

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Georgia Public Service Commission
Petition for Declaratory Ruling and
Confirmation of the Justness and
Reasonableness of Established Rates**

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WC Docket No. 06-90

COMMENTS OF COMPTTEL

May 19, 2006

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Introduction And Summary

COMPTTEL¹ hereby respectfully submits its Comments in support of the above-referenced Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates (“Petition”) filed by the Georgia Public Service Commission (“GPSC”) on April 18, 2006. In its Petition, the GPSC asks the Commission to clarify that state commissions are not preempted by any federal statute or regulation from setting just and reasonable rates for the network elements that BellSouth is required to offer requesting carriers pursuant to its obligations under Section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271.² In the alternative, the GPSC asks

¹ COMPTTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTTEL advances its member’s business through policy advocacy and through education, networking and trade shows. COMPTTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTTEL members share a common objective: advancing communications through innovation and open networks.

² Petition at 1.

the Commission to confirm that the rates the GPSC has set for “high capacity loops and transport and line sharing are just and reasonable.” *Id.* Finally, the GPSC asks that, if the Commission finds that the GPSC lacks the authority to set rates under Section 271 *and* that the rates the GPSC set are *not* just and reasonable, the FCC set just and reasonable rates for the relevant network elements based on the factual record assembled by the GPSC. *Id.*

For the reasons explained below, COMPTTEL believes it is neither necessary, nor appropriate, for the Commission to actually set rates in conjunction with the present Petition. To the contrary, the GPSC has clearly, and convincingly, demonstrated that it was correct in its original determination that it has the authority to set just and reasonable rates as part of its overall ability to set the rates for network elements in interconnection agreements, and that the rates that it has set are just and reasonable. Furthermore, there is clearly a need for state oversight of rates, terms, and conditions of BOC Section 271 checklist items. The BOCs remain dominant in the local, local exchange, and exchange access markets. Because of the lack of competitive alternatives, BOC special access rates are not just and reasonable under Section 271 and other BOC terms and conditions for access to checklist items are unreasonably discriminatory against competitors.

Therefore, COMPTTEL urges the Commission to promptly grant the Petition of the GPSC, and to acknowledge that the GPSC and other state commissions have the authority to establish rates for network elements that the Commission has determined are no longer required to be made available by incumbent local exchange carriers (“ILECs”)

under Section 251(c),³ but that are still required to be provided by Bell Operating Companies (“BOCs”) under Section 271 of the Act.

I. Federal Law Does Not Preempt State Rate-Making Under Section 271.

A federal court has already addressed the question presented by the GPSC, as to whether a state commission is preempted by the federal law from setting rates for network elements required under Section 271, but not Section 251. *Verizon New England, Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F.Supp. 2d 96 (D. Me. 2005) (“*Verizon Maine*”). In *Verizon Maine*, the Maine Public Utilities Commission used the existing TELRIC rates as interim rates for elements no longer required to be provided as unbundled network elements (“UNEs”) pursuant to Section 251, but still required under Section 271. Verizon had argued that “Congress gave the [FCC] . . . exclusive jurisdiction to establish, interpret, price, and enforce these network access obligations under Section 271.” *Id.* at 102 (internal citations omitted). After considering Verizon’s argument, the court held the opposite, concluding “[i]t is clear that the statute is not intended to have any such effect.” *Id.* In reaching its finding, the court analyzed all of Verizon’s contentions of express, implied, and conflict preemption and concluded that, under the 1996 Act, a state commission is not preempted from setting just and reasonable rates under Section 271.

Just as it is clear that the Act did not grant the FCC exclusive jurisdiction over any pricing of local network elements, it is equally clear that the Act preserved the traditional jurisdictional separation between interstate and intrastate facilities. In fact, in adopting the 1996 Act, Congress kept in place the provision denying the Commission jurisdiction

³ 47 U.S.C. § 251(c).

over pricing for strictly local facilities.⁴ Moreover, the Supreme Court had, prior to the 1996 Act, held that Section 152(b) prevented the FCC from preempting state depreciation practices with respect to local plant, regardless of the fact that the local plant could be used to provide both interstate and intrastate services. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 373 (1986). In the 1996 Act, Congress also left to the states the responsibility to actually establish the rates, using guidance by the FCC, for local network elements. 47 U.S.C. § 252(c)(2). The Supreme Court, in *Iowa Utilities Board v. AT&T*, 525 U.S. 366 (1999), expressly affirmed that Congress intended to continue this historical division of responsibility:

The FCC’s prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory ‘Pricing standards’ set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

Id. at 384. Thus, the court’s analysis in *Verizon Maine* is completely consistent with the Supreme Court’s construction of the Act.

