

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
BellSouth Emergency Petition for )  
Declaratory Ruling and Preemption ) WC Docket No. 04-245  
of State Action )  
)

**BELLSOUTH REPLY COMMENTS**

**BELLSOUTH TELECOMMUNICATIONS, INC.**

Jonathan B. Banks  
1133 21st Street, N.W.  
Suite 900  
Washington, D.C. 20036-3351  
(202) 463-4182

Date: August 16, 2004

## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY .....	1
DISCUSSION .....	5
I.    Neither Section 271 Nor Section 252 Authorizes State Commissions To Establish Rates for Access to Facilities That Must Be Offered Solely Under Section 271 .....	5
II.   State Law Cannot Authorize State Commissions To Set Rates for Facilities That Must Be Provided Under Section 271 .....	15
III.  There Is No Procedural Obstacle to the Commission Issuing a Declaratory Ruling and Preempting State Action. ....	19
CONCLUSION.....	22

## INTRODUCTION AND SUMMARY

A core fact frames the dispute in this case: BOCs must provide the facilities at issue *only* to satisfy the obligations of section 271, as that provision has been interpreted by this Commission. And section 271 is extraordinarily clear in authorizing this Commission, not state agencies, to determine whether section 271's requirements have been met. It states that "the Commission shall . . . approv[e] or den[y]" an application and that the "Commission may" revoke section 271 authority or take other action if it subsequently determines that the BOC is no longer in compliance with section 271's requirements. 47 U.S.C. § 271(d)(3), (6)(A). In sum, as the Commission has properly explained, Congress intended that a single federal agency, not 51 separate state bodies, exercise "*exclusive authority*" over "the section 271 process."<sup>1</sup>

Indeed, Congress expressly considered the proper role of the states in the section 271 process, and it gave them only a limited, advisory role, not the power to impose obligations as a condition of compliance with that statutory section. Under the plain terms of section 271, this Commission is merely to "consult" with the relevant state agency before deciding whether to grant an application, and, in contrast to the views of the Attorney General, the Commission need not even give the views of that state commission any particular weight. *See id.* § 271(d)(2)(B). A straightforward reading of the statutory text thus demonstrates that state commissions have no authority to impose obligations as a condition of compliance with section 271. In the D.C. Circuit's words, Congress "has clearly charged the FCC, and *not the State commissions,*" with assessing BOC compliance with section 271.<sup>2</sup>

---

<sup>1</sup> Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) ("*US West Order*") (emphasis added).

<sup>2</sup> *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).

In the teeth of the clear statutory text, however, some commenters argue that state commissions do have authority to impose obligations, including rates, for facilities that must be made available solely to satisfy section 271. These commenters suggest that such an obligation stems from (1) section 271 and/or section 252, or (2) state law. Neither of these arguments is persuasive.

First, there is no statutory support for the federal law arguments. Section 271 grants no pricing authority to state commissions, and this Commission has never concluded that state commissions have any such authority for facilities that are not subject to unbundling under section 251(c)(3). CLEC commenters, accordingly, are left to rely on Commission statements that state agencies can enforce any *voluntary commitments* made to the states by BOCs during the section 271 process and on Commission statements noting the valuable *consultative* role played by state commissions. Neither set of statements has anything to do with this matter, which does not involve a voluntary section 271 commitment or a state attempt merely to consult about rates.

Nor are commenters correct that the references in section 271(c)(1) to agreements “approved under section 252” support a state commission’s assertion of pricing authority. By its terms, that statutory language does not purport to grant states authority to set rates. Moreover, by tying state authority to section 252, that language in fact confirms that states *cannot* establish prices for facilities unless they are subject to unbundling under section 251(c)(3). That is because section 252(d)(1) expressly limits state rate-setting authority to items that must be offered “under subsection (c)(3) of that section [251].” Congress could have specified that states also could set rates for purposes of the competitive checklist under section 271, but it did not do so. That choice must be respected.

The claim that the statutory reference to “open issues” somehow allows any issues that a BOC has negotiated to be arbitrated is also wrong, as the Eleventh Circuit has held. That argument ignores the fact that section 252(c) limits a state commission’s arbitration duty to implementing section 251(b) and (c). Moreover, it attributes to Congress the absurd intent to require arbitration of any issue at all, regardless of whether there is even a federal-law standard and thus a rule for the state commission to apply to resolve such a dispute. In addition, such a conclusion would create enormous disincentives to negotiate within the section 251-252 process, because the price of such negotiation would be acquiescence in binding arbitration. That would be contrary to what this Commission has acknowledged was Congress’s intent to make negotiation the “very essence of section 251 and section 252.”<sup>3</sup>

