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
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

On December 2, 2009, the Maine Public Utilities Commission ("MPUC") filed a petition with the Federal Communications Commission ("FCC" or "Commission") for a declaratory ruling

> on the question of whether carriers subject to section 271 of the Telecommunications Act of 1996 must make line sharing, certain dark fiber loops, dark fiber transport facilities, and dark fiber entrance facilities available to competitors seeking access and interconnection services. Specifically, the MPUC requests that the FCC determine whether line sharing, certain dark fiber loops, dark fiber transport, and dark fiber entrance facilities are facilities falling within items four and/or five of the "competitive checklist" found in 47 U.S.C. § 271(c)(2)(B)(iv),(v)….[1]

The FCC has put the Petition out for public comment.[2] The National Association of State

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[1] MPUC Petition at 1 (footnote omitted). "Items four and/or five" are referred to herein as, e.g., "Checklist item 4."

[2] DA 10-94 (rel. Jan. 15, 2010).

Utility Consumer Advocates ("NASUCA")[3] files these reply comments to support a ruling that the listed facilities are subject to § 271.[4]

Understandably, comments were filed opposing the Maine Petition by the companies that are subject to the competitive checklist of 47 U.S.C. § 271(c)(2)(B), which would be required to provide "line sharing, certain dark fiber loops, dark fiber transport, and dark fiber entrance facilities" to their competitors if the Petition were granted.[5] Equally understandably, comments were filed supporting the Petition by competitors that would use the facilities required to be provided.[6] A review of the Petition and the comments shows the competitors to have the better part of the argument.

Most parties recognize that the continuing § 271 obligations are independent of the unbundling obligations of 47 U.S.C. § 251, which require unbundling based upon a Commission finding of impairment.[7] This makes unavailing one of the RBOCs' key

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[3] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[4] The Petition was filed based on the ruling of the First Circuit Court of Appeals that the FCC was the "expert agency charged with administering section 271." *Verizon New England, Inc. v. Me. Pub. Utilities Comm'n*, 509 F.3d 1, 11 (1st Cir. 2007) ("*Verizon New England*").

[5] AT&T Inc. ("AT&T"); FairPoint Commuincations, Inc. ("FairPoint"); and Verizon. FairPoint assumed Verizon's RBOC obligations when it acquired the Verizon properties in Maine, New Hampshire and Vermont. See FairPoint Comments at 1, n.1. For purposes of these reply comments, these commenters will be referred to collectively as "the RBOCs."

[6] Alpheus Commuincations, L.P. and Biddeford Internet Corporation d/b/a Great Works Internet ("Alpheus, et al"); COMPTEL; and Section 271 Coalition and One Communications Corp. ("Section 271 Coalition, et al").

[7] AT&T Comments at 9; Alpheus, et al Comments at 2-4. The one exception is FairPoint (FairPoint Comments at 2-3), which attempts to conflate the two sets of requirements. Even FairPoint acknowledges, however, that the § 271 requirements continue past the initial RBOC approval under § 271. Id. at 5-6.

arguments, which is that the supposed impacts of unbundling on investment, found relevant under the § 251 analysis, negate the § 271 requirements.[8] They do not.

AT&T and Verizon argue that the plain terms of the statute do not extend to dark fiber or line sharing.[9] AT&T even asserts that Commission has never even **suggested** that dark fiber or line sharing are included in Checklist items 4 or 5.[10] The non-RBOCs correctly disagree.[11] As Alpheus, et al state:

> The Commission has repeatedly emphasized that § 271 checklist access includes all features, functions, and capabilities of the particular element. Under checklist item No. 4, for example, the FCC defined the "local loop" "as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises" and expressly stated that "[*d*]*ark fiber…[is] among the features, functions, and capabilities of the loop*." The Commission could not have been more clear that BOCs must provide dark fiber pursuant to the checklist.[12]

This disproves Verizon's argument that dark fiber cannot provide transmission, and thus cannot fall under Checklist item 4.[13] As Alpheus, et al also state,

