DISSENTING STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149 (adopted Nov. 3, 2003).

I respectfully dissent from the Commission's decision to reject Verizon's forbearance petition seeking elimination of the ban on sharing operation, installation, and maintenance ("OI&M") functions. In my view, the Commission may forbear from the OI&M rule without even implicating section 10(d) of the Act[1] — and thus without deciding whether section 271 is "fully implemented" — because the OI&M restriction is not a "requirement" of the statute. Rather, the Commission adopted this prophylactic ban notwithstanding that more limited degrees of separation could have faithfully implemented the statutory requirement that the Bell company and its long distance affiliate "operate independently." In any event, I disagree with the Commission's conclusion that section 271(d)(3)[2] has not been fully implemented even after the grant of section 271 authority throughout Verizon's service territory. Had the Commission reached the merits of the forbearance analysis under section 10(a), I would have been inclined to conclude that the prohibition on sharing OI&M functions is not necessary to ensure just and reasonable rates or practices, to protect consumers, or to promote the public interest.

First, I disagree that section 10(d) bars forbearance from the OI&M rule. While section 10(a) authorizes the Commission to forbear from "any regulation *or* any provision of this Act," 47 U.S.C. § 160(a) (emphasis added), the limitation in section 10(d) applies only to the "requirements of section 251(c) or 271" themselves. *Id.* § 160(d). To be sure, some Commission rules are "requirements" of the statutory provisions they implement. But I cannot agree with the Commission's apparent holding that *every* regulation promulgated under section 272 is *necessarily* a "requirement" of the statute. In fact, the statute typically permits a range of different policy outcomes, none of which is required. Indeed, this is why the *Chevron* doctrine governing judicial review has two steps: one for situations where the statute compels a particular result, and one for the far more common situations where it does not. Given that the Commission usually has a broad range of permissible policy choices under the Communications Act, it would be bizarre if whatever regulation the Commission promulgates is transformed into a "requirement" of the statute, even as other, mutually exclusive choices also could have become "requirements" of the very same provision.

There is little doubt that the OI&M restriction falls into the category of rules that are not "requirements" of the statute. When the Commission adopted the ban on sharing

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[1] Section 10(d) provides that the Commission "may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."

[2] Section 271(d)(3)(B) requires the Commission to find, before granting authority to provide in-region interLATA services, that "the requested authorization will be carried out in accordance with the requirements of section 272."

OI&M functions, it acknowledged that — unlike some of the other safeguards it was adopting — this rule was not compelled by the text of section 272. Rather, the Commission was concerned that lesser degrees of structural separation would require "excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier . . . to audit and monitor the accounting plans necessary for [the sharing of OI&M functions] to take place."[3] The Commission thus made a *policy* judgment that the OI&M rule would best effectuate the statutory requirement that the BOC and its long distance affiliate operate independently. If the Commission now finds, based on its experience with the OI&M rule, that the prohibition is *not* necessary to achieve its intended purposes, it has the flexibility to forbear from that regulation because other regulations are sufficient to ensure compliance with section 272(b)(1) of the Act.

Moreover, I find it anomalous, to say the least, that at the same time the Commission finds the OI&M rule to be a requirement of the statute, it is willing to adopt a companion NPRM that expresses a willingness to consider elimination of this very rule. If the majority is correct that the OI&M rule is a requirement of the Communications Act, then how can we simultaneously propose to do away with it in a rulemaking? To the extent that the majority believes that a rule adopted pursuant to a notice of proposed rulemaking may be changed only through a subsequent NPRM, the plain text of section 10 belies that argument. Congress, giving teeth to its general preference for competition over regulation, not only authorized elimination of a Commission regulation through the vehicle of forbearance, but went so far as to *mandate* forbearance from any regulation where the three-part set forth in section 10(a) is satisfied. 47 U.S.C. § 160(a).[4]

Second, even if the OI&M rule were required by section 272, I disagree with the majority's conclusion that the requirements of section 271 are not fully implemented in the states served by Verizon. The majority reasons that, because section 271(d)(3)(B) requires the Commission to find, before granting a section 271 application, that "the requested authorization will be carried out in accordance with the requirements of section 272," and because section 272 requires the BOC to provide in-region, interLATA services through a separate affiliate for at least three years, section 271 is not "fully implemented" until the sunset of the section 272 requirements. That argument has some superficial appeal, but I believe it is wrong for several reasons.

