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November 9, 2009

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NOV - 9 2009

Federal Communications Commission
Office of the Secretary

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Petition For Expedited Rulemaking

Dear Ms. Dortch:

On behalf of The Section 271 Coalition, attached please find our Petition for Expedited Rulemaking.

Kindly date stamp the duplicate of this letter and return it to the courier.

Please contact the undersigned at (202) 342-8531 if you have any questions concerning this letter.

Respectfully submitted,

Genevieve Morelli
Genevieve Morelli

Counsel to Section 271 Coalition

Enclosures

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

FILED/ACCEPTED

NOV - 9 2009

Federal Communications Commission
Office of the Secretary

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| In the Matter of |) | |
| |) | |
| Petition for Expedited Rulemaking to Adopt |) | |
| Rules Pertaining to the Provision by |) | WC Docket No. 09 - _____ |
| Regional Bell Operating Companies of |) | |
| Certain Network Elements Pursuant to 47 |) | |
| U.S.C. § 271(c)(2)(B) of the Act |) | |

PETITION FOR EXPEDITED RULEMAKING

360networks (USA) inc.
Broadview Networks, Inc.
Cbeyond, Inc.
COMPTEL
Covad Communications Company
NuVox
PAETEC Holding Corp.
Sprint Nextel Corporation
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PETITION FOR EXPEDITED RULEMAKING

Pursuant to Sections 1.401, 1.49, 1.52, and 1.419(b) of the Commission’s Rules,¹ the Section 271 Coalition (“Coalition”),² by its attorneys, hereby files this petition seeking adoption, on an expedited basis, of rules to govern the provision of certain network elements by the Bell Operating Companies (“BOCs”) pursuant to Section 271(c)(2)(B) of the Communications Act of 1934, as amended (“Act”).³

1. INTRODUCTION AND SUMMARY

The fundamental goal of the Telecommunications Act of 1996⁴ was to create robust competition in all telecommunications markets, including broadband markets, while protecting against possible backsliding and re-concentration by the BOCs. To that end, Congress

¹ 47 U.S.C. §§ 1.401, 1.49, 1.52, and 1.419(b).

² The Section 271 Coalition is comprised of the following members: 360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, NuVox, PAETEC Holding Corp., Sprint Nextel Corporation, and tw telecom inc.

³ 47 U.S.C. § 271(c)(2)(B).

⁴ Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (“1996 Telecom Act”).

set forth specific additional unbundling obligations in Section 271 that each BOC must agree to before being permitted to offer in-region interLATA interexchange and information services. These threshold protections were needed to maximize narrowband competition in the short term and to set the stage for robust broadband competition over time. Among these unbundling obligations are access to critical last-mile and middle-mile facilities that competitors need to reach end users (and entire communities).

There is no question that the BOCs have fully exploited the competitive opportunities provided to them by Section 271, not only by offering in-region interLATA and information services, but by achieving dominant share positions in their incumbent operating territories. What is missing is the regulatory oversight needed to ensure the economically-viable wholesale offerings required by Section 271 that would foster a continuing competitive environment and serve as a long-term check on the BOCs' market power.

The development of facilities-based competition since passage of the 1996 Telecom Act has made it economically and practically feasible in some limited cases for competitors to supply their own middle-mile or last-mile facilities. In some other limited locations, there may be non-ILEC wholesale local loop and/or interoffice transport products available for purchase on reasonable rates and terms. In the vast majority of locations, however, BOC loops and transport facilities continue to be the only viable means available to most service providers to reach end users and aggregation locations. In those situations, access to unbundled loops and transport under Section 251(c)(3) of the Act⁵ or, where Section 251(c)(3) unbundled access is no longer available, pursuant to the terms of the Section 271(c)(2)(B) Competitive Checklist, is still essential to enable narrowband and broadband competition.

⁵ 47 U.S.C. § 251(c)(3).

