

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Petition for Expedited Rulemaking to Adopt
Rules Pertaining to the Provision by Regional
Bell Operating Companies of Certain Network
Elements Pursuant to 47 U.S.C. § 271(c)(2)(B)
of the Act

WC Docket No. 09-222

**OPPOSITION OF AT&T INC. TO THE PETITION
OF THE SECTION 271 COALITION**

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INTRODUCTION

Petitioners' request that the Commission adopt rules to implement 47 U.S.C. § 271 – including TELRIC-based pricing rules for high-capacity loops and transport – is a transparent attempt to circumvent the Commission's ongoing special access rulemaking. The Petition also represents an effort to reverse course on Commission determinations interpreting and applying 47 U.S.C. § 251 – determinations that were hard-fought, were reached only after extensive judicial prodding and close to a decade of litigation-based uncertainty, and have been validated by the substantial investment and competition that have occurred since their issuance. In both respects, the Petition is deeply flawed.

I. The primary complaint animating the Petition is a familiar one: incumbent local exchange carrier (“LEC”) special access prices are too high. But Petitioners and others have been asking this Commission to revise the rules governing special access pricing since 2002. And the Commission has responded with a rulemaking proceeding that now includes multiple rounds of comments and extensive incumbent LEC-provided data and economic testimony. AT&T believes the evidence in that proceeding makes clear that there is no basis for the Commission to mandate special access rate reductions. But, in all events, it is in the context of that proceeding, not here, that issues pertaining to special access regulation should be addressed.

Indeed, the Commission has already ruled as much. When commenters, including many of the same parties that are Petitioners here, previously asked the Commission to address special access pricing through the formulation of unbundling rules – and thereby to circumvent a special access rulemaking – the Commission soundly rejected their claim, explaining that Petitioners' proper recourse was to seek changes to the purportedly “problematic rules themselves, rather

than attempt[ing] to tilt the unbundling framework to account for the asserted deficiency.”¹ The Commission should reach the same result here, and it should reject the Petition on this basis alone.

II. The Commission should also reject the Petition because it reflects an attempt to turn the clock back on Commission rulings interpreting and applying § 251.

The Commission’s implementation of the unbundling requirements of the Telecommunications Act of 1996 (“1996 Act”) consumed close to a decade, including four massive rulemaking proceedings, two trips to the Supreme Court, and three trips to the D.C. Circuit. At the culmination of that lengthy and hard-fought process, the Commission put in place rules that, consistent with the statutory text and its authoritative construction by the Supreme Court and the D.C. Circuit, imposed meaningful limitations on unbundling and were accordingly able to withstand judicial review.

Thus, for example, the Commission developed an “impairment” standard for unbundled access that, consistent with the 1996 Act’s goal of encouraging competitors to compete with their own facilities where feasible, foreclosed TELRIC-based access except where such subsidized access was truly necessary to compete. The Commission then applied that standard to prevent TELRIC-based unbundling of high-capacity loops and transport in areas where such access is not necessary to permit competitive LECs to compete, as well as to eliminate the UNE-Platform. The Commission also foreclosed TELRIC-based access to provide services, including wireless and long distance, that were characterized by robust rivalry and where subsidized access would distort competition. And it interpreted the statute, as mandated by its text, in a manner that

¹ Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 23 (2005) (“*Triennial Review Remand Order*”), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

distinguished § 251 from § 271 by, among other things, concluding that the TELRIC-based pricing methodology that the Commission had held applies under § 251 does not and cannot be applied under § 271.

The Petition defies each and every one of these rulings. It asks the Commission to require TELRIC-based access to certain high-capacity loop and transport facilities, purportedly because those facilities are “essential” to Petitioners’ ability to compete, despite the fact that the Commission already held in the § 251 context that they are *not* necessary to compete and should *not* be made available at TELRIC rates. It seeks subsidized access to facilities for use in wireless and long distance, in spite of the Commission’s express holding in the § 251 context that such access would distort well-functioning competitive markets. It seeks to recreate the “completely synthetic competition” represented by the UNE-P (and repeatedly vacated by the courts) in the face of evidence showing that, since its elimination, facilities-based voice competition has exploded. And it seeks to import into § 271 the Commission’s TELRIC methodology for rate setting, despite the Commission’s express holding that the statute does not permit that result and despite the Commission’s repeated instruction that § 271 pricing should be governed by the market.

In each of these respects – as well as in others discussed below – the Petition represents an invitation to the Commission to eviscerate the unbundling regime it reached only after years of effort and repeated trips to the courts, and which has provided much needed regulatory stability in the industry. There is no basis in the statute or sound policy that would permit that result. For this reason as well, the Petition should be rejected.

DISCUSSION

I. THE PETITION IS AN IMPROPER ATTEMPT TO CIRCUMVENT THE COMMISSION'S ONGOING SPECIAL ACCESS PROCEEDING.

Petitioners focus in large part on § 271 competitive checklist items 4 and 5, which require Bell Operating Companies (“BOCs”) to provide access to local loop transmission and local transport services, unbundled from other services.² BOCs typically satisfy these obligations through a combination of existing interconnection agreements and their special access tariffs – in particular, with respect to loop transmission and transport that no longer qualify as unbundled network elements (“UNEs”) under § 251(c)(3), BOCs satisfy their obligations under checklist items 4 and 5 through their special access tariffs.³ Petitioners argue that special access is insufficient because, they claim, “the BOCs are continuing to exercise market power to set supracompetitive special access prices.”⁴

But the Commission already has an ongoing proceeding to review special access rates. In 2005, after prodding by many of the same parties that are Petitioners here, the Commission “commence[d] a broad examination of the regulatory framework to apply to . . . interstate special access services” and sought comments on “what steps the Commission should take to ensure that rates for special access services remain just and reasonable.”⁵ Two years later, in response to significant developments in the industry, the Commission invited interested parties to update the

² See 47 U.S.C. § 271(c)(2)(B)(iv)-(v); Petition for Expedited Rulemaking at 18-21 (filed Nov. 9, 2009) (“Pet.”).

³ See *Triennial Review Remand Order* ¶¶ 142, 195 (citing tariffed special access services as a replacement option for previously unbundled loop and transport facilities).

⁴ Pet. at 19-20.