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[3] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21984 ¶ 163 (1996) (internal quotation marks and citation omitted).

[4] I am also concerned that the Commission's decision to deny forbearance based on its apparent preference to address the OI&M rule in a rulemaking parallels the Commission's decision in 1999 rejecting a petition to forbear from dominant-carrier regulation based on its preference to address that issue under the framework established by the *Pricing Flexibility Order*. The D.C. Circuit made clear that the Commission may not deny forbearance on the ground that another mechanism may provide similar relief. *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) ("Congress has established section 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different regulatory mechanism.").

The Commission's approval of a section 271 application represents the culmination of an exhaustive and exacting regulatory process. Congress understandably forbade the Commission from short-circuiting that process; it sought to ensure that a BOC would be permitted to enter the long-distance business if and only if the statutory prerequisites have been satisfied (as is now the case throughout Verizon's service territory). One of those prerequisites, set forth in section 271(d)(3)(B), calls on the Commission to make a *predictive judgment*, based on evidence in the record, about a BOC's *future* compliance with section 272. Once that judgment has been made, however, and the BOC is authorized to provide in-region interLATA services, section 271 has been "fully implemented," since no further action by the Commission is required. Thereafter, the obligation to continue complying with section 272 and the Commission's implementing regulations is a requirement of section 272 itself, not of section 271(d)(3)(B). And if the Commission later forbears from one of the requirements imposed under section 272, that cannot retroactively undermine the Commission's full implementation of section 271.

The logic underlying the majority's approach implausibly suggests that section 271 may *never* be fully implemented, given that all of the section 271 requirements have continuing effect. For example, while the Commission must determine under section 271(d)(3)(A) that the competitive checklist has been "fully implemented,"[5] the BOC of course remains obligated to comply with the nondiscriminatory access obligations set out in the checklist following the grant of the section 271 application. Thus, if the ongoing effectiveness of a requirement were enough to prevent full implementation, section 10(d) would be impossible to satisfy. Moreover, even if section 271 could be fully implemented under the majority's approach, full implementation would be meaningless, since, by the time the section 10(d) bar is removed, the section 272 requirements (and the Commission's OI&M rule) will have sunset pursuant to section 272(f). We should not interpret section 10(d) to be a nullity. The better interpretation treats a grant of section 271 authority in a state — the main event in the section 271 process — as full implementation in that state, with section 271(d)(6) serving as an ongoing check against undoing what was demonstrated in the application process.

Notably, finding section 10(d) inapplicable by no means establishes that forbearance is warranted; it simply makes a BOC *eligible* for forbearance. Each of the factors set forth in section 10(a) also must be satisfied. The fact that full implementation only gets a BOC through the starting gate, rather than across the finish line, further supports the argument that section 10(d) is satisfied upon the grant of section 271 authority in a given state.

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[5] Congress's use of the phrase "fully implemented" to describe satisfaction of the 14-point competitive checklist, 47 U.S.C. § 271(d)(3)(A)(i), strongly suggests that the identical language in section 10(d) of the Act was intended to preclude forbearance only until the Commission has found section 271 as a whole to be satisfied (*i.e.*, until the Commission has granted the application) for the state in question. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (observing that identical words used in different parts of the same statute are intended to have the same meaning).

Finally, because I believe that section 10(d) poses no bar to forbearance, I would have proceeded to apply the three-part test set forth in section 10(a), and I likely would have found it satisfied. I am reluctant to provide a more definitive view, because the Commission appears willing to consider elimination of the OI&M rule in a new rulemaking proceeding, in which I must keep an open mind. My tentative position is that the substantial costs imposed by the OI&M rule — including the need for duplicative resources — outweigh its benefits, especially given that the remaining safeguards appear adequate to prevent discrimination or other misconduct. While I am disappointed by the Commission's refusal to grant forbearance, and I consider that refusal legally suspect, I welcome the opportunity to revisit the merits in the upcoming rulemaking.