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 SECTION 271 COALITION

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REPLY COMMENTS OF THE SECTION 271 COALITION

The Section 271 Coalition ("Coalition"), by its attorney, hereby files its reply comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on December 14, 2009 seeking comment on the Petition for Expedited Rulemaking ("Petition") filed by the Coalition on November 9, 2009.[1]

I. INTRODUCTION AND SUMMARY

The competitive carrier community is united on the need for access to Section 271 Checklist elements and support for the rules proposed in the Petition. Comments were submitted by individual carriers and by industry associations representing competitive service providers across the United States[2] and those comments each detailed the harms to competition occurring from the current lack of rules to enforce the Regional Bell Operating Companies' ("RBOCs'")

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1 *Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222, Public Notice, DA 09-2590 (rel. Dec. 14, 2009) ("*Dec. 14th Public Notice*").

2 Comments were filed by industry associations representing competitive carriers doing business in the Southeast (*i.e.*, CompSouth), Southwest and Midwest (*i.e.*, MACC) and competitive carriers' state associations in California (*i.e.*, CALTEL) and Texas (*i.e.*, TEXALTEL).

Section 271 Checklist obligations. As stated by TDS Metrocom LLC, *et al.*, "[T]he BOCs have taken advantage of the lack of detailed rules to impose unilaterally excessive, non-negotiable rates for Section 271 network elements."[3]

The California Association of Competitive Telecommunications Companies' ("CALTEL") comments document the market consequences of the problem described by TDS Metrocom. According to an analysis performed by the California Public Utilities Commission ("CPUC"), since AT&T's California operating company (Pacific Bell Telephone Company) gained authority to provide interLATA and information services in December 2002, competition has steadily eroded in that state.[4] The analysis found that concentration ratios in the combined residential wireline, wireless, and residential broadband markets "have steadily increased in California since June 2005, with the largest increases coming most recently."[5] Indeed, the markets for residential wireline, wireless accounts billed directly, and residential broadband connections in California were determined to be "concentrated" or "oligopolistic" under the Herfindahl-Hirschman Index ("HHI") and Four-Firm Concentration ratios.[6] In sum, CALTEL warned that "the California telecommunications market is becoming less and less competitive, and [ ] it is significantly less competitive now than it was in June 2001."[7]

CALTEL attributes this steadily decreasing competition in part to the lack of rules to administer and enforce AT&T's Section 271 Checklist obligations, concluding that

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3 Comments of TDS Metrocom, LLC, and U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications, WC Docket No. 09-222 (filed Jan. 12, 2010) ("*TDS Metrocom, et al. Comments*"), at 2.

4 Comments of the California Association of Competitive Telecommunications Companies, WC Docket No. 09-222 (filed Jan. 12, 2010) ("*CALTEL Comments*"), at 2-5.

5 *Id.*, at 4.

6 *Id.*, at 3.

7 *Id.*, at 4.

"[e]nforcement of the BOC's § 271 obligations, as proposed by the Section 271 Petition, is essential to the reversal of these trends in California."[8] This endorsement of the Coalition's proposed rules was echoed by the Competitive Carriers of the South, Inc. ("CompSouth"). In CompSouth's view, "[t]he procedures and rules recommended by the Section 271 Coalition provide a reasonable framework for the RBOCs to publish and disclose the offerings that they claim satisfy their Section 271 obligations, as well as a process for those claims to be reviewed."[9] The Midwest Association of Competitive Communications, Inc. ("MACC") concurred, urging the Commission to adopt the Coalition's proposed rules "in order to ensure that carriers have much-needed ongoing access to [RBOC] network elements at reasonable rates and terms ..."[10]

Not surprisingly, the only opposition to the Coalition's proposed rules came from the RBOCs themselves, who remain committed to preserving the current regulatory vacuum which permits them to ignore their Section 271 Checklist obligations. Qwest Communications International Inc. ("Qwest") summed up the RBOCs' position in dismissing the Petition as "a solution in search of a problem."[11] In the RBOCs' view, "[t]here is simply no predicate" for what Qwest characterizes as "the radical regulatory overhaul" proposed by the Section 271 Coalition.[12]

There is good reason for the RBOCs to cling to this position. As the Commission was reminded in the Petition, Section 271 embodies a carefully-constructed balancing of private

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8 *Id.*, at 5.

9 Comments of the Competitive Carriers of the South, Inc., WC Docket No. 09-222 (filed Jan. 12, 2010) ("*CompSouth Comments*"), at 3 (footnote omitted).

10 Comments of the Midwest Association of Competitive Communications, Inc., WC Docket No. 09-222 (filed Jan. 12, 2010) ("*MACC Comments*"), at 1-2.

11 Comments of the Qwest Communications International Inc., WC Docket No. 09-222 (filed Jan. 12, 2010) ("*Qwest Comments*"), at 2.

12 *Id.*

interests, with the goal of fostering the public interest. In return for permission to provide information and in-region interLATA services, the RBOCs are obligated to comply with certain specific requirements including, importantly, the access and interconnection obligations contained in the Section 271(c)(2)(B) Competitive Checklist.[13] As AT&T Inc. ("AT&T") correctly notes:

> [Section 271] 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." 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.[14]

These access and interconnection obligations are ongoing (*i.e.*, they do not disappear once an RBOC has been awarded interLATA and information services operating authority) and they are independent of the obligation on all incumbent local exchange carriers ("ILECs") to provide access to certain network elements under Section 251. As AT&T confirms, "[t]he Commission has long recognized that § 251 and § 271 impose separate obligations."[15] In addition, as the RBOCs acknowledge, Sections 201 and 202 of the Act govern the pricing and terms for Section 271 Checklist elements.[16] Indeed, as Qwest states, "there is one point on which [it] agrees with the Section 271 Coalition – once Checklist Elements are not

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13 *Petition*, at 7-8.

14 Comments of AT&T Inc., WC Docket No. 09-222 (filed Jan. 12, 2010) ("*AT&T Comments*"), at 9 (citations and footnotes omitted).

