

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

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

REPLY COMMENTS OF VERIZON

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INTRODUCTION

The CLECs’ strategy is readily apparent: they see in section 271 another ticket to ride the gravy train of maximum unbundling at TELRIC rates for all narrowband and broadband facilities, regardless of whether they are impaired without such unbundling. Thus, AT&T contends — consistent with CLECs’ claims before numerous state commissions — that “nothing prevents the states from adopting forward-looking economic cost approaches, such as the TELRIC methodology” for network elements provided exclusively pursuant to section 271 (“271 elements”). AT&T at 11. But this Commission has flatly rejected those claims, and the D.C. Circuit affirmed that result. The Commission held that, absent a finding of impairment, “it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices,” *UNE Remand Order*² ¶ 473 (emphasis added), and that “TELRIC pricing for checklist

¹ The Verizon telephone companies (“Verizon”) are identified in Appendix A to Verizon’s comments.

² 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 (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).

network elements that have been removed from the list of section 251 UNEs” is “no[t] necessary to protect the public interest,” *Triennial Review Order*³ ¶ 656 (emphasis added). Basic principles of conflict preemption are sufficient to prevent state commissions from undermining these determinations by “gratuitously reimpos[ing]” under section 271 the CLECs’ fantasies of “virtually unlimited . . . unbundling” of narrowband and broadband facilities at TELRIC rates forever. *Id.* ¶¶ 658-659.

Moreover, as Verizon and other commenters demonstrated, Congress gave state commissions no authority to establish rates, terms, and conditions for 271 elements. Instead, Congress repeatedly and explicitly authorized the Commission to implement section 271, limited state commissions’ role under section 271 to non-binding consultation at the application stage, and expressly tied state commissions’ arbitration and rate-setting authority under section 252 to network elements that must be provided as UNEs under section 251. For these reasons, state commissions have no authority under federal law to regulate 271 elements and any state law purporting to provide such authority is preempted as inconsistent with Congress’s design.

In addition, the Commission’s regulation of 271 elements independently precludes state commissions from establishing the rates, terms, and conditions on which BOCs provide access to 271 elements. Virtually all commenters acknowledge that state commissions have no authority to take actions that conflict with the Commission’s rules. And the Commission has held that, when network elements must be provided as 271 elements, “the market price should prevail, as opposed to a regulated rate,” with those market terms assessed only against the *federal* standards

³ 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 (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).

set forth in sections 201 and 202. *UNE Remand Order* ¶¶ 470, 473; *see Triennial Review Order* ¶ 656. Any efforts by a state to establish rates, terms, and conditions for 271 elements would run directly counter to the Commission's determination. The state-by-state regulation of 271 elements that the CLECs propose, moreover, would frustrate the Commission's expressed preference for commercial agreements with respect to 271 elements.

For these reasons, the Commission should grant BellSouth's petition and confirm that 271 elements are a purely federal construct, subject to exclusive federal regulation, and therefore state commission regulation of 271 elements conflicts with federal law and is preempted. None of the comments opposing BellSouth's petition identifies any valid source of state commission authority to regulate 271 elements.⁴

First, the CLECs are incorrect in claiming that the Commission's orders approving long-distance applications have recognized state commission authority to enforce section 271. In fact, in the portions of the orders they cite, the Commission has recognized only state commission authority to implement sections 251 and 252 or to enforce voluntary commitments BOCs made to the state commissions to take on obligations not required by any provision of the 1996 Act.

Second, although the CLECs note that state commissions apply the Commission's TELRIC standard in setting rates for UNEs, they do so pursuant to an express delegation of authority and Congress made no comparable grant of authority to those commissions to set rates for 271 elements. On the contrary, Congress gave the Commission exclusive authority over 271

⁴ Numerous commenters echo ITC^DeltaCom's claim that the Commission has no jurisdiction over BellSouth's petition because the TRA's decision occurred as part of an interconnection agreement arbitration that is not yet complete. *See, e.g.*, AT&T at 12-13; Covad at 10-12; TRA at 10-12. But, at a minimum, the Commission has jurisdiction to issue a declaratory ruling that the TRA's action is unlawful, which BellSouth could enforce in a subsequent federal court action. *See Verizon* at 3 n.7. That is sufficient to dispose of these supposed barriers to the Commission's jurisdiction.

elements. And any state commission effort to establish rates for 271 elements conflicts with the Commission's conclusion that sections 201 and 202 require market rates, not regulated rates — and, in no event, forward-looking rates.

Third, contrary to the CLECs' claims, the reference in section 271(c)(1)(A) to “agreements that have been approved under section 252” does nothing to alter the clear provisions in section 252 tying state commissions' authority to arbitrate issues and set rates to the requirements of section 251(b) and (c). For the same reason, the Fifth Circuit's decision in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), does not authorize state commissions to arbitrate rates for 271 elements. Even that court recognized that, under section 252, BOCs need only negotiate regarding the obligations in section 251(b) and (c).

Fourth, the CLECs' claims that Congress did not intend for the Commission's regulations implementing section 271 to preempt contrary state commission actions are foreclosed by the Supreme Court's decision in *Iowa Utilities Board*.⁵ In any event, as the Commission and the CLECs themselves explained to the Supreme Court, 271 elements such as loops, transport, and switching are inextricably interstate and intrastate and, therefore, are subject to the Commission's exclusive jurisdiction.