⁵ Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994, ¶¶ 1-2 (2005).

record in the proceeding.⁶ Since July 2007, the Commission has received over 400 filings in the special access proceeding, including filings from every member of the “Section 271 Coalition” that filed this Petition.⁷

Petitioners’ request for rulemaking here is thus a transparent attempt to circumvent the rulemaking proceeding that is already well underway. Indeed, their proposed rules would essentially replicate the current special access tariff regime, by requiring BOCs to file with the Commission a Statement of Generally Available Terms (“SGAT”),⁸ just as they file interstate special access tariffs today. What is more, Petitioners would have the Commission enable existing special access customers to “convert” their tariffed service agreements into an “equivalent Checklist Element offering.”⁹ The only thing that would change through this conversion would be the price.

Moreover, the arguments Petitioners present in support of the price reduction they seek are, by Petitioners’ own admission, recycled from the special access proceeding.¹⁰ The Petition relies, for example, on a July 9, 2009, letter filed by tw telecom inc. (“tw”) in the special access proceeding.¹¹ That letter was one in a series of filings in which tw purported to demonstrate that incumbent LECs are charging unjust and unreasonable prices for special access services.¹² In

⁶ See Public Notice, *Parties Asked To Refresh Record in the Special Access Notice of Proposed Rulemaking*, 22 FCC Rcd 13352 (2007).

⁷ See WC Docket No. 05-25.

⁸ See Pet. at 29, 41-43.

⁹ *Id.* at 31 (explaining proposed 47 C.F.R. § 53.608).

¹⁰ See *id.* at 20-21 & nn.66-75 (reiterating contents of NPRM and filings by tw telecom inc., AdHoc Telecommunications Users Committee, Sprint Nextel Corp., T-Mobile USA, Inc., and Rep. Edward Markey).

¹¹ *Id.* at 20.

¹² See Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed July 9, 2009); Letter from Thomas Jones, Counsel

response, AT&T has repeatedly explained that twt’s data and arguments are flawed.¹³ Now, twt, as part of the “Coalition” supporting this proposed rulemaking, offers the same flawed data, purportedly to support its effort to achieve through a § 271 rulemaking what it has already sought to obtain elsewhere.

This is not the first time Petitioners have attempted to circumvent the Commission’s special access rulemaking. In particular, when commenters, including some of the Petitioners here, previously argued that supposedly “excessive special access rates” warranted particular unbundling rules, the Commission emphatically rejected their claim.¹⁴ If special access prices are “impeding the development of competition,” the Commission explained, “parties should seek redress of the problematic rules themselves, rather than attempt to tilt the unbundling framework to account for the asserted deficiency.”¹⁵

Petitioners’ renewed attempt to short-circuit the pending special access rulemaking should meet the same fate. Regulating special access pricing through a § 271 rulemaking, as Petitioners request, would undermine the Commission’s comprehensive approach to special access pricing by creating rules that apply only to BOCs and by neglecting the extensive (albeit

to Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Oct. 11, 2007).

¹³ *See, e.g.*, Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 10-12 (filed Nov. 4, 2009) (explaining that the meaninglessness of calculating market share based on accounting profits – twt’s method of analysis – is one of the most “widely accepted” propositions in the field of economics); Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 6 (filed Feb. 6, 2009) (explaining that, as FCC and GAO had predicted, special access prices increased under pricing flexibility because price caps set rates below cost); *id.* at 6-7 (further explaining that twt’s price charts consisted of an “apples-to-oranges comparison,” that its competitive LEC data were based on undocumented and internal numbers, and that its incumbent LEC prices were inflated by hundreds or even thousands of dollars over the actual price).

¹⁴ *See Triennial Review Remand Order* ¶ 23.

¹⁵ *Id.*

lopsided¹⁶) record that has already been established in the special access proceeding. The Petition should be rejected on this basis alone.

II. THE PETITION IS AN IMPROPER AND INADEQUATE ATTEMPT TO CIRCUMVENT THE COMMISSION’S INTERPRETATION AND APPLICATION OF § 251.

In addition to attempting an end run around the ongoing special access proceeding, the Petition also seeks to circumvent Commission rulings interpreting and applying § 251. Those rulings were reached by the Commission – and affirmed by the courts – only after a decade of proceedings that featured repeated vacatures of Commission rules and enormous uncertainty in the industry. Petitioners do not and cannot provide any sound basis to revisit those rulings and thereby undermine the certainty that now characterizes the Commission’s UNE regime.

A. The Petition Is a Misguided Effort To Avoid the Commission’s Previous Rulings.

1. The Proposed Rules Conflict with the Commission’s Interpretation of § 251 and § 271.

The Petition runs afoul of prior Commission unbundling decisions, first, because it contradicts the Commission’s settled understanding that § 271 unbundling is distinct from that required under § 251.

a. The Commission has long recognized that § 251 and § 271 impose separate obligations. In the *Triennial Review Order*, the Commission comprehensively addressed this precise question and put to rest the assertion – which animates the entire Petition – that § 251 and

¹⁶ As AT&T and other parties have explained, the parties challenging special access rates – including Petitioners here – have steadfastly refused to provide the Commission with relevant data supporting their claims. *See Ex Parte* Letter from Glenn Reynolds, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Apr. 27, 2009). Meanwhile, the incumbent LECs have offered “tremendous amounts of irrefuted and irrefutable data demonstrating the success of the Commission’s current regulatory policies for pricing of special access services.” *Id.*

§ 271 are substantively the same.¹⁷ The Commission first pointed out that the language and structure of the 1996 Act demonstrate that the two sections establish independent obligations: because checklist item 2 of § 271 already requires compliance with § 251 unbundling, reading the other checklist items as subject to § 251's requirements would render those provisions "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."¹⁸

Moreover, the Commission explained that its interpretation of the separate provisions as imposing distinct obligations accords with Congress's differing purposes in enacting each. Section 251, which applies to all incumbent LECs, "is a mandatory provision designed to ensure a minimum level of openness in the local market."¹⁹ Section 251 unbundling thus allows competitive carriers to access network elements that cannot be duplicated in the market and are accordingly necessary in order to compete. The Commission determines whether an element meets that demanding standard by asking whether "the failure to provide access to [the network element in question] would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."²⁰ Critically, if the Commission applies that test and finds *no* impairment – and therefore declines to order unbundling – it represents an affirmative,

¹⁷ See generally Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 649-667 ("Triennial Review Order"), petitions for review denied in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"); see Pet. at 15-18.