15 *Id.*, at 7.

16 *See Verizon Comments*, at 8 ("The Commission first addressed the pricing standard for 271 elements in the *UNE Remand Order*, in which it held that rates for 271 elements 'are determined in accordance with section[] 201(b).'"); *AT&T Comments*, at 12 ("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 and reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.'").

subject to Section 251 unbundling requirements they become subject to Section 201 and Section 202 requirements."[17]

Because the Commission has failed to adopt any regulations that establish parameters governing the offering of Section 271 Checklist elements, however, the RBOCs have successfully avoided giving effect to their acknowledged Section 271 Checklist obligations. At the same time, they have reaped handsome benefits from Section 271 in the form of vast interexchange and information service revenues. It therefore should come as no surprise that the RBOCs would very much like to maintain the status quo.

In an effort to preserve the substantial advantages of the current environment, the RBOCs have raised arguments in opposition to the Petition that avoid or misrepresent the plain language of Section 271, the congressional intent underlying that provision, the Commission's holdings, and the relief sought by the Petition. The RBOCs willfully ignore the ongoing, independent obligation to make Checklist elements available on an unrestricted basis at just and reasonable and not unreasonably discriminatory rates and terms and instead attempt to convince the Commission to view the Petition as something it is not, *i.e.*, a vehicle to reclaim strict TELRIC-compliant pricing for de-listed Section 251(c)(3) elements or to force reductions to special access prices. The RBOCs also intentionally misconstrue the Commission's prior rulings interpreting the Section 271 Checklist obligations. As shown herein, each of the RBOCs' arguments is baseless and should be rejected by the Commission.

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17 *Qwest Comments*, at 16 (footnote omitted).

II. THE RBOCS MISREPRESENT THE COMMISSION'S PRIOR HOLDINGS ON SECTION 271 CHECKLIST ISSUES

In their effort to convince the Commission to reject the Petition, the RBOCs make various representations regarding the Commission's prior pronouncements on the Section 271 Checklist obligations that are factually incorrect or misleading. A careful review of the Commission's previous statements shows the fallacy of the RBOCs' representations and instead supports the Coalition's reading of Section 271 and the relief sought in the Petition.

A. The Commission Has Not Held That Market Rates Will Prevail For Section 271 Checklist Elements

Each of the RBOCs incorrectly represents that the Commission has previously determined that market rates should apply to Section 271 Checklist elements. AT&T's statement that "Petitioners propose pricing rules for § 271 checklist elements that … studiously ignore the Commission's repeated explanation that § 271 requires market-based, not cost-based, pricing"[18] also reflects the position of Verizon and Qwest.[19] Each RBOC cites the Commission's statements in the *UNE Remand Order*[20] and the *Triennial Review Order*[21] to support its

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18 *AT&T Comments*, at 14 (emphasis and footnote omitted).

19 *See Verizon Comments*, at 4 ("[T]he Commission has long held that 'the market price should prevail' for 271 elements … 'as opposed to a regulated rate,' such as TELRIC (or another 'forward-looking' rate), which 'would be counterproductive to mandate.'"); *Qwest Comments*, at 19-20 ("[T]he Commission has clearly stated for Section 271 elements – which are offered when the Commission has determined an element to be 'non-impaired' that 'market prices should be permitted to prevail … rather than requiring forward-looking prices.'").

20 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

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

position.[22] In reality, the RBOCs fundamentally mischaracterize the Commission's reasoning and holdings in those orders.

In the *UNE Remand Order*, the Commission first considered "the interplay between the unbundling obligations of Section 251(c), and the competitive checklist network elements of section 271" and the "pricing standards [that] would apply if a checklist network element were no longer required to be unbundled pursuant to section 251(c)(3), after considering the 'necessary' and 'impair' standards of section 251(d)(2)."[23] The Commission concluded that "the prices, terms and conditions set forth under section 251(c)(3) do not presumptively apply" to Section 271 Checklist elements,[24] and that "[i]f a checklist network element does not satisfy the unbundling standards in section 251(d)(2), *the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)*."[25] The Commission concluded further that Sections 201(b) and 202(a) provide a basis for it to scrutinize the prices, terms and conditions under which Checklist elements are offered and that under those provisions, all charges, practices, classifications, and regulations pertaining to Checklist elements must be "just and reasonable" and "not unreasonably discriminatory."[26]

The RBOCs grudgingly acknowledge the applicability of Sections 201(b) and 202(a) to Section 271 Checklist element rates and terms.[27] The problem arises, however, from their incorrect conclusion that the Commission has determined that those statutory provisions

22 *Qwest Comments*, at 20-21; *AT&T Comments*, at 11-12; *Verizon Comments*, at 4.

23 *UNE Remand Order*, at ¶ 466 (footnote omitted).

24 *Id.*, at ¶ 469.

25 *Id.*, at ¶ 470 (emphasis supplied).

26 *Id.*, at ¶ 472.

27 *See, e.g., Qwest Comments*, at 17 ("The statutory basis for the Commission's regulation of the rates, terms and conditions of common carrier offerings is rooted in Sections 201 and 202, and the Commission's history of applying these provisions is more than sufficient to address any issues pertaining to Section 271 checklist items.").

compel endorsement of unregulated (*i.e.*, market-based) prices for Section 271 Checklist elements.

Far from adopting a blanket deregulation policy in the *UNE Remand Order*, the Commission merely suggested that in a *fully competitive environment* prices might be found to meet the substantive requirements of Sections 201(b) and 202(a) without regulatory intervention.[28] The Commission was even more emphatic in the *Triennial Review Order* that the prices of Section 271 Checklist elements "are [to be] reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 … that has historically been applied under most federal and state statutes including … the Communications Act."[29] And, as we have previously explained, the Commission's application of the Section 201/202 standard has traditionally and consistently required a reasonable nexus between cost and price.[30]

The Commission went on to point out that whether a particular Checklist element rate meets the pricing standard of Sections 201 and 202 (*i.e.*, reflects a reasonable nexus between cost and price) "is a fact-based inquiry."[31] The Commission suggested several possible ways this standard *might* be satisfied that would not necessarily require it to set prices,[32] but it did not conclude that market-based prices for Checklist elements by definition meet the cost-based pricing standard of Sections 201 and 202 and thus achieve "Congress's intent that Bell

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28 *See UNE Remand Order*, at ¶ 473.