Fifth, contrary to the CLECs' claims — and as the Commission has previously recognized — state commission regulation will impede the development of market rates, and the formation of commercial agreements, for 271 elements. Nor is there any merit to CLECs' claims that the Commission will be required to establish rates for 271 elements if the state commissions cannot do so. Instead, as the Commission has made clear, market rates should prevail.

⁵ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

DISCUSSION

I. STATE COMMISSIONS HAVE NO AUTHORITY UNDER FEDERAL OR STATE LAW TO REGULATE 271 ELEMENTS

A. The Commission has construed section 271 to impose an obligation on BOCs, independent of their obligation to provide UNEs under section 251, to provide access to “loop[s],” “transport,” “switching,” and “databases and associated signaling.” 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x). Congress placed the implementation of this federal law duty within the Commission’s exclusive jurisdiction. *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (“Congress has clearly charged the FCC, and *not the State commissions*,” with assessing BOC’s compliance with section 271) (emphasis added); *InterLATA Boundary Order*⁶ ¶¶ 17-18 (finding that Congress granted “*sole authority* to the Commission to administer . . . section 271” and intended that the Commission exercise “*exclusive authority* . . . over the section 271 process”) (emphases added); 47 U.S.C. § 271(d)(3), (4), (6).

In contrast, the only role Congress identified for state commissions is derivative of a task Congress assigned to the Commission. Thus, section 271(d)(2)(B) provides that, with respect to an “application” for long-distance approval, “the *Commission shall* consult with the State commission of [that] State” so that the Commission (not the state commission) can “verify the compliance of the Bell operating company with the requirements of []section [271](c).” 47 U.S.C. § 271(d)(2)(B) (emphasis added). Congress also gave state commissions no role *after* approval of such an application, and the Commission has never held that it has the obligation to

⁶ Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) (“*InterLATA Boundary Order*”).

consult with a state commission before ruling on a complaint under section 271(d)(6).⁷ State commissions therefore have no authority to “parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order” — whether under federal law or “ostensibly under state law” — “dictating conditions on the provision” of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004). Such efforts are preempted because they “bump[] up against” the procedures that are “spelled out in some detail in sections 251 and 252” and “interfere[] with the method the Act sets out” in section 271. *Id.*⁸

The detailed procedures in sections 251 and 252, moreover, confirm that state commissions have no authority to regulate 271 elements. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under section 251. Thus, state commission authority over interconnection agreements is triggered by “a request . . . pursuant to section 251” and where “negotiation[s] under this section” are unsuccessful either party “may petition a State commission to arbitrate any open issues.” 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with “the requirements of section 251”); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that “does not meet the requirements of section 251”). Furthermore, section 251(c)(1)

⁷ Mpower’s claim (at 7) that, “even in enforcement proceedings under Section 271(d)(6), the Commission is required to consult with the state commission” is therefore contrary to the text of section 271 and the Commission’s practice.

⁸ Therefore, it is irrelevant that “section 271 does not prohibit a state commission from *investigating* certain aspects of a BOC’s compliance with the section 271 conditions.” Cbeyond at 9 (emphasis added). A state commission has no authority under section 271 to take any action based on such an investigation — other than filing a complaint with the Commission under section 271(d)(6)(B) — and any attempt to take such action on its own authority is preempted as inconsistent with express terms of the 1996 Act.

obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to section 252 — only “terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of [section 251](b) and [(c)].” *Id.* § 251(c)(1). Based on these provisions, the Commission has held that “only those agreements that contain an ongoing obligation relating to section 251(b) or (c)” are “interconnection agreement[s]” covered by section 252.⁹ Courts have likewise held that the 1996 Act establishes “only a limited number of issues on which incumbents are mandated to negotiate.” *See MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

With respect to state commissions’ authority to set rates, section 252(d)(1) is similarly “quite specific” and “only applies for the purposes of implementation of section 251(c)(3).” *Triennial Review Order* ¶ 657 (emphasis added). The Commission’s conclusion is compelled by the text of section 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only “for network elements according to [section 252](d),” which in turn authorizes “[d]eterminations by a State commission” of the “rate for network elements for purposes of [section 251](c)(3).” 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commissions with respect to 271 elements and there is “no serious argument” that the UNE pricing regime “appl[ies] to unbundling pursuant to § 271.” *USTA II*, 359 F.3d at 589 (emphasis added). Indeed, one group of CLECs admits that “section 271, unlike section 252 [with respect to UNEs], does not specify state commission involvement in establishing rates for 271 [elements].” *Cbeyond* at 18. And because Congress gave the Commission — and the Commission alone — authority to determine

⁹ 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, ¶ 8 & n.26 (2002) (“*Qwest Declaratory Ruling*”) (emphasis added).

whether a BOC complies with section 271, that authority rests exclusively with the Commission. *See USTA II*, 359 F.3d at 565.¹⁰

B. Congress, in the 1996 Act “created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission,” *Indiana Bell*, 359 F.3d at 494, and “unquestionably” took “regulation of local telecommunications competition away from the States” on *all* “matters addressed by the 1996 Act,” including in section 271. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see Triennial Review Order* ¶ 663. Exercising its authority to implement section 271, the Commission has ruled that *federal* law — namely, sections 201 and 202 — establishes the standard that BOCs must meet in offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II*, 359 F.3d at 588-90. Interpreting that federal law standard, the Commission has held, moreover, that “TELRIC pricing” or other “forward-looking pric[ing]” for 271 elements would be “counterproductive” and is “no[t] necessary to protect the public interest.” *Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 473. Instead, sections 201 and 202 require nothing more than that “the market price should prevail” — “as opposed to a regulated rate.” *UNE Remand Order* ¶ 473.