¹⁸ *Triennial Review Order* ¶ 654.

¹⁹ *Id.* ¶ 655.

²⁰ 47 U.S.C. § 251(d)(2)(B).

binding finding that competitive carriers can compete effectively without the subsidized, TELRIC-based access required under § 251.²¹

Section 271, by contrast, requires no impairment analysis, because it does not perform the same work done by § 251. Instead, it sets out “specific conditions of entry into the long distance [market] that are unique to the BOCs,” reflecting “Congress’s concern . . . with balancing the BOCs’ entry into the long distance market with increased presence of competitors in the local market.”²² Thus, § 271’s competitive checklist ensures that any BOC that enters the interLATA market is actually providing (or at least offering) local exchange competitors access to the specified network elements.²³ Were it not for the § 271 checklist, for example, BOCs might be free to withdraw the special access tariffs they use to satisfy their § 271 obligations to provide local loop transmission and local transport services, without providing substitute service offerings in their place. It is therefore neither “illogical” nor “contrary to basic principles of statutory construction” to conclude that Congress intended to allow BOCs to comply with their checklist obligations by offering the same special access and market-based contract services they had historically made available;²⁴ the checklist obligation simply ensures that BOCs will continue to make local loop transmission and local transport services available at just and reasonable rates.

²¹ See Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, WC Docket No. 03-251, FCC 05-78, ¶¶ 21-30 (rel. Mar. 25, 2005) (preempting as inconsistent with federal law state rulings that contradicted Commission’s decision not to require access to certain loop capability).

²² *Triennial Review Order* ¶ 655.

²³ See, e.g., Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 4 (2004) (BOCs satisfy the competitive checklist by “demonstrating that the local market is open to competition”).

²⁴ Pet. at 21.

But the fact that § 271 imposes additional requirements on BOCs that are separate from the requirements of § 251 does not mean, as Petitioners seem to think, that it mandates a more stringent, BOC-specific version of the same rules – in effect, a “§ 251 plus” regime.²⁵ Rather, the Commission has made clear that the difference between the two sections is one of substance, not merely degree. And the D.C. Circuit “agree[d] with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist.”²⁶

Thus, for example, the Commission and the courts have expressly concluded that the pricing standard for network elements unbundled only under § 271 is distinct from the deeply subsidized, TELRIC-based pricing standard that applies to § 251 unbundling. The Supreme Court has explained that § 252(d), which the Commission concluded provides the statutory rationale for TELRIC pricing of UNEs made available under § 251, is “radically unlike” other statutes requiring that rates be just and reasonable, reflecting “an explicit disavowal of the familiar public-utility model of rate regulation” that Petitioners point to as the rationale for importing TELRIC pricing into the § 271 context.²⁷ By contrast, as the Petition recognizes, § 271 checklist element prices are judged against the traditional just and reasonable standard set

²⁵ Indeed, the Commission has rejected one competitive LEC’s suggestion that § 271 imports the unbundling requirements of § 251 even where no impairment exists. *See Triennial Review Order* ¶ 658 (“Were we to accept Z-Tel’s argument, we would again impose a virtually unlimited standard to unbundling, based on little more than faith that more unbundling is better, regardless of context.”).

²⁶ *USTA II*, 359 F.3d at 590.

²⁷ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002). This statement alone clearly refutes Petitioners’ argument that the traditional “touchstone” to the “just and reasonable” standard of § 201 and § 202 is cost, and that TELRIC satisfies that standard. *See Pet.* at 35-39.

out in § 201 and § 202.²⁸ Under the Supreme Court’s decision, that means, not that the pricing standards that apply under § 251 and § 271 are the same as the Petition contends, but rather that they are vastly different.

And the Commission has held exactly that. In the *UNE Remand Order*, the Commission explained that, when a facility is not unbundled under § 251 (and therefore is required to be made available, if at all, only pursuant to § 271), it means that “competitors can acquire [that facility] in the marketplace at a price set by the marketplace.”²⁹ In such circumstances, “it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, *the market price should prevail*, as opposed to a regulated rate which, at best, is designed to *reflect* the pricing of a competitive market.”³⁰

The Commission reaffirmed and elaborated on this determination in the *Triennial Review Order*. “Contrary to the claims of some commenters,” the Commission stated, “TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest.”³¹ In fact, the Commission noted that requiring TELRIC pricing under § 271 would conflict with the statute, as it would “gratuitously reimpose the very same requirements that another provision (section 251)

²⁸ See Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 470, 472 (1999) (“*UNE Remand Order*”).

²⁹ *Id.* ¶ 473.

³⁰ *Id.* (emphasis added). The D.C. Circuit later echoed this reasoning, explaining that the purpose of the unbundling requirement “is to stimulate competition – preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.” *USTA II*, 359 F.3d at 589.

³¹ *Triennial Review Order* ¶ 656. Likewise, the D.C. Circuit found “no serious argument” in favor of this claim. *USTA II*, 359 F.3d at 576.

has eliminated.”³² Thus, instead of relying on TELRIC, “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.”³³ And the Commission specifically decided *not* to promulgate rules to gauge when those standards would be satisfied, noting that this determination “is a fact-specific inquiry that [it] will undertake” on a case-by-case basis,³⁴ while at the same time providing a safe harbor by explaining that a BOC could satisfy the standard by showing that it had “entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.”³⁵ (This treatment of § 271 pricing refutes Petitioners’ claim that the Commission has not provided “meaningful guidance” on the issue.³⁶)

Nor is pricing the only substantive distinction between § 251 and § 271. The text of § 251(c)(3) requires incumbent LECs to provide “nondiscriminatory access” to UNEs, whereas § 271 contains no such requirement for checklist items four, five, and six. Access to those network elements is governed by § 202, which forbids only “*unjust or unreasonable* discrimination.”³⁷ The Commission has interpreted § 251’s unique “nondiscriminatory access” requirement as the source of two rules applicable to that section: the rules regarding the combination of UNEs under § 251,³⁸ and the requirement that incumbent LECs must perform for competitive LECs “routine network modifications” that they “regularly undertake for their own

³² *Triennial Review Order* ¶ 659.

³³ *Id.* ¶ 656.