29 *Triennial Review Order*, at ¶ 663.

30 *Petition*, at 34-39.

31 *Triennial Review Order*, at ¶ 664.

32 *Id.* ("a BOC *might* satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions … under its interstate access tariff … Alternatively, a BOC *might* demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements … to provide the element at that rate." (emphasis added).

companies provide meaningful access to network elements."[33] In effect, the RBOCs' reading of the Commission's orders would result in the exception swallowing the rule.[34] Moreover, as explained in detail in Section IV.A, *infra*, the Commission in the *Triennial Review Order* expressly rejected any requirement that a competitive wholesale market exist as a precondition to a finding of non-impairment and a de-listing of network elements under Section 251(c)(3) of the Act. Consequently, the market pricing rule espoused by the RBOCs in their comments is not only an exception, by the Commission's own reasoning it is a rare exception to the rule.

B. The Commission Has Never Affirmatively Decided To Refrain From Adopting Rules To Administer The RBOCs' Checklist Obligations

In its comments, AT&T alleges that the Commission has "specifically decided not to promulgate rules to gauge when [the standards set forth in Sections 201 and 202] would be satisfied ..."[35] In AT&T's view, "[t]his treatment of § 271 pricing refutes Petitioners' claim that the Commission has not provided 'meaningful guidance' on the issue."[36] AT&T is wrong.

AT&T bases its allegation on the Commission's observation in the *Triennial Review Order* that the determination of whether the Section 201(b) and 202(a) pricing standard has been met necessitates a fact-based analysis.[37] The requirement for a factual inquiry does not,

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33 *Id.*

34 AT&T characterizes the Commission's suggestion in the *Triennial Review Order* that a RBOC might be able to demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing it has entered into agreements with other carriers to provide the element at that rate as the creation of a "safe harbor" for the RBOCs. *AT&T Comments*, at 12. AT&T blatantly mischaracterizes the Commission's statement. The language in fact is consistent with the Commission's long history that cost-based rates are required to comply with Sections 201 and 202. The Commission merely suggests that after a "fact-specific inquiry" in a specific competitive environment the rates contained in negotiated agreements "*might*" be found to be cost-based, as required by Sections 201 and 202. *Triennial Review Order*, at ¶ 664 (emphasis supplied).

35 *AT&T Comments*, at 12 (emphasis omitted).

36 *Id.*

37 *Id.*, citing *Triennial Review Order*, at ¶ 664.

however, negate the need for or the appropriateness of rules to administer Section 271 Checklist compliance. To the contrary, the "fact-based inquiry" identified by the Commission would only be enhanced by the application of rules that provide a framework for the Commission's analysis of the facts (as well as an identification of what facts would be most relevant).

The rules proposed by the Section 271 Coalition would clearly define the requirements that must be satisfied for the provision of Checklist elements to be just and reasonable and nondiscriminatory in practice and effect and would set forth the filing requirements for the principal administrative device needed to ensure compliance with Checklist obligations. As such, these rules would assist the Commission (and the industry) in conducting the analyses required to administer and enforce Section 271 Checklist obligations.[38]

C. A Formal Complaint Is Not The Only Means To Administer And Enforce Section 271 Checklist Obligations

Hand-in-hand with the contention that the Commission has affirmatively decided to refrain from adopting rules to administer the RBOCs' compliance with the Section 271 Checklist is the notion that the formal complaints suggested in Section 271(d)(6)(B)[39] are the appropriate means to enforce Checklist compliance and that the adoption of rules such as those proposed by the Coalition would impede use of the Section 271(d)(6) complaint process. In reality, the opposite is true. The enforcement process contemplated in Section 271(d)(6) cannot function effectively in the absence of Commission rules that clearly define the requirements that must be satisfied for the provision of Checklist elements. For example, it is difficult to envision

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38 It is worth noting that the pricing rule proposed in the Petition (proposed § 53.609) would establish a safe-harbor methodology by which Checklist element prices would be presumed just and reasonable but would provide each RBOC with the opportunity to propose alternatives. *See Petition*, at 39. In other words, proposed § 53.609 is designed to assist in the factual inquiry AT&T identifies as critical to an assessment of Section 271 Checklist compliance rather than to foreclose it.

39 47 U.S.C. § 271(d)(6)(B).

how the Commission can properly adjudicate a dispute over whether the rate for a particular Checklist element is just and reasonable if the Commission has not defined the parameters of the just and reasonable standard as applied to Checklist elements.[40] If the Commission is serious about enforcement of the Section 271 Checklist – through the Section 271(d)(6) complaint process or by other means – it must adopt rules such as those proposed by the Coalition.

III. THE RBOCS ARE IMPROPERLY INTERJECTING SPECIAL ACCESS INTO THE COMPETITIVE CHECKLIST

Section 271 Checklist elements must be priced at just and reasonable levels in order to achieve "Congress's intent that Bell companies provide meaningful access to [Section 271] network elements."[41] The Petition proposed adoption of a simple and flexible pricing standard that the Commission has traditionally applied to ensure compliance with the just and reasonable standard of Sections 201 and 202 of the Act.

One of the principal arguments raised by the RBOCs in response is that the Petition is "an improper attempt to circumvent" the Commission's ongoing special access proceeding.[42] That claim is simply not true, for it is not *the Coalition's* position that special access services satisfy the Section 271 Competitive Checklist. That is the contention of the RBOCs who are improperly attempting to interject their special access services into this proceeding which addresses the requirements of the Competitive Checklist.