The Commission’s determinations preempt any contrary state commission ruling, including the Tennessee Regulatory Authority’s (“TRA”) attempt to establish a “regulated rate” for enterprise switching under section 271. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from “deliberately imposed” federal standards); *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation

¹⁰ Contrary to the claims of the Cbeyond CLECs, the Commission cannot delegate its authority under section 271 to state commissions and any attempt to do so would receive no deference from the courts. *See USTA II*, 359 F.3d at 566; Cbeyond at 10 & n.19.

that “consciously has chosen not to mandate” particular action preempts state law depriving an industry “of the ‘flexibility’ given it by [federal law]”); *see* SBC at 3. The state-by-state establishment of rates, terms, and conditions for 271 elements that the CLECs envision also conflicts with sections 201 and 202, by yielding “patchwork contracts” and impeding the negotiation of multi-state, voluntary commercial agreements to provide 271 elements. *See Boomer v. AT&T Corp.*, 309 F.3d 404, 418-20 (7th Cir. 2002). And the Commission has recognized that extending the procedural requirements in section 252 to cover agreements that implement obligations other than those in section 251(b) and (c) would raise “unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.” *Qwest Declaratory Ruling* ¶ 8.

II. THE CLECS’ ARGUMENTS THAT STATE COMMISSIONS HAVE AUTHORITY TO REGULATE 271 ELEMENTS UNDER FEDERAL AND STATE LAW ARE WITHOUT MERIT

A. The Commission’s Section 271 Orders Have Never Authorized State Commissions To Regulate 271 Elements

A number of commenters contend that the Commission, in approving applications under section 271, held that state commissions have authority to implement section 271 and to regulate 271 elements. *See, e.g.*, ALTS at 2, 5-7; AT&T at 7-8; Cbeyond at 4-5, 7-8; Covad at 7-10; Z-Tel at 18-20. But the Commission’s decisions have done nothing of the sort.

Indeed, the primary example cited by the commenters — the Commission’s recognition that state commissions may resolve “[c]omplaints involving a BOC’s alleged noncompliance with *specific commitments the BOC may have made to a state commission*”¹¹ — has no bearing

¹¹ *E.g.*, 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, ¶ 452 (1999) (“*New York 271 Order*”) (emphasis added), *aff’d*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

on state commission authority over section 271 elements. *See, e.g.*, ALTS at 2; Cbeyond at 4-5; Z-Tel at 18-19. Voluntary commitments made to secure a state commission’s support for a section 271 application, including Performance Assurance Plans, “are not creatures of the Act” and such extra-statutory obligations cannot be imposed on a BOC without its consent. *See Indiana Bell*, 359 F.3d at 496-97. In contrast, the obligation to provide access to 271 elements derives from section 271, as construed by the Commission, not from any voluntary commitment. Moreover, the Commission has made clear that, in enforcing such commitments, state commissions are not acting under authority conferred by section 271.¹²

Covad also relies on the Commission’s statements that “section 271 does not compel [the Commission] to preempt the orderly disposition of intercarrier disputes by the state commissions.”¹³ But the Commission was not recognizing the authority of state commissions to “resolve intercarrier disputes *over the requirements of section 271.*” Covad at 9 (emphasis added). Instead, the Commission was holding that, in fulfilling its “independent obligation to ensure compliance with the checklist,”¹⁴ it was not required to preempt pending state

¹² *See New York 271 Order* ¶¶ 447, 452 (distinguishing, in the course of describing “[t]he Commission’s Section 271(d)(6)(A) [p]owers,” “complaints concerning failure by a BOC to meet the conditions required for section 271 approval” — which Congress directed the Commission to resolve — from complaints about noncompliance with voluntary commitments, which “should be directed to th[e] state commission” because they do not “alleg[e] violations of section 271”).

¹³ Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, ¶ 118 (2001) (“*Pennsylvania 271 Order*”), *aff’d*, *Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir. July 1, 2003); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, 17 FCC Rcd 18660, ¶ 141 n.495 (2002) (“*New Hampshire/Delaware 271 Order*”); Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, ¶ 203 (2001) (“*Massachusetts 271 Order*”), *aff’d in part, dismissed in part, and remanded in part*, *WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

¹⁴ *E.g.*, *Pennsylvania 271 Order* ¶ 118.

commission proceedings under *section 252* — such as whether a particular interconnection agreement is properly interpreted to require payment of reciprocal compensation for ISP-bound traffic or whether a BOC’s collocation pricing complies with the requirements of sections 251(c)(2) and 252(d)(1).¹⁵ That is, the Commission held only that it would not construe section 271 to require preemption of the authority conferred on state commissions under section 252 “to resolve specific carrier-to-carrier disputes arising under the local competition provisions,” in addition to the preemption required under section 252(e)(5). *E.g., Pennsylvania 271 Order App. C, ¶ 22* (citing 47 U.S.C. § 252(c), (e)(6)). The Commission never suggested, let alone held, that state commissions are enforcing section 271 when they rule on these run-of-the-mine carrier-to-carrier disputes.