³⁴ *Id.* ¶ 664.

³⁵ *Id.*

³⁶ Pet. at 32.

³⁷ See 47 U.S.C. § 202(a) (emphasis added).

³⁸ See 47 C.F.R. § 51.315.

customers.”³⁹ By contrast, the Commission has refused “to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251,”⁴⁰ and it has never suggested that BOCs are or could be required to perform routine network modifications under § 271.

Finally, the statute differentiates between, on the one hand, the *physical facilities* that must be made available under § 251(c)(3), and, on the other hand, *services* that must be made available to satisfy the competitive checklist (including in particular checklist items 4 (loops) and 5 (transport)). Section 251(c)(3) requires unbundled access, upon proper findings by the Commission, to “network elements,” which the statute defines as “facilit[ies] or equipment used in the provision of a telecommunications service,” as well as “features, functions, and capabilities that are provided by means of such facilit[ies] or equipment.”⁴¹ Checklist items 4 and 5, by contrast, require BOCs to provide a local *service*: checklist item 4 requires a BOC to provide “local loop transmission from the central office to the customer’s premises, unbundled from local switching and *other services*,”⁴² and checklist item 5 requires “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or *other services*.”⁴³ These differences in the language Congress used – between “facilit[ies] and equipment” that must be unbundled under § 251, and a “service” that must be provided under

³⁹ *Triennial Review Order* ¶ 632. The Commission defended its decision to the D.C. Circuit by arguing that the rule is “affirmatively demanded” by the “nondiscriminatory access” language in § 251. *USTA II*, 359 F.3d at 578.

⁴⁰ *Triennial Review Order* ¶ 655 n.1990; *see also USTA II*, 359 F.3d at 589-90 (affirming the Commission’s decision and noting that § 271 neither mentions “combining” nor contains the “nondiscriminatory access” requirement that underlies the Commission’s combination rules).

⁴¹ 47 U.S.C. § 153(29).

⁴² *Id.* § 271(c)(2)(B)(iv) (emphasis added).

⁴³ *Id.* § 271(c)(2)(B)(v) (emphasis added).

§ 271 – must be presumed to be intentional,⁴⁴ and they make clear that checklist items 4 and 5 are satisfied by the provision of *a* local loop transmission service and *a* local transport service. Accordingly, whereas the Commission has held that *all* loop and transport facilities in an incumbent LEC network are presumptively eligible for unbundling under § 251,⁴⁵ the plain terms of the statute foreclose such an interpretation under § 271.

b. The Petition runs headlong into these established distinctions between § 251 and § 271. Indeed, Petitioners make no attempt to disguise that their aim is the wholesale importation of § 251 rules into the § 271 context, explaining that their proposed rules *start* with the “current Section 251 rules” and are then edited primarily “to *eliminate*” limitations on those rules that apply in the § 251 context.⁴⁶

Thus, for example, Petitioners propose pricing rules for § 271 checklist elements that are avowedly TELRIC-based and studiously ignore the Commission’s repeated explanation that § 271 requires *market-based*, not cost-based, pricing.⁴⁷ Petitioners would set rates for nonrecurring charges at the *exact same level* as § 251 rates⁴⁸ – that is, using the TELRIC methodology the Commission adopted to implement § 251.⁴⁹ Recurring charges would also be

⁴⁴ See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (alteration in original, citation omitted); *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009); *Duncan v. Walker*, 533 U.S. 167, 173 (2001).

⁴⁵ See *UNE Remand Order* ¶¶ 167, 323.

⁴⁶ Pet. at 26 (emphasis added).

⁴⁷ See *id.* at 33-34 (proposed 47 C.F.R. § 53.609). Even notwithstanding their attempt to import TELRIC pricing from § 251 into § 271, Petitioners’ effort in proposed § 53.609(f) to police wholesale rates by regulating *retail pricing* shows just how heavy-handed their proposed rules are.

⁴⁸ See *id.* (proposed 47 C.F.R. § 53.609(a)).

⁴⁹ See 47 C.F.R. § 51.505.

priced at TELRIC, with only a minor adjustment such that the common cost component of the rate – which states have set at percentages ranging up to 35%⁵⁰ – would be presumed reasonable if it were less than or equal to 22%.⁵¹ And the proposal to limit total charges to the stand-alone cost of a checklist element “mirrors an identical provision in [47 C.F.R.] § 51.505(c)(2)(i) intended to ensure that the prices for any individual Checklist Element [sic] not exceed the level that would be charged by an efficient provider in a competitive market.”⁵² There can be little doubt, therefore, that Petitioners seek to price services that are available only under § 271 using the TELRIC-based methodology that the Commission has said applies only under § 251.

Petitioners similarly neglect the Commission’s interpretation of the “nondiscriminatory access” language that appears in § 251 but that does not apply to checklist items four, five, or six of § 271. The proposal seeks to adopt 47 C.F.R. § 51.315, the rule governing UNE combinations under § 251, to require combinations of checklist elements that are not subject to § 251 unbundling.⁵³ And the proposed rules would mandate routine network modifications for all local

⁵⁰ See generally, e.g., Opinion and Order, *Peninsula Telephone Co.*, No. U-12637, 2000 WL 33125068 (Mich. PSC Dec. 20, 2000) (setting common cost factor of 35%); Memorandum Opinion and Order, *Application by SBC Communications Inc. et al. for Authorization To Provide In-Region, InterLATA Services in California*, 17 FCC Rcd 25650, ¶ 24 (2002) (noting California common cost factor of 21%); Memorandum Opinion and Order, *Application by Verizon New England Inc. et al. for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, 17 FCC Rcd 18660, ¶¶ 27, 72 & n.89 (2002) (noting common cost factors of 15% in New Hampshire and 5.95% in Delaware); Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303, ¶ 231 (2002) (noting Idaho common cost factor of 13%).

⁵¹ See Pet. at 33 (proposed 47 C.F.R. § 53.609(b)-(d)).

⁵² *Id.* at 40.