A recently released draft report by the Berkman Center for Internet and Society at Harvard University confirms the importance of unbundling to the deployment of first and next generation broadband services.⁶ The *Berkman Study*, which reviewed “the current plans and practices pursued by other countries in the transition to the next generation of connectivity, as well as their past experience”⁷ found that:

“open access” policies – unbundling, bitstream, access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.⁸

The *Berkman Study* discovered that open access, which requires incumbents “to make available to their competitors, usually at regulated rates, the most expensive, and in the case of local loop and shared access, lowest-tech elements of their networks,”⁹ enables non-incumbents to compete through investment in the more technology-sensitive and innovative elements of the network. Regulated access, the *Study* found, “provides one important pathway to make telecommunications markets more competitive than they could be if they rely solely on

⁶ Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world, Berkman Center for Internet and Society at Harvard University (Draft, Oct. 2009) (“*Berkman Study*”), available at http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf. The Commission recently issued a Public Notice inviting comment on the *Berkman Study*. See *Comments Sought on Broadband Study Conducted by the Berkman Center for Internet and Society*, NBP Public Notice #13, DA 09-2217 (rel. Oct. 14, 2009).

⁷ *Id.*, at 9.

⁸ *Id.*, at 11.

⁹ *Id.*, at 77.

competition among the necessarily smaller number of companies that can fully replicate each other's infrastructure."¹⁰

The *Study* directly attributed the United States' status as a middle-of-the-pack performer on most first generation broadband measures¹¹ to the fact that the Commission, between the fall of 2001 and the spring of 2002, "passed a series of decisions that abandoned the effort to implement open access ..."¹² The *Study* concluded that the weight of the evidence supports the conclusion that "the original judgment made by Congress in the Telecommunications Act of 1996 represented the better course ... Open access policies, where seriously implemented by an engaged regulator, contribute[] to a more competitive market and better outcomes."¹³ In sum, the *Study* noted that the "most surprising findings [of the *Study*] to an American seeped in the current debate in the United States are the near consensus outside the United States on the value and importance of access regulation, [and] the strength of the evidence supporting that consensus ..."¹⁴

The need to make certain that carriers have ongoing access to BOC unbundled loops and transport at reasonable rates and terms under the Section 271(c)(2)(B) Competitive Checklist is important not only as the availability of comparable elements as Section 251(c)(3) UNEs continues to decrease for competitive local exchange carriers ("CLECs"), but also as long distance and mobile wireless carriers – who are precluded from access to Section 251(c) UNEs –

¹⁰ *Id.*

¹¹ The attributes benchmarked by the *Berkman Study* are penetration, capacity, and price. *Id.*, at 9-10.

¹² *Id.*, at 82.

¹³ *Id.*, at 83.

¹⁴ *Id.*, at 77.

face unprecedented pressure from AT&T and Verizon. While these essential network elements remained available to CLECs ubiquitously as Section 251(c)(3) UNEs, their availability as Checklist Elements was not critical to local wireline competition. As these elements have become “de-listed” as Section 251(c)(3) UNEs, however, either through application of non-impairment triggers or through the granting of Section 10 forbearance petitions, their ongoing availability as Checklist Elements has increased in importance. Further, as AT&T and Verizon have become by far the two largest carriers in the long distance and mobile wireless markets, the lack of access to unbundled elements for the provision of long distance and mobile wireless services has become a critical competitive concern.

The Commission has held repeatedly that the rates, terms and conditions for Checklist items are subject to the just and reasonable and nondiscrimination requirements of Sections 201(b) and 202(a) of the Act.¹⁵ To date, however, despite being presented with various opportunities, the Commission has declined to exercise its responsibility to oversee or enforce these standards. Not unexpectedly, the BOCs have seized on this inaction to flout their obligation to make Checklist Elements available and the result has been extremely detrimental to competition. Where service providers must rely on BOC Competitive Checklist elements for middle-mile and/or last-mile access to end user customers, they are forced to accept non-negotiable terms and conditions and prices for these critical elements that do not permit them to effectively compete.

It has been nearly a decade since the BOCs began realizing the benefits they were afforded by Section 271. It is time for the Commission to act. The failure to develop and administer procedures to police the BOCs’ ongoing compliance with their Competitive Checklist

¹⁵ 47 U.S.C. §§ 201(b), 202(a).

obligations has allowed the BOCs to essentially ignore these competitively-critical statutory requirements. The purpose of this petition is to provide the Commission with a framework to remedy this situation by proposing rules to govern the provision of Checklist Elements by the BOCs that are straightforward, fair, and simple to apply and enforce. The Coalition urges the Commission to adopt these rules on an expedited basis.¹⁶

II. SECTION 271 IS NOT FUNCTIONING AS INTENDED BY CONGRESS

The overriding goal of the 1996 Telecom Act is to open all telecommunications markets to competition.¹⁷ Before the 1996 Act's passage, major segments of the telecommunications industry were precluded, by law and economics, from entering each others' markets. The BOCs were barred from entering certain lines of business, including long distance services.¹⁸ This restriction was determined to be necessary to preserve competition in the interexchange and information services markets.¹⁹ The MFJ court found that if the BOCs were permitted to compete in the interexchange market, they would have substantial incentives and opportunity, through their control of local exchange and exchange access facilities and services, to discriminate against their interexchange rivals and to cross-subsidize their interexchange operations.²⁰

¹⁶ The Coalition's proposed rules are appended hereto as Attachment A.

