

**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

**REPLY COMMENTS OF AT&T INC.**

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## INTRODUCTION

“Before embarking on any regulatory journey, it is pragmatic for the government to ask, ‘What exactly is broken that only the government can fix?’”<sup>1</sup> The Petitioners, and the commenters supporting them, ask the Commission to undertake a significant regulatory endeavor without providing an answer to that critical question. They want the Commission to impose extensive new rules governing the provision of elements listed in the “competitive checklist” of 47 U.S.C. § 271, yet neither the Petitioners nor their supporting commenters have shown any need for such rules. Contrary to their breathless claims of market failure, the growth in wireless and intermodal services has led to an unprecedented degree of competition in the provision of communications services, while competition in traditional wireline services remains a potent factor. The market is not “broken.”

As AT&T explained in its opening comments, the Petition is a transparent attempt to circumvent the Commission’s ongoing special access proceeding. In support of Petitioners, some commenters argue that special access prices are too high. But if that is so, CLECs should prove it by filing relevant evidence in the proceeding the Commission has established to address that very question. CLECs have so far failed to do so, preferring instead to support the Petitioners’ end-run around the other docket.

In addition, CLECs seek to dismantle the careful distinctions between the different obligations imposed by § 251 and § 271 that were drawn by Congress and interpreted and applied by this Commission and the courts over nearly a decade and a half. Sections 251 and 271 serve different functions and impose different obligations on telecommunications carriers.

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<sup>1</sup> Robert M. McDowell, Comm’r, FCC, Keynote Address to the Free State Foundation, *The Best Broadband Plan for America: First, Do No Harm* 7 (Jan. 29, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296081A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296081A1.pdf) (“McDowell Broadband Address”).

Yet the rules proposed by the Petitioners and supported by CLEC commenters would collapse those distinctions. The Commission should reject their invitation not only to misread the plain terms of the Communications Act but also to depart from established policies of encouraging facilities-based competition. The Commission should deny the Petition.

**I. THE CLEC COMMENTS CONFIRM THAT THE PETITION IS AN ATTEMPT TO CIRCUMVENT THE ONGOING SPECIAL ACCESS PROCEEDING.**

As AT&T emphasized in its opening comments, the Commission has been engaged in a proceeding since 2005 to examine the rules applicable to interstate special access services, including “what steps the Commission should take to ensure that rates for special access services remain just and reasonable.”<sup>2</sup> The Commission has assembled an enormous record, including a wealth of incumbent LEC-provided data, on which to base a decision. Petitioners here, however, would have the Commission sidestep that entire proceeding and instead provide them lower prices for special access under the guise of regulating Bell companies’ § 271 local loop transmission and local transport offerings.<sup>3</sup>

The CLEC comments in support of the Petition take the same approach. Like Petitioners, for example, TDS Metrocom et al. and TEXALTEL devote a large part of their efforts to complaining about the prices of the BOCs’ special access services.<sup>4</sup> TDS, in particular, recycles

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

<sup>3</sup> See Opposition of AT&T Inc. to the Petition of the Section 271 Coalition at 4-7, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) (“AT&T Opposition”); see also Comments of Verizon at 4-7, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) (“Verizon Comments”); Comments of Qwest Communications International Inc. at 10, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) (“Qwest Comments”).

<sup>4</sup> See Comments of TDS Metrocom, LLC; and U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications at 4-6, 12-14, *Petition for*

the same arguments that CLECs have made in the special access proceeding. Indeed, much of TDS's "discussion" of the issue simply cuts and pastes from a conclusory *ex parte* letter filed in the special access proceeding over two years ago.<sup>5</sup> TDS also recycles the tired argument that current special access prices must be unjust and unreasonable simply because some rates have increased since the Commission's adoption of pricing flexibility.<sup>6</sup> But there is no law of economics that says that rates in a competitive marketplace only go down, particularly when the industry is transitioning from decades of regulation that has divorced rates from marketplace reality. Indeed, as AT&T has explained elsewhere<sup>7</sup> – without substantive rebuttal – price increases for some special access service offerings are neither surprising nor problematic given that price caps had historically set rates below market levels.

TDS also cites a 2009 study by the National Regulatory Research Institute ("NRRI") addressing competition in the special access market<sup>8</sup> – just as it did in its recent comments in the

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*Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) ("*TDS Comments*") (labeling special access rates "excessive"); Comments of TEXALTEL at 2, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) ("*TEXALTEL Comments*") (claiming, without evidentiary support, that AT&T's special access rates are "as much as 15 times the TELRIC based prices for the same services when priced as UNEs").