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40 Moreover, even where an individual CLEC were to successfully challenge the just and reasonableness of an RBOC's Section 271 Checklist element rates through a Section 271(d)(6) complaint, other CLECs might not be able to easily avail themselves of the results. Indeed, it is not even clear what administrative device would be used by the RBOC to comply with a Commission complaint decision, because the RBOCs oppose a federal SGAT and claim they have no obligation to offer Checklist elements through interconnection agreements subject to state approval. As a consequence, it is likely that other CLECs would be forced to file duplicative complaints to obtain the same relief, which would be an administrative burden to the Commission (and the CLECs) and a waste of limited agency and industry resources.

41 *Triennial Review Order*, at ¶ 663.

42 *See AT&T Comments*, at 4; *Verizon Comments*, at 1.

As the Commission has previously explained, the obligations of Section 271 are:

> *[A]dditional* requirements [that] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market. ... Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are *unique* to the BOCs.[43]

The Coalition concurs with the Commission's determination that Section 271 places additional obligations uniquely on the RBOCs. As such, it could never have been Congress's intent that the Section 271 obligations could be satisfied by special access services that existed at the Act's passage, and which are offered by *all* incumbent local exchange carriers, not just the RBOCs.

There is no evidence in the legislative record that Congress intended the specific, additional obligations of the Competitive Checklist to merely continue existing obligations applicable to all ILECs. AT&T goes so far as to argue (without citation to any legislative history) that Congress wanted to accomplish nothing more than to ensure that the RBOCs did not withdraw their special access offerings.[44] But Congress was well aware of the Commission's access charge rules – including the rules that required the offering of special access – and enacted a specific provision that continued these ILEC obligations unless superseded by explicit order by the Commission.[45] As the Commission has correctly noted, maintaining the status quo was not a goal of the Checklist:

> [I]f anything, Congress expressly sought to displace the special access regime ... it did *not* intend to permit services offered

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43 *Triennial Review Order*, at ¶ 655 (emphasis supplied).

44 *AT&T Comments*, at 9 ("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.").

45 47 U.S.C. § 251(g).

> pursuant to "the familiar public-utility model of rate regulation" to trump its more aggressive posture regarding competition.[46]

Moreover, as the Commission noted concerning the similarities between Section 251 elements and special access:

> Congress's enactment of section 251(c)(3) ... at a time when special access services were already available to carriers in the local exchange market indicates that UNEs were intended as an *alternative* to these services, available at alternative pricing.[47]

The identical logic applies here, where the independent obligations of the Section 271 Checklist are similar – but in addition to – the obligations of Sections 251(c) and special access. The enactment of the Checklist at a time when special access services were already available to carriers in the local exchange market indicates that Checklist elements were intended as an alternative to these services, at alternative prices.

Indeed, the Commission concluded that Section 271 Checklist obligations and RBOC special access offerings are independent offerings when it evaluated Qwest's obligations in the wake of the *Omaha Forbearance Order*:

> To begin with, we note that a withdrawal of these loop and transport offerings would be impermissible under section 271, which requires Qwest to make its loop and transport facilities (among others) available to competitors at just and reasonable rates and terms. *In addition,* Qwest offers similar special access services pursuant to tariffing or contract filing requirements, and cannot cease offering such services to customers without authority under section 214.[48]

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46 *Triennial Review Order*, at ¶ 51 (emphasis in original).

47 *Id.* (emphasis in original).

48 *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, at ¶ 80 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007) (emphasis supplied).

Moreover, Section 271 sets forth specific obligations to offer Checklist elements to "*other telecommunications carriers*" at rates that are just and reasonable.[49] The Competitive Checklist is unambiguously a *wholesale* obligation, intended to enable the purchasing carrier to incorporate Checklist elements into its own retail services. In contrast, special access services are available to end users (as well as carriers), and this dual role creates tension between the retail pricing of special access and its suitability to fulfill a wholesale obligation.

Uses of Special Access Capacity - Verizon[50]

Use of Special Access Capacity	Percentage of Special Access Capacity
Retail	27%
Wholesale	39%
Wholesale to Affiliates	34%

Data provided by Verizon demonstrates how special access improperly ignores the important distinction between wholesale and retail services. As shown above, special access services are used approximately 1/3 by retail customers, 1/3 by legitimate wholesale customers, and 1/3 by Verizon's own affiliates.

The central request of the Petition is for the Commission to adopt a quantifiable and enforceable pricing standard appropriate to Checklist elements. If *after* the Commission adopts clear pricing rules the RBOCs wish to claim that their special access services are (or can be) priced at levels that comply with those Commission's rules, then there may be a nexus between this proceeding and the Commission's special access proceeding. At this juncture,

49 47 U.S.C. § 271(c)(2)(B) (emphasis supplied).

50 Source: Letter from Genevieve Morelli, Counsel to Broadview Networks, Inc., *et al.*, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed May 11, 2009), at 3. The relative percentages shown in the Table are developed from market and wire-center specific data filed by Verizon for Rhode Island and the Virginia Beach MSAs. Although the relative shares shown in the table are accurate, the data has been aggregated into these categories and combined for both markets to protect the confidentiality of the underlying data.

however, the RBOCs are placing the cart in front of the horse by interjecting a claim that is not ripe (*i.e.*, that no matter the pricing standard, the answer will be special access), as well as a claim that is fundamentally wrong (*i.e.*, that retail pricing levels are appropriate for wholesale services).

IV. THE NEW SERVICES TEST IS THE APPROPRIATE METHODOLOGY TO DETERMINE WHETHER SECTION 271 ELEMENTS SATISFY SECTIONS 201 AND 202 OF THE ACT

All parties agree that the elements required by the Section 271Checklist must comply with Sections 201 and 202 of the Communications Act.[51] Despite agreement as to the applicable law, however, there is substantial disagreement between the RBOCs and other commenters as to what exactly is required for a rate to be just, reasonable and nondiscriminatory.