¹⁷ The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement").

¹⁸ Under the Modification of Final Judgment ("MFJ") settling the U.S. Department of Justice's antitrust suit against AT&T, the BOCs were prohibited from providing interLATA services. The MFJ did not bar the BOCs from providing intraLATA toll services. See *United States v. Western Elec. Co.*, 552 F. Supp 131 (D.D.C. 1882), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

¹⁹ *Id.*, at 188.

²⁰ *Id.*

Through Section 271, Congress required the BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region interLATA interexchange and information services, and provided an unambiguous blueprint for the unbundling that would be required of these carriers as a condition of entry.²¹

Given their unique scale and national footprints, Congress established additional obligations for the BOCs to ensure that the competitive benefits of the MFJ would not be undermined as the line-of-business restrictions were lifted.

Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market. ... Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.²²

An essential component of the obligations imposed on a BOC in return for permission to provide in-region interLATA services is compliance with the Competitive Checklist contained in Section 271(c)(2)(B). The Competitive Checklist specifies the access and interconnection obligations a BOC must meet. A BOC must demonstrate that it has "fully

²¹ The Act permitted the BOCs to begin providing interLATA interexchange services outside their incumbent local operating territories upon the Act's enactment. *See* 47 U.S.C. § 271(b)(2).

²² *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand*, 18 FCC Rcd 16978, at ¶ 655 (2003) ("Triennial Review Order" or "TRO") (footnotes omitted).

implemented the Competitive Checklist in subsection(c)(2)(B).”²³ More specifically, a BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.²⁴ The nondiscrimination standard has been defined by the Commission in orders addressing Section 271 interLATA entry applications as follows:

[F]or those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in “substantially the same time and manner” as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a “meaningful opportunity to compete.”²⁵

Several of the items enumerated in the Checklist are identical to items the Commission has deemed to be UNEs under the standards of Section 251(c)(3) of the Act. In particular, Checklist items 4 through 6 and 10 require: “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services;”²⁶ “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;”²⁷ “[l]ocal switching unbundled from transport, local loop

²³ *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act of 1934 to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, at ¶ 44 (1999) (“*New York InterLATA Entry Order*”), *aff’d AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

²⁴ 47 U.S.C. § 271(c)(1)(B)(i), (ii).

²⁵ *New York InterLATA Entry Order*, at ¶ 44 (footnotes and citations omitted).

²⁶ 47 U.S.C. § 271(c)(2)(B)(iv).

²⁷ 47 U.S.C. § 271(c)(2)(B)(v).

transmission, or other services;”²⁸ and “[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion.”²⁹

The Commission repeatedly has made clear that the obligation to provide these Checklist Elements applies regardless of whether the network element is subject to unbundling under Section 251(c)(3). In the 1999 *UNE Remand Order*, the Commission first noted that the BOCs must continue to provide access to those network elements described in Checklist items 4-6 and 10, even if such access is not mandated under Section 251.³⁰ The Commission also concluded in that Order that it has independent authority to ensure that such network elements “are provided on a reasonable, nondiscriminatory basis.”³¹ Importantly, the Commission held that the applicable prices, terms and conditions for Checklist Elements that do not satisfy the Section 251 unbundling standard are to be determined in accordance with Section 201(b) and 202(a) of the Act.³² The Commission explained:

Section 201(b) provides a basis for the Commission to scrutinize the prices, terms, and conditions under which the checklist network elements are offered. Section 201(b) states that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication services, shall be *just and reasonable*, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared unlawful.” Section 202(a) mandates that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities,

²⁸ 47 U.S.C. § 271(c)(2)(B)(vi).

²⁹ 47 U.S.C. § 271(c)(2)(B)(x).

³⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 465-73 (1999) (“*UNE Remand Order*”).

³¹ *Id.*, at ¶ 471.