<sup>5</sup> Compare *TDS Comments* at 13-14, with *Ex Parte* Letter from Philip J. Macres, Counsel to 360 Networks et al., to Marlene H. Dortch, Secretary, FCC, WCC Docket No. 05-25, at 2 (filed Oct. 5, 2007).

<sup>6</sup> See *TDS Comments* at 12.

<sup>7</sup> See 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) (citing FCC and GAO predictions that special access prices would increase under pricing flexibility for this very reason); AT&T Opposition at 6 & n.13.

<sup>8</sup> See Peter Bluhm & Dr. Robert Loube, National Regulatory Research Inst., *Competitive Issues in Special Access Markets* (revised ed. Jan. 21, 2009) ("NRRI Study"), available at [http://nrri.org/pubs/telecommunications/NRRI\\_spcl\\_access\\_mkts\\_jan09-02.pdf](http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf).

special access proceeding.<sup>9</sup> But the results of the study are not as one-sided as TDS suggests in either filing. Indeed, the study's authors explain that "the evidence does not support a simple 'thumbs-up' or 'thumbs-down' judgment on market power for special access markets."<sup>10</sup> In any event, in preparing that report, NRRI was unable to obtain comprehensive information regarding the networks, services, and prices of competitive suppliers of special access services, and instead relied only on a random smattering of incomplete and facially defective data from a few companies.<sup>11</sup> And what little data NRRI did manage to collect confirmed what AT&T and others have long maintained: that the prices customers actually pay for DS1 and DS3 special access circuits have continued to decline,<sup>12</sup> refuting claims regarding a dearth of competition for such services. Finally, contrary to TDS's description, the study reached no definitive conclusions, calling instead for further study and additional process.<sup>13</sup>

The existing special access proceeding provides ample opportunity to undertake the comprehensive review of special access rates. Yet the parties challenging special access rates in that proceeding – including Petitioners and many commenters here – have refused to provide relevant data to support their claims.<sup>14</sup> Nevertheless, it is in that proceeding where the Commission should undertake its review of such rates, where a record has been established and where the Commission can address the special access rates of *all* incumbent providers, not just the few that are subject to the competitive checklist obligations of § 271(c)(2)(B).

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<sup>9</sup> See Comments of Paetec Holdings Inc.; TDS Metrocom LLC; et al., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC filed Jan. 19, 2010).

<sup>10</sup> NRRI Study at 79.

<sup>11</sup> See *id.* at 35-37.

<sup>12</sup> See *id.* at 58.

<sup>13</sup> See *id.* at 84-95.

<sup>14</sup> See *Ex Parte* Letter from Glenn Reynolds, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Apr. 27, 2009).

## II. THE COMMENTS CONFIRM THAT THE PETITION SEEKS RELIEF THAT IS CONTRARY TO COMMISSION PRECEDENT.

### A. The Petition Conflicts with the Commission's Interpretation of § 251 and § 271.

1. As AT&T explained in its opening comments,<sup>15</sup> the Commission has consistently recognized the distinctions between § 251 and § 271. It has recognized, first and foremost, that the two provisions serve different purposes and impose different obligations. Section 251 ensures that the local exchange market is open to competition by allowing CLECs to gain access, at deeply subsidized TELRIC-based rates, to those elements of incumbents' networks that the Commission concludes are truly essential for competition and cannot be duplicated in the market.<sup>16</sup> Section 271, meanwhile, created a special mechanism applicable only to the BOCs to provide them an opportunity to enter the long-distance market if they are able to demonstrate that the local market is open to competition, notwithstanding the specific requirements of § 251.<sup>17</sup>

The Commission has further recognized that, consistent with these different purposes, § 251 and § 271 impose substantively different obligations. Thus, for example, whereas § 251 mandates cost-based rates for unbundled network elements, the rates for services and facilities required only under § 271 are to be set by the market.<sup>18</sup> And because the § 271 checklist lacks the "nondiscriminatory access" language of § 251(c)(3), it does not carry the same obligations

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<sup>15</sup> See AT&T Opposition at 21-29.

<sup>16</sup> See 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, ¶¶ 654-655 (2003) ("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 I").

<sup>17</sup> See *id.* ¶ 655; *Qwest Comments* at 14-15.