Even though, in its oral deliberations and decision, the Tennessee Regulatory Authority (“TRA”) did not claim that state law could support its conclusion here, some commenters, including the TRA, now claim that state commissions could legitimately rely on state authority to set rates for facilities subject to section 271. Indeed, AT&T Corp. (“AT&T”) argues that states can set rates as low as they like without running afoul of federal law, because the only federal interest is in ensuring that the rates for such facilities are not too high. AT&T can make that claim only by ignoring this Commission’s directly relevant decisions. The Commission expressly concluded in the *Triennial Review Order* that requiring rates for section 271 facilities to be set at low, forward-looking levels would be the same as “gratuitously reimpos[ing]” section

---

<sup>3</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17404, ¶ 701 (2003) (“*Triennial Review Order*”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), petitions for cert. pending, *NARUC v. United States Telecom Ass’n*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

251(c)(3) unbundling without the statutorily required impairment finding, and would thus be contrary to the statutory scheme.<sup>4</sup>

Moreover, the Commission has determined that, in this context, the “market price should prevail” in the first instance,<sup>5</sup> and that if any party is concerned about a specific rate, the Commission would review that rate under the standards provided in section 201 of the Communications Act. State attempts to impose rate requirements violate both those federal policies.

Finally, some parties claim that BellSouth’s petition is procedurally defective because the federal-court review mechanism provided by section 252(e)(6) allegedly strips this Commission of authority to act in this context. They are wrong. BellSouth’s primary request here is for a declaratory ruling establishing a principle of federal communications law. Such a declaratory ruling is an aid to, and not a substitute for, federal court review of a state commission decision on this issue. No federal statute or case suggests that this Commission cannot issue a declaratory ruling simply because the same issue may be presented to a federal court on review of a state agency decision. Such a conclusion would be deeply perverse, as it would deprive the Commission of a key tool to remove uncertainty and establish uniformity at a time when it is especially needed – when a generalist federal court is confronted with an issue within the Commission’s expertise. Moreover, even as to the Commission’s authority to preempt the determinations of the TRA and of other state commissions, the 1996 *Local Competition Order*<sup>6</sup>

---

<sup>4</sup> *Id.* at 17387, ¶ 659.

<sup>5</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3906, ¶ 473 (1999) (“*UNE Remand Order*”), *petitions for review granted, United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”), *cert. denied*, 538 U.S. 940 (2003).

<sup>6</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (“*Local Competition Order*”), *modified on*

establishes that federal court review is not exclusive and does not preclude this Commission from acting.

## DISCUSSION

### I. **Neither Section 271 Nor Section 252 Authorizes State Commissions To Establish Rates for Access to Facilities That Must Be Offered Solely Under Section 271**

a. Because the language of section 271 is clear in granting implementing authority only to this Commission, no commenter has found any statement by the Commission (or, for that matter, a federal court) indicating that state commissions may impose obligations to ensure section 271 compliance. On the contrary, as emphasized above, this Commission has stated unequivocally that Congress intended a single federal authority, this Commission, to have “exclusive authority” over “the section 271 process.”<sup>7</sup> AT&T’s claim that this Commission does not have “sweeping and exclusive jurisdiction over each particular rate, term, and condition for all of the checklist items”<sup>8</sup> is thus contrary to the Commission’s own reading of the statute.<sup>9</sup>

In arguing for a different result, some parties<sup>10</sup> quote the Commission’s statement that “[c]omplaints involving a BOC’s alleged noncompliance with *specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement*

---

*recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>7</sup> See *US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

<sup>8</sup> AT&T at 6.

<sup>9</sup> Covad is similarly wrong (at 9) in suggesting that the Commission’s reference to state commissions’ “orderly disposition of intercarrier disputes” is related to disputes *under section 271*. Rather, the Commission was simply acknowledging that state commissions have authority to resolve disputes *under section 252* involving such things as the proper interpretation of a particular agreement. See, e.g., Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, 25851, ¶ 50 (2002).

<sup>10</sup> See, e.g., ALTS at 2; Cbeyond at 4-5; Covad at 7-8.

*mechanisms imposed by a state commission, should be directed to that state commission.”*<sup>11</sup> By its plain terms, however, that statement is irrelevant to the issue presented here. This matter has nothing to do with specific voluntary commitments that any BOC made to a state commission during the section 271 process, nor does it involve a performance monitoring mechanism that a BOC consented to have imposed by a state commission. Indeed, the fact that the Commission *limited* its discussion of state authority under section 271 to those discrete areas where a BOC has made a commitment to a state commission or agreed to performance standards demonstrates that the states have no *general* authority to impose any obligations, including rates, to ensure continuing compliance with the competitive checklist.<sup>12</sup>

Commenters are likewise wrong to suggest that the state commissions’ consultative role in the section 271 process somehow justifies their imposition of specific pricing obligations. Cbeyond, for instance, relies on the fact that the states “play a critical statutory role” by providing consultative reports to contend that Congress would “expect a state commission to establish just and reasonable rates, terms, and conditions” for facilities that must be made available under section 271, but not section 251.<sup>13</sup>

That conclusion does not follow from the premise. As Cbeyond acknowledges, Congress considered the appropriate role of state commissions in the section 271 process, and it decided to

---

<sup>11</sup> 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, 4176-77, ¶ 452 (1999), *aff’d*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (emphasis added).