³² *Id.*, at ¶ 470. If a checklist element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252.

or services for or in connection with like communication service.”³³

Not surprisingly, the BOCs challenged the Commission’s *UNE Remand Order* determination that Section 271 establishes a separate BOC access obligation for network elements no longer listed under Section 251(c)(3) and its conclusion that the requirements of Section 201(b) and 202(a) govern the prices and terms of delisted network elements under Section 271. Specifically, the BOCs contended that once the Commission has determined that a network element is not necessary under Section 251, the corresponding Checklist Element should be construed as being satisfied.³⁴ In response, in the *Triennial Review Order*, the Commission “reaffirm[ed] that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so under just and reasonable rates.”³⁵ The Commission stated:

[T]he plain language and structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271 ... were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.

* * *

³³ *Id.*, at ¶ 472 (footnotes omitted, emphasis in original).

³⁴ *See, e.g.*, Comments of the Verizon Telephone Companies, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002), at 66-67.

³⁵ *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, at ¶ 652 (2003) (“*Triennial Review Order*” or “*TRO*”).

[W]e find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.³⁶

The Commission went on to explain its application of the just and reasonable and nondiscriminatory pricing standard of Sections 201 and 202. It noted that the Supreme Court has held that the last sentence of Section 201(b), which authorizes the Commission “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act” empowers it to adopt rules to implement the provisions of the 1996 Act and that “Section 271 is such a provision.”³⁷ It concluded that “[a]pplication of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress’s intent that Bell companies provide meaningful access to network elements.”³⁸

Between 1999 when the Commission first addressed this issue in the *UNE Remand Order* and December 2003, the BOCs were granted permission to enter the in-region interLATA market in each state in their incumbent operating territories.³⁹ The BOCs’ success in gaining interLATA operating authority in no way altered their “independent and ongoing access obligation under section 271” however.⁴⁰ As far back as 1997, the Commission specified that compliance with the Competitive Checklist – as well as the other market-opening provisions of

³⁶ *Triennial Review Order*, at ¶¶ 654, 656 (footnotes omitted).

³⁷ *Id.*, at ¶ 663.

³⁸ *Id.*

³⁹ The first application for in-region interLATA entry (by Bell Atlantic for New York) was granted in December 1999 and the final application (by Qwest for Arizona) was granted in December 2003.

⁴⁰ *Triennial Review Order*, at ¶ 654.

the 1996 Act – “continue after [the BOCs’] entry into the long distance market.”⁴¹ The Commission held that “[i]t is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance.”⁴²

A. The BOCs Are Reaping the Rewards of InterLATA and Information Services Entry Without Meaningful Checklist Compliance

It has been ten years since the Commission approved the first request for interLATA entry to (what was then) Bell Atlantic for the state of New York. In that time, the BOCs have largely recaptured the interexchange market in their regions. AT&T and Verizon have consolidated much of the BOC footprint and have acquired the nation’s largest interexchange (and, at the time, local) competitors, all the while reducing competitive opportunities for carriers leasing network facilities from them as contemplated by the Act. Today, AT&T and Verizon each enjoy revenues exceeding \$100 billion per year, an order of magnitude beyond the largest of their local competitors.⁴³

The entry of the BOCs into the long distance market has effectively eliminated long distance service as a stand-alone market, with the majority of customers today obtaining long distance service from the same carrier that provides their local exchange service.⁴⁴ Within this emerging “full service market” – that is, the market of subscribers who choose a single

⁴¹ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, at ¶ 22 (1997).

⁴² *Id.*

⁴³ In comparison, Comcast will receive approximately \$11 billion in revenue from telephone and high speed Internet services in 2009. *See* Comcast Corp. Quarterly Report 10-Q, Securities and Exchange Commission (filed Nov. 4, 2009).

⁴⁴ *See Local Telephone Competition: Status as of June 30, 2008*, Industry Analysis and Technology Division, FCC, at Table 6, Presubscribed Interstate Long Distance Lines (Jul. 2009).

provider for their local and long distance needs – the BOCs now enjoy a market share of 72%, with the remaining 28% share spread among *all* other providers of local/long distance service.⁴⁵ A similar pattern is occurring in the mobile wireless services market where AT&T and Verizon Wireless combined enjoy nearly 61% (and rising) market share.⁴⁶

It was precisely this dominance that Section 271 – and its unambiguous requirement to lease each element of the local network at just and reasonable rates without restriction – was intended to check. Yet, as explained in more detail in the following section, over the past several years the availability of network facilities under Section 251 has contracted, without any enforcement of the BOCs’ continuing unbundling obligations under Section 271.