<sup>18</sup> See AT&T Opposition at 10-12; *Verizon Comments* at 8-9; see also *USTA II*, 359 F.3d at 576; *Triennial Review Order* ¶ 656; Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 473 (1999) ("UNE Remand Order").

relating to combinations of network elements and routine network modifications.<sup>19</sup> Furthermore, while § 251 requires unbundling of physical facilities within an incumbent LEC's network, § 271 by its terms applies to "services,"<sup>20</sup> indicating that BOCs may satisfy their checklist obligations by offering a service rather than by physically unbundling separate elements as required under § 251.<sup>21</sup>

2. As AT&T explained in its opening comments, the Petition ignores all of these distinctions and asks the Commission to import the burdens of § 251 unbundling into § 271 – yet *without* any of its corresponding limitations. The same is true of the comments in support of the Petition: All of them would have the Commission undo the decisions of Congress, the courts, and the Commission that differentiate between § 251 and § 271.<sup>22</sup>

Thus, for example, the Midwest Association of Competitive Communications ("MACC") and the Competitive Carriers of the South ("CompSouth") cast § 271 as simply a more stringent form of § 251. Both groups focus on the Commission's reference to the requirements of § 271 as "additional."<sup>23</sup> But they neglect to acknowledge this Commission's simultaneous statement that

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<sup>19</sup> See AT&T Opposition at 12-13; *Triennial Review Order* ¶¶ 632, 655 & n.1990.

<sup>20</sup> 47 U.S.C. § 271(c)(2)(B)(iv)-(vi).

<sup>21</sup> See AT&T Opposition at 14.

<sup>22</sup> See *TDS Comments* at 14; *TEXALTEL Comments* at 3; Comments of CompSouth at 6, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) ("*CompSouth Comments*"); Comments of Midwest Association of Competitive Communications, Inc. at 4, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) ("*MACC Comments*"); Comments of CALTEL at 8, *Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222 (FCC filed Jan. 12, 2010) ("*CALTEL Comments*").

<sup>23</sup> See *CompSouth Comments* at 2 (quoting *Triennial Review Order* ¶ 655); *MACC Comments* at 2 (same).

§ 271 “does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.”<sup>24</sup>

CLEC commenters likewise ignore the Commission’s clear statement that, under § 271, “the market price should prevail.”<sup>25</sup> TEXALTEL, for example, grudgingly concedes only that one “*might argue*” that a standard other than TELRIC “*might apply*” under § 271.<sup>26</sup> But TDS refuses to admit even this much, using the TELRIC benchmark to judge how just and reasonable the rates under § 271 are.<sup>27</sup> But, as AT&T has explained, this proposal runs headlong into the Commission’s express holding that, while the cost-based pricing for § 251 unbundling is required by § 252(d), such a pricing methodology is “radically unlike” the “just and reasonable” pricing standard that applies to § 271.<sup>28</sup> Moreover, by definition, competitors are not impaired without access to services under § 271 that are no longer available under § 251.<sup>29</sup> This is why the D.C. Circuit found “no serious argument” that, under the Telecommunications Act of 1996 (“1996 Act”), TELRIC pricing should apply to elements that are not required to be unbundled pursuant to § 251.<sup>30</sup> Yet that is exactly the argument the CLECs proffer here.

CLECs also characterize the “just and reasonable” standard that does apply to § 271 as vague and uncertain, and they ask the Commission to set a specific pricing rule dictating rates for

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<sup>24</sup> *Triennial Review Order* ¶ 659.

<sup>25</sup> *UNE Remand Order* ¶ 473.

<sup>26</sup> *TEXALTEL Comments* at 2 (emphases added).

<sup>27</sup> *TDS Comments* at 15.

<sup>28</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

<sup>29</sup> *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 473; *USTA II*, 359 F.3d at 589.

<sup>30</sup> *USTA II*, 359 F.3d at 576.

§ 271 checklist items.<sup>31</sup> But the Commission has already determined that such a rule is not appropriate. In the *Triennial Review Order*, the Commission explained that “[w]hether a particular checklist element’s rate satisfies the just and reasonable pricing standard of section 201 and 202 is a *fact-specific inquiry*” to be undertaken on a case-by-case basis.<sup>32</sup> In other words, the just and reasonable standard is not susceptible to the kind of rate-setting regime that CLECs seek. Indeed, the rationale underlying the Commission’s repeated statement that § 271 prices are to be set by the market is that market prices are *not like* regulated rates, which are, at best, “designed to *reflect* the pricing of a competitive market.”<sup>33</sup> The Commission has expressed its sound preference for actual market prices, and the CLECs offer no reason to abandon that approach.