<sup>12</sup> See *Indiana Bell Tel. Co. v. Indiana Utils. Regulatory Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004) (concluding that a state commission decision was contrary to the 1996 Act where the state agency “parlay[ed] its limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service”).

<sup>13</sup> Cbeyond at 7-9.

give them only a limited, advisory function.<sup>14</sup> There is nothing about Congress’s decision to give states such a consultative role that suggests that state commissions may impose obligations under section 271. Indeed, when a state commission sought to go beyond its assigned “limited role in issuing a recommendation under section 271” and to impose affirmative obligations to implement section 271, a federal court of appeals held that its actions were contrary to the federal scheme and thus unlawful.<sup>15</sup>

Moreover, this Commission has made plain that Congress assigned it, not the states, the duty to determine continuing compliance with section 271. The *Triennial Review Order* states that, in the event there is a dispute about whether a particular market rate is just and reasonable, “the Commission will undertake” a “fact-specific” inquiry into the lawfulness of the particular rate.<sup>16</sup> And, contrary to some commenters’ claims that this authority is not intended to be exclusive of state authority to enforce section 271,<sup>17</sup> the Commission’s repeated references to its authority to implement section 271 must be read against the backdrop of its prior statements, reproduced above, that Congress gave it “exclusive authority” over the section 271 process.

Indeed, it is only natural that this agency, not 51 different state agencies, would have the authority to implement sections 271 and 201. Those provisions are part of the Communications Act, and it is this Commission (which, unlike state agencies, is accountable to Congress) that is “empower[ed]” to “implement” that statute.<sup>18</sup> Where Congress has allowed state agencies to implement federal-law requirements under the 1996 Act, it has “carefully delineated a particular

---

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Indiana Bell*, 359 F.3d at 497.

<sup>16</sup> *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664.

<sup>17</sup> *See, e.g.*, TRA at 14-15.

<sup>18</sup> *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 663.

role for the state commissions.”<sup>19</sup> Congress delineated no such rate-making role for the states under section 271.

Moreover, and significantly in this regard, no party has found any precedent establishing that state commissions are authorized to apply section 201 generally, much less that they can apply section 201 to ensure compliance with section 271. By contrast, BellSouth has cited multiple cases establishing that compliance with section 201 is a matter that “Congress has placed squarely in the hands of [this] Commission.”<sup>20</sup>

**b.** Commenters’ arguments based on the references in section 271(c)(1)(A) and 271(c)(2)(A) to agreements “approved under section 252” do not change this result. AT&T asserts that these provisions “demonstrate[] that Congress fully expected that state commissions would in the first instance set the particular prices for competitive checklist items.”<sup>21</sup> Covad makes the even more audacious claim that these provisions “confer[] exclusive jurisdiction upon state commissions in the first instance to resolve the terms of access to competitive checklist items under section 271.”<sup>22</sup> And Z-Tel claims that these provisions gave state agencies a “central role in implementing the section 271 ‘competitive checklist’” – a role that allegedly includes imposing pricing obligations for section 271 facilities in section 252 arbitrations.<sup>23</sup>

These arguments read language into section 271(c) that does not exist. By their terms, none of the cited subsections of section 271(c) supports the notion that state commissions have authority to establish rates and other terms and conditions to ensure continued compliance with section 271, which of course is the issue here. On the contrary, by referring back to section 252,

---

<sup>19</sup> *USTA I*, 290 F.3d at 568.

<sup>20</sup> Pet. 10 (quoting *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987)).

<sup>21</sup> AT&T at 12.

<sup>22</sup> Covad at 3-4.

<sup>23</sup> Z-Tel at i.

these subsections confirm that state commissions do *not* have that authority. Section 252 could not be clearer in limiting state authority to set rates to UNEs that must be unbundled under section 251(c)(3). Section 252(d)(1) empowers state commissions to set rates only for “purposes of subsection (c)(3) of such section [251].” As the Commission has stated, that section “is quite specific in that it only applies for the purposes of implementation of section 251(c)(3)” and “does not, by its terms” grant the states any authority as to “network elements that are required only under section 271.”<sup>24</sup>

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for “purposes of subsection (c)(3) of such section [251]” *and* separately for “purposes of the competitive checklist contained in subsection (c)(2)(B) of section 271” it could easily have said so. It said nothing of the kind. As the Commission has explained in a related context involving the relationship between sections 251 and 271, “Congress’ decision to omit cross-references [is] particularly meaningful” in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.<sup>25</sup>

Indeed, *nowhere* in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as this Commission and the D.C. Circuit have emphasized, contains obligations that are independent of section 251.<sup>26</sup> Rather, as confirmed by the *limited* authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with this Commission. And as the D.C. Circuit made plain in *USTA II*, when Congress assigns a certain