As a threshold matter, this disagreement provides compelling evidence as to the need for this rulemaking. The Coalition-proposed rules would simply extend to Section 271 Checklist elements a methodology that the Commission has used repeatedly to determine whether prices are just and reasonable. In contrast, the RBOCs claim that the Commission effectively *deregulated* the pricing of Section 271 elements, finding that whatever the market will bear is (by definition) just and reasonable.[52] Such a broad range of perception would not be

[51] *See AT&T Comments,* at 10-11 ("[A]s the Petition recognizes, § 271 checklist element prices are judged against the traditional just and reasonable standard set out in § 201 and § 202"); *Qwest Comments*, at 16 ("[T]here is one point on which Qwest agrees with the Section 271 Coalition – once Checklist Elements are not subject to Section 251 unbundling requirements they become subject to Section 201 and Section 202 requirements.").

[52] Qwest goes so far to characterize the Petition's extensive discussion of prior Commission pricing decisions as "irrelevant." *Qwest Comments*, at 19. Qwest never explains, however, why the Commission should not consider its own precedents as guidance as to a rate standard the Commission describes as "the basic just and reasonable and nondiscriminatory rate standard ... that is fundamental to common carrier regulation *that has historically been applied* under most federal and state statutes ...." *Triennial Review Order*, at ¶ 663 (emphasis supplied). There is nothing more relevant to a discussion of a rate standard that has historically been applied than a review of Commission pricing approaches over time.

possible if the Commission had clear rules, even if its rules were different than those the Coalition recommends. The Coalition is not altering its position that the New Services Test is the most appropriate methodology to judge the reasonableness of Checklist element prices. The threshold issue before the Commission, however, is whether *any* rate standard should apply because in the absence of rules, the RBOCs have adopted a *de facto* Descartes standard, "if I exist, I must be reasonable."

The central claim of the RBOCs – *i.e.*, that market prices are reasonable – presupposes the existence of effective market forces capable as acting as a check on RBOC pricing. However, as explained below, the Commission has never established the existence of the market forces that would ensure reasonable rates for these wholesale facilities. Critically, a finding of non-impairment under Section 251(c)(3) is <u>not</u> a finding of effective wholesale competition and, as such, a finding of non-impairment says nothing about whether deregulation can be expected to yield rates that are just and reasonable. Thus, the pricing rules proposed in the Petition are necessary to achieve "Congress's intent that Bell companies provide meaningful access to [Section 271] network elements."[53]

A. The Commission's Impairment Analysis Does Not Assure That "Market Prices" Will Be Just And Reasonable.

The basic argument of the RBOCs is that no fact-based analysis could ever be required to demonstrate that their rates are just, reasonable and nondiscriminatory. The RBOCs offer no cost analyses and make no claim that their rates bear any particular relationship to cost (even if the claim is not factually true). Indeed, the RBOCs do not even accept that there exists a cost standard under which their rates would be found reasonable. Rather, the RBOCs each claim that the Commission has excused them from *any* fact-based pricing standard because the

[53] *Triennial Review Order*, at ¶ 663.

Commission has determined that the RBOCs may "market price" at whatever level they believe is appropriate.[54]

The entire basis for the RBOC "market-pricing" claim stems from two paragraphs, written four years apart, that they allege deregulated the prices for Section 271 elements by finding that non-impairment for network elements under Section 251(c)(3) automatically means that wholesale prices for Section 271 elements will be just and reasonable.[55] Before addressing these two isolated paragraphs in detail, it is important to establish that the Commission *never* equated non-impairment under Section 251(c)(3) with a finding that an ILEC no longer enjoys market power over the network element in question. To the contrary, the Commission expressly *rejected* that standard, concluding that non-impairment could arise even where an ILEC maintains market power over the availability and pricing of an element:

> We also decline to adopt a standard that equates or hinges a requesting carrier's impairment with an incumbent LEC's market power in the wholesale market for the input in question.... While incumbent LECs control wholesale facilities in a manner that often creates market power, we look instead for whether new entrants are impaired without those facilities. Indeed, there may be circumstances where an incumbent LEC has market power with regard to a particular input, but competitors are not impaired without access to the element, so unbundling would not be appropriate and might discourage new entrants from building their own facilities.[56]

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54 *See AT&T Comments*, at 3 ("§ 271 pricing should be governed by the market."); *Verizon Comments*, at 2 ("BOCs are free to provide [Section 271 Elements] at market rates."); *Qwest Comments*, at 19 ("There is no basis to depart from market-based pricing for Section 271 elements.").

55 The two defining paragraphs of the RBOCs' market-pricing theory are *UNE Remand Order* paragraph 473 and *Triennial Review Order* paragraph 664.

56 *Triennial Review Order*, at ¶ 110. *See also Triennial Review Order*, at ¶ 113 ("We disagree that we should continue to require unbundling of a network element until a vibrant wholesale market for that element exists, or that a wholesale market is the best evidence of the feasibility of self-provisioning.").

Thus, while the existence of a vibrant wholesale market could demonstrate non-impairment, the causality does not hold in the opposite direction. That is, because non-impairment is not contingent on the existence of a "vibrant wholesale market"[57] or a loss of market power, a finding of non-impairment does not ensure that unregulated "market" prices will be just and reasonable. The Commission deliberately and explicitly adopted an impairment analysis that could eliminate unbundling under Section 251 even in the face of continuing market power by the incumbent. And it is axiomatic that if an RBOC maintains market power it has the ability to *impose and sustain* prices above just and reasonable levels.

Even though the Commission expressly rejected conditioning non-impairment on a finding that the RBOC lacked market power, the RBOCs claim that the Commission still granted them complete pricing freedom. Notably, the RBOCs do not cite a single instance where "the basic just and reasonable and nondiscriminatory rate standard" has been applied to grant complete pricing freedom whether or not a competitive market (or market power) exists. Rather, the RBOCs claim that the Commission took this *unprecedented* step with only two paragraphs of explanation.

The first paragraph followed the Commission's elimination of local switching used to serve enterprise customers in certain cities as a Section 251(c)(3) element in the *UNE Remand Order*:

> In circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. Such a finding in the case of switching for large volume customers is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking

57 *Id.*, at ¶ 113.