The fact that Congress has consistently maintained the states’ historical role in setting rates for local facilities and services, and continued to do so within the context of the Act, is significant, precisely *because* the Act is silent on the issue of rate-making authority under Section 271. This fact sets the bar higher for those seeking to argue that the Act could be construed to require preemption of the GPSC’s authority to set rates for network elements under Section 271. The Supreme Court has held that, “[i]f Congress

⁴ “[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) *charges*, classifications, practices, services, *facilities*, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .” 47 U.S.C. § 152(b) (emphasis added)s.

intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added, internal quotations and citations omitted). The Commission, therefore, in conducting its own analysis of the statute, can conclude only as the court in *Verizon Maine* found. What is “clear” is that, if Congress did not intend to vest the Commission with exclusive, preemptive rate-making authority under Section 271, then Congress certainly did not make this transfer of traditional state authority to the Commission “unmistakably clear” so as to justify preemption of the GPSC in the present case.

II. The FCC Cannot Practicably Set Rates Under Section 271.

Entirely aside from the fact that there is no *legal* basis for the Commission to find that it has the authority to preempt the GPSC’s decision to set rates under Section 271, COMPTEL can see no compelling, pragmatic basis under which the Commission should *want* to usurp the role of the state commissions in setting just and reasonable rates for network elements under Section 271. The fundamental reason why COMPTEL can see no advantage to the Commission in attempting to assert exclusive authority to set just and reasonable rates under Section 271 is this: The statutory time frame under which the Commission must resolve complaints about BOC compliance with Section 271 is the same 90-day period that the Commission had to review the Section 271 application initially. 47 U.S.C. § 271(d)(6)(B). This time period is so short that, as the D.C. Circuit noted, “[w]hen the Commission adjudicates § 271 applications, it does not — and cannot — conduct *de novo* review of state rate-setting determinations.” *Sprint Communications Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001).

Rather, as the court explained, the Commission simply reviews for general compliance with its just and reasonable standard, or clear errors in applying that standard. *Id.* The statutory time constraints of Section 271, whether for reviewing an initial application or for determining existing compliance with the requirements of the statute, realistically do not permit the Commission to conduct a thorough *de novo* review, much less an exercise in rate making.

Commission experience supports this observation. The Commission has historically not been quick to complete interpretations under Section 271. BellSouth filed what it styled an *Emergency Petition For Declaratory Ruling and Preemption of State Action* on July 1, 2004 (WC Docket No. 04-245), requesting that the Commission declare that it has sole authority to set rates under Section 271, and asking it to preempt an order of the Tennessee Regulatory Authority.⁵ The Commission has taken no action on the Petition in the ensuing two years. Similarly, after the Virginia State Corporation Commission declined to act on a Section 252 arbitration and referred the matter to the Commission, the Commission found the task of setting rates to be enormously difficult and time-consuming. The entire proceeding required almost *five years* from the filing of a petition for arbitration to final resolution of pricing issues.⁶ So, while it is very clear

⁵ The state ordered adjustments to rates under Section 271 for switching for customers with 4 or more lines in the context of a Section 252 arbitration.

⁶ *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, DA 05-658. The petition for arbitration was filed October 26, 2000. Almost 3 years passed before the Wireline Competition Bureau issued a decision on the cost models to be used in setting rates in the arbitration. Memorandum Opinion and Order, DA 03-2738 (rel. Aug. 28, 2003). It was over three years before the Bureau set the interconnection and UNE rates and the resale discount. Memorandum Opinion and Order, DA 04-181 (rel. Jan. 29,

that the 1996 Act has not limited state authority to set rates under Section 271, it should be equally clear — even if the Act would allow such a construction — that the Commission should not want to wrest rate setting authority from the states.