AT&T and Z-Tel rely on the manner in which the Commission has reviewed state-established rates for UNEs. *See AT&T at 7-8; Z-Tel at 19-21.*¹⁶ As they note, the Commission has conducted limited review of UNE rates in section 271 proceedings, holding that it “will reject [an] application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.”¹⁷ But AT&T and

¹⁵ *See id.*; *New Hampshire/Delaware 271 Order* ¶ 141 n.495; *Massachusetts 271 Order* ¶ 203.

¹⁶ The Cbeyond CLECs speculate that, if an application for long-distance approval were filed today, the Commission “would expect a state commission to establish just and reasonable rates, terms, and conditions” for “loops, transport, switching, and/or signaling” “under section 271,” even when “the BOC was not compelled by section 251(c)(3) to offer” access to those elements as UNEs. Cbeyond at 9. But when the Commission approved 48 of the 49 applications for long-distance authority, operator services and directory assistance were 271 elements but not UNEs and the Commission never once looked to a state commission to establish the rates, terms, and conditions on which a BOC provided access to those 271 elements. *See also Triennial Review Order* ¶ 661.

¹⁷ *New York 271 Order* ¶ 244.

Z-Tel are wrong in claiming that the Commission must conduct deferential review of state-commission-established rates for network elements that are not “required to be unbundled under § 251.” AT&T at 8; Z-Tel at 20-21. Checklist item 2 requires a BOC to comply with “sections 251(c)(3) and 252(d)(1).” 47 U.S.C. § 271(c)(2)(B)(ii). As part of that checklist item, the Commission reviews the UNE rates that a state commission established under the express delegation of authority from Congress in section 252(d)(1). The Commission’s review of the rates, terms, and conditions on which a BOC provides access to 271 elements, in contrast, is under different checklist items that do not require compliance with sections 251(c)(3) and 252(d)(1), but instead require BOCs to provide access to those elements at market rates consistent with sections 201 and 202. *See Triennial Review Order* ¶ 657; *USTA II*, 359 F.3d at 589.¹⁸ Because the checklist items involve different legal standards, the manner in which the Commission assessed compliance with checklist item 2 has no bearing on the “fact-specific inquiry” that the Commission has stated it “will undertake” in any “enforcement proceeding brought pursuant to section 271(d)(6)” with respect to 271 elements. *Triennial Review Order* ¶ 664.¹⁹

¹⁸ Z-Tel asserts that, in approving BellSouth’s application for long-distance authority in Tennessee, the Commission “defer[red] to state network element rate-setting” “even beyond network elements that are required by section 251.” Z-Tel at 20-21 (citing 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, ¶¶ 45-51 (2002) (“*Florida/Tennessee 271 Order*”). In fact, in the portion of the order Z-Tel cites, the Commission held only that AT&T had presented “a dispute regarding interpretation or implementation of [its] interconnection agreement,” which did “not amount to a violation of checklist item 2.” *Florida/Tennessee 271 Order* ¶ 50.

¹⁹ ALTS claims that “state commissions review, and in many cases issue orders establishing, the rates BOCs charge for section 271 checklist obligations,” but provides no citation to, or other evidence of, any such order. ALTS at 3. In fact, competitors in multiple states have obtained access to directory assistance and operator services as 271 elements from Verizon, without any regulation by state commissions. *See Verizon* at 14. And although the New Jersey Ratepayer Advocate claims that “states continue to regulate intrastate operator and

B. State Commissions' Authority To Set Rates for UNEs Does Not Extend to Regulation of Rates for 271 Elements

Virtually all of the commenters opposing BellSouth's petition argue that, "just as states apply federal pricing standards for network elements unbundled pursuant to sections 251 and 252, they can perform the same role with respect to section 271." AT&T at 9 (citation omitted); *see* Cbeyond at 9-10, 17-18; Covad at 6; NARUC at 3; PACE at 9-12; TRA at 18-19; US LEC at 4; Z-Tel at 15-16. But in claiming, for example, that "the Commission did not — and could not — divest state commissions of the pricing responsibility the Act gives them," Z-Tel at 15, the CLECs ignore the text and structure of the 1996 Act.

As explained above, Congress delegated to state commissions a "quite specific" rate-setting authority. *Triennial Review Order* ¶ 657. In section 252(c)(2) and (d)(1), Congress authorized state commissions to "establish . . . rates" for "network elements for purposes of [section 251](c)(3)" — that is, for "unbundled network elements." 47 U.S.C. §§ 251(c)(3), 252(c)(2), (d)(1). As the Commission held, and the D.C. Circuit affirmed, this rate-setting authority "does not, by its terms, apply to network elements that are required only under section 271." *Triennial Review Order* ¶ 657; *see USTA II*, 359 F.3d at 589-90. Moreover, as the Cbeyond CLECs concede, "unlike section 252," section 271 "does not specify state commission involvement in establishing rates for 271 [elements]." Cbeyond at 18.²⁰ For these reasons, the

directory assistance," RPA at 3, that is the case with respect to *retail* rates only — states have not established rates for competitors to obtain access to directory assistance and operator services as 271 elements from Verizon for intrastate use.

²⁰ The Cbeyond CLECs contend, however, that state commissions can regulate 271 elements because "Congress never explicitly stated in section 271 that states lack the authority to regulate" 271 elements and, therefore, section 271 is "silent regarding a state's authority." Cbeyond at 6. But Congress was not silent. It assigned state commissions a specific, and extremely limited role, under section 271 — consulting on a long-distance application — as compared to the much broader role in implementing sections 251 and 252. Indeed, it would be "surpassing strange" to find that Congress, after expressly delegating authority to state

establishment of rates for 271 elements was *not* one of the “few specified areas” that Congress in the 1996 Act “left . . . to be determined by state commissions,” and the terms on which BOCs provide 271 elements are instead within the Commission’s exclusive jurisdiction. *Iowa Utils. Bd.*, 525 U.S. at 385 n.10.

The Commission, therefore, had no need to “divest” state commissions of authority to regulate 271 elements because state commissions had no such authority in the first place. Indeed, state commissions have *never* had authority over the conditions for BOC entry into the interLATA market. That authority was initially exercised by the federal courts and Congress then transferred that authority to the Commission,²¹ which now has “sole” and “exclusive” authority “to administer . . . section 271.” *InterLATA Boundary Order* ¶¶ 17-18.

Even aside from the fact that Congress granted the Commission exclusive authority to regulate 271 elements, the Commission’s pricing standard for 271 elements precludes state commissions from establishing rates. As explained above, the Commission has held that, under sections 201 and 202, 271 elements must be provided at “market price[s]” and *not* at “regulated rate[s]” — and, in particular, not at “forward-looking prices,” which would be “counterproductive” and are “no[t] necessary to protect the public interest.” *UNE Remand Order* ¶ 473; *Triennial Review Order* ¶ 656.²² Despite all of this, AT&T claims that “there is

commissions to regulate UNEs, delegated the identical authority over 271 elements to those commissions, but did so *sub silentio*. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see also id.* at 385 n.10 (“we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies”).

²¹ *See Order, Petition for Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd 4738, ¶¶ 17-19 (Chief, Comm. Car. Bur. 1997) (citing 1996 Act, § 601(a)(1) and 47 U.S.C. § 251(g)), *aff’d*, *InterLATA Boundary Order* ¶¶ 14-20.

²² Covad asks “how exactly the Commission’s standard for the terms of access to section 271 checklist items would ever come to actually be implemented” if state commissions have no authority to apply that standard. Covad at 6. But there is no great mystery — the rates will be

absolutely no section 271 basis for a federal concern that . . . rates [for 271 elements] are too *low*” and, therefore, that “nothing prevents” a state commission “from adopting forward-looking economic cost approaches, such as the TELRIC methodology,” for “§ 271 checklist elements.” AT&T at 2, 11. AT&T’s claims, however, cannot be squared with the Commission’s clear holdings. Any state commission decision following AT&T’s suggestions would conflict with federal law and, therefore, would be preempted.

C. State Commissions’ Authority To Arbitrate Interconnection Agreements Does Not Authorize State Commissions To Set Rates for 271 Elements

Numerous commenters contend that state commissions’ authority under section 252 to arbitrate interconnection agreements extends to arbitration of the rates, terms, and conditions for 271 elements. *See, e.g.*, AT&T at 12-13, 15-18; Covad at 2-5, 10-12; ITC^DeltaCom at 5-10; Mpower at 4-6, 18; NARUC at 4-5 & n.7; PACE at 5-7; TRA at 10-12, 16-17; US LEC at 3-4; Z-Tel at 6-13. Covad goes so far as to assert that Congress gave the states “exclusive jurisdiction” to establish the “terms of access” to 271 elements in “the first instance,” with the Commission relegated to policing “non-compliance” with state commission decisions. Covad at 3-5 (emphasis omitted). In making these claims, the commenters rely first on the reference in section 271(c)(1)(A) to “agreements that have been approved under section 252” and second on the Fifth Circuit’s decision in *Coserv*. They are wrong on both counts.

1. The commenters claim that section 271(c)(1)(A) “could not be clearer that section 271 network elements must be offered in interconnection agreements *subject to the same review process* as other (*i.e.*, section 251) network elements.” PACE at 6 (emphasis added). But

set in the market. Indeed, where CLECs are not impaired without access to network elements as UNEs, “competitors can acquire [those elements] in the marketplace at a price set by the marketplace.” *UNE Remand Order* ¶ 473.

section 271(c)(1)(A) says nothing of the sort.²³ That section expressly refers only to “approv[al]” of agreements under section 252. Congress made no mention of including 271 elements in negotiations under sections 251(c)(1) and 252(a)(1), arbitration under section 252(b), state commission resolution of open issues under section 252(c), or state commission rate-setting under section 252(d)(1). All of those sections, as Verizon has shown, are explicitly linked — and limited — to implementation of section 251(b) and (c). The bare reference to agreements “approved under section 252” in section 271(c)(1)(A) is insufficient to vitiate the express terms of section 252, particularly given that Congress “carefully delineate[d] [the] particular role for the state commissions” under the 1996 Act. *USTA II*, 359 F.3d at 568; *see Iowa Utils. Bd.*, 525 U.S. at 385 n.10. If Congress had intended for state commissions to arbitrate terms and conditions implementing section 271 as well as section 251(b) and (c) it would have said so. Instead, “Congress[] grant[ed] . . . sole authority to the Commission to administer . . . section 271” and it “would be inconsistent” with that grant “to interpret the 1996 Act as allowing any other entity the authority to” implement section 271. *InterLATA Boundary Order* ¶ 17.

In addition, the Commission has held that an agreement that does not “contain an ongoing obligation relating to section 251(b) or (c)” — such as an agreement limited to 271 elements — is *not* “an interconnection agreement that must be filed pursuant to section 252(a)(1)” and is *not* subject to “state commission . . . approv[al] or reject[ion] [of] the agreement as an interconnection agreement under section 252(e).” *Qwest Declaratory Ruling*

²³ Nor does section 271(c)(2), which merely cross-references section 271(c)(1)(A). *See* 47 U.S.C. § 271(c)(2) (referring to a BOC “providing access . . . pursuant to one or more agreements described in [section 271(c)](1)(A),” where “such access . . . meets the requirements of” the competitive checklist).