---

<sup>24</sup> *Triennial Review Order*, 18 FCC Rcd at 17386-87, ¶ 657.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 17385-86, ¶ 655 (“section 251 and 271 . . . operat[e] independently”); *USTA II*, 359 F.3d at 588 (“The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52.”).

responsibility to this Commission, it is this federal agency, and not 51 separate state bodies, that must make the relevant determinations.

c. It is no answer to the express limitation on state pricing authority in section 252 to contend, as the TRA, NARUC, and several CLECs do, that section 252 authorizes state commissions to resolve all “open issues” in an arbitration.<sup>27</sup> The Eleventh Circuit has addressed this issue and properly explained that, read (as it must be) in the context of the rest of the statute, the reference to “any open issues” subject to arbitration must be understood to encompass only those issues that incumbents must negotiate to fulfill sections 251(b) and (c). *See MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002). As that federal court of appeals stated, a rule that required arbitration of “any issue raised by the moving party” would be “contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.” *Id.* (citing section 251(b) and (c), which, the court noted, “set[] forth the obligations of all local exchange carriers and incumbent local exchange carriers, respectively”).

The Eleventh Circuit’s understanding is well grounded in the statute and leads to the only plausible result.<sup>28</sup> The 1996 Act specifically restricts a state commission’s authority to arbitrate to the discrete obligations imposed by section 251(b) and (c). Section 252(c) provides that the

---

<sup>27</sup> *See, e.g.*, US LEC at 2-4; NARUC at 3-5; TRA at 10-12.

<sup>28</sup> CLEC commenters’ attempts to distinguish the Eleventh Circuit decision are unpersuasive. Z-Tel, for instance, argues (at 13) that the Eleventh Circuit decision supports its position because section 271 issues are ones that incumbents are “required to negotiate” (internal quotation marks omitted). In fact, the Eleventh Circuit specified that arbitrable items were those necessary to implement section 251(b) and (c), precisely because it is only those issues that an ILEC must negotiate under section 251. *See* 47 U.S.C. § 251(c)(1). Mpower similarly argues (at 6-7) that this decision does not “address a state commission’s Section 252 authority over interconnection agreements for Section 271 unbundling.” Again, however, that argument ignores the fact that Eleventh Circuit limited the scope of arbitration to items implementing section 251(b) and (c), which do not include section 271 requirements.

state commission’s duties in “resolving . . . open issues” are limited to (1) ensuring that the conditions it imposes on the parties “meet the requirements of section 251” and this Commission’s regulations that are prescribed “pursuant to section 251”; (2) establishing rates “according to [section 252(d)],” which in turn provides pricing rules only for items that must be offered under section 251; and (3) establishing a “schedule for implementation.” Nowhere did Congress authorize state commissions to arbitrate disputes as to duties that do not involve section 251(b) and (c).<sup>29</sup> Likewise, under section 252(e)(2)(B), a state commission may only reject arbitrated portions of an agreement if it does not “meet the requirements of section 251” or the pricing rules “set forth in subsection (d)” of section 252. In sum, as this Commission has explained in the *Qwest Declaratory Ruling*<sup>30</sup> – a ruling that some CLEC commenters wrongly cite in support of their position<sup>31</sup> – “only those agreements that contain an ongoing obligation relating to section 251(b) or (c)” are “interconnection agreement[s]” that are subject to the procedures detailed in section 252.<sup>32</sup>

Indeed, the conclusion that the 1996 Act permits arbitration of any disputed issue, regardless of whether it implicates section 251(b) or (c), would lead to absurd results that Congress could not have intended. If, as some commenters argue, the open issues that state commissions must arbitrate go beyond the requirements of section 251, there is no logical reason that they should be limited to arbitrating additional obligations imposed under section 271.

---

<sup>29</sup> Although state commissions do have authority to impose, in appropriate circumstances, additional state requirements in approving agreements, *see* 47 U.S.C. § 252(e)(3), those obligations have to be consistent with federal law and not substantially prevent implementation of the purposes of the 1996 Act. *See id.* §§ 251(d)(3), 261.

<sup>30</sup> Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) (“*Qwest Declaratory Ruling*”).

<sup>31</sup> *See, e.g.*, PACE Coalition at 10.

<sup>32</sup> *Qwest Declaratory Ruling*, 17 FCC Rcd 19340-41, ¶ 8 & n.26.

Under this reasoning, state commissions would be authorized (indeed, required) to arbitrate an unlimited number of issues that CLECs could raise that have nothing to do with the specific statutory obligations that Congress imposed. And, because such obligations have no grounding in the requirements of section 251(b) and (c) (or in this Commission’s regulations implementing that statutory section), there would be no governing legal standard for a state commission to apply in resolving such questions. Accordingly, to accept this theory, one would have to assume that Congress directed state agencies to decide an unlimited number of issues – issues Congress did not consider important enough to address in the federal statute – without providing *any* guidance as to how the relevant decision should be made. There is no reason to conclude that Congress intended to impose such a limitless and nonsensical obligation.