> The argument that the BOCs are only obligated to provide an element in a form specifically enumerated under the checklist would lead to absurd results. A BOC could argue that offering "tin cans and strings" complies with the local loop requirement, since there is no explicit statement that the loop must be able to transmit electromagnetic signals; or, conversely, it could claim to be in compliance by offering only an extremely expensive type of high-capacity loop that no customer would ever order. The Commission, however, has made clear that to satisfy the checklist the BOC "must provide access to any functionality of the loop requested by a

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[8] E.g., AT&T Comments at 10-11; FairPoint Comments at 3-5; Verizon Comments at 7-14. See Alpheus, et al Comments at 17.

[9] AT&T Comments at 2-4; Verizon Comments at 2-4.

[10] AT&T Comments at 4-10.

[11] COMPTEL Comments at 3-4; Section 271 Coalition, et al Comments at 5-8.

[12] Alpheus, et al Comments at 7 (footnotes omitted, emphasis in original).

[13] Verizon Comments at 3.

> competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested."[14]

AT&T argues that in early § 271 orders, the Commission "directly confronted and rejected arguments that BOCs had an obligation to demonstrate the adequacy of their dark fiber and line-sharing offerings to receive section 271 approval."[15] Yet the cited portions of the *New York 271 Order* and the *Texas 271 Order* are not relevant to Checklist items 4 and 5, rather addressing the applicability of the new § 251 unbundling rules.[16]

Indeed, neither dark fiber nor line sharing are even mentioned in the portions of those orders addressing Checklist items 4 and 5.[17] This is hardly a definitive rejection of dark fiber and line sharing being included in Checklist items 4 and 5; in these first § 271 orders, the Commission was addressing many other issues for the first time.[18] AT&T's suggestion that "if checklist items four and five encompassed dark fiber and line sharing, the Commission would have had no authority to grant Bell Atlantic and SBC's applications without such a showing…."[19] reads far more into the Commission's silence on the issue than it deserves. Similarly, Verizon assumes that, because the Commission did not suggest in the *TRO* or the *TRRO* that competitors could obtain dark fiber under §

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[14] Alpheus, et al Comments at 8-9 (footnotes omitted); see also id. at 10-11.

[15] AT&T Comments at 5, citing Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 31 (1999) ("*New York 271 Order*"), and Memorandum Opinion and Order, *Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶¶ 30-32 & n.70 (2000) ("*Texas 271 Order*"). See also Verizon Comments at 4.

[16] E.g., *New York 271 Order*, ¶ 31.

[17] Id., ¶¶ 273-336, 338-342.

[18] See also Alpheus, et al Comments at 8, n.26.

[19] AT&T Comments at 6; see also Verizon Comments at 5.

271, dark fiber is not therefore included under § 271.[20] Again, this reads far more into the Commission's silence than it deserves.

In a somewhat different vein, AT&T asserts that, in later orders, when the Commission did consider dark fiber and line sharing under Checklist items 4 and 5, it did so only incidentally, because it had already addressed them under Checklist item 2 (which addresses elements required to be unbundled under § 251).[21] This assumes that the Commission's discussion of dark fiber and line sharing in those orders was surplusage or dicta, a characterization not evident from any of those orders. The non-RBOCs' extensive citations to those orders show how "non-incidental" the discussion of dark fiber and line sharing was.[22]

AT&T appears quite willing to selectively cite the Commission's discussions. AT&T says,

> For example, in considering Verizon's compliance with checklist item five in the *Rhode Island 271 Order*, the Commission rejected a competitive LEC's arguments that Verizon's dark fiber offerings did not "satisfy section 251(c)(3)." In other words, although it was nominally applying checklist item five, the Commission concluded that Verizon had satisfied this checklist by recognizing that it provided access to dark fiber transport as a UNE under checklist item two.[23]

Yet the *Rhode Island 271 Order* actually shows that the argument AT&T refers to was

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[20] Verizon Comments at 6, citing *In the Matter of 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, 18 FCC Rcd 16978, 17389 ¶ 662 (2003) ("*TRO*") and *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533. 2615-16 ¶ 149 (2005) ("*TRRO*").