The Omaha “forbearance experiment” provides additional evidence of the competitive harm that follows from Section 271 obligations not having been translated into meaningful wholesale offerings. In the *Omaha Forbearance Order*, the Commission relied upon the theoretical availability of Checklist Elements at just and reasonable and not unreasonably discriminatory rates and terms to justify granting Qwest partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in the Omaha Metropolitan Statistical Area (“MSA”).⁴⁷ The Commission noted the BOCs’ ongoing access requirement under the Competitive Checklist, stating that post-forbearance “competitive LECs continue to ... have

⁴⁵ Share calculated as (Number of Lines Presubscribed to BOCs)/(Number of Lines Presubscribed to BOCs + Lines Presubscribed to CLECs).

⁴⁶ AT&T states that it has 81.6 million wireless customers. See <http://www.att.com/gen/press-room?pid=4800&cdun=newsarticleid=27290> (last visited Oct. 30, 2009). Verizon Wireless states that it has 86.3 million wireless customers. See <http://investor.verizon.com/news/view.aspx?NewsID=1019> (last visited Oct. 30, 2009). CTIA sizes the wireless market as of June 2009 at 276.6 million customers. See http://www.ctia.org/consumer_info/index.cfm/AID/10323 (last visited Oct. 30, 2009).

⁴⁷ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”) *aff’d* *Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

rights under section 271(c)(2)(B)(iv)-(vi) to access Qwest's loops, switching and transport throughout Qwest's service area, except where Qwest's obligations already have been lifted by the *Section 271 Broadband Forbearance Order*.⁴⁸ And the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a BOC/cable duopoly on the ground that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct."⁴⁹

Unfortunately (but not unexpectedly), the Commission's predictive judgment that Qwest would honor its Competitive Checklist obligation to offer unbundled loops and transport at just and reasonable rates and terms once forbearance from Section 251(c)(3) UNE obligations was granted has proven incorrect. McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services ("McLeodUSA"), a former competitor in the Omaha MSA dependent on access to Qwest's last-mile facilities, has petitioned the Commission to reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "predictive judgment" that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of

⁴⁸ *Omaha Forbearance Order*, at ¶ 62.

⁴⁹ *Id.*, at ¶ 71. Similarly, the Commission's decision to grant ACS forbearance from its Section 251(c)(3) unbundling obligations in certain wire centers in Anchorage was conditioned on the continued availability of loop access. Noting that because ACS is not a BOC, and therefore is not subject to the requirements of Section 271, the Commission conditioned its grant of forbearance on an obligation that "mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval ..." *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, at ¶ 41 (2007) ("*Anchorage Forbearance Order*").

Section 251(c) has proven incorrect.”⁵⁰ McLeodUSA detailed its repeated good faith attempts to obtain replacement loop and transport arrangements with Qwest and Qwest’s conclusive refusal to provide such elements.⁵¹ Ultimately, McLeodUSA made the decision that, in the absence of unbundling and wholesale alternatives, it had to leave the Omaha market.

B. The Courts Have Rejected State Enforcement of Checklist Obligations and The FCC Has Failed to Exercise its Oversight Responsibility

Over the years, competitive carriers and other interested parties have engaged in numerous attempts to obtain regulatory oversight and enforcement of the BOCs’ Section 271(c)(2)(B) Competitive Checklist obligations. Some of these activities have been initiated before state regulators and several have been brought before the FCC. For various reasons, as explained below, to date none of these activities has resulted in meaningful enforcement of the BOCs’ ongoing obligation to make Checklist Elements 4, 5, and 6 available at rates and terms that comply with Sections 201(b) and 202(a) of the Act. Moreover, the critical transparency provided by the obligation in Section 252 to file interconnection agreements with state commissions – which affords competitive carriers the opportunity to review the pricing and terms of BOC offerings – does not now apply to Checklist Elements.

The FCC has been presented with several opportunities to preserve the role of state commissions to review – and make public – the terms, conditions, and prices of Checklist Elements. In July 2004, BellSouth Telecommunications, Inc. (“BellSouth”) filed an “emergency petition to enforce the unambiguous provisions of the 1996 Act and clear Commission precedent by 1) declaring that it, and not state commissions, enforce the provisions of Section 271, and 2)

⁵⁰ See *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) (“*McLeodUSA Petition*”), at 1.