¶¶ 8, 12 & n.26.²⁴ The Commission also has not interpreted section 271 to require a BOC to provide checklist items through a state-commission-approved interconnection agreement. Instead, the Commission has found that a BOC satisfies the competitive checklist as long as it has a “concrete and specific legal obligation” to provide a checklist item, such as through a tariff. *Connecticut 271 Order*²⁵ ¶ 39; *see, e.g., Pennsylvania 271 Order* ¶ 96; *Massachusetts 271 Order* ¶ 194; *New York 271 Order* ¶ 73. A commercial agreement with a competitor unquestionably satisfies that standard.²⁶

2. The CLECs also contend that BellSouth did — or that BOCs must — negotiate terms for the provision of 271 elements as part of the section 252 process and, relying on *Coserv*, claim further that state commissions have authority to arbitrate disputes about *any* issues negotiated as part of that process. *See, e.g., AT&T* at 15-18 & n.14; *NARUC* at 4-5 & n.7. As an initial matter, this claim also relies on the erroneous premise that section 271(c)(1)(A) nullifies the express provisions of sections 251(c) and 252 that tie the negotiation and arbitration process to implementation of section 251(b) and (c). Sections 251(c)(1) and 252(a)(1) do not

²⁴ The few commenters that argue that the *Qwest Declaratory Ruling* held that an agreement limited to 271 elements is an interconnection agreement for purposes of section 252 ignore that the Commission specifically referred to “section 251(b) or (c)” but not to section 271 and to “unbundled network elements” — a term that appears only in section 251 and never in section 271. *Qwest Declaratory Ruling* ¶ 8 & n.26; *see also ITC^DeltaCom* at 9; *NARUC* at 5 n.10; *PACE* at 7-8.

²⁵ Memorandum Opinion and Order, *Application of Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 (2001) (“*Connecticut 271 Order*”).

²⁶ Such an agreement, moreover, if filed with the Commission, would be filed pursuant to section 211(a), which provides for “fil[ing] with the Commission copies of all contracts . . . with other carriers” but not for prior Commission approval of such contracts. *See Qwest Attach. A* at 10-12. Because, under the Communications Act, “a carrier may conduct its business either by tariff or by contract,” *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d Cir. 2003), there is no merit to Global Crossing’s claim (at 2-4) that BOCs must file federal tariffs governing their provision of 271 elements. Global Crossing’s support of federal tariffs, however, is consistent with the BOCs’ position that state commissions have no authority to regulate 271 elements.

obligate incumbents to negotiate terms for 271 elements *at all*, let alone as part of the negotiation of terms and conditions to implement the requirements of section 251(b) and (c). BOCs, therefore, are free to insist that any negotiations with respect to 271 elements occur separate from, though perhaps parallel to, negotiations under section 252. Even *Coserv* holds that an “ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252,” which require an ILEC “to negotiate about those duties listed in § 251(b) and (c)” only. 350 F.3d at 487-88.

In any event, to the extent *Coserv* holds that state commissions have authority under federal law to arbitrate any “issues that were the subject of voluntary negotiations,” *id.* at 487 — and BellSouth did not voluntarily negotiate a rate for a 271 element, *see* BellSouth Petition at 3-4 — that decision is wrong and in conflict with an Eleventh Circuit decision. *Coserv* is based entirely on the phrase “any open issues” in section 252(b)(1), *see* 350 F.3d at 487, without consideration of the context in which it appears.²⁷ Because every step of the section 252 process is directly linked to the requirements of section 251 — from the request to negotiate to the state commission’s resolution of disputes — the Fifth Circuit erred in holding that private parties can render irrelevant Congress’s express limitations on state commission authority under section 252. Indeed, the Fifth Circuit’s conclusion that “Congress contemplated” that any “non-§ 251 issues might be subject to compulsory arbitration if negotiations fail,” *Coserv*, 350 F.3d at 487, cannot be squared with the standard Congress directed state commissions to apply in resolving open issues in arbitrations: “the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251,” 47 U.S.C. § 252(c)(1); *accord id.* § 252(e)(2)(B). In

²⁷ *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 “any” must be interpreted in light of “statutory context” and can be “construed in a non-expansive fashion” when doing so is necessary not to “vitiate” related provisions).

other words, the Fifth Circuit presumed that Congress delegated federal authority to state agencies to decide a potentially unlimited number of issues — including issues Congress did not deem sufficiently important to address in the 1996 Act — without providing any guidance as to the standard state commissions should apply in resolving those non-section 251 issues.

