified in the *Triennial Review Order* that the TELRIC rules do not apply to elements unbundled under section 271 alone, CLECs have already argued to state regulators that they have a right to oversee—*i.e.*, intrusively regulate—these federal obligations.