⁵³ See *id.* at 31 (noting only “editorial” and “clarifying” changes to § 51.315, which is mistakenly identified here as § 51.305).

loop transmission and local transport made available under checklist items 4 and 5, whether or not they are subject to § 251 unbundling.⁵⁴

The Petition also would import into § 271 several additional requirements that have no place in the competitive checklist. For example, BOCs would be required to “have on file an approved federal SGAT [Statement of Generally Available Terms] describing the rates, terms and conditions of service for each Checklist Element,”⁵⁵ even though the statute gives BOCs the *option* to file such a statement.⁵⁶ And the proposed rules include mechanisms for filing petitions to suspend or reject a filed SGAT that find no justification in the statute.⁵⁷ Similarly, Petitioners propose to subject checklist elements to “any performance and/or penalty plans filed by a BOC for *corresponding network elements* provided under section 251(c)(3) of the Act”⁵⁸ – even though many checklist elements *do not* correspond to § 251(c)(3) UNEs, even though the Commission itself never adopted those plans, and even though those plans are by and large the product of voluntary agreement by BOCs to apply performance measures *only* to facilities and services required under § 251. Finally, Petitioners would require BOCs to provide access to “all of the features, functions, and capabilities” of each and every loop and transport facility in their network,⁵⁹ even though the Commission has never held that § 271 requires BOCs to make available every conceivable type of loop and transport facility (much less every feature, function, and capability of those facilities), and even though the statute makes clear that checklist items 4

⁵⁴ *See id.*, Attachment A at 2 (proposed 47 C.F.R. § 53.602(e)).

⁵⁵ *Id.* at 29 (summarizing proposed 47 C.F.R. § 53.601).

⁵⁶ *See* 47 U.S.C. § 271(c)(2)(A)(i)(II).

⁵⁷ *Pet.* at 42-43 (proposed 47 C.F.R. § 53.612).

⁵⁸ *Id.*, Attachment A at 3 (proposed 47 C.F.R. § 53.602(g)) (emphasis added).

⁵⁹ *See id.*, Attachment A at 2 (proposed 47 C.F.R. § 53.602(c)).

and 5 are satisfied by making available a local loop transmission service and a local transport service.

In each of these respects, the Petition runs contrary to settled law. Congress, the Commission, and the courts have made clear that the rules applicable to § 251 do not necessarily apply under § 271, and indeed in many cases the law is clear that those rules *cannot* apply under § 271. The Petition rests on precisely the opposite assumption and should be rejected on this basis as well.

2. The Petition Seeks To Undo the Commission’s Previous Applications of the § 251 Unbundling Standard.

Nor have Petitioners justified their attempts to avoid the Commission’s previous applications of the § 251 unbundling standard. In 2005, after close to a decade of litigation during which the courts sharply rebuked the Commission for failing to apply a meaningful limiting standard to § 251’s unbundling requirement, the Commission finally put in place unbundling rules that could withstand review. Thus, in the *Triennial Review Remand Order*, the Commission determined that competition exists, in specified circumstances, without TELRIC-based access to DS1, DS3, dark fiber loops and transport, and the UNE-P, and it concluded that those facilities should not be made available at TELRIC rates.⁶⁰

The Petition seeks to undermine these conclusions by requiring TELRIC-based unbundling of high-capacity loop and transport facilities and services pursuant to § 271 in all cases where they are not available under § 251, as well as to switching. But its logic reflects a profound misunderstanding of the meaning of a Commission conclusion that particular facilities should *not* be made available under § 251. The Petition claims that, “where Section 251(c)(3) unbundled access [to loops and transport] is no longer available,” mandatory subsidized access is

⁶⁰ See *Triennial Review Remand Order* ¶¶ 66, 146.

nevertheless “essential to enable narrowband and broadband competition” and therefore must be provided “pursuant to the terms of the Section 271(c)(2)(B) Competitive Checklist.”⁶¹ This misses the point entirely. Where the Commission concludes that a network element should not be made available under § 251(c)(3), the Commission has concluded that subsidized access to that element is *not* “essential” to competition. And when the Commission reaches that conclusion, it follows that nevertheless requiring such subsidized access – which is precisely what Petitioners seek – would affirmatively *undermine* competition by distorting the marketplace and inhibiting the incentive to invest of incumbent and competitive carriers alike.

The Petition reflects similar confusion in connection with its plea for subsidized access to facilities that Petitioners wish to use for wireless and long-distance service. After prompting from the D.C. Circuit,⁶² the Commission found in the *Triennial Review Remand Order* that competition in the mobile wireless and long-distance services markets has “evolved without access to UNEs,” it recognized that introducing subsidized access to facilities used in the provision of such services would undermine that competition, and it therefore refused to order unbundling of network elements for use with such services.⁶³ Yet Petitioners argue that subsidized access to network elements under § 271 is particularly important in the long-distance and wireless contexts *because* long-distance and mobile wireless carriers are precluded from

⁶¹ Pet. at 2.

⁶² See *USTA II*, 359 F.3d at 576 (with regard to mobile wireless services, “market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don’t impede competition”), 592 (“The CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services.”).

⁶³ *Triennial Review Remand Order* ¶ 36; see also *id.* ¶ 36 nn.106-07 (citing the numerous instances in which the Commission had previously found the mobile wireless and long-distance markets competitive); *Covad*, 450 F.3d at 538 (noting the “robust competition” in the mobile wireless and long-distance markets).

accessing those elements under § 251(c)(3) UNEs.⁶⁴ In other words, the Petition seeks to justify its proposed rules – and, in particular, the application of nearly all of the requirements of § 251 to such carriers (albeit under the guise of § 271 regulation) – expressly *because* they would nullify the Commission’s ruling (in the § 251 context) that subsidized access to network elements should *not* be permitted to undermine well-functioning, competitive markets. There is no basis in law or logic that would permit the Commission to expand the scope of § 271 to require access to facilities at subsidized rates for the sole purpose of undercutting its own ruling, spurred by the D.C. Circuit, that such access is affirmatively contrary to the facilities-based competition that is the 1996 Act’s central goal.

Indeed, the text of the statute itself forecloses that result. The Petition seeks access to checklist items 4-6 for use in the provision of long-distance and wireless service. Yet each of those checklist items is confined to “local” services: checklist item 4 requires access to “*local* loop transmission”; checklist item 5 requires access to “*local* transport”; and checklist item 6 requires access to “*local* switching.”⁶⁵ Long-distance and wireless providers do not want merely *local* switching, loop transmission, and transport. On the contrary, the purpose of the Petition is to enable them to obtain access to BOC services and facilities (at deeply subsidized rates) for *long-distance* services (including wireless services). Furthermore, the statute contemplates that BOCs will satisfy the terms of the competitive checklist by providing access to local services to “competing providers of telephone exchange service.”⁶⁶ Long-distance providers plainly are not providers of “telephone exchange service,” and the statute by its terms excludes cellular

⁶⁴ See Pet. at 4-5.

⁶⁵ 47 U.S.C. § 271(c)(2)(B)(iv)-(vi).

⁶⁶ *Id.* § 271(c)(1)(A) (incorporating the definition of “telephone exchange service” in “section 153(47)(A) of [title 47], but excluding exchange access”).

providers from qualifying as such for purposes of § 271.⁶⁷ For this reason as well, the statute forecloses Petitioners' request that the Commission promulgate rules entitling long-distance and wireless providers to services pursuant to § 271.

Finally, Petitioners would effectively reverse the Commission's exclusion of local switching from unbundling and its elimination of the "UNE platform" or "UNE-P." In the *Triennial Review Remand Order*, the Commission found that "competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets."⁶⁸ Moreover, it found that the availability of UNE-P discouraged investment in new infrastructure and even discouraged use of competitive facilities that had already been deployed.⁶⁹ The Commission's decision to eliminate the UNE-P, in short, was based on a thorough review of compelling evidence that its continued availability would frustrate facilities-based competition. Yet, here too, the Petition asks the Commission effectively to reverse that prior, judicially affirmed ruling, and thereby turn the clock back to an era of "completely synthetic competition" that had no footing in the text or goals of the 1996 Act then and still doesn't today.⁷⁰

⁶⁷ *See id.* ("For the purposes of this subparagraph, services provided pursuant to [47 C.F.R. § 22.901 *et seq.*] shall not be considered to be telephone exchange services."); 47 C.F.R. § 22.901 *et seq.* (rules governing the provision of cellular service).

⁶⁸ *Triennial Review Remand Order* ¶ 199.

⁶⁹ *See id.* ¶ 220.

⁷⁰ *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

B. Petitioners Have Failed To Justify Their Proposed Departures from Commission Precedent.

As the above discussion makes clear, the Petition amounts to a request that the Commission revisit and revise extensively litigated, hard-fought determinations that have been sustained by the courts and that have provided stability in an area long characterized by uncertainty. Even apart from the statutory obstacles to this approach explained above, an agency seeking to effectuate such a wholesale rejection of prior policy determinations must, in the first place, “display awareness that it *is* changing position,” and then “show that there are good reasons for the new policy.”⁷¹ Furthermore, when an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy . . . a reasoned explanation is needed for disregarding [those] facts.”⁷² Petitioners’ passing attempts to provide a factual foundation for their attempt to revisit settled rulings fall far short of the showing necessary to support the reversal of course they seek.

1. Petitioners first suggest that a reversal of Commission policy is justified because Commission decisions to limit unbundling have limited investment in new technologies, including “the deployment of first and next generation broadband services.”⁷³ To support this counterintuitive proposition, Petitioners rely on the conclusions of the recently released “draft” report on the effects of “open access” regulation worldwide by Harvard University’s Berkman Center.⁷⁴ As the Petition sees it, the Berkman Center Report “discovered” that “open access”

⁷¹ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

⁷² *Id.*

⁷³ Pet. at 3. The petition also notes that Sprint Nextel has made a similar argument in the special access proceeding, claiming that BOCs are charging “inflated” special access prices that “deter the deployment of innovative, competitive broadband networks.” *Id.* at 21.

⁷⁴ See Berkman Center for Internet & Society, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy From Around the World* (Oct. 2009) (“Berkman

policies, including in particular unbundling of network elements at regulated rates, facilitate broadband deployment by enabling competitive carriers to compete and encouraging them to invest in broadband.⁷⁵

AT&T, however, has already refuted the Berkman Center Report's methodology and conclusions, including the specific claims Petitioners cite regarding the alleged benefits of unbundling.⁷⁶ In brief, the Report's analysis is based on highly selective and demonstrably unreliable data, combined with a subjective (and in at least some cases obviously incorrect) "qualitative" assessment of individual countries' experience with broadband deployment as well as an "econometric" analysis of available data that is so obviously out-of-keeping with objective statistical standards as to make any responsible economist blush.⁷⁷ The Report's conclusions, in short, neither offer a reliable foundation on which the Commission can shape its national broadband plan nor justify the proposed departures from existing § 251 and § 271 policy Petitioners seek.

The Berkman Center Report, moreover, has no answer to the facts, which demonstrate beyond dispute that the Commission's decisions to limit unbundling have in fact led to a spate of investment. In limiting unbundling of next-generation loops, for example, the Commission stated its expectation that its decision would "give[] incumbent LECs an incentive to deploy fiber . . . and develop new broadband offerings" while simultaneously "stimulat[ing] competitive

Center Report"), *available at* http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.

⁷⁵ See Pet. at 3 (citing Berkman Center Report at 11, 77).

⁷⁶ See Comments of AT&T Inc. on Berkman Center Report, *National Broadband Plan Public Notice #13*, GN Docket Nos. 09-47, -51, and -137 (FCC filed Nov. 16, 2009) ("AT&T Berkman Comments").

⁷⁷ See *id.* at 1-4 (summarizing Report's myriad shortcomings).

LEC deployment of next-generation networks.”⁷⁸ And it has. Since the Commission’s 2003 decision, the BOCs and other “leading wireline broadband providers have invested enormous sums to push fiber deep into their networks in order to provide increasing broadband speed and reliability to consumers.”⁷⁹ AT&T, for example, has invested billions of dollars building a new, advanced fiber-to-the-node network that now passes more than 20 million homes and is still expanding.⁸⁰ Other companies have undertaken similar broadband deployment efforts.⁸¹ There is, in short, no reason to question the logic of the Commission’s decision to exclude next-generation fiber loop architecture from unbundling requirements; on the contrary, by doing so, the Commission unleashed a wave of investment that has continued even as other industries have dramatically scaled back.⁸²

2. Petitioners also try to justify their proposed departures from Commission precedent by painting a picture of a communications market dominated by BOCs that thwart would-be competitors by denying them access to critical network facilities. Citing the Commission’s most recent Local Competition Report,⁸³ Petitioners claim that “the BOCs now

⁷⁸ *Triennial Review Order* ¶ 290.