The text and structure of the 1996 Act, however, make clear that Congress did not grant state commissions such unfettered discretion, unencumbered by binding federal standards. Instead, as the Eleventh Circuit held, “§ 252(b)(1)’s language ‘any open issues’ can only be read to include those issues which an incumbent is mandated to negotiate.” *MCI Telecomms.*, 298 F.3d at 1274. The Fifth Circuit’s view that a state commission may “arbitrate *any* issue raised by a moving party” is therefore “too broad” and is “contrary to the scheme and the text of th[e] [1996 Act], which lists only a limited number of issues on which incumbents are mandated to negotiate.” *Id.*

The Eleventh Circuit’s holding is correct not only as a matter of statutory interpretation but also as a matter of sound policy. “[V]oluntary negotiations,” the Commission has explained, are “the very essence” of interconnection agreements. *Triennial Review Order* ¶ 701. But *Coserv* will make incumbents unwilling to address issues as part of section 252 negotiations that sections 251 and 252 do not require them to negotiate. That is because the price for attempting to reach a mutually beneficial result on such optional subjects of negotiations, under the Fifth Circuit’s view, is to empower the state commission to mandate a result to which the incumbent (and, potentially, the competitor) never would have agreed.

D. The Commission’s Rules Implementing Section 271 Preempt Conflicting State Commission Action

The Supreme Court has clearly established that the Commission “has rulemaking authority to carry out the ‘provisions of this Act,’ which include [provisions] added by the

Telecommunications Act of 1996.” *Iowa Utils. Bd.*, 525 U.S. at 378. This is true even when those regulations apply to intrastate telecommunications, because Congress, in the 1996 Act, “unquestionably” took “regulation of local telecommunications competition away from the States” on all “matters addressed by the 1996 Act.” *Id.* at 378 n.6. The Commission, therefore, is permitted to “draw the lines to which [state commissions] must hew.” *Id.* There can be no serious dispute that the Supreme Court’s conclusions apply equally to section 271 — particularly given that states never had any jurisdiction over the conditions for BOC entry into the long-distance market, even for purely intrastate, interLATA calls. *See InterLATA Boundary Order* ¶ 15 (Congress “vested exclusive jurisdiction” over whether to permit BOCs to carry calls across “LATA boundaries, whether interstate or intrastate”).

Despite all of this, a handful of commenters claim that the 1996 Act is insufficiently clear for the Commission’s regulations implementing section 271 to preempt state regulation of 271 elements. *See* AT&T at 10; Cbeyond at 14-18; NARUC at 4 n.8; PACE at 8-9.²⁸ But their claim cannot be squared with *Iowa Utilities Board*, which, as the Commission has recognized, held that “the 1996 Act’s silence regarding state jurisdiction, rather than implicitly allocating jurisdiction to the states, assures that Commission jurisdiction is not superseded.” *InterLATA Boundary Order* ¶ 18. Moreover, the cases on which they rely provide no support for their claims. For example, in determining whether section 276 grants the Commission the authority to regulate the

²⁸ Mpower, relying on Justice Breyer’s separate opinion in *Iowa Utilities Board*, contends that the Commission’s authority to preempt state regulations is limited to the process set forth in section 253. *See* Mpower at 9-15; *see also* NARUC at 6 n.12; PACE at 13-14. But the Supreme Court unambiguously held that the Commission, in promulgating regulations under section 201 to implement the provisions in the 1996 Act, “draw[s] the lines to which [state commissions] must hew.” *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The Court, therefore, did not accept Justice Breyer’s contention that section 253 is the exclusive means by which the Commission can “prevent[] States from adopting [rules] that would interfere with the Act’s basic objectives.” *Id.* at 418 (Breyer, J., concurring in part and dissenting in part).

BOCs' intrastate payphones lines, the D.C. Circuit recognized that *Iowa Utilities Board* conclusively answered the question whether the Commission has authority to issue rules implementing the 1996 Act that preempt contrary state commission actions, even as to "purely local, intrastate facilities and services." *New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69, 77 (D.C. Cir. 2003).²⁹ The only question before that court was whether the express reference in some provisions of section 276 to intrastate service compelled the conclusion that "Congress deliberately omitted the word 'intrastate' from" the other provisions of section 276, such that the Commission's regulations with respect to those few provisions would be limited to regulating interstate services. *New England Pub. Communications Council*, 334 F.3d at 76-77. The D.C. Circuit concluded that Congress had not limited the Commission's authority in this manner. *See id.* at 77.

There similarly is no merit to the claims of some CLECs that 271 elements are "predominantly used to provide intrastate services that are traditionally within the states' exclusive jurisdiction," AT&T at 10, and, therefore, that regulation of such elements "are not within the Commission's exclusive control pursuant to section 201," Cbeyond at 18-19; *see* PACE at 10-11. Indeed, the Commission has already rejected this argument, explaining to the Supreme Court that "access to an incumbent's local facilities to provide a range of competitive services" — including such elements as loops, transport, switching, and databases and associated

²⁹ The Second Circuit similarly recognized that the express reference to the Commission's "exclusive jurisdiction" over numbering in section 251(e) was not necessary to grant the Commission "authority to act with respect to those areas of intrastate service" covered by that section; instead, it was sufficient that "[s]ection 251(e) falls within th[e] expansion of the FCC's jurisdiction" recognized in *Iowa Utilities Board. People of the State of New York v. FCC*, 267 F.3d 91, 102 (2d Cir. 2001).

signaling — “are inextricably *both* interstate *and* intrastate in character.”³⁰ The Commission also argued and “the Supreme Court concluded [that] it would be impossible to implement the local competition provisions while limiting the Commission’s authority to interstate services.”³¹ Of particular relevance here, the Commission contended further that this result was necessary to preserve “the Commission’s jurisdiction over an additional subject that has always been a matter of uniquely federal concern: Bell Company entry into the interstate long-distance market, now governed by Section 271.”³² And despite their position here, CLECs such as AT&T made the same arguments to the Supreme Court, explaining that the “network elements” that CLECs can obtain under the Act — such as “local loop[s] and associated transport and switching facilities” — “inherently encompass[] both interstate and intrastate uses” and “are not severable.”³³ Whether provided as UNEs, as a result of a lawful finding of impairment, or as 271 elements, the network elements at issue here are inextricably interstate and intrastate and, therefore, within the Commission’s exclusive jurisdiction.