⁵¹ *Id.*, at 4. At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.

preempting a recent order of the Tennessee Regulatory Authority that illegally asserts enforcement authority.”⁵² BellSouth sought preemption of a Tennessee Regulatory Authority (“TRA”) order setting a rate for Checklist Element 6 in the context of a Section 252 arbitration proceeding.

Nearly two years later, the Georgia Public Service Commission (“GPSC”) filed a petition seeking clarification that the GPSC is not preempted from setting just and reasonable rates under Section 271 for Checklist Elements 4, 5, and 6.⁵³ Alternatively, the GPSC asked the FCC to declare that the rates that the GPSC set for high capacity loops, transport and line sharing are just and reasonable and compel BellSouth to abide by those rates.⁵⁴

Despite earnest appeals from numerous interested parties that it resolve this jurisdictional dispute, the Commission has refrained from ruling on either petition.⁵⁵ Instead, this issue has played out first before state commissions and, subsequently, before various federal courts. State commissions in Arizona, Georgia, Kentucky, Illinois, Mississippi, Missouri, Maine, Michigan, New Hampshire, and Tennessee each have issued orders on this issue and each state commission ruling has been appealed to federal court. To date, U.S. appeals courts in five circuits have ruled on this issue and they each have held that state commissions have no authority under federal law to enforce Section 271 because Section 271 is a grant of authority to the FCC and does not provide any express role for the states beyond making recommendations to the FCC

⁵² *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed Jul. 1, 2004) (“*BellSouth Petition*”), at 1.

⁵³ *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006) (“*GPSC Petition*”), at 1.

⁵⁴ *Id.*

⁵⁵ The *BellSouth Petition* was voluntarily withdrawn nearly two years after it was filed. See *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245, Voluntary Withdrawal of Petition (filed Apr. 29, 2008). The *GPSC Petition* remains pending at the Commission.

to be used in determining whether to grant Section 271 applications.⁵⁶ Regardless whether these circuit court opinions correctly reflect congressional intent, the practical result is that today the FCC is the *only* regulatory body sanctioned by the courts to ensure Checklist compliance by the BOCs.

The federal courts that have spoken have clearly and unambiguously held that Section 271 assigns exclusive duty to the FCC to police BOC post-interLATA entry compliance with the Competitive Checklist. However, the Commission has failed to adopt any regulations that establish parameters for or in any way govern the offering of Checklist Elements. There are no Commission guidelines describing the essential components of a Competitive Checklist offering or what form the offering must take. There are no procedures for challenging the sufficiency of a BOC's Checklist offering.⁵⁷ And when Checklist compliance issues have been brought to the Commission for resolution, the Commission has ignored repeated requests to act.

Moreover, the Commission has avoided any explication of how the just and reasonable standard of Section 201(b) should be applied to assess the lawfulness of Checklist Element rates. As explained in detail in Section III.B, *infra*, competitive carriers maintain that the Commission can – and should – apply its well-established New Services Test to determine

⁵⁶ *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1 (1st Cir.), *order on rehearing*, 509 F.3d 1(1st Cir. 2007). *See also Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008); *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, *Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel. Co. d/b/a SBC Missouri*, 129 S. Ct. 971 (2009); *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109 (9th Cir. 2009); *BellSouth Telecommunications, Inc. v. Georgia Pub. Serv. Comm'n*, 2009 WL 368527 (11th Cir. 2009).

⁵⁷ In the *TRRO*, the Commission acknowledged that Section 271(d)(6) of the Act grants it authority to determine whether a BOC “has ceased to meet any of the conditions required for [interLATA entry] approval ...” 47 U.S.C. § 271(d)(6). There, the Commission suggested that “whether a particular checklist element’s rate satisfies the just and reasonable pricing standard of section 201 and 202” could be determined in an “enforcement proceeding brought pursuant to section 271(d)(6)” *TRRO*, at ¶ 664. That said, the Commission has failed to develop any procedures for review and analysis of Checklist compliance or to expand on how the just and reasonable standard should be applied.

the appropriate level of Checklist Element rates. In contrast, the BOCs contend that no regulatory oversight is needed and the market can be relied upon to set just and reasonable rates and terms for these elements.⁵⁸ The lack of FCC involvement on this issue has resulted in the *de facto* adoption of the BOCs' position. The marketplace results, as explained below, have demonstrated that oversight and transparency are critically needed.