⁷⁹ *AT&T Berkman Comments* at 28.

⁸⁰ See News Release, AT&T, *Record Wireless Gains, Double-Digit Growth in IP-Based Revenues, Strong Cash Flow Highlight AT&T’s Third Quarter Results* (Oct. 22, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27290&mapcode=>.

⁸¹ See *AT&T Berkman Comments* at 29 (summarizing deployment figures).

⁸² In addition to the extensive comments rebutting the Berkman Center Report’s faulty conclusions, a recent report finds that “[m]andatory unbundling can delay facilities-based entry and reduce network investment, particularly if unbundled input prices are set too low.” Harold Ware & Christian M. Dippon, NERA Economic Consulting, *Wholesale Unbundling and Intermodal Competition 1* (2010).

⁸³ See Indus. Analysis & Tech. Div., FCC, *Local Telephone Competition: Status as of June 30, 2008* (2009) (“*Local Competition 2008*”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292193A1.pdf.

enjoy a market share of 72%” of the all-distance wireline market – that is, “the market of subscribers who choose a single provider for their local and long-distance needs.”⁸⁴

But these data are utterly – and increasingly – meaningless because they fail to account for intermodal competition. Almost three years ago, the Commission recognized that “intermodal competition between wireline services and services provided on alternative service platforms, such as facilities-based VoIP and mobile wireless, has been increasing and is likely to continue to increase.”⁸⁵ That prediction has been borne out in spades.

As AT&T recently explained in detail, technological changes and market forces are making plain old telephone service (“POTS”) and the public switched telephone network (“PSTN”) – and the supposed “market share” figures Petitioners use to justify their Petition – increasingly beside the point.⁸⁶ By early 2009, over 22% of households had already “cut the cord” and were relying on wireless service for their voice communication needs, and this number has been rising steadily over the past three years.⁸⁷ Even among those who have not dispensed with landline service entirely, a growing percentage receive all or nearly all calls on their wireless phones; in early 2009, 14.7% of households were in this “wireless-mostly” category, and that number too is rapidly increasing.⁸⁸ Industry analysts predict that the pace of these

⁸⁴ Pet. at 12-13.

⁸⁵ *Id.*

⁸⁶ See Comments of AT&T Inc. on the Transition from the Legacy Circuit-Switched Network to Broadband at 8, *NBP Public Notice #25*, GN Docket Nos. 09-47, -51, and -137 (FCC filed Dec. 21, 2009) (“*AT&T Broadband Comments*”).

⁸⁷ See Stephen J. Blumberg & Julian V. Luke, Nat’l Ctr. for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2009*, at 6 tbl.1 (2009), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200912.pdf>.

⁸⁸ See *id.* at 2-3, 14-15 tbl.4.

trends “is accelerating, as secular and cyclical impacts force consumers to rethink the relevance of wireline.”⁸⁹ Yet Petitioners’ claims of BOC dominance ignore them.

Petitioners also ignore that consumers are abandoning traditional POTS in favor of VoIP services offered by cable companies and by “over-the-top” providers. At least 24 million households currently use a VoIP service.⁹⁰ Demand is rising, especially for cable-provided VoIP; an estimated 24 million customers are expected to subscribe to cable VoIP service in 2010.⁹¹ By 2011, the total number of VoIP subscribers is expected to rise to 45 million.⁹² By contrast, from 2000 to 2008, the number of residential switched access lines fell by almost half, from 139 million to 75 million; another 700,000 lines are now being cut *each month*.⁹³ Petitioners do not and cannot explain how their claims of BOC dominance can be squared with data showing that BOC access lines are plummeting at the same time as a key competing technology is close to doubling in subscribers every year.

⁸⁹ Jason Armstrong et al., Goldman Sachs, *The Quarter in Pictures: 3Q2009 North America Communications Services Review* 20 (Nov. 2009).

⁹⁰ An estimated 21.7 million customers currently obtain VoIP service from a cable company, and Vonage alone serves an additional 2.3 million customers. See National Cable & Telecommunications Ass’n: Industry Data, <http://www.ncta.com/Statistics.aspx> (cable phone customers as of September 2009); Vonage Holdings Corp., Form 10-Q, at 6 (filed Nov. 6, 2009) (citing 2.45 million customers as of September 30, 2009, 94% of whom are in the United States).

⁹¹ See *AT&T Broadband Comments* at 9 & n.19; Jessica Reif Cohen et al., Bank of America/Merrill Lynch, *Battle for the Bundle: The Internet Goes Negative* 13 tbl.12 (Aug. 19, 2009) (estimating 24.2 million cable VoIP subscribers at year-end 2010).

⁹² See Comments of AT&T at 28, *High-Cost Universal Service Support*, WC Docket No. 05-337 & CC Docket No. 96-45 (FCC filed Nov. 26, 2008) (“*AT&T Universal Service Comments*”) (citing estimates of 45 million VoIP customers by 2011).

⁹³ See *AT&T Broadband Comments* at 9-10 (citing *Ex Parte* Letter from Mary L. Henze, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, at 3-4 (filed Nov. 24, 2009)); Craig Moffett, Bernstein Research, *Weekend Media Blast: The Wireline Problem 2* (May 15, 2009).

Nor can the Petition be justified in any respect on the bare assertion that BOCs “enjoy substantial market power” in wireless.⁹⁴ As AT&T recently explained in detail, the U.S. wireless marketplace is the most competitive and least concentrated in the world.⁹⁵ It includes four national providers, three large regional wireless providers, dozens of smaller providers, and numerous Mobile Virtual Network Operators that lease capacity from facilities-based wireless carriers and resell that service together with unique content and devices.⁹⁶ Most Americans can choose from among at least five facilities-based carriers, almost all can choose from among at least three, and no single wireless carrier has anything approaching a dominant market share.⁹⁷ And the industry consistently exhibits each of the hallmarks that economists and this Commission have historically relied upon to gauge the effectiveness of competition, including rapidly improving service quality, expanding output, decreasing prices, extensive investment, and dizzying innovation.⁹⁸

⁹⁴ Pet. at 27.