E. State Commission Regulation of 271 Elements Is in Any Event Unwarranted and Unnecessary

A few commenters claim that “state jurisdiction over 271-specific elements will serve two important public policy objectives: Efficient dispute resolution and encouraging commercial agreements.” Covad at 13; *see* AT&T at 19-20; PACE at 14. As shown below, there is no merit to either of these claims. State regulation would impede commercial negotiations, and the

³⁰ Opening Brief for the Federal Petitioners, *FCC v. Iowa Utils. Bd.*, No. 97-831, at 35 (U.S. filed Apr. 3, 1998) (“Commission Opening Brief”).

³¹ *New England Pub. Communications Council*, 334 F.3d at 77; *see* Commission Opening Brief at 37.

³² Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents, *FCC v. Iowa Utils. Bd.*, Nos. 97-826 *et al.*, at 14 (U.S. filed June 17, 1998).

³³ Brief of Petitioners in No. 97-826, *AT&T Corp. v. Iowa Utils. Bd.*, Nos. 97-826 *et al.*, at 5-6, 27-28 (U.S. filed Apr. 3, 1998).

Commission can address any complaints that might arise where those negotiations are unsuccessful. But in any event, Congress reached the contrary determination by granting the Commission exclusive jurisdiction over 271 elements. This determination is dispositive of the public policy debate, and the Commission is prohibited from delegating its authority to the state commissions. *See Verizon* at 8-9. Moreover, state regulation of 271 elements would conflict with the Commission’s determination that 271 elements must be provided at market rates, consistent with the standards in sections 201 and 202. *See id.* at 12-14.

First, following the *Triennial Review Order* and *USTA II*, each of the BOCs has reached commercial agreements with competitors to provide 271 elements without the intervention of state commissions.³⁴ These actual agreements belie the assertions that “BOCs have no interest in engaging in the give-and-take characteristic of true commercial negotiations.” *PACE* at 14; *see AT&T* at 19; *Covad* at 13. The BOCs have every incentive to negotiate reasonable commercial terms, to avoid losing wholesale customers to other alternative sources of supply. In addition, where CLECs are not impaired without access to an element as a UNE, they do not need to rely on that portion of the BOCs’ network to provide service, but instead “can acquire [that element] *in the marketplace* at a price set by the marketplace.” *UNE Remand Order* ¶ 473 (emphasis added).

³⁴ *See* Opposition of BellSouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order, CC Docket Nos. 01-338 *et al.*, at 9 & n.23 (FCC filed July 6, 2004); *see also* *See also* Verizon News Release, *DSCI and Verizon Sign Letter of Intent for Wholesale Enterprise Services* (Apr. 23, 2004), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=84754>; Verizon News Release, *InfoHighway and Verizon Sign Letter of Intent for Wholesale Enterprise (DSI) Services* (May 18, 2004), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85135>; Verizon News Release, *Verizon and Granite Telecommunications Sign Binding Letter of Intent for Commercial Agreement on Wholesale Services* (June 15, 2004), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85517>; Verizon News Release, *Verizon Entering Into Commercial Agreement with a Wholesale Customer* (June 18, 2004), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85593>.

Thus, it is the CLECs' hopes for state commission regulation — not the absence of such regulation — that is a significant impediment to such negotiations. With the CLECs arguing that state commissions should use section 271 to require BOCs to provide access to narrowband and broadband facilities at TELRIC rates, even where there is no impairment, they have little incentive to negotiate commercial terms and conditions for access to those facilities. And the Commission has recognized that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing section 251(b) and (c) would raise “unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.” *Qwest Declaratory Ruling* ¶ 8.

Second, contrary to the claims of Covad and AT&T, confirming that state commissions have no authority to regulate 271 elements would not require the Commission to arbitrate “literally thousands” of “interconnection agreements,” Covad at 12, or “to set rates, on an expedited basis, in each of the states and for each of the items that Bells must provide under the competitive checklist,” AT&T at 20. Instead, BOCs would continue to offer access to 271 elements at market rates, such as through negotiation of “arms-length agreements” that the Commission has recognized are one method of establishing rates, terms, and conditions for 271 elements. *Triennial Review Order* ¶ 664. This is precisely what Verizon has done, with “no adverse effect” on competition, with respect to directory assistance and operator services. *Id.* ¶ 661; *see* Verizon at 14. AT&T’s and Covad’s focus on rate-setting also ignores the Commission’s determination that, for 271 elements, “*the market price should prevail*, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.” *UNE Remand Order* ¶ 473 (emphasis added). Although some CLECs might be dissatisfied with the market rates available from BOCs, the absence of impairment means that they always have

the option of self-provisioning or procuring facilities from other wholesale sources. And in the event a CLEC challenges a BOC's practices under section 271(d)(6)(B), the Commission has established procedures to address such complaints. *See Report and Order, Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497 (1997).

CONCLUSION

The Commission should grant BellSouth's petition, issue a declaratory ruling confirming that state commissions have no authority to regulate network elements that BOCs must make available pursuant to 47 U.S.C. § 271, and preempt any contrary state laws.

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