> 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.[58]

To begin, the analysis cited above is *not* grounded in the impairment standard that is employed today, but instead suggests the existence of a wholesale market for switching used to serve large volume customers.[59] Consequently, this paragraph does not set forth a pricing methodology that would correspond to *any* non-impairment finding, but is (at most) a discussion appropriate to this particular conclusion that itself is dependent on specific wholesale market conditions. The Commission found effective competition existed in providing local switching to large volume business customers and nothing more. As the final sentence of the paragraph makes clear, the Commission merely was concluding that a requirement to price at cost-based levels would be "counterproductive" because where there is competition, competition can be expected to force prices to those levels.

The *UNE Remand Order* did not grant the RBOCs license to price any Checklist element at any price they desire. To the contrary, the limited discussion in the *UNE Remand*

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58 *UNE Remand Order*, at ¶ 473.

59 Although the Commission's impairment analysis at the time did not strictly require that a wholesale market exist before it would reach a finding of non-impairment, the analysis of the *UNE Remand Order* placed great weight on wholesale market conditions, finding continued impairment for dark fiber because a wholesale market had not emerged, while finding non-impairment for OS/DA because of the presence of wholesale competition ("We find, however, that the <u>nascent wholesale market</u> in fiber loop facilities is not yet extensive enough for us to conclude that competitors are not impaired without access to incumbent LECs' unbundled dark fiber loops."). *UNE Remand Order*, at ¶197. *See also id.*, at ¶ 441 (emphasis supplied) ("The record provides <u>significant evidence of a wholesale market</u> in the provision of OS/DA services and opportunities for self-provisioning OS/DA services."). Given the importance of wholesale-level competition to the Commission's limited non-impairment findings in the *UNE Remand Order*, it is not surprising that the Commission would expect competitive pricing pressure to accompany a finding of non-impairment under the *UNE Remand* regime. As noted above, however, there is no continuing significance of wholesale market pressures in the Commission's revised non-impairment findings and any reliance on a decade-old paragraph, drawn from a different non-impairment analysis, to conclude that the Commission expected competition to produce just and reasonable rates for elements required under Section 271 is misplaced.

Order provides further endorsement of the Commission's commitment to cost-based pricing, which can be achieved through market forces (where there is competition and the absence of market power), or regulation (where market power would prevent the achievement of competitive outcomes).

The second paragraph cited by the RBOCs as "proof" that the Commission authorized market pricing is even more tenuous.[60] As discussed above, in the *Triennial Review Order*, the Commission expressly rejected limiting its Section 251(c)(3) non-impairment findings to those areas where the ILEC no longer enjoys market power. The Commission provided a more extensive discussion of the RBOCs' pricing obligations under Section 271, concluding once again that rates must be just, reasonable and nondiscriminatory under Sections 201 and 202 of the Act. The Commission opined that for a given purchasing carrier, an RBOC *might* satisfy this standard by demonstrating that the rate for a Section 271 element is at or below the rate at which the RBOC offers comparable functions to similarly-situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, an RBOC *might* demonstrate that the rate at which it offers a Section 271 element is reasonable by showing that it has entered into arms-length agreements with other, similarly-situated purchasing carriers to provide the element at that rate.[61]

In their comments, the RBOCs attempt to translate the "might" to a "shall," removing from the analysis any discussion as to whether the RBOC continues to enjoy market power and the ability to sustain unreasonable rates. AT&T goes so far as to claim that the *Triennial Review Order* establishes a "safe harbor" mechanism that never requires any showing by an RBOC that its prices are reasonable, but only requires a showing that some carriers are

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60 *See Qwest Comments*, at 21; *Verizon Comments*, at 4; *AT&T Comments*, at 12.

61 *Triennial Review Order*, at ¶ 664 (emphasis added).

agreeing to purchase the element at the price being charged.[62] Such a claim exposes the absurdity of the RBOCs' position by turning a century of utility ratemaking on its head – *market power is the ability to charge unreasonable rates and get away with it because the customer has no choice.* If any rate that a customer will pay is reasonable simply because the customer pays it, then there is no reason for Sections 201 and 202 to exist at all. Under the RBOCs' theory, neither the Commission (nor any state commission) ever had cause to regulate their rates because customers would have continued to subscribe to their local services even if the rates had been higher.

Obviously, Sections 201 and 202 are intended to prohibit more than just prices that are so high that nobody buys the service. The mere fact that an RBOC is able to charge customers certain rates does not mean that the rates themselves are just and reasonable. There can be no "safe harbor" defense that an RBOC's rates are just and reasonable merely because carriers have agreed to pay. The Commission must take this opportunity to establish pricing guidelines that are both reasonable and fair.

B. TELRIC Provides A Valid Measure Of Cost Under The New Services Test

The Petition asks the Commission to apply its "flexible cost-based" New Services Test as the most appropriate method to judge the reasonableness of Checklist element prices.[63] The New Services Test limits prices to the recovery of direct cost plus a "reasonable contribution." The Petition recommends that the Commission use existing TELRIC cost studies

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62 *AT&T Comments*, at 12.

63 The Commission has long recognized that the New Services Test provides a reasonable measure of pricing flexibility to carriers. *See Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 244, at ¶ 212 (1994).

as the measure of direct cost, and that the Commission adopt a "safe harbor" maximum contribution that would be presumed reasonable.

The RBOCs oppose this methodology largely by claiming that it amounts to imposing TELRIC prices on Section 271 elements.[64] AT&T goes so far as to repeatedly claim the methodology provides "subsidized access," as though repetition creates fact.[65] There is no merit to either assertion. The Petition does not ask that Section 251 prices be applied to Checklist elements,[66] and it is misleading beyond reason to claim that a methodology that on its face calls for prices to exceed cost provides "subsidized access."