CLECs also misapprehend the fundamental difference between the requirements for access to the BOCs’ networks under § 251 and § 271. TDS asks the Commission to mandate access under § 271 to *any* network element that was previously available under § 251.<sup>34</sup> But the plain terms of the statute foreclose this request. Again, as AT&T explained, § 251 applies to “network elements,” defined by the statute as network “facilit[ies] or equipment” and their “features, functions, and capabilities.”<sup>35</sup> By contrast, § 271 applies to particular “services”; under the statute, a telecommunications service qualifies as such “regardless of the facilities

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<sup>31</sup> See *TDS Comments* at 4; *CompSouth Comments* at 1; *TEXALTEL Comments* at 2.

<sup>32</sup> *Triennial Review Order* ¶ 664 (emphasis added).

<sup>33</sup> *UNE Remand Order* ¶ 473 (emphasis added).

<sup>34</sup> See *TDS Comments* at 16

<sup>35</sup> 47 U.S.C. § 153(29).

used.”<sup>36</sup> BOCs can plainly satisfy the requirements of § 271 without offering access to every network element that is capable of providing a service enumerated in the competitive checklist.

3. In addition to supporting the flawed proposals of the Petition, some CLEC commenters ask the Commission to go even further in collapsing the distinction between § 251 and § 271. For example, TDS proposes a rule requiring BOCs to incorporate § 271 offerings into their § 252 interconnection agreements.<sup>37</sup> But, by its plain terms, § 252 applies only to agreements “for interconnection, services, or network elements *pursuant to section 251*,”<sup>38</sup> which is one of the many reasons courts have uniformly held that state commissions have no authority to implement or enforce § 271.<sup>39</sup> TDS’s request accordingly has no basis in the statute. Nor does its proposed rule that BOCs be required to “post all Section 271 agreements on their respective websites.”<sup>40</sup> This request would transform the statutory *option* in § 271 to file a statement of generally available terms<sup>41</sup> into a mandatory provision. Perhaps most egregiously, both TDS and CompSouth seek to subject § 271 agreements to arbitration before state commissions.<sup>42</sup> As court after court has held, the statute permits state commissions to arbitrate

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<sup>36</sup> *Id.* § 153(46).

<sup>37</sup> *TDS Comments* at 15.

<sup>38</sup> 47 U.S.C. § 252(a)(1) (emphasis added).

<sup>39</sup> *See, e.g., Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1117 (9th Cir. 2009) (“In short, all state commission arbitration authority under Section 252 is inextricably tied to the duties imposed under Section 251.”); *Illinois Bell Telephone Co. v. Box*, 548 F.3d 607, 613 (7th Cir. 2008) (rejecting CLECs’ argument in part “because section 252 doesn’t mention section 271”); *see also BellSouth Telecomms., Inc. v. Georgia Pub. Serv. Comm’n*, 555 F.3d 1287, 1288 (11th Cir. 2009); *Southwestern Bell Telephone, L.P. v. Missouri Pub. Serv. Comm’n*, 530 F.3d 676, 682 (8th Cir. 2008); *Verizon New England, Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 7 (1st Cir. 2007).

<sup>40</sup> *TDS Comments* at 15.

<sup>41</sup> *See* 47 U.S.C. § 271(c)(2)(A)(i)(II).

<sup>42</sup> *See TDS Comments* at 15 n.31; *CompSouth Comments* at 5 n.13.

only disputes arising under § 251 and indeed forecloses such arbitration for disputes arising under § 271.<sup>43</sup>

Finally, TDS asks the Commission to declare that certain terms or conditions of § 271 service agreements are “unreasonable on their face,” including volume provisions, growth or exclusivity requirements, and charges for converting a former § 251 UNE into a § 271 service.<sup>44</sup> TDS offers no reasoning or evidence to support this broad request, and its proposal has no basis in the statute or Commission precedent.

**B. The Petition Also Conflicts with the Commission’s Application of the § 251 Unbundling Standard.**

As AT&T has explained, the Petition also runs directly contrary to the Commission’s conclusions no longer to require unbundling – at TELRIC rates – of certain specific network elements.<sup>45</sup> Here too, the CLEC comments confirm that the Petition is inconsistent with this precedent.