C. The BOCs Have Exploited the Regulatory Vacuum Created by the Courts

As a general matter, it is useful to note that the BOCs never have promoted their Competitive Checklist offerings. When pressed to identify which of their products constitute their Checklist Element offerings, they frequently sidestep the issue or provide incomprehensible or inconsistent responses. However, the past several years has revealed a pattern of abuse that it is time for the Commission to correct.

1. Checklist Item 4 (Loops) and Checklist Item 5 (Transport)

The BOCs at times have half-heartedly pointed to their special access tariffs as evidence of their compliance with Checklist Elements 4 and 5 (loops and transport, respectively).⁵⁹ As McLeodUSA has represented, it has “made repeated good faith attempts to negotiate wholesale replacement agreements with Qwest” for Checklist items since release of the *Omaha Forbearance Order*.⁶⁰ Qwest’s response has been “steadfast refusal to negotiate any wholesale pricing for high capacity facilities in the affected wire centers that deviates from its special access and RCP pricing.”⁶¹

⁵⁸ See, e.g., Comments of Verizon, WC Docket No. 06-90 (filed May 19, 2006), at 16-18; Comments of AT&T, Inc, WC Docket No. 06-90 (filed May 19, 2006), at 16.

⁵⁹ See, e.g., *McLeodUSA Petition*, at 5 (stating that in the Omaha MSA “[w]ith regard to DS1 and DS3 loops, Qwest has merely offered the tariffed ‘Regional Commitment Program’ (‘RCP’) from its special access tariffs.”).

⁶⁰ *McLeodUSA Petition*, at 5.

⁶¹ *Id.*

Verizon has taken a similar tack. Carriers that must replace Verizon's Section 251(c)(3) loop and transport elements in wire centers and on routes that have been delisted are presented with a take-it-or-leave-it choice among Verizon's special access services.⁶² This issue was presented to the Commission several years ago in the context of Verizon's petitions for forbearance from Section 251(c)(3) unbundling obligations in six major metropolitan areas.⁶³ In support of its forbearance requests, Verizon represented that its ongoing obligation to make Checklist Elements 4, 5, and 6 available to competitive carriers would discipline its post-forbearance market behavior. In response, Commenters informed the Commission of Verizon's heavy-handed approach to its Competitive Checklist obligations.⁶⁴ Among other things, Commenters detailed Verizon's introduction of a special access pricing plan that would raise carriers' rates significantly while locking them into a multi-year contractual arrangement.⁶⁵

The notion that the BOCs' special access offerings satisfy their continuing obligation to make Checklist Elements 4 (loops) and 5 (transport) available at rates and terms that meet the requirements of Sections 201(b) and 202(a) of the Act would not be so problematic

⁶² See Comments of Broadview Networks, Inc., *et al.*, WC Docket No. 06-172 (filed Mar. 5, 2007) ("*Broadview, et al. Comments*"), at 64-65.

⁶³ *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006) ("*Verizon Petition – Boston*"); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006) (the "*Verizon 6-MSA Petitions*").

⁶⁴ *Broadview, et al. Comments*, at 65-67.

⁶⁵ *Id.*, at 66-67.

if the evidence did not show that the BOCs are continuing to exercise market power to set supra-competitive special access prices. Since the Commission initiated a request for input on potential modifications to its special access regulatory regime in 2005, numerous parties have provided voluminous evidence that the BOCs retain market power in the provision of special access services and are abusing that market power with unjust and unreasonable rates and terms.⁶⁶

For example, tw telecom inc. submitted comparisons between the prices it charges, the prices other competitors charge, incumbent LEC prices made available to tw telecom under volume-term agreements, and TELRIC-based prices.⁶⁷ That comparison showed that “incumbent LECs price at least their DS1 and DS3 services well above competitors and even higher above TELRIC ... yield[ing] the conclusion that incumbent LECs are exercising market power in the provision of special access services.”⁶⁸ Further, tw telecom demonstrated that in most cases the ILECs’ special access rates are higher in areas where they have been granted special access pricing flexibility than where they are subject to price cap regulation.⁶⁹ The AdHoc Telecommunications Users Committee’s (“AdHoc’s”) economic analysis confirms these conclusions.⁷⁰ In addition, AdHoc has detailed its members’ actual market experience that there

⁶⁶ *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (“*Special Access NPRM*”).