In this regard, *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), which some commenters rely on for a contrary proposition,<sup>33</sup> is both wrong and irrelevant. That decision is wrong because, contrary to established canons of interpretation, it wrests the phrase “any open issues” from its context in the statute<sup>34</sup> and, moreover, renders irrelevant Congress’s express statements in section 252(c) limiting a state commission’s arbitration function to the implementation of the requirements of section 251(b) and (c). Moreover, by making submission to arbitration (indeed, arbitration under uncertain or nonexistent legal standards) the price of an ILEC’s willingness to negotiate, the Fifth Circuit provided an enormous disincentive to negotiation, which undermines a core goal of the 1996 Act: encouraging agreements reached through voluntary negotiation. As this Commission has

---

<sup>33</sup> See, e.g., TRA at 11-12; US LEC at 3 & n.8; AT&T at 16.

<sup>34</sup> See, e.g., *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (holding in a 1996 Act case that the meaning of “any” in that statute “depends on context,” and explaining that the “Supreme Court has specifically held that in context the word ‘any’ may be considered in a non-expansive fashion”) (citing *O’Connor v. United States*, 479 U.S. 27, 31 (1986) (Scalia, J)).

stated, “[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252.”<sup>35</sup>

The Fifth Circuit’s decision is irrelevant because it expressly acknowledges that an ILEC’s duty to negotiate is limited to items covered by section 251(b) and (c), and thus that ILECs have no duty to negotiate section 271 obligations as part of this process. As the Fifth Circuit explains, an “ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act,” which include “those duties listed in § 251(b) and (c).”<sup>36</sup> Accordingly, if *Coserv* were correct, BellSouth and other BOCs simply would not discuss section 271 rates in the context of a section 251-252 arbitration. On a going-forward basis, therefore, *Coserv* would not alter the effects of a Commission declaration that state commissions lack authority to impose rate requirements for facilities that must be provided solely to satisfy section 271.

Indeed, in the TRA litigation that prompted BellSouth to seek declaratory and preemptive relief from this Commission, BellSouth never negotiated rates for section 271 facilities, nor did it acquiesce in state commission arbitrations of those matters. On the contrary, as DeltaCom’s own evidence shows, all that BellSouth did was provide DeltaCom a standard interconnection agreement that contained, along with innumerable other items, a market rate for enterprise switching that did not have to be unbundled under section 251.<sup>37</sup> DeltaCom filed for arbitration on this issue without raising it during negotiations.<sup>38</sup> Neither DeltaCom nor the TRA have provided any letters, proposals, or other documents transmitted between the parties that suggest

---

<sup>35</sup> *Triennial Review Order*, 18 FCC Rcd at 17404, ¶ 701.

<sup>36</sup> *Coserv*, 350 F.3d at 487-88.

<sup>37</sup> *See* DeltaCom Exh. 1.

<sup>38</sup> It is undisputed that the \$14.00 rate existed not only in DeltaCom’s prior interconnection agreement, but also in virtually every interconnection agreement approved by the TRA. Further, it is undisputed that DeltaCom previously purchased local switching at the \$14.00 market rate.

otherwise. Indeed, DeltaCom never even argued before the TRA that BellSouth had acquiesced in arbitration of this issue by voluntarily negotiating it, nor did it cite *Coserv* as a basis for the TRA's authority.

Moreover, contrary to the impression that DeltaCom and the TRA seek to leave, once DeltaCom sought arbitration before the TRA, BellSouth made clear its view that the state commission lacked authority to resolve these issues. On the final Issues Matrix submitted by the parties to the TRA, BellSouth made clear that, as to Issue 26(d), which involved the "market rate" when BellSouth "is not required to provide local switching as a UNE," BellSouth's position was that "an arbitration under § 251 of the 1996 Act is not the appropriate forum for resolution of this issue."<sup>39</sup> Similarly, BellSouth submitted testimony stating that "the appropriateness of BellSouth's rates for providing local switching where it is not required by the [1996 Act] or the FCC's Rules implementing the Act [is] not governed by §§ 251 or 252 of the Act and, accordingly, it is not appropriate to address this matter in an arbitration proceeding."<sup>40</sup> Those are hardly the statements of a party that voluntarily chose to include this issue in the section 251-252 process.

Finally, BellSouth's Motion to Remove Issues from the arbitration before the TRA did not discuss this specific issue because that motion involved distinct concerns about issues that had either been addressed in other proceedings on a generic basis or were more appropriately handled in other forums (particularly, the Change Control Process or CCP).<sup>41</sup> As demonstrated

---

<sup>39</sup> *ITC^DeltaCom/BellSouth 2003 Arbitration Issues Matrix*, TRA Docket No. 03-00119, at 10 (TRA filed July 11, 2003) (attached hereto as Exhibit 1).

<sup>40</sup> Direct Testimony of Kathy K. Blake, TRA Docket No. 03-00119, at 4 (TRA filed Aug. 4, 2003) (attached hereto as Exhibit 2).

<sup>41</sup> See BellSouth Telecommunications, Inc.'s Motion To Remove Issues from ITC^DeltaCom Communications, Inc.'s Petition for Arbitration, Docket No. 03-00119 (TRA filed July 2, 2003).

above, BellSouth separately made plain on the Issues Matrix and in its testimony that this issue was beyond the TRA's authority.

## **II. State Law Cannot Authorize State Commissions To Set Rates for Facilities That Must Be Provided Under Section 271**

Although the TRA's oral deliberations and decision make no reference to any state law basis for imposing rate obligations, in the comments filed here both the TRA and a number of CLECs argue that such state-law exists and is not preempted by federal law. AT&T's comments exemplify these claims. AT&T argues that the "federal interest under section 271 is to ensure that rates for checklist items are not too *high*, and there is absolutely no section 271 basis for a federal concern that these rates are too *low*."<sup>42</sup> Because there is allegedly no federal interest here, AT&T argues that section 271 does not "oust" states of their supposed state-law authority to establish rates for these facilities, especially, AT&T claims, because "these facilities are predominantly used to provide intrastate services within the states' exclusive jurisdiction."<sup>43</sup> Indeed, AT&T goes so far as to claim that it would be "nonsensical" to conclude that the states are "divest[ed]" of authority to set rates for these facilities.<sup>44</sup>

These arguments are wrong in all respects. As an initial matter, clear precedent establishes that this Commission has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable separately to regulate those components.<sup>45</sup> As the Commission has stated to the Supreme Court, that analysis applies directly to the pricing of facilities that must be provided by ILECs under the 1996 Act. The

---

<sup>42</sup> AT&T at 2.

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Id.*

<sup>45</sup> See *Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045-46 (4th Cir. 1977) ("*NCUCIP*").

Commission explained to the Court that it had concluded in the *Local Competition Order* that “it would be economically and technologically nonsensical . . . for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an ‘intrastate’ rate set by a state commission and an ‘interstate’ rate set by the FCC.”<sup>46</sup> Rather there must be a single rate for wholesale access, and, accordingly “the Commission may ensure effective regulation of the interstate component . . . by preempting inconsistent state regulation of the matter in issue.”<sup>47</sup> The Supreme Court agreed that the Commission had the authority to resolve such matters under the 1996 Act and thus to “draw the lines to which [state commissions] must hew.”<sup>48</sup>

The Supreme Court’s decision and this Commission’s statements provide a full response to claims that the Commission “does not have the authority to strip state commissions of their local intrastate authority over 271 UNEs”<sup>49</sup> or, put differently, that the Commission “could not preempt” state authority here.<sup>50</sup> Indeed, even ALTS grudgingly acknowledges that “it is true that state law may be preempted in certain circumstances should it conflict with federal policy.”<sup>51</sup>

Nor is it the case that the Commission may only preempt state action under section 253(d), as Mpower asserts.<sup>52</sup> On the contrary, when, as here, state regulation necessarily touches on interstate communications, the Commission can use its authority, under sections 152(a),

---

<sup>46</sup> Opening Brief for the Federal Petitioners, *FCC v. Iowa Utils. Bd.*, No. 97-831, at 36-37 (U.S. filed Apr. 3, 1998) (“FCC S. Ct. Brief”).

<sup>47</sup> *Id.* at 36 (emphasis added).

<sup>48</sup> *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

<sup>49</sup> *Cbeyond* at 19.

<sup>50</sup> *Z-Tel* at 14.

<sup>51</sup> *ALTS* at 8.

<sup>52</sup> *See Mpower* at 10-15. Mpower wrongly relies (at 10) on Justice Breyer’s views on the scope of Commission authority, even though he dissented from the Court’s resolution of this issue in *Iowa Utilities Board*.

201(b), and 154(i), among other statutory provisions, to regulate interstate communications to preempt state regulation that would be inconsistent with federal policy as to that interstate traffic. In the Commission’s own words, if the rule were otherwise, the “Commission ‘would necessarily be prevented from discharging its statutory duty . . . to regulate interstate communications.’”<sup>53</sup>

Contrary to AT&T’s arguments, there are established federal policies here, so this is a paradigmatic instance where it is appropriate to declare unlawful and preempt state decisions that thwart this Commission’s attempt to regulate (and deregulate) interstate services. First, AT&T’s argument that low regulated rates do not conflict with federal policy is specious. Imposing on section 271 facilities forward-looking prices of the kind required under section 251 is no different from mandating section 251 unbundling in the absence of the statutorily required impairment finding. Such a result conflicts with both the statutory scheme, which makes impairment the “touchstone” of section 251 unbundling,<sup>54</sup> and with this Commission’s conclusion, affirmed in *USTA II*, that “gratuitously reimpos[ing]” low TELRIC rates under section 271 would be the same as an unlawful adoption of “a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better.”<sup>55</sup>

Even beyond the issue of low rates, there is also an established federal policy that, when unbundling is not required under section 251, “the market price should prevail” instead of a “regulated rate” and that “it would be *counterproductive* to mandate” specific rates in the first

---

<sup>53</sup> FCC S. Ct. Br. at 39 (quoting *NCUC II*, 552 F.2d at 1045) (alteration in original). Contrary to Mpower’s understanding, *New England Public Communications v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), supports this understanding. There, the D.C. Circuit confirmed that, in *Iowa Utilities Board*, the “Supreme Court confirmed that it would be impossible to implement the local competition provisions while limiting the Commission’s authority to interstate services.” *Id.* at 77.