For example, several commenters argue that the Petition should be granted because access to BOCs’ facilities (including high-capacity loops and transport) at cost-based TELRIC

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<sup>43</sup> See 47 U.S.C. § 252(b)(1) (providing for arbitration of requests for negotiations “under this section,” which contemplates such requests only with regard to the requirements of § 251); see also *Qwest Corp.* 567 F.3d at 1116 (holding that “the Act does not authorize state commissions to implement Section 271 terms and rates in interconnection agreements”); *BellSouth* 555 F.3d at 1288; *Illinois Bell*, 548 F.3d at 613 (noting that a contrary reading “makes no sense”); *Southwestern Bell*, 530 F.3d at 683 (“[A] state commission may not ‘parlay [its] limited role’ into the authority to impose substantive requirements” (citation omitted, alteration in original)); *Verizon New England*, 509 F.3d at 7 (“[A]uthority under section 271 is granted exclusively to the FCC.”).

<sup>44</sup> See *TDS Comments* at 16.

<sup>45</sup> See AT&T Opposition at 17-20.

rates is necessary in order to permit CLECs to compete.<sup>46</sup> But if that were true, those elements would still be unbundled under § 251. The Commission removed them from § 251 – and from all of its corresponding rules and requirements – precisely because it found that the failure to provide access to such network elements would *not* impair the ability of CLECs to compete.<sup>47</sup> Like the Petitioners, the CLEC commenters offer no coherent reason why the Commission should impose under § 271 what it declined to require under § 251.

Nor do commenters attempt to rationalize their request for loops and transport at TELRIC rates for wireless and long-distance pursuant to § 271 with the Commission’s express holding that such subsidized access – under § 251 – was unnecessary and would in fact undermine competition in those well-functioning markets.<sup>48</sup> MACC asserts that “the availability of unbundled elements under the Section 271 Competitive Checklist is becoming increasingly important . . . as long distance and mobile wireless carriers face escalating competitive pressure.”<sup>49</sup> But *all* providers in these markets face “escalating competitive pressure,” and MACC offers no reason why one segment of providers in these robustly competitive markets should be forced to subsidize others. Any effort to impose such a lopsided regime would run into the same problem that befell the Commission’s line sharing rules, which the D.C. Circuit struck down because of the Commission’s “naked disregard of the competitive context” in the

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<sup>46</sup> See *MACC Comments* at 3; *TEXALTEL Comments* at 2; see also *TDS Comments* at 16 (seeking a declaration that restrictions on which loop and transport services are available under § 271 are “unreasonable on their face”).

<sup>47</sup> See Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶¶ 66, 146 (2005) (“*Triennial Review Remand Order*”), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>48</sup> See *id.* ¶ 36.

<sup>49</sup> *MACC Comments* at 3.

broadband market, which included “robust competition” and “the dominance of cable.”<sup>50</sup> Furthermore, as AT&T explained, § 271 requires BOCs to provide only *local* services and only to providers of “telephone exchange service,” which does not include long-distance and cellular providers.<sup>51</sup>

**C. There Is No Basis in this Record to Depart from Precedent.**

As the discussion above makes clear, Petitioners and those that support them are asking the Commission to cast aside settled precedent interpreting and applying § 251 and § 271. But, even apart from the fact that much of what the Petition seeks is foreclosed by the text and structure of the 1996 Act, the Commission could not act on the Petition absent “good reasons” for turning its back on its own precedent.<sup>52</sup> AT&T’s opening comments demonstrated that the Petitioners offered no such reasons. And the comments filed by other CLECs fail to remedy that critical defect.

1. Several commenters claim that a § 271 rulemaking is necessary to combat BOCs’ supposed market dominance.<sup>53</sup> AT&T thoroughly refuted such charges in its opening comments.<sup>54</sup> As explained there, customers are rapidly abandoning traditional wireline telephone service in favor of alternative services like VoIP and mobile wireless, resulting in a drastic reduction in the number of BOC access lines that shows no sign of slowing.<sup>55</sup> And BOCs enjoy no “dominance” in the growing wireless market, where competition is thriving.<sup>56</sup> As

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<sup>50</sup> *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002).

<sup>51</sup> *See* AT&T Opposition at 19-20.

<sup>52</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>53</sup> *See TDS Comments* at 9; *MACC Comments* at 3; *CALTEL Comments* at 5-6.