To begin – and to be absolutely clear – the Petition does not ask that TELRIC *prices* be applied to Checklist elements. However, TELRIC *cost studies* are the best available information to determine the direct cost of the elements at issue. There is nothing in the RBOC pleadings that explains – much less demonstrates – how or why TELRIC *cost studies* do not

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64 *See, e.g., AT&T Comments*, at 1 ("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…"); *Verizon Comments*, at 1 ("Moreover, petitioners' proposals — specifically, their attempt to use § 271 to force BOCs to sell special access services at TELRIC (or near-TELRIC) rates…"); *Qwest Comments*, at 3 ("[T]he Coalition mistakenly presumes that the TELRIC and nondiscrimination standards of Sections 251 and 252 should be applied to Section 271 checklist elements …").

65 *AT&T Comments*, at 2, 3, 9, 10, 17, 18, 19, 27. Overall, AT&T characterizes the Petition that clearly and unambiguously calls for "reasonable, cost-based" prices as requesting "subsidized" access fifteen times, without once explaining how cost-based pricing produces subsidized access.

66 The Petition did recommend that non-recurring charges ("NRCs") for Checklist elements be set at the same level as NRCs applicable to Section 251 UNEs, mostly for administrative convenience and because such charges discourage customers from upgrading to new services or different providers. Such charges comprise a small portion of overall network element revenues and costs, but loom large in the RBOC comments. To eliminate the distraction caused by this recommendation, the Coalition does not oppose applying the same methodology to NRCs as it recommends for Recurring Charges and revises the requested relief accordingly. Specifically, we recommend that proposed rule § 53.609(a) *Non-recurring charges* be revised to read: "Non-recurring charges for Checklist Network Elements shall be calculated by applying the methodology used to establish recurring charges for Checklist Network Elements in accordance with this section.

reasonably calculate cost. To the cost estimate drawn from these studies, the Petition recommends a "safe harbor" contribution *greater* than that used to establish TELRIC prices.[67] Consequently, the "flexible, cost-based" New Services Test recommended in the Petition would produce prices higher than TELRIC, although not *unreasonably* so.

Importantly, however, none of the RBOCs offer any evidence (or even argument) as to why TELRIC *cost studies* would not provide a reasonable measure of direct cost. Nor do the RBOCs propose any other costing methodology that could be used in its place. Fundamentally, the RBOC attack on TELRIC amounts to an attack on cost-based pricing in *all* respects, because the objection is to having a cost-based standard, not to how the cost basis is measured. The forward-looking costing principles used in TELRIC cost studies are standard economic principles, generally endorsed by RBOC economists (even if disparaged by their lawyers).[68]

Second, the particular TELRIC cost studies recommended here are the product of extensive litigation before state commissions, with (in many instances) federal review in the course of the Commission's evaluation (in an interLATA entry proceeding) as to whether the Section 271 Checklist was being met. By recommending that existing cost studies be used to

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67 Interestingly, despite claiming that the Petition would reinstitute TELRIC prices, the RBOC comments *confirm* that the safe-harbor contribution level recommended by the Petition would yield prices higher than TELRIC. *See AT&T Comments*, at 15. The only instance that AT&T could cite of a higher contribution factor than that recommended by the Petition (*i.e.*, 22%) is a contribution factor used by the Michigan Public Service Commission for a small rural company (Peninsula Telephone) in a TSLRIC (not TELRIC) cost study. The fact that AT&T had to introduce a fact of such irrelevance – citing the contribution factor for a non-RBOC in a non-TELRIC analysis – exposes the lengths it had to go to paint the safe-harbor factor recommended in the Petition as unreasonable.

68 *See, e.g.*, Declaration of Aniruddha Banerjee on behalf of BellSouth, extolling the virtues of incremental costing as to establish "efficient and fair pricing." *Momentum Telecom, Inc. v. BellSouth Telecommunications, Inc.* FCC File No. EB-05-MD-029, at ¶ 8.

implement Checklist element prices, costly additional litigation can be avoided.[69]

Third, the existing TELRIC cost studies generally were conducted several years ago. Consequently, to the extent that any study assumed technologies that had only been partially deployed in the RBOCs' networks (such as fiber optic technology for interoffice transmission), substantial time has elapsed for the actual network to more closely match the modeled network, thereby greatly reducing (if not eliminating) any perceived unfairness. More importantly, the existing TELRIC studies are based on a circuit-switched (not packet) architecture, so that the studies are likely to overestimate forward-looking costs (which would be far less due to new technology).

Fourth, it is likely that existing TELRIC studies also produce direct cost estimates that are higher than the estimates embedded cost studies would produce. One critical characteristic of embedded costs are that they decline through time as investment is recovered through depreciation. At the time the Commission adopted the forward-looking TELRIC principles, there was some debate (but not proof) that TELRIC rates might not fully compensate RBOCs for past investments. The intervening years, however, have likely *reversed* this relationship, as another decade (or more) of depreciation has greatly reduced the net investment in cable and wire facilities used for loops and transport. In fact, the RBOCs had depreciated over

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69 Verizon claims that the Petition asks the Commission to accept TELRIC rates "that state commissions have set without any opportunity for direct review by the Commission," and that, therefore, the Petition "proposes an unlawful subdelegation of the Commission's exclusive statutory authority to implement § 271." *Verizon Comments*, at 13. It is difficult to believe that Verizon is serious about this concern, but if it is, the entire Petition is premised on the Commission having exclusive authority to implement Section 271, including any subsequent Commission review of a Verizon cost study filed alongside a waiver of the administratively simple rules proposed by the Petition. There is nothing in the Petition that prevents Verizon (or any other RBOC) from rejecting the "safe harbor" option and proposing a different price, so long as the RBOC could demonstrate that its proposal would yield just and reasonable rates.

75% of their investment in cable and wire facilities by the end of 2007 (which is the last year for which ARMIS data is available). Consequently, using TELRIC cost studies to establish the direct cost of Checklist elements is likely to produce cost measures substantially higher than an embedded cost analysis would produce.