<sup>54</sup> *USTA I*, 290 F.3d at 425.

<sup>55</sup> *Triennial Review Order*, 18 FCC Rcd at 17387-88, ¶¶ 658-659.

instance.<sup>56</sup> State attempts to set rates in such circumstances also necessarily violate this established federal policy. Indeed, contrary to some commenters' arguments that a ruling in BellSouth's favor would lead to a flood of litigation at the Commission,<sup>57</sup> BOCs have employed commercial negotiations since the *UNE Remand Order* to establish rates for facilities (such as operator services) that need not be unbundled under section 251(c)(3). The Commission has concluded that there has been "no adverse effect" or "perverse policy impact" from reliance on such a market-based approach.<sup>58</sup>

In any event, for all the reasons discussed above, when disputes do arise, the statute expressly contemplates a single federal arbiter of compliance with section 271, including any pricing obligations imposed by that section. Accordingly, the Commission has stated that, to the extent there is a concern that market rates are unjust and unreasonable under section 201, the proper remedy is to file a complaint so that the "*Commission* [can] undertake" a "fact-specific" inquiry.<sup>59</sup> Nowhere has the Commission suggested that each state may apply its own understanding of section 201 to establish rates for facilities that must be provided under section 271, and any such conclusion would be inconsistent with Congress's evident intent to give this Commission "exclusive" decisionmaking authority under section 271.<sup>60</sup> Indeed, it is especially important that the Commission make clear that it alone is authorized to resolve these issues so as to create the certainty that can be provided only by a coherent and uniform approach to this federal-law issue. By contrast, as Verizon has properly stated, allowing 51 different states to impose their own understanding of what constitutes just and reasonable rates for purposes of

---

<sup>56</sup> *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473 (emphasis added).

<sup>57</sup> *See, e.g.*, Covad at 12.

<sup>58</sup> *Triennial Review Order*, 18 FCC Rcd at 17388, ¶ 661.

<sup>59</sup> *Id.*

<sup>60</sup> *US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

section 201 would “‘create a labyrinth of rates, terms and conditions’ that ‘violates Congress’s intent in passing the Communications Act.’”<sup>61</sup>

### **III. There Is No Procedural Obstacle to the Commission Issuing a Declaratory Ruling and Preempting State Action**

The TRA and DeltaCom, among other commenters, contend that 47 U.S.C. § 252(e)(6), which grants federal district courts authority to review state commission determinations in section 252 proceedings, prevents this Commission from taking any action to clarify the law on the important and recurring issue presented here. These parties assert that the “proper forum for review is in the federal district court.”<sup>62</sup>

These arguments miss the mark. As an initial matter, these claims disregard the fact that BellSouth is seeking first and foremost a declaratory ruling that will establish the law on this issue nationwide. The issuance of such a declaratory ruling is not a substitute for judicial review of a particular decision, and thus would not implicate any federal court authority under section 252(e)(6). A declaratory ruling would simply provide the Commission’s authoritative understanding of the statute that it implements and thus substantially assist any reviewing court in determining the lawfulness of any state agency’s attempt to impose rates on section 271 facilities. *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Congress expressly empowered this Commission to issue such declaratory rulings to “terminate a controversy or remove uncertainty.”<sup>63</sup> Such a “controversy” currently exists both in

---

<sup>61</sup> Verizon at 12-13 (quoting *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002)).

<sup>62</sup> TRA at 26; *see also* NARUC at 2-3.

<sup>63</sup> 5 U.S.C. § 554(e); *See also* 47 C.F.R. § 1.2 (“The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”); *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d, 911, 915 (5th Cir. 1993) (“Congress commits

Tennessee, where the TRA has asserted the authority to impose rates on section 271 facilities, creating what AT&T itself refers to as a “*bona fide* dispute,”<sup>64</sup> and in other states where parties have requested that state commissions establish similar requirements. As Verizon has demonstrated in detail in its comments, there is a “systemic and nationwide” effort to have state commissions impose rate regulation under section 271 and thus do an end-run around this Commission’s no-impairment findings in the *Triennial Review Order* as well as the D.C. Circuit’s decision in *USTA II*.<sup>65</sup>

It is thus incorrect to claim that this issue is not “ripe” for a declaratory ruling because the particular TRA proceeding that prompted BellSouth to file this petition is not complete.<sup>66</sup> As the Commission has long established, it is not bound by federal-court “case or controversy” requirements,<sup>67</sup> and it may issue declaratory rulings when, as here, “*recent and potential State actions* have tended to create uncertainty regarding the scope of State authority to impose requirements.”<sup>68</sup>

Nor, contrary to the claims of the TRA and DeltaCom, is there anything in the statute that suggests that this Commission lacks authority to issue a declaratory ruling because the same issue is (or may soon be) pending before a federal court. Commenters do not cite a single case

---

to the sound discretion of the agency the decision whether to grant requested declaratory relief.”).