[21] AT&T Comments at 7-9.

[22] See, e.g., COMPTEL Comments at 4, n.9.

[23] AT&T Comments at 9, referring (without paragraph citation) to Memorandum Opinion and Order, *Application by Verizon New England Inc. et al. To Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300 (2002) ("*Rhode Island 271 Order*"). See also Verizon Comments at 6-7.

peripheral to the FCC's overall finding regarding dark fiber and Checklist item 5:

> We disagree with CTC's argument that Verizon's dark fiber offering does not comply with the requirements of this checklist item. … CTC **also argues generally** that Verizon's dark fiber offering does not satisfy section 251(c)(3). CTC does not, however, support its assertions with references to our rules or precedent. We will not find noncompliance based on such vague assertions.[24]

Likewise, AT&T states that although the Commission "discussed line sharing under the heading of checklist item four as well as checklist item two, the extent of the Commission's analysis was to determine whether the BOC applicants were complying with the requirements of the *Line Sharing Order*…."[25] Yet the *Rhode Island 271 Order* itself shows a much more detailed analysis.[26]

FairPoint asserts that "[t]he structure of Section 271 makes clear that any requirement imposed under that section must be interpreted and applied in light of specific conditions in the relevant market."[27] FairPoint does not point to any aspect of the "structure" of § 271 that dictates such a result. Indeed, the Commission has given no indication that any of the items on the checklist will go away due to market changes.[28]

FairPoint also asserts that the Commission granted forbearance with regard to the items under review here[29]; neither Verizon nor AT&T make that argument. FairPoint's argument represents conjecture piled upon speculation, with a number of clear errors. First, FairPoint assumes that the *Section 271 Forbearance Order*, which granted

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[24] *Rhode Island 271 Order*, ¶ 93 (emphasis added, footnotes omitted).

[25] AT&T Comments at 9.

[26] *Rhode Island 271 Order*, ¶ 89.

[27] FairPoint Comments at 6.

[28] The one quasi-exception would be Checklist item two, which of course specifically incorporates the concepts of § 251, such as impairment.

[29] FairPoint Comments at 8-9.

forbearance for a list of four (4) specific broadband elements and was issued after the *TRO*, was retroactively expanded by the subsequent *TRRO*.[30] Second, FairPoint asserts that the Commission's lack of discussion of line sharing in the *Section 271 Forbearance Order* means that Verizon's request for forbearance for line sharing was deemed granted pursuant to 47 U.S.C. § 160(c).[31] This overlooks the fact that, prior to the *Section 271 Forbearance Order*, Verizon had clarified (and limited) its forbearance request to the Commission.[32] Indeed, Alpheus, et al argue that the grant of forbearance itself demonstrates that the RBOCs **were** subject to dark fiber obligations under § 271.[33]

FairPoint also asserts that "[i]n considering the question of Verizon's obligations as a BOC to provide the elements that are the subject of the MPUC Petition in Maine and New Hampshire, the First Circuit concluded that the Commission had not imposed any clear obligation with respect to those elements under Section 271(c)(2)(B), **and therefore none could be enforced**."[34] The first part of the statement is correct; the second is flagrantly wrong, given the questions at issue in this proceeding. FairPoint also states that "Section 271 incorporates only those obligations that have been clearly and unambiguously imposed by the Commission."[35] If that were the case, then there would have been no point in the First Circuit's referral of the issue back to the Commission.

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[30] FairPoint Comments at 9, n.33.

[31] Id. at 13.

[32] *Section 271 Forbearance Order*, ¶1, n.6; see Verizon Comments at 1.

[33] Alpheus, et al Comments at 14-15.

[34] FairPoint Comments at 8, citing *Verizon New England*, 509 F.3d at 11 (emphasis added).

[35] FairPoint Comments at 9.

The Commission should find that the elements listed in the MPSC's Petition are, indeed, required under Checklist items 4 and 5. The RBOCs should not be allowed to evade their § 271 obligations.

Respectfully submitted,

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