⁶⁷ Declaration of Stanley M. Besen, attached as Attachment B to Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Jul. 9, 2009) (“*tw telecom Letter*”).

⁶⁸ *tw telecom Letter*, at 2.

⁶⁹ *Id.*, at 6-7.

⁷⁰ Comments of the AdHoc Telecommunications Users Committee, WC Docket 05-25 (filed Aug. 8, 2007), at 8-14.

are “no competitive alternatives to ILEC [special access] services to meet their broadband business services requirements in the overwhelming majority of their service locations.”⁷¹

Sprint Nextel (“Sprint”) has identified a “particularly pernicious effect of the current unjust and unreasonable special access rates” of the BOCs.⁷² Sprint notes that the inflated special access prices charged by the BOCs “deter the deployment of innovative, competitive broadband networks.”⁷³ Other competitors have raised similar concerns. T-Mobile has cautioned that “[c]onsumers ultimately suffer from the high cost of special access as companies like T-Mobile must expend their limited resources on exorbitant fees in lieu of investing in improved services, including wireless broadband, and expanded coverage areas.”⁷⁴ Knowledgeable members of Congress agree. In a letter to the Commission, Rep. Edward Markey noted that “unduly high prices may force carriers to expend funds on special access that would be better spent on upgrading their networks to provide broadband services.”⁷⁵

It would be illogical and contrary to basic principles of statutory construction to conclude that Congress intended to permit the BOCs to comply with their Competitive Checklist obligations by offering access services that were being offered well before passage of the 1996 Telecom Act. It is time for the Commission to begin enforcing the Act as written.

⁷¹ *Id.*, at 8 (footnote omitted).

⁷² Letter from Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Oct. 5, 2007), at 4.

⁷³ *Id.*

⁷⁴ Comments of T-Mobile USA, Inc., WC Docket No. 05-25 (filed Aug. 8, 2007), at 8.

⁷⁵ Letter from Hon. Edward J. Markey, Chairman, House Subcommittee on Telecommunications and the Internet, to Kevin J. Martin, Chairman, Federal Communications Commission (May 23, 2007), *available at* http://markey.house.gov/index.php?option=com_content&task=view&id=2859&Itemid=46, at 2.

2. Checklist Item 6 (Local Switching)

The BOCs' approach to Checklist Element 6 (local switching) is similar to their approach to Checklist Elements 4 and 5. When challenged to identify their compliance efforts, the BOCs sometimes point to their highly problematic standard master wholesale unbundled network element platform ("UNE-P") replacement service agreements (*i.e.*, Verizon's Wholesale Advantage, Qwest's Local Services Platform ("QLSP")) as evidence of their satisfaction of Checklist item 6. AT&T offers a stand-alone Section 271 local switching agreement pursuant to which the recurring charges for a two-wire DS0 analog line port are as high as \$29.00 per month.⁷⁶

This issue has arisen several times over the past several years in the context of BOC requests for forbearance from Section 251(c)(3) unbundling obligations. Verizon and Qwest each have pointed to their standard UNE-P replacement agreements to support their contention that sufficient competition for residential customers exists in a particular geographic market to justify forbearance.⁷⁷ They also have alleged that the availability of these wholesale services proves that, post-forbearance, they would continue to offer economically-viable wholesale substitutes for Section 251(c)(3) UNEs.⁷⁸ Unfortunately, their representations are baseless.⁷⁹

⁷⁶ See AT&T Section 271 Local Switching Offer, available at <https://clec.att.com/clec/cars/shell.cfm?section=2424> (last visited Nov. 5, 2009).

⁷⁷ See, e.g., *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24 (filed Feb. 14, 2008) ("*Verizon Rhode Island Petition*"), at 10-11; *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135 (filed Mar. 24, 2009) ("*Qwest Second Phoenix Petition*"), at 22.

⁷⁸ See, e.g., *Verizon Petition – Boston*, at 14; *Qwest Second Phoenix Petition*, at 22.

⁷⁹ Even if the BOCs' wholesale local switching offerings did not suffer from the fatal flaws discussed herein, competitors' use of these wholesale services would have no legitimate impact on the Commission's Section 251(c)(3) UNE forbearance analysis. The Commission has stated on numerous occasions that only facilities-based (*i.e.*, competitive