<sup>64</sup> AT&T at 4.

<sup>65</sup> See Verizon at 1-2.

<sup>66</sup> See, e.g., Covad at 6-7.

<sup>67</sup> Order, *Guam Telephone Authority*, 12 FCC Rcd 13938, 13940, ¶ 9 (1997).

<sup>68</sup> Memorandum Opinion and Order on Reconsideration, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 98 F.C.C.2d 777, 782, ¶ 10 (1984) (internal quotation marks omitted; emphasis added); see Memorandum Opinion and Order, *Commercial Communications, Inc.*, 81 F.C.C.2d 106, 121-22, ¶ 45 (1980) (Commission is not obligated to await some action by a state or carrier which creates a clear conflict between state and federal regulation having the ingredients of a conventional “case or controversy” before issuing a ruling).

invalidating a Commission declaratory ruling on that basis. In fact, such a perverse rule would have deeply unfortunate consequences for sound implementation of the 1996 Act. Under such a rule, the Commission would be precluded from weighing in on a pressing matter of federal law so long as that same legal issue might be the subject of a state commission proceeding, and thus an arbitration appeal, in any of the 50 states. The Commission's jurisdiction could be thwarted by the actions of any party before any state commission, and crucial issues raised by the 1996 Act would suddenly be off limits to the Commission's power to issue declaratory rulings. Such an implausible scheme would prevent the Commission from bringing clarity to a legal issue when it may be most necessary, even though Congress enacted 5 U.S.C. § 554(e) precisely so that expert federal agencies such as this Commission could resolve uncertainty and ensure uniformity in application of the law. The Commission should reject such an unlikely and pernicious result.

Indeed, contrary to these commenters' arguments, this Commission has recently reiterated that it is empowered to use its declaratory ruling authority where a state agency goes beyond its lawful authority in an arbitration proceeding. In the *Triennial Review Order*, the Commission made plain that if a state commission takes action, whether "in the course of a rulemaking or during review of an interconnection agreement," that is inconsistent with this Commission's limitations on unbundling, aggrieved parties "may seek a declaratory ruling from this Commission."<sup>69</sup>

The pendency of an action before the TRA also does not prevent this Commission from issuing an order preempting decisions by all state agencies that are contrary to federal law. In its

---

<sup>69</sup> *Triennial Review Order*, 18 FCC Rcd at 17100-01, ¶¶ 194-195 (emphasis added).

1996 *Local Competition Order*, the Commission expressly rejected the conclusion that section 252(e)(6) prevented it from acting:

We find . . . that federal court review is not the exclusive remedy regarding state determinations under section 252. The 1996 Act is clear when it intends for a remedy to be exclusive. For example, section 252(e)(6) provides that, if a state commission fails to act, as described in section 252(e)(5), “the proceeding by the Commission under [section 252(e)(5)] and any judicial review of the Commission’s actions *shall be the exclusive remedies* for a State commission’s failure to act.” In contrast, the succeeding sentence in section 252(e)(6) provides that any party aggrieved by a state commission determination under section 252 “*may* bring an action in an appropriate Federal district court.”

*Local Competition Order*, 11 FCC Rcd at 15563, ¶ 124 (quoting 47 U.S.C. § 252(e)(6)).<sup>70</sup>

Section 252(e)(6) thus does nothing to strip the Commission of its long-established power “to preempt state actions . . . if they would thwart [the FCC’s] regulatory goals.”<sup>71</sup>

### CONCLUSION

The Commission should grant BellSouth’s petition.

Respectfully submitted,

/s/

---

Jonathan B. Banks  
BellSouth Telecommunications, Inc.  
1133 21st Street, N.W.  
Suite 900  
Washington, D.C. 20036

---

<sup>70</sup> Although the Eighth Circuit disagreed with the FCC’s interpretation, *see Iowa Utils. Bd.*, 120 F.3d at 803-04, the Supreme Court reversed the Eighth Circuit’s decision as not ripe for judicial review until the FCC took action in a concrete context, *see AT&T Corp.*, 525 U.S. at 386.

<sup>71</sup> Declaratory Ruling and Order, *Proposed 708 Relief Plan and 630 Numbering Plan Area Code By Ameritech – Illinois*, 10 FCC Rcd at 4596, 4602-03, ¶ 14 (1995).