⁹⁵ See *The United States and World Wireless Markets: Competition and Innovation Are Driving Wireless Value in the U.S.* 6, 11 (May 2009) (“CTIA Study”), attached to Ex Parte Letter from Christopher Guttman-McCabe, CTIA, to Marlene Dortch, FCC, RM-11361, GN Docket No. 09-51 & WC Docket No. 07-52 (FCC filed May 12, 2009) (U.S. wireless marketplace is the least concentrated of the 26 major industrialized countries that make up the Organization for Economic Co-Operation and Development).

⁹⁶ See Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 24 FCC Rcd 6185, ¶¶ 14, 17 (2009) (“Thirteenth Annual Report”); Comments of AT&T Inc. at 10-11, 22, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 09-66 (FCC filed Sept. 30, 2009) (“AT&T Wireless Comments”).

⁹⁷ See *Thirteenth Annual Report* ¶ 2 (“More than 95 percent of the U.S. population lives in census blocks with at least three mobile telephone operators competing to offer service, and more than 60 percent of the populations lives in census blocks with at least five competing operators.”).

⁹⁸ See *AT&T Wireless Comments* at 10-18, 22-29.

Finally, to the extent Petitioners seek to base their Petition on the claim that BOCs must be constrained in stand-alone long distance, they provide no meaningful data to support that assertion, and in any event the Commission and industry observers have long recognized that “long distance service purchased on a stand-alone basis is becoming a fringe market,” and even that fringe market is “steadily declining in size.”⁹⁹

The reality, in short, is that competition is thriving in every sector of the communications marketplace, as next-generation technologies and alternative platforms provide opportunities for new entrants to offer a variety of innovative services, and as customers flock to those competing technologies in droves. The additional regulations sought by Petitioners are not merely unsupported by the evidence in the marketplace; they in fact threaten to disrupt the competitive status quo by imposing rules that would distort investment incentives and return the industry to a period when companies unable to innovate were subsidized to compete, and when companies that wanted to invest were discouraged from doing so. Petitioners provide no sound basis for that result.

3. Finally, Petitioners seek to justify their effort to revive the UNE-P by claiming that BOCs are charging unjust and unreasonable rates for local switching. As evidence for this claim, they point to a decrease since the *Triennial Review Remand Order* in the number of UNE

⁹⁹ Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, 22 FCC Rcd 5207, ¶¶ 16, 19 (2007); see also Timothy Horan et al., Oppenheimer, *Cautious on the RLEC Sector 3* (June 18, 2008) (“[Long distance] is disappearing as a stand-alone service, and access lines are being cannibalized by wireless, VoIP and broadband.”); Joseph H. Weber, *The Bell System Divestiture: Background, Implementation, and Outcome*, 61 Fed. Comm. L.J. 21, 28 (2008) (“Long-distance service was not viable as a stand-alone business. . . . The telecommunications environment in the United States has been so transformed by new services and technologies in the past twenty-five years as to be almost unrecognizable.”).

loops with switching provided by incumbent LECs, which they claim is not matched by a corresponding increase in the provision of stand-alone loops.¹⁰⁰

Far from undermining the Commission’s decision to eliminate the UNE-P, however, the available data confirm that it was correct. By removing local switching from the list of § 251 UNEs, the Commission intended to encourage competitive providers to invest in their own facilities and to spur competition from competing platforms. The “70% decline in [leased] loops with switching”¹⁰¹ that Petitioners cite is precisely what the Commission was trying to achieve; during the same time period, from December 2004 to June 2008, the number of loops owned by competitive LECs increased by nearly 54%.¹⁰² As the Commission predicted, without the investment-detering effects of the UNE-P, competitive carriers invested in deploying their own facilities – both switches and loops – and to upgrading existing plant (including cable plant in particular) to provide voice service. This decision to substitute leased loops plus switching with newly deployed and/or upgraded facilities explains why, as Petitioners note, the demise of UNE-P did not result in a one-for-one “parallel increase in stand-alone loops”¹⁰³ leased from

¹⁰⁰ See Pet. at 24. Petitioners also cite a complaint filed in 2005 by Momentum Telecom, Inc., challenging BellSouth’s local switching rates under § 271(d)(6). But, as Petitioners concede, Momentum withdrew its complaint before the Commission reached a decision on it – and indeed, even before BellSouth had an opportunity to respond. See *id.* at 24 n.82. Petitioners cannot rely on allegations in an abandoned complaint as “evidence” of unjust rates.

¹⁰¹ *Id.* at 24.

¹⁰² See *Local Competition 2008* at 6 tbl. 3. This was calculated as ((CLEC-owned loops in June 2008) – (CLEC-owned loops in December 2004)) / (CLEC-owned loops in December 2004).

¹⁰³ Pet. at 24. Petitioners claim that such an increase was “predicted by the Commission in its local switching impairment analysis.” *Id.* This is incorrect. In its transition plan, the Commission explained that, without access to unbundled local switching, competitive LECs would have multiple options, “which could include *deploying competitive infrastructure*” in addition to or instead of altering their service arrangements to stand-alone loops. *Triennial Review Remand Order* ¶ 227 (emphasis added).

incumbent LECs. No such increase would be expected given that competitive providers were also encouraged to provide service exclusively over their own facilities.

Moreover, to the extent the volume of loops leased by competitive LECs is not fully explained by the substitution of competitive providers' own facilities, it is surely the result of the industry-wide changes discussed above. Again, the market is rapidly moving away from POTS and PSTN and toward mobile wireless and broadband voice services such as VoIP. As a result of this migration, traditional BOC access lines are in steep decline. The decrease in loops leased by competitive LECs in the past few years precisely mirrors the decrease in lines *owned* by incumbent LECs,¹⁰⁴ suggesting that both trends are the result of the move away from traditional POTS. In the face of this evidence, Petitioners provide no basis for their apparent assumption that, even as traditional BOC access lines plummet, competitive LEC use of legacy copper loops under § 251(c)(3) should be expected to increase. In all events, they have provided no data to support their claim that the Commission should reverse course on its judicially mandated decision to eliminate the availability of the UNE-P at TELRIC-based rates.

CONCLUSION

For the reasons discussed above, the Commission should deny the Petition.

¹⁰⁴ See *Local Competition 2008* at 5 chart 4 (showing corresponding decrease from June 2005 to June 2008 in "Total ILEC Lines" and "Percent of Total Lines Provided to Other Carriers").

Respectfully submitted,

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