III. The Commission Has Recognized The Importance Of Cooperative State-Federal Enforcement Of Section 271.

While the Commission does have clear jurisdiction to enforce the Section 271 obligations under section 271(d)(6), its jurisdiction to implement Section 271, generally, is not exclusive. The states continue to retain authority to consult with the Commission under Section 271(d)(2) as to the BOCs' ongoing compliance with Section 271(c). The BOC's cannot credibly claim that the Commission, in the *Triennial Review Order*, reserved exclusive authority over all rates, terms, and conditions of 271 elements. The Commission simply stated:

[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 or in an enforcement proceeding brought pursuant to section 271(d)(6).⁷

The Commission was discussing only its review of BOC applications filed under section 271 and carrier complaints brought pursuant to section 271(d)(6). It was not referring to the initial review of the rates, terms, and conditions that *the states* must conduct under section 252. Given the clear, *dual* role that the statute envisions under Section 271, it is utterly unreasonable to suggest that, by referring only to itself in the

2004). And over 1 year after the rates were initially set, the FCC was still resolving pricing issues. Memorandum Opinion and Order, DA 05-658 (rel. Mar. 11, 2005).

⁷ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) (“Triennial Review Order”) at ¶ 664.

context of reviewing 271 applications and enforcement proceedings brought pursuant to Section 271(d)(6), the Commission's impliedly preempted the state commissions.

Under Section 251, the states apply the federal pricing standard as they review interconnection agreements. States continue to have authority to set prices for network elements in interconnection agreements, whether those network elements are required to be made available by all ILECs under Section 251(c)(3), or just by the BOCs, under the Section 271 checklist. By applying the Section 252 approval process to Section 271 elements, Congress clearly intended for state commissions to continue to exercise their considerable expertise in the area of rate-setting in their individual markets. Similarly, the BOCs must continue to comply with Section 271 requirements even after they have received Section 271 approvals.

Because Section 271 requires that the BOCs provide the checklist elements pursuant to agreements that the state commissions review under Section 252, it follows that the state commissions continue to play a significant role in ensuring BOC Section 271 compliance. It makes no sense to argue that the state commission's role is somehow extinguished upon Section 271 approval. In fact, the Commission has acknowledged and supported the continued state commission role in ensuring ongoing compliance with Section 271 requirements.⁸

⁸ See, e.g., *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307 (rel. Dec. 19, 2002) at ¶ 182; *Verizon Maine* at 102 (“[N]o . . . provision in the Act confers exclusive jurisdiction on the FCC with respect to rate-making for §271 UNEs.”).

IV. There Is Plainly A Need For State Oversight Of Rates, Terms, And Conditions Of BOC Section 271 Checklist Items.

A. The BOCs remain dominant in the local, local exchange, and exchange access markets.

The BOCs remain dominant in the local, local exchange, and exchange access markets. CLECs hold only a small share of local access lines, and total BOC loop plant dwarfs that of the rest of the industry combined. The BOCs have exploited this dominance to establish themselves, virtually overnight, as the dominant long distance carriers in their regions -- and without any meaningful investment in their own facilities. They also have a long record of discrimination, violation of Section 271 requirements and merger conditions, and failure to meet performance standards. Together, the BOCs have been obliged to pay penalties, issue refunds, or make consent decree payments in excess of \$2 billion.

The Commission should be concerned about the BOCs' handling of Section 271 unbundling obligations. They have the ability and the incentive to discriminate, to misallocate costs, and to cross-subsidize to disadvantage competitors and consumers. Not only do the BOCs now dominate the long distance business, but the two largest BOCs now account for the majority of the enterprise market, following the mergers of AT&T and MCI with the former SBC and Verizon with only minimal regulatory conditions. The three largest BOCs also have wireless affiliates accounting for fully half of the entire country's wireless customer base. Granting the Petition will confirm that state commissions have authority to help police the BOCs' provision of Section 271 network elements, including ensuring that rates, terms, and conditions are just and reasonable and not unreasonably discriminatory.

B. There are insufficient competitive alternatives to BOC special access.

By any measure, the BOCs remain unquestionably dominant in special access. CLECs, or alternative providers of facilities, remain a small presence in all but the most major urban markets. Following the Commission's implementation of the Triennial Review Remand Order, applying the nonimpairment tests for high-capacity loops and transport showed that competitive carriers remain impaired in the great majority of BOC wire centers and transport routes.⁹ Competitors lack alternative suppliers to BOC facilities, and economic realities have limited the ability of competitors to deploy their own.

Moreover, only BOCs can provide ubiquitous coverage. Their facilities extend throughout vast, multistate territories. They reach virtually every building, customer and cell site within their regions. In contrast, CLECs reach only a small percentage of buildings -- and often only particular floors or suites within those buildings -- and must rely on BOC facilities to reach their customers. The BOCs' wireless competitors must rely on BOC special access for transport between their cell sites and mobile switching centers. Even cable competitors must rely on BOC special access to complete calls, often even between their own subscribers. And the BOCs solidify their in-region dominance by charging higher prices to retail market competitors if they will not agree to purchase virtually all of their special access from the BOC, through stringent volume and term commitments, which limit opportunities for prospective wholesale market competitors.

⁹ *Unbundled Access to Network Elements*, Order on Remand, WC Docket No. 04-313 (rel. Feb. 4, 2005) ("Triennial Review Remand Order") at ¶¶ 167, *et seq.*

It does not help that the two largest BOCs recently acquired the two largest competitive suppliers of non-BOC special access-type services. As a consequence of the SBC/AT&T and Verizon/MCI mergers, true non-BOC special access is now even more limited. The former AT&T and MCI -- both of which had been COMPTEL members -- cannot realistically be expected to provide the same price and service pressure on the BOCs now that they are BOC affiliates. Nor does it help that the Commission has yet to complete its rulemaking on special access price regulation and performance measures.¹⁰

Given this environment, the provision of Section 271 network elements is all the more critical to competition. The GPSC is right to recognize the important statutory role meant for states in overseeing rates, terms, and conditions of Section 271 network elements.

C. BellSouth and other BOC special access rates are not just and reasonable under Section 271.

COMPTEL's members can attest that BellSouth's and other BOC's rates for Section 271 items generally fail to be just and reasonable and not unreasonably discriminatory.¹¹ It should not be surprising that BOCs would price Section 271 network

¹⁰ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, *et al.*, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001); *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, 16 FCC Rcd 20641 (2001).

¹¹ 47 U.S.C. §§ 201(a), 202(b).

elements at excessive rates to disadvantage competitors. And Georgia's is not the only state commission that has found BOC tariffed rates excessive.¹²

The mere fact that a BOC may have an interstate access tariff on file does not automatically render those rates compliant with Section 271 standards. After all, as the GPSC correctly explained, if the mere existence of access tariffs were sufficient to satisfy the standard, Congress would not have required Section 271 unbundling in addition to that under Section 251. Section 251(g), in fact, expressly preserves ILECs' obligations to provide access "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier" prior to enactment of the 1996 Act. If all Congress intended was to preserve the *status quo*, it would not have established a separate provision in Section 271. As the Commission explained in the *Triennial Review Remand Order*, "[i]t would be a hideous irony if the incumbent LECs, simply by offering a service [interstate special access], the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, 'give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.'"¹³ Indeed, the Commission specifically recognized that special access rates may not be priced in such a way as to permit local entry.¹⁴

¹² Today's *TR State Newswire*, for example, reports that commissions in Arizona, Colorado, Maine, Minnesota, and Tennessee have, like the GPSC, asserted jurisdiction over rates for Section 271 UNEs.

¹³ *Triennial Review Remand Order* at ¶ 663.

¹⁴ *Id.* at ¶ 664 ("[T]here is insufficient record evidence to conclude that special access-based competition, to the extent it exists, is sustainable, enduring competition.").

