Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

STEFANIE A. BRAND
ACTING PUBLIC ADVOCATE &
DIRECTOR DIVISION OF RATE COUNSEL

Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101
(973) 648-2690 - Phone
(973) 624-1047 - Fax
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

On the Comments:

Christopher J. White, Esq.
Deputy Ratepayer Advocate

Date: February 10, 2010

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION

The New Jersey Division of Rate Counsel ("Rate Counsel") submits these reply comments to the Federal Communications Commission ("FCC" or "Commission") in response to initial comments filed concerning the petition submitted by 360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, NuVox, PAETEC Holding Corp., Sprint Nextel Corporation and tw telecom inc. (collectively "the Section 271 Coalition") for expedited rulemaking. The Petition seeks adoption of rules to govern the provision of certain network elements by Bell Operating Companies ("BOCs") pursuant to section 47 U.S.C. § 271(c)(2)(B) of the Communications Act of 1934, as amended ("Act").[1]

---

[1] / 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, filed November 9, 2009 ("Petition"). Pursuant to the Commission's schedule, initial comments were submitted January 12, 2010. "Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations," WC Docket No. 09-222, DA 09-2590, December 14, 2009. Comments were filed by AT&T, Inc. ("AT&T"), Verizon, California Association of Competitive Telecommunications Companies ("CALTEL"), Qwest Communications International Inc. ("Qwest"), Midwest Association of Competitive Communications, Inc. ("MACC"), TDS Metrocom LLC, U.S. TelePacific Corp. and Mpower Communications Corp. (collectively "Joint CLECs"), Competitive Carriers of the South, Inc. ("CompSouth"), and TEXALTEL.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.[2] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices."[3] Competitors' ability to obtain access to incumbent carriers' network elements at reasonable terms and conditions directly affects consumers' competitive alternatives and the prices and quality of services offered in New Jersey and throughout the United States. The Petition also bears on the future development of the nation's broadband network.

II. COMMENT

The BOCs' comments submitted in opposition to the Petition are insufficient to counter the concerns raised by the Section 271 Coalition.[4] The Section 271 Coalition raised the following valid points:

- The BOCs' fulfillment of Section 271 unbundling obligations is essential to provide competitors with access to last-mile and middle-mile facilities so that competitors can reach end users.

---

[2] / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

[3] / N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

[4] / AT&T, Qwest, and Verizon submitted comments opposing the Petition. Qwest submitted confidential comments – Rate Counsel's reply comments are based on a review of Qwest's redacted comments.

- BOCs have benefited enormously from gains obtained as a result of Section 271 relief: their interLATA authority, combined with substantial market concentration occurring through numerous post-Act mergers, have enabled them to dominate long-distance and adjacent markets.[5] Yet the BOCs are resisting efforts that would require them to uphold their end of the Section 271 bargain.
- The present situation, where BOCs have been and continue to enjoy the opportunities that Section 271 offers and competitors lack access to critical facilities at just and reasonable terms, has created a lopsided market, to the detriment of consumers.
- As the Section 271 Coalition states: "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."[6]
- Effective competition (and the consumer benefits that flow from such competition) depends critically on new entrants' ability to obtain last mile and middle mile facilities from BOCs at reasonable terms.
- BOCs have an independent obligation to provide access to certain network elements that are no longer subject to section 251 unbundling.[7]
- As the Petition clearly demonstrates, the congressionally intended link between BOCs' Section 271 authority and their provision of network elements to competitors has been severely weakened, which thwarts efforts to promote competition.[8]
- Meaningful enforcement of the BOCs' obligation to make Checklist Elements 4, 5, and 6[9] at rates and terms consistent with the requirements in Sections 201(b) and 202(a) of the Act is lacking.[10]
- Special access tariffs are not a reasonable substitute for the provision of loops and transport at just and reasonable rates pursuant to the Act's Section 271 requirements.[11]

---

5 / See Petition at 13, stating that BOCs now control 72% of the long-distance market and that AT&T and Verizon control nearly 61% (and rising) share of the mobile wireless services market.

6 / *Id.*, at 2.

7 / *Id.*, at 10, citing *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 para. 652 (2003) ("Triennial Review Order" or "TRO").