<sup>54</sup> *See* AT&T Opposition at 23-27.

<sup>55</sup> *See id.* at 24-25.

<sup>56</sup> *See id.* at 26.

Commissioner McDowell recently described, “America’s wireless market is an illustration of how well policies that encourage competition over regulation work for consumers.”<sup>57</sup> No commenter offers any evidence that calls that observation into question.

CALTEL draws extensively from a white paper prepared by the California Public Utilities Commission (“CPUC”)<sup>58</sup> to support its argument that AT&T exercises market power in California.<sup>59</sup> But the CPUC paper *confirms* that AT&T’s wireline business is declining; the data show a precipitous loss of residential telephone lines in recent years.<sup>60</sup> And the market concentration analysis emphasized by CALTEL shows an increase *only* when wireless services are included in the measurement. Wireline concentration, by contrast, is *decreasing*.<sup>61</sup> Indeed, the CPUC counts several competitive LECs and cable companies among the “largest carriers” in California.<sup>62</sup>

Furthermore, the supposed concentration of the wireless and broadband market segments in California reflects a profoundly distorted understanding of the state of competition. AT&T elsewhere has documented the extensive competition in the wireless and broadband marketplaces.<sup>63</sup> Indeed, Commissioner McDowell has characterized the broadband market as

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<sup>57</sup> McDowell Broadband Address at 6.

<sup>58</sup> *See CALTEL Comments*, App. A.

<sup>59</sup> *See id.* at 3.

<sup>60</sup> *See id.*, App. A at 6-7 (citing an average annual loss rate of 5.1% for residential telephone lines since 2005).

<sup>61</sup> *Id.*, App. A at 12, 14.

<sup>62</sup> *Id.*, App. A at 9.

<sup>63</sup> *See, e.g.*, Comments of AT&T Inc. at 19-41, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 09-66 (FCC filed Sept. 30, 2009); Reply Comments of AT&T Inc. at 9-33, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 09-66 (FCC filed Oct. 22, 2009); Comments of AT&T Inc. at 82-87, *Preserving the Open Internet*, GN Docket No. 09-191 (FCC filed Jan. 14, 2010).

“robust and dynamic,” noting that “America enjoys more competition among different broadband platforms than most of our international competitors.”<sup>64</sup>

Moreover, any concentration that might exist in these markets would have no bearing on § 271. The Commission has already concluded that it is sufficient that wireless carriers are entitled “to use incumbent LEC facilities on a tariffed basis,” according to which they have “access on similar terms as other, similarly situated carriers.”<sup>65</sup> And the Commission has expressly granted forbearance from § 271’s requirements with regard to network elements used to provide broadband services.<sup>66</sup> The CPUC paper does not, in any event, demonstrate that the markets for these services are concentrated. The CPUC’s analysis is based predominantly on the Herfindahl-Hirschman Index and Four-firm Concentration Ratio, which it describes as “two common methods for measuring market concentration.”<sup>67</sup> AT&T has previously explained the shortcomings of these measurements, particularly in dynamic markets such as wireless and broadband.<sup>68</sup> Moreover, the CPUC itself concedes that these measures “do not capture information regarding the nature of competition in the specific market.”<sup>69</sup> It is not surprising, then, that the CPUC determined “it would be inappropriate to conclude whether competition is sufficient” based on its report, and that “[t]he information in [the] report cannot provide the sole basis for sound regulatory policy.”<sup>70</sup>

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<sup>64</sup> McDowell Broadband Address at 5, 7.

<sup>65</sup> *Triennial Review Remand Order* ¶ 40.

<sup>66</sup> *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd 21496 (2004).

<sup>67</sup> *CALTEL Comments*, App. A at 11.

<sup>68</sup> *See Reply Comments of AT&T Inc. at 12-13, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 09-66 (FCC filed Oct. 22, 2009).

<sup>69</sup> *CALTEL Comments*, App. A at 11.

<sup>70</sup> *Id.*, App. A at 16.