Capital Recovery of Cable and Wire Facility Investment
($ billions)[70]

Plant in Service	Accumulated Depreciation	Percent Recovered
$16.1	$14.0	87%
$87.4	$64.5	74%
$41.6	$31.3	75%
$145.0	$109.8	76%

The above analysis is not intended to suggest that the Commission should adopt an embedded cost standard in place of the economic forward-looking standard underlying TELRIC. Rather, the point is that TELRIC likely *overstates* embedded costs, and that the existing TELRIC studies likely overstate true forward-looking costs because such studies are not based on new packet technology. As such, using the existing TELRIC cost studies are more likely to overstate (than understate) costs under any conceivable measure and the Petition's recommendation that these studies be used to establish direct cost provides a generous safe-harbor methodology for the RBOCs.

70 Source: ARMIS 43-04, Table 1 Separations and Access Data, Column "Subject to Separation," Rows 1530 (Total Plant in Service – Cable and Wire Facilities) and Row 3060 (Accumulated Depreciation – Cable and Wire Facilities).

V. THE RBOCs WILLFULLY MISCONSTRUE THE REQUIREMENTS OF SECTION 271

In their effort to convince the Commission that the Petition seeks to impermissibly reapply Section 251(c) unbundling rules to Section 271 Checklist elements, the RBOCs misrepresent the substantive differences between the requirements of Sections 251(c) and 271 in a number of ways. The RBOCs' novel interpretations of Section 271 Checklist elements should be rejected by the Commission.

As explained above, Sections 251 and 271 are independent obligations, but they do not require the availability of fundamentally different facilities or elements. The difference is one of price, not definition. Nevertheless, AT&T has presented a number of novel constructions of Section 271, including arguments that (1) Checklist elements are "services" not "facilities," (2) the adjective "local" (when used to describe a loop or switch) is intended to limit its use to local service, and (3) the requirement that an RBOC show that at least one of its interconnection agreements that includes its Checklist obligations is being used by a "competing provider of telephone exchange service" was intended by Congress as a blanket prohibition against carriers using those elements for any other purpose.

AT&T first argues that the loops and transport required by Checklist items 4 and 5 must necessarily be different than Section 251(c)(3) network elements because one particular Section 251(c)(3) network element is defined as a *physical facility*, while the corresponding Checklist element is described as a *service*. Importantly, the term "service" is never used to describe what *is* being offered (*i.e.*, the unbundled Checklist element). It is only used to describe what is not (*i.e.*, the "other service").[71]

[71] For example, a typical construction is: "(iv) Local loop *transmission* from the central office to the customer's premises, unbundled from local switching or other services."

As the Supreme Court reminds us, "The dictionary definition of 'unbundled' (and the only definition given, we might add) matches the Commission's interpretation of the word: 'to give separate prices for equipment and supporting services.'"[72] Consequently, the reference to services only requires that the Checklist element be separately priced, it does not require or imply that the Checklist element is (or is not) a "service" or a "facility" as AT&T uses those terms.

More importantly, perhaps, is the fact that the term "service" upon which AT&T places such great importance is not a defined term in the Act.[73] Although AT&T suggests (but never directly states) that a network element cannot be a service – and a service cannot be a network element – it never explains why that would be the case, nor what attributes would apply to one but not the other. Moreover, given the Act's *expansive* definition of a Network Element[74] – effectively, anything and everything that can be used to provide a service – it is hard to understand exactly what AT&T would claim separates one from the other.[75]

AT&T also attempts to impose a use restriction on Checklist elements by claiming that the term "local" as used in "local loop," "local transport," and "local switch" to describe Checklist elements 4, 5 and 6 respectively, is intended to limit the use of such facilities

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72 *AT&T Corp. v. Iowa Utils. Bd*, 525 U.S. 366, 394 (1999).

73 The Act does define the term "telecommunications service." 47 U.S.C. § 153 (51) states: TELECOMMUNICATIONS SERVICE – The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

74 47 U.S.C. § 153 (29) states: "NETWORK ELEMENT- The term `network element' means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

75 AT&T also argues that "network elements" are always *physical* facilities (and suggests that services never are), but that is simply not the case. More often than not, whether a carrier is obtaining a "loop," "transport," or "switching," the element actually provided is a "logical facility" such as an assigned time-slot on a shared transmission facility (or temporary path through a digital switching matrix) and not a unique physical network component.

to the provision of local service.[76] As AT&T (or anyone in the industry) is well aware, these are common terms to describe facilities that are located in a local *area*, and do not in any way suggest the facilities can only be used for local *calling*. Indeed, AT&T's own interstate switched access tariff, which applies to long distance calls, describes its end-office switching as "local switching."[77]

Finally, AT&T argues that the requirement in Section 271(c)(1)(A) Track A (which applied only when AT&T's affiliates were first permitted to provide in-region interLATA services) that it "has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to … one or more unaffiliated competing providers of telephone exchange service" is intended to limit the availability of Checklist elements *only* to the provision of telephone exchange service.[78] AT&T has been adamant (and successful) in arguing that Checklist elements do not have to be included in "agreements approved under section 252," which necessarily implies a State role. It is difficult to see how a requirement to provide Checklist elements in an interconnection agreement approved pursuant to Section 252 no longer applies, but the requirement to provide the element to a competing provider of exchange access not only continues, but is intended to act as a limitation on the services offered by that competing provider.

Qwest claims that the Petition impermissibly attempts to lift use restrictions on Section 271 elements.[79] The contention ignores the basic fact that Section 271 contains no use

76 *AT&T Comments*, at 19.

77 *See, e.g.*, AT&T Tariff FCC No. 73.

78 *AT&T Comments*, at 19.

79 *Qwest Comments*, at 22.

restrictions. The Section 271 Checklist straightforwardly enumerates specific network elements that must be offered to telecommunications carriers, without *any* reference to – much less any limitation on – the services offered by those carriers. The *only* limitation on Checklist elements is that their availability is restricted to telecommunications carriers.[80] Consequently, although the Commission's Section 251 rules provide a useful *starting* point to develop rules applicable to Section 271 Checklist elements, limitations in those rules – such as use restrictions – that are grounded in the impairment analysis unique to Section 251 are inapplicable here.[81]

The RBOCs' novel interpretations each have but one purpose – to ensure that any argument that could conceivably be made (regