

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Georgia Public Service Commission Petition) WC Docket No. 06-90
for Declaratory Ruling and Confirmation of)
Just and Reasonableness of Established Rates)

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (“Qwest”) hereby submits these reply comments in the above-captioned docket.¹ In its Petition, the Georgia Public Service Commission requests a declaratory ruling that it has the authority to regulate the rates charged by BellSouth for network elements that do not meet the statutory impairment test for unbundled network elements (or “UNEs”) under Section 251(d)(2) of the Act, but nevertheless must be unbundled pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act.

I. INTRODUCTION AND SUMMARY

Qwest agrees with the analyses submitted by AT&T Inc. (“AT&T”), Verizon and BellSouth Corporation (“BellSouth”) in their opening comments, in which they demonstrated that state regulators have no authority to enforce any part of Section 271 of the Act beyond the limited authority given to them under the Act itself.² As to pricing of those network elements that do not meet the “impairment test” (that is, carriers are not “impaired” by their inability to purchase them as UNEs pursuant to the UNE regulations) but nevertheless made available on an unbundled basis by Regional Bell Operating Companies (“RBOCs”) under Section 271(b)),

¹ See Public Notice, DA 06-903, rel. Apr. 19, 2006. Georgia Public Service Commission Petition for Declaratory Ruling filed Apr. 18, 2006 (“Petition”).

² Opening comments were filed May 19, 2006.

pricing is subject to the exclusive jurisdiction of the Federal Communications Commission (“Commission”) under Section 201(a) of the Act.³ Fundamentally, “these delisted UNEs”⁴ are subject to federal jurisdiction. States are prohibited from requiring that they be offered on an unbundled basis, as the sole authority for such unbundling is federal (*i.e.*, 47 U.S.C. § 271(c)(2)(B)). As they were created in the 1996 Act, they are not subject to the traditional division of interstate and intrastate jurisdiction promulgated in the 1934 Act as they are used to provide interstate and intrastate services without any separation or division. Indeed, the Act contemplates clearly that separation of these elements into jurisdictionalized components would be inconsistent with the Act. There are no “intrastate” components of Section 271 elements. The notion that these elements, which are offered on an unbundled basis pursuant to a federal statute that prohibits state regulators from requiring unbundling (on account of the fact that they do not meet the statutory “impairment” test that is a statutory prerequisite to unbundling) are intrastate in nature⁵ or have any relationship to a state regulator’s inherent authority to set the price for intrastate services, is simply not accurate. These “delisted UNEs” are not intrastate in nature, either in whole or in part.

This foundational point has been well made by AT&T, *et al.*, in their initial comments.⁶ These reply comments address several errors presented by parties supporting state jurisdiction. Specifically, we respond to erroneous notions that appear in several of the comments filed in response to the Petition.

³ This is also true of UNEs that are offered under Section 251(c)(3) of the Act.

⁴ This nomenclature is taken from TEXALTEL. *See* TEXALTEL at 1-2.

⁵ *See* New Jersey Division of Ratepayer Advocate (“New Jersey”) at 2-4; Eschelon Telecom, Inc. (“Eschelon”) at 5-9.

⁶ *See generally* AT&T; Verizon at Section I; BellSouth at 10-15.

- Some commentators claim that state jurisdiction can be predicated on the notion that agreements between carriers for the provision of delisted UNEs that do not meet the impairment test are “interconnection agreements” as that term is understood in Section 252 of the Act, and that state authority over such agreements is coterminous with state authority over unbundled network elements. This assumption is incorrect. State jurisdiction over “interconnection agreements” under the Act is limited to agreements for those functions and services covered in Sections 251(b) and (c) of the Act. Agreements (or tariffs) for elements that do not pass the impairment test are not subject to the limited jurisdiction that states have been delegated concerning Section 252 “interconnection agreements.”
- Contrary to the claims of some commentators, the Commission does not need to conduct a preemption analysis to determine whether it *should* preempt state regulation of the pricing of delisted elements. The Act is clear that statutory preemption over regulation of network elements that do not meet the impairment test has already occurred by operation of law. Unlike the 1934 Act, there is no presumption of state authority over services and obligations imposed by the 1996 Act. Instead, state regulatory authority to enforce the Act is delegated in the Act itself, and that authority is limited to the extent of that delegation. As no authority has been delegated to the states to regulate any aspect of network elements that do not pass the impairment test, state authority over such elements does not exist.

II. STATE AUTHORITY OVER “INTERCONNECTION AGREEMENTS” EXTENDS ONLY TO AGREEMENTS THAT ARE SUBJECT TO STATE APPROVAL AUTHORITY UNDER SECTIONS 252(a) AND (e) OF THE ACT

Several commentators begin with the premise that agreements between carriers for the provision of Section 271 elements are “interconnection agreements” under Sections 251 and 252 of the Act, and that state jurisdiction should be analyzed under the rubric of that assumption.⁷ As such, they argue that state jurisdiction extends to establishing prices for Section 271 elements that are lower than the just and reasonable rates that meet the standards required under Sections 201 and 202 of the Act.⁸ But this analysis misses the mark. Agreements for delisted elements are not “interconnection agreements” as that term is described in the Act when state authority is delegated to regulate interconnection agreements.⁹ That term is limited to agreements that must be filed under Sections 252(a) and (e) of the Act. Because agreements for elements that do not meet the impairment test, but are required to be made available under Section 271 of the Act, do not need to be filed under Sections 252(a) and (e) of the Act, states cannot gain jurisdiction over these clearly interstate offerings by relying on their delegated powers to review and approve interconnection agreements that must be thus filed.

⁷ See ATX Licensing Inc., *et al.* (“ATX”) at 6-9; Cbeyond Communications, *et al.* (“Cbeyond”) at 4-5; COMPTTEL at 7-8; Eschelon at 12-15; EarthLink at 2-3.

⁸ See, e.g., COMPTTEL at 11-13. This is a very real danger. For example, the Arizona Corporation Commission recently released a ruling holding not only that it had the right to regulate delisted UNEs, but that it had the right to impose TELRIC pricing on those elements. See Opinion and Order, Docket Nos. T-03632A-04-0425, T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC Lexis 5, *46-*47 (Ariz. Corp. Com’n Feb. 2, 2006).

⁹ We recognize that contracts filed with state regulators can include agreements for services and facilities outside the scope of state jurisdiction. 47 U.S.C. §§ 252(b)(2)(A)(iii), 252 (e)(1). Including such elements in a filed contract does not serve to alter the Commission’s jurisdiction over those provisions that the statute places within the Commission’s authority.

One of the specific regulatory powers vested in the states by the 1996 Act is the authority to review and approve “interconnection agreements” entered into under the Act.¹⁰ Agreements can be either voluntary or, if necessary, the result of state-conducted arbitration.¹¹ The state’s authority with regard to negotiated agreements is limited to approval or disapproval (on very limited grounds as specified in Section 252(e)(2)(A)) and enforcing the “pick and choose” requirements of Section 252(i).

However, Section 252’s delegation of authority to states to regulate certain aspects of contracts between carriers for network elements is not unlimited. Not all agreements between carriers need to be filed under Sections 252(a) and (e) of the Act, and those that are not required to be filed are not subject to state jurisdiction. The filing requirement (and concomitant state jurisdiction) depends on whether the agreement is an “interconnection agreement” covered by Sections 251(b) and (c) of the Act. Section 252(e) requires the filing and approval of “any interconnection agreement adopted by negotiation or arbitration.” Section 252(a)(1) specifically references agreements “pursuant to section 251. . .” Agreements for network elements that are not required to be unbundled because of a ruling that they do not pass the “impairment test” are not “interconnection agreements” for purposes of Sections 252(a) and (e). While the vocabulary may be confusing, the point is ultimately simple and self-evident. To hold that jurisdiction over any inter-carrier agreement that could fit within the broad wording of the phrases “network element” or “interconnection agreement” was relegated to state regulators would ultimately be foolhardy. Parsing the statutory language bears this out.

¹⁰ 47 U.S.C. § 252(a)(1) (“The agreement. . . shall be submitted to the State commission under subsection (e) of this section”) and 47 U.S.C. § 252(e)(1) (“Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State Commission.”).

¹¹ 47 U.S.C. § 252(b).

The term “interconnection agreement” is not defined in the Act. The Commission has defined the term in the context of carrier obligations under Sections 252(a) and (c) as “any ‘agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. . .’”¹² The term “network element” is defined broadly in the Act as “a facility or equipment used in the provision of a telecommunications service.”¹³ “Unbundled network element” is not defined and is found only in Section 251(c) of the Act.¹⁴ A “network element” includes almost any aspect of interconnection, while an “unbundled network element” includes only those network elements that pass the statutory impairment test. The Commission has ruled that “only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed. . .” under Sections 252(a) and (e).¹⁵ In other words, as regards network elements, only agreements relating to UNEs covered by Section 251(c)(3) must be filed under Sections 252(a) and (e), not all agreements relating to all network elements. The determining factor in the case of a network element is whether the element is required to be unbundled by the unbundling provisions of Section 251(c)(3) -- that is, whether it has met the statutory “impairment test” for unbundling under Section 251(d)(2)(B).

¹² *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5169, 5180-81 ¶ 22 (2004), citing *In the Matter of 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)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340-41 ¶ 8 (2002) (“*Declaratory Ruling Order*”).

¹³ 47 U.S.C. § 153(29).

¹⁴ The independent unbundling requirements of Section 271(c) of the Act do not use the term “unbundled network element.”

¹⁵ *Declaratory Ruling Order*, 17 FCC Rcd at 19341, n.26.

In this respect, the Commission has established a twofold test for determining whether a network element is subject to the filing requirements of Sections 252(a) and (e). The Act permits state regulators to demand the filing of a contract for a network element only if: 1) it is classified properly as an “unbundled network element;” or 2) it fits within the confines of Sections 251(b) or (c). Network elements that have been examined by the Commission and have been found to fail the statutory “impairment test” meet neither of these standards.

The purchase of a network element that is not covered by Section 251(c) does not fall within the ambit of “obligations relating to Sections 251(b) or (c).” Section 251(b) deals with obligations of all local exchange carriers (“LECs”) (including competitive LECs (“CLECs”)), and does not include any obligations regarding network elements. Section 251(c) contains the mandatory requirements for the offering of “unbundled network elements” (which are subject to Section 252(e) filing), but does not apply by its terms to elements that do not need to be unbundled based on a valid finding by the Commission (*i.e.*, removed from Section 251(c)). The full relevant language of footnote 26 of the *Declaratory Ruling Order* makes this point clearly:

We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that *only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)*.¹⁶

The filings in the proceeding leading up to the *Declaratory Ruling Order* are instructive in this respect. In 2002, Qwest had filed a declaratory ruling petition requesting a declaration that certain types of agreements did not need to be filed under Sections 252(a) or (e). Part of that petition noted that agreements for the purchase of network elements that did not need to be

¹⁶ *Id.* (emphasis added).

unbundled under Section 251(c) did not need to be filed under Sections 252(a) or 252(e), precisely the issue under consideration here. Qwest stated in its petition:

Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling under the ‘necessary’ and ‘impair’ standards of Section 251(d)(2), nor to the transport and termination of non-local types of traffic, such as information access.¹⁷

The *Declaratory Ruling Order* treated the Qwest position stated above as part of the Qwest request for a declaratory ruling.¹⁸ The Commission never questioned the premise that network elements not subject to mandatory unbundling were not subject to Sections 251(b) or (c) and that they were accordingly not subject to the filing requirements of Sections 252(a) and 252(e). In context, the statement in footnote 26 of the *Declaratory Ruling Order* that only Sections 251(b) and 251(c) services are covered by the Sections 252(a) and 252(e) filing requirements confirms that contracts for the sale of network elements not required to be unbundled under the “impairment test” do not need to be filed under those sections of the 1996 Act.¹⁹

Agreements between Qwest and CLECs for the provision of network elements that have been found to not meet the statutory impairment test are not interconnection agreements as that term is used in Sections 252(a) and 252(e) of the Act. Accordingly, they are not subject to state

¹⁷ Petition for Declaratory Ruling of Qwest Communications International Inc., WC Docket No. 02-89, filed Apr. 23, 2002 at 36 (footnotes omitted). See Reply Comments of Qwest Communications International Inc., WC Docket No. 02-89, filed June 20, 2002 at 20-23.

¹⁸ “According to Qwest, the following categories of incumbent LEC-competitive LEC arrangements should not be subject to section 252(a)(1): . . . (iii) agreements regarding matters not subject to sections 251 or 252 (e.g., interstate access services, local retail services, intrastate long distance, and *network elements that have been removed from the national list of elements subject to mandatory unbundling.*” *Declaratory Ruling Order*, 17 FCC Rcd at 19338-39 ¶ 3 (emphasis supplied).

¹⁹ See *id.* at 19341, n.26.

filing and approval rules under those sections of the Act. States may not regulate any aspect of agreements for these elements -- certainly not the price of service or facilities.

III. EXCEPT AS PROVIDED IN SECTIONS 252(a) AND 252(e) OF THE ACT, AUTHORITY OVER CONTRACTS OR TARIFFS FOR NETWORK ELEMENTS THAT DO NOT MEET THE STATUTORY IMPAIRMENT STANDARD IS VESTED BY STATUTE IN THE COMMISSION

Commentors supporting state jurisdiction also start with a second erroneous supposition. A number of such commentors seem to believe that jurisdiction over the pricing of Section 271 elements is a matter where state jurisdiction is to be presumed in the absence of express federal preemption.²⁰ This is not true -- in the area of implementation of the 1996 Act, federal authority is paramount unless authority has been expressly delegated to the states by statute or by lawful act of the Commission. Congress in the 1996 Act has already preempted state authority to regulate the price of network elements made available only on account of Section 271(b). States have no more jurisdiction over these elements than they do over interstate special access services. A clarifying declaratory ruling by the Commission confirming the interstate nature of these network elements will, of course, be extremely productive, but the Commission does not need to take affirmative preemptive action to protect Section 271 elements from state regulation. They are interstate in nature and subject to the sole jurisdiction of the Commission. Commentors arguing to the contrary simply start from the erroneous premise that the 1996 Act had only a modest impact on state authority. To the contrary, states have jurisdiction to enforce the Act only where such authority has been expressly delegated. As Section 271 elements have been removed from the scope of state authority because they do not meet the impairment test, there is nothing remaining within state jurisdiction for the states to regulate, including price.

²⁰ COMPTEL at 4-5; Cbeyond at 7-10; ATX at 16-19.

Network elements offered pursuant to contract²¹ or tariff to competing carriers are subject to federal law and federal jurisdiction under the Act. In the case of network elements that meet the impairment test under the Act (*i.e.*, “unbundled” network elements), state regulatory agencies have been delegated certain limited authority to review such agreements. In the case of network elements that do not meet this test, the federal jurisdiction remains plenary and states have no authority to regulate their offering or to review any agreements pertaining to their offering.²² In other words, when a contract for a network element is no longer subject to the state’s delegated authority under Sections 252(a) and (e) of the Act, regulatory authority over the element reverts almost entirely to the Commission, including vesting in the Commission the sole power to review and regulate contracts between carriers for such network elements. The same is true for those network elements whose offering is governed by interstate tariffs -- the state is simply without jurisdiction.

Prior to the 1996 Act, states generally retained jurisdiction over intrastate telecommunications services and facilities except to the extent that the Act specified otherwise or the Commission acted to preempt state jurisdiction based on state regulation interfering with the Commission’s exercise of its own jurisdiction over interstate telecommunications. However, the 1996 Act changed that balance for matters addressed in the Act. Because the Act generally created categories of facilities, functions and services that are not reasonably carved into interstate and intrastate components, it vests plenary power in the Commission subject to specific

²¹ There is long-standing precedent for the proposition that carriers can, except in instances where tariffs are required, order their business relationships by contract, not by tariff. *See GTE Service Corp., et al. v. FCC*, 782 F.2d 263, 271-72 (D.C. Cir. 1986). Intrastate services such as intrastate private line services subject to state regulation are not included within the definition of network element. Network elements are, by their nature, incapable of simple interstate/intrastate jurisdictional assignment.

²² States would also be without authority to regulate such elements if included in a contract for other services and facilities that was filed with the Commission or with a state commission.

“carve-outs” where states were delegated the authority to act. In the instance under examination here, specific delegations to state regulatory authorities provide the sole basis for exercise of state authority to review agreements for network elements. Such delegation can be accomplished through the Act itself (or, in some cases, lawful order of the Commission). But the delegation cannot be implied. States have been delegated authority to review “interconnection agreements” addressing matters covered by Sections 251(b) and (c) of the Act.

States are also delegated the authority to maintain and adopt state rules relating to telecommunications competition so long as they are “not inconsistent with [the Act] or the Commission’s regulations to implement [the Act].”²³ These statutory delegations of authority over interstate services to the states for those services and facilities covered by the Act are limited delegations, quite unlike the broad reservation of power to states for intrastate services covered by Section 2(b) of the Act.²⁴

There are three independent bases for federal jurisdiction by the Commission over delisted UNEs that do not meet the “impairment test.”

First, in the case of Qwest and other RBOCs, there is an independent investiture of federal jurisdiction under the 1996 Act. Some network elements that have been removed from the list of unbundled network elements must still be unbundled pursuant to Section 271(c)(2)(B) of the Act.²⁵ The offering of the switching element, for example, on an unbundled basis pursuant

²³ 47 U.S.C. §§ 261(b) and (c). *See also* 47 U.S.C. § 251(d)(3), pertaining to state interconnection regulations.

²⁴ 47 U.S.C. § 152(b). *See Indiana Bell Telephone Company v. McCarty*, 362 F.3d 378 (7th Cir. 2004).

²⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17387 ¶ 659 (2003) (“*Triennial Review Order*”),

to Section 271(c)(2)(B)(vi) is subject to federal jurisdiction.²⁶ The filing and review (if any) of contracts entered into pursuant to Section 271(c)(2)(B) of the Act is a federal matter which has not been delegated to the states.²⁷

Second, all network elements made available under the Act are subject to the jurisdiction of the Commission (subject to specific exceptions).²⁸ The Commission's jurisdiction is not diminished whenever such a network element is removed from the list of unbundled elements because of proper application of the "impairment test."²⁹ Instead, the states' authority is retracted. Again, there is no jurisdictional split between interstate and intrastate network elements. And the fact that a network element is provided under the Act is presumptively subject to federal jurisdiction.³⁰ There is no intrastate presumption and there is no residual assumption that there are intrastate elements for states to regulate.

vacated in part and remanded, USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, 125 S. Ct. 313 (2004).

²⁶ The Commission, in the *Triennial Review Order*, confirmed this jurisdiction, noting that it would enforce compliance with Section 271 offerings and that it would apply Sections 201 and 202 of the Act to such offerings. *Triennial Review Order, id.* at 17389 ¶¶ 662-64.

²⁷ Of course, state jurisdiction over Section 271 issues is considerably more limited than is the case with Section 251, and is advisory only. *See* 47 U.S.C. § 271(d)(2)(B).

²⁸ *See Triennial Review Order*, 18 FCC Rcd at 17100-01 ¶¶ 194-95; *USTA II*, 359 F.3d at 594.

²⁹ *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999): "Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extensions to be determined by state commissions. . ."

³⁰ In other words, the contrary presumption for services assigned to the intrastate jurisdiction by Section 2(b) of the Act does not apply because federal jurisdiction is established *a priori*. *See California v. FCC*, 798 F.2d 1515, 1520 (D.C. Cir. 1986). The landmark case for the premise that the Commission's jurisdiction to preempt on policy grounds is limited to where it has federal jurisdiction in the first place is *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). This limitation does not apply to facilities and services committed to the federal jurisdiction under the 1996 Act.

Third, some network elements, such as line sharing, high-capacity loops and transport, are used almost exclusively for the provision of services that themselves already fall within the federal jurisdiction on other grounds. Line sharing (leasing the high frequency portion of a copper loop to a CLEC which uses this frequency for the provision of DSL service) as a network element would be within the federal jurisdiction because DSL service is a service that itself is interstate in nature.³¹ This is also true of interstate special access loops or transport where these have been found to not meet the impairment test. Because states do not have jurisdiction over interstate DSL or special access service, they do not have jurisdiction

IV. PROFESSED CONCERNS ABOUT ALLEGED PRICING AND OFFERING OF NETWORK ELEMENTS THAT DO NOT MEET THE IMPAIRMENT TEST ARE IRRELEVANT

A number of commentors focus on what they perceive to have state regulators establish their own prices or different access standards (*e.g.*, use restrictions) for network elements that do not meet the statutory impairment test.³² Their unstated position seems to be that the Commission itself will not regulate these elements in the manner that these commentors perceive

³¹ See, *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998), *recon. denied*, 17 FCC Rcd 27409 (1999). DSL services are now characterized as non-common carrier services, either as information services or private carrier services. See, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era; Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005), *appeal pending sub nom. Time Warner v. FCC*, No. 05-4769 (3rd Cir.).

³² See, *e.g.*, Eschelon at 9-11; COMPTTEL at 14-16.

as optimal.³³ Others seem to seek reevaluation of the Commission's impairment findings with respect to these network elements. As noted above, at least one state commission claims the right to impose TELRIC pricing on delisted UNEs.³⁴ Qwest disagrees with these allegations. Qwest has responded to the Commission's decisions concerning the impairment status of switching and line sharing with commercial product offerings that provide CLEC customers with the services that they need at just and reasonable rates, and its tariffed high-capacity services are likewise available on a general and reasonable basis at prices that are just, reasonable and competitive. Moreover, the marketplace and competition are the driving forces behind these offerings, not regulatory compulsion -- the facts on which the Commission determined that these network elements did not meet the impairment test were compelling.

But these issues are not relevant in determining the proper jurisdiction to enforce the provisions of Section 271 of the Act. The Act itself has made this determination already. Disagreements with the Commission's conclusions and/or manner of enforcing those portions of the Act entrusted to the Commission's authority cannot be resolved by attempting to limit the Commission's statutory authority. To the contrary, the Commission's jurisdiction exists independent of whether it exercises its lawful authority in a manner that an individual entity believes to be contrary to the public interest. If a party believes that the Commission has erred in making a particular decision, the appropriate forum for redress is judicial review of a Commission decision pursuant to Section 402 of the Act, not a claim that the Commission's statutory jurisdiction should be reduced to accommodate differences of opinion on substantive questions. The arguments on the so-called merits of the Commission's rules and policies are simply irrelevant.

³³ See, e.g., Eschelon at 14-15; COMPTTEL at 11-13, 14-15; Cbeyond at 7-10; ATX at 16-19.

³⁴ See note 8, *supra*.

V. CONCLUSION

AT&T, BellSouth and Verizon have it right. States have no authority to regulate the price of network elements made available because of Section 271(b) of the Act. The Commission should deny the Georgia Public Service Commission's Petition and clearly state that the pricing of these elements is entirely an interstate issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System; 2) served (electronic copy) via e-mail on Ms. Janice M. Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at Janice.myles@fcc.gov; 3) served (electronic copy) via e-mail on the FCC's contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 4) served (hard copy) via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

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