8 / *See, e.g.*, *id.*, at 6-22.

9 / Checklist items 4, 5, and 6 correspond with loops, transport and local switching, respectively.

10 / Petition at 15-18 (explaining, among other things, that the federal courts have deferred the review of the terms, conditions, and rates of checklist items to the Commission (and not to state commissions)).

11 / *Id.*, at 18-21, stating among other things: "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 offered well before passage of the 1996 Telecom Act." *Id.*,at 21. Furthermore, as has been amply demonstrated in the Commission's special access proceeding, special access rates are exorbitant, and cannot be considered to be just and reasonable.

- The Commission "lacks rules to ensure that Checklist Elements are offered free of restriction and discrimination, at rates that are just and reasonable, and offered under administrative processes that give affected parties an opportunity to object."[12]

The BOCs oppose the Petition in part because, according to them, the Petition seeks to avoid the Commission's special access proceeding.[13] Rate Counsel acknowledges that the Commission has been and is continuing to investigate BOCs' and other incumbent carriers' special access rates (as well as the proper analytic framework for examining special access markets) in a separate proceeding,[14] but disagrees that the special access proceeding resolves the important and specific matters that the Petition raises. The Section 271 checklist obligations are unique and different from special access tariffs: they provide a much-needed counterweight to (and are directly linked to) the BOCs' Section 271 authority to enter interLATA and information services markets.[15] Special access services have a much longer history and a separate origin from the Section 271 obligations set forth in the Telecommunications Act of 1996. For example, when AT&T's local operations were divested in 1984 from its long-distance operations, BOCs established special access tariffs, through which interexchange carriers such as AT&T could purchase local ends of private line circuits in order to serve customers. Special access services were spun off to BOCs, twelve years before the 1996 Act. Contrary to the implications of the BOCs' arguments, special access services and the Section 271 checklist obligations differ in origin and in purpose.[16] The Act requires carriers to offer checklist items at just and reasonable

---

12 / *Id.*, at 25.

13 / Verizon, at 1, 3-7; AT&T, at 4-7; Qwest, at 10-11.

14 / Federal Communications Commission Public Notice, "Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the *Special Access NPRM*," rel. November 5, 2009. Reply comments are due February 17, 2010. *Federal Register* Vol. 74, No. 232, December 4, 2009, 63702.

15 *See, e.g.*, MACC, at 2, referring to the *quid pro quo* that Section 271 of the Act encompasses.

16 / Rate Counsel is not persuaded by AT&T's unfounded assertion that absent the Section 271 obligation, "BOCs might be free to withdraw the special access tariffs." AT&T, at 9.

and not unreasonably discriminatory prices and terms.[17] As the Petition amply demonstrates, rules are long overdue to guide the Commission's assessment of BOCs' rates, terms, and conditions for competitive checklist items.[18]

Qwest, AT&T and Verizon protest that the Petition seeks rates based on TELRIC methodology, which they assert is specific and unique to Section 251 elements, arguing that instead market prices should apply for Section 271 elements.[19] However, the threshold question is whether some rules and pricing guidelines are necessary. The Section 271 Coalition has amply demonstrated that such rules are necessary, and, as Joint CLECs observe, although the Commission may have hoped that market forces would deterr BOCs' monopolistic behavior (such as imposing "unilaterally excessive, non-negotiable rates for Section 271 elements"), such market forces are lacking.[20] Rates that BOCs unilaterally set cannot plausibly be construed as "market" rates. Simply because rates are commercially established, does not mean that they have been negotiated between parties in an arms length setting.

Furthermore, as initial comments point out, Courts have not looked kindly on states' efforts to assess the reasonableness of rates for Section 271 checklist items.[21] It may be appropriate and necessary, therefore, for the Commission to delegate explicit authority to states to undertake such an analysis, and consistent with Joint CLECs' recommendation, also to make

---

[17] / MACC, at 3.

[18] / See CompSouth, at 3 (emphasis in original), stating: "Three times in the BellSouth/AT&T region, state commissions have investigated proposed rates of BellSouth/AT&T, and in each instance the state commission concluded that BellSouth/AT&T's rates were *not* just and reasonable."

[19] / AT&T, at 10-17; Verizon, at 3-4, 8-13; Qwest, at 18-21.

[20] / Joint CLECs, at 2.

[21] / See, e.g., Verizon at 12-13, positing that "the Commission has exclusive authority to determine whether rates for 271elements are consistent with the § 201(b) standards that apply to those elements; the state commissions have no such authority." See also Joint CLECs, at 7; TEXALTEL, at 2.

"arbitration before state public utility commissions an option."[22] In the absence of such delegated authority to state regulators, it is of paramount importance that the Commission fill the long-standing void in pricing guidelines for Section 271 elements. The next but distinct question is the methodology that the Commission should use to assess whether rates are reasonable.

The BOCs certainly have not supported a conclusion that the FCC lacks the authority to establish rules or guidelines for such pricing. The FCC possesses such authority, and, as the 271 Coalition has clearly explained, the future of competition depends in part on the FCC's exercise of such authority. *How* the FCC chooses to implement such authority is a separate question. Before the 1996 Act, the FCC has reviewed the reasonableness of rates, and indeed has a long history of doing so. The Section 271 Coalition has proposed pricing rules that, though similar, are not identical to TELRIC-based pricing rules. The FCC possesses the requisite expertise to set forth parameters for the industry to guide the FCC's review of BOCs' rates, terms, and conditions for Section 271 elements.

If, however, the Commission defers to its decision on this petition until the special access proceeding is concluded,[23] Rate Counsel renews its recommendation that the Commission resolve that proceeding in a timely manner to prevent BOCs (and other incumbent local exchange carriers) from charging supracompetitive rates for services for which, in the vast majority of instances, competitive alternatives do not exist.[24]

---

[22] / Joint CLECs, at 3.

[23] / In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, FCC WC Docket No. 05-25. The Commission recently asked parties in the proceeding to comment on the analytical framework for reviewing the special access market. Federal Communications Commission Public Notice, "Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the *Special Access NPRM*," rel. November 5, 2009. Reply comments are due February 17, 2010. *Federal Register* Vol. 74, No. 232, December 4, 2009, 63702.

[24] / *See, e.g.*, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special

The BOCs fail to address their failure to uphold their end of the Section 271 bargain. Although they have been benefiting from their authority to enter long distance and information services markets, they balk at providing open access to their network. As aptly stated by Joint CLECs: "Section 271 is not functioning as intended by Congress and ... the Bell Operating Companies ("BOCs") are reaping the rewards of offering interLATA long-distance and information services; however, at the same time, there are not meaningful rules they must obey to ensure they are compliant with their ongoing 271 checklist obligations."[25]

The BOCs assert that the Petition's proposed rules would be inconsistent with the 1996 Act, the Commission's prior decisions, and various court decisions.[26] By contrast, "clear and enforceable rules" are necessary to ensure that new entrants have access to Section 271 checklist elements are reasonable rates and terms.[27] Without such rules, competitors will have no recourse if BOCs charge unreasonable rates and impose unreasonable terms and conditions for Section 271 checklist items.[28]

Contrary to the BOCs' assertions, FCC oversight is essential: BOCs possess market power.[29] Numerous mergers and acquisitions by BOCs have led to market concentration,

---

Access Services, FCC WC Docket No. 05-25; RM-10593, Comments of the New Jersey Division of the Ratepayer Advocate, June 13, 2005; Reply Comments of the New Jersey Division of the Ratepayer Advocate, July 29, 2005; Comments of the New Jersey Division of Rate Counsel, August 8, 2007; Reply Comments of the New Jersey Division of Rate Counsel, August 15, 2007.

[25] / Joint CLECs, at 1. See also CompSouth, at 1.

[26] / *See, e.g.*, Verizon, at 2.

[27] / *See, e.g.*, MACC, at 2.

[28] / CALTEL, at 8.

[29] / See CALTEL, at 1-2, and Appendix A ("Market Share Analysis of Residential Voice Communications in California," California Public Utilities Commission, Communications Division – Policy Branch, Staff White Paper, December 2008).

undermining the competitive objectives of the 1996 Act.[30] AT&T's reliance on its comments on the transition from the legacy circuit-switched network to broadband as support for its assertion that BOCs do not dominate markets is unpersuasive.[31] Focusing on "intermodal" competition misses the point – a customer that migrates from Verizon's landline service to Verizon's wireless service is certainly not constraining Verizon's overall market dominance. As demonstrated by the Petition, BOCs now control 72% of the long-distance market and AT&T and Verizon control nearly 61% (and rising) share of the mobile wireless services market.[32]

Furthermore, in order to assess whether rates for Section 271 elements are just and reasonable, it is essential to consider the associated costs.[33] Ultimately, the FCC possesses the authority to determine the appropriate relationship between the costs incurred by BOCs in providing checklist items to competitors and the rates that the BOCs may charge for such items. Granting the Petition would provide long overdue guidance regarding a critical aspect of the competitive landscape, namely guidelines for the rates, terms, and conditions of Section 271 checklist items.

III. CONCLUSION

Although at first blush, this proceeding may appear to concern simply a dispute among telecommunications services providers, the outcome of the proceeding has long-ranging consequences for consumers. If BOCs are successful in thwarting competitors' ability to obtain

---

[30] / See, e.g., *id.*, at 3 describing the competition that has eroded in California following the merger of SBC and AT&T in 2005. Rate Counsel has raised similar concerns about the increasing market concentration associated with numerous mergers by and between BOCs in filings submitted previously by Rate Counsel to the FCC

[31] / AT&T, at 24-25, citing Comments of AT&T Inc. on the Transition from the Legacy Circuit-Switched Network to Broadband, NBP Public Notice #25, GN Docket Nos. 09-47, -51, and -137, December 21, 2009.

[32] / Petition, at 13. Qwest faults the 271 Coalition for failing to address Qwest's relative market position. Qwest, at 5. Rate Counsel acknowledges that Qwest's position in the telecommunications market differs from those of Verizon and AT&T, but, *nonetheless Qwest continues to dominate the markets that it serves.*

[33] / *See, e.g., id.*, at 32, citing *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2057 (2002), at para. 23.

last-mile and middle-mile facilities at reasonable rates and terms, consumers' opportunities for competitive alternatives, the prospects of innovation, and the future of broadband deployment will be curtailed.[34] In those markets where replicating last-mile and middle-mile facilities would require an inefficient use of society's resources, it is essential that such facilities be made available to new entrants at reasonable rates. Rate Counsel recommends that the Commission adopt the proposed rules set forth in the Petition, and, in the alternative, supports the Joint CLECs' alternative recommendation that the Commission's rule establish a presumption that nonrecurring and recurring rates that are not higher than 15% above state-approved prices for comparable unbundled network elements be considered presumptively just and reasonable.[35]

BOCs have profited from many years of Section 271 relief, and since the enactment of the 1996 Act, have, through multiple mergers, caused extreme market concentration.[36] Rate Counsel urges the Commission to grant the Petition in order to ensure that BOCs keep up their end of the Section 271 bargain. By rendering incumbent carriers' networks open, the Commission will further the goal of promoting competition in traditional telecommunications markets as well as in broadband deployment. This opportunity for companies to meaningfully compete with incumbent carriers will benefit consumers in New Jersey and throughout the United States.

---

[34] / See TEXALTEL, at 3, observing that proposals for Stimulus monies "to build middle mile facilities ... totaled to huge sums" and that "[n]early all of these proposals would duplicate the facilities of the ILEC and the sole reason was to make facilities available to facilitate last mile services at prices that more closely correspond to cost." As TEXALTEL aptly explains, establishing reasonable section 271 rates "rather than spending billions of government dollars to duplicated underutilized facilities" makes sense. TEXATEL, at 3.

[35] ./ Joint CLECs, at 15, citing to the *TRRO*, at paras. 145 and 198, which set a 15% mark-up for the transition rate that would be charged for loop and transport facilities for which no Section 251(c)(3) unbundling obligation existed

[36] / See, e.g. Rate Counsel's analyses of market concentration submitted in comments regarding various BOC mergers.

Respectfully submitted,

STEFANIE A. BRAND
ACTING PUBLIC ADVOCATE &
DIRECTOR DIVISION OF RATE
COUNSEL
Christopher J. White
Christopher J. White
Deputy Public Advocate
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101
(973) 648-2690 - Phone
(973) 624-1047 – Fax

February 10, 2010