The Commission also found that “[w]hether a particular checklist element’s rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry....”¹⁵ A BOC “*might* meet this standard by showing that a rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff,” if in fact there are any suitable comparisons.¹⁶ Or a BOC *might* try to demonstrate that its Section 271 network element rate is reasonable by showing it has entered into arms-length agreements with other, similarly situated requesting carriers, to provide the element at that rate. But the mere existence of a tariff, by itself, can prove nothing.

The Commission has already taken actions that cut back on many marketplace protections in recent years. These include, among others, allowing the BOCs’ section 272 requirements to sunset, forbearing from enforcing the statutory requirement for separate operations, installation, and maintenance by BOC long distance affiliates, approving the Verizon/MCI and SBC/AT&T mergers with minimal, time-limited conditions, and granting Verizon forbearance from the application of Title II to broadband services by default. This makes it all the more critical that the Commission grant the GPSC Petition and confirm that the states’ have the statutory authority to ensure rates, terms, and conditions for Section 271 items are just and reasonable and not unreasonably discriminatory against competitors.

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

D. Other BOC terms and conditions for access provided pursuant to Section 271 are also unreasonably discriminatory, particularly use restrictions.

Of course, excessive rates are not the only way BOCs act anticompetitively in the provision of Section 271 network elements. They also can impose a variety of terms and conditions that are unreasonably discriminatory. BOC-imposed use restrictions are perhaps the most egregious example.

The BOCs refuse to allow Section 271 unbundled loops to be used to provide mobile wireless or long distance services. Yet nothing in Section 271 restricts how unbundled loops, required under section 271(c), can be used. There is certainly no basis in that section that justifies refusing them to mobile wireless and long distance carriers. The BOCs' mobile wireless and long distance affiliates do not face the restriction; why should their competitors?

The Commission based use restrictions for Section 251 UNEs on the statutory impairment standard. In applying Section 251 to ILEC network elements, wherever the Commission found competitors would be impaired without access to the UNE, the Commission necessarily required it to be made available as a Section 251 UNE and priced at the Section 251 (TELRIC) rate. In the *Triennial Review Order*, the Commission concluded that mobile wireless and long distance competitors did not need access to unbundled loops in order to compete effectively against BOCs, and so it prohibited access to section 251 unbundled network elements for the exclusive use of mobile wireless and long distance services.¹⁷ The Commission's rationales for applying use restrictions to UNEs under Section 251, if they ever made sense, are clearly irrelevant to Section 271 checklist items.

¹⁷ *Triennial Review Remand Order* at ¶ 64.

The Section 251 impairment analysis is applicable only to “what network elements should be made available for *purposes of subsection (c)(3)*.” 47 U.S.C. § 251(d)(2) (emphasis added). It is inapplicable to Section 271 unbundled network elements. The Commission also has concluded that Section 251 pricing does not apply to network elements unbundled pursuant to Section 271. The *USTA II* panel, in remarking on the dramatic growth of wireless carriers, never suggested that any impairment review would apply to mobile wireless or long distance carriers -- or any other requesting carrier -- for Section 271 network elements.¹⁸ That makes sense. The statute compels BOCs to provide Section 271 elements if they want to enter the in-region long distance market, as all have done. The statute does not restrict how these elements can be used. And the Commission itself has never suggested that use restrictions should apply to Section 271 network elements.

Use restrictions on Section 271 elements are clearly anticompetitive. The BOCs mobile wireless and long distance affiliates are not subject to these restrictions, and they thus force the BOCs’ competitors to operate less efficiently than the BOCs themselves. In imposing such use restrictions for network elements requested under Section 271, the BOCs thus unreasonably and unlawfully discriminate against other carriers. At the very least, the GPSC and other state commissions should be able to assess the reasonableness, under Sections 201 and 202, of a BOC’s imposition of use restrictions on Section 271 network elements. The continued imposition of such practices by BOCs underscores the importance of granting the GPSC’s Petition and confirming state authority to help police

¹⁸ *USTA v. FCC*, 369 F.3d 554, 575-76 (D.C. Cir. 2004) (“*USTA II*”).

BOC compliance with their obligations to provide access to Section 271 network elements.

Conclusion

For the reasons outlined above, COMPTTEL respectfully requests that the GPSC's Petition be granted without delay.

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