2. Other commenters claim that Commission action is necessary because BOCs are imposing unjust and unreasonable rates for the services they offer under § 271. TDS, for example, cites the decline since 2004 in “UNE-P lines” – that is, UNE loops plus switching – provided by BOCs at TELRIC rates.<sup>71</sup> But, as AT&T explained in its opening comments, this evidence simply supports the Commission’s decision to eliminate UNE-P and encourage investment in facilities-based competition.<sup>72</sup> In other words, the Commission eliminated the UNE-P because it undermined facilities-based competition; it fully expected the volume of UNE-P lines to decline once the effective subsidies were eliminated. Furthermore, the decline in leased loops plus switching cited by TDS coincided with a substantial increase in the number of loops *owned* by competitive LECs – just as the Commission predicted in the *Triennial Review Remand Order*.<sup>73</sup> At the same time, the total number of loops owned by incumbent LECs declined due to the industry trend away from traditional wireline service. TDS’s attempt to cast these developments as the result of BOCs’ alleged unreasonableness has no basis in the facts.

Nor is that “unreasonableness” demonstrated by the state commission findings on which commenter CompSouth relies. First, as explained above, state commissions have no jurisdiction to evaluate BOCs’ compliance with § 271 or the just and reasonable standard of § 201. And CompSouth grossly mischaracterizes the state proceedings in any case. For example, the Kentucky commission did not “reject[ AT&T’s] proposed rates.”<sup>74</sup> AT&T did not propose any rates, relying instead on the commission’s lack of jurisdiction under § 271.<sup>75</sup> Nor did AT&T

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<sup>71</sup> See *TDS Comments* at 11-12.

<sup>72</sup> See *AT&T Opposition* at 28-29.

<sup>73</sup> See *Triennial Review Remand Order* ¶ 227.

<sup>74</sup> *CompSouth Comments* at 4.

<sup>75</sup> See *In re Southeast Telephone, Inc.*, Case No. 2006-00316, 2007 WL 1302145, \*3 (Ky. P.S.C. Mar. 28, 2007).

approve of the New Services Test as “a sound methodology for establishing just and reasonable rates.”<sup>76</sup> Although AT&T’s witness in the Georgia proceeding acknowledged that the Commission historically *had* employed that test as one benchmark of just and reasonable rates, he repeatedly explained that § 271 requires market prices.<sup>77</sup> Finally, the Tennessee arbitrators, on reconsideration of the order cited by CompSouth, applied the same market-based standard set out by the Commission in the *Triennial Review Remand Order* and emphasized that rates under § 271 are not based on TELRIC.<sup>78</sup> None of these state decisions supports CompSouth’s contention that AT&T is charging unjust or unreasonable rates.

3. Finally, CLEC commenters offer untenable policy arguments to justify their requested rulemaking. CALTEL, for example, claims that competitors have no other recourse to obtain just and reasonable rates.<sup>79</sup> But CALTEL does not, and cannot, provide any evidence to suggest that Commission intervention is necessary or appropriate where, as the Commission has already held, rates should be established by market participants negotiating at arm’s length.<sup>80</sup>

TEXALTEL’s proffered justification for Commission action here is equally unconvincing. In its view, the “vision” of the 1996 Act was to allow competitive carriers “to avoid having to build their own networks” and instead to enable them to rely on “ubiquitously available ILEC facilities . . . to provide service.”<sup>81</sup> This is a complete mischaracterization. As

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<sup>76</sup> *CompSouth Comments* at 4.

<sup>77</sup> See Georgia Public Service Commission Record at 82-84, 91-92, *Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (FCC filed Apr. 18, 2006).

<sup>78</sup> See *In re ITC DeltaCom Communications, Inc.*, Docket No. 03-000119, 2006 WL 3479025, \*3 (Tenn. R.A. May 18, 2006).

<sup>79</sup> See *CALTEL Comments* at 8.

<sup>80</sup> See *Triennial Review Order* ¶ 664; *UNE Remand Order* ¶ 473.

<sup>81</sup> *TEXALTEL Comments* at 2-3.

the Commission has recognized, the goal of the 1996 Act was “to encourage the innovation and investment that come from facilities-based competition.”<sup>82</sup> The D.C. Circuit has emphasized the same point, explaining that the purpose of the Act “is to stimulate competition – preferably genuine, facilities-based competition.”<sup>83</sup> TEXALTEL’s comments – and indeed, the Petition itself – suggest that some competitive carriers would prefer to leave the investment to the BOCs while taking advantage of subsidized access through an unwarranted extension of § 251 rules into the § 271 context. Nothing in the statute or sound policy supports that result.

### CONCLUSION

For the reasons discussed above and in AT&T’s Opposition, the Commission should deny the Petition.

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<sup>82</sup> *Triennial Review Remand Order* ¶ 2.

<sup>83</sup> *USTA II*, 359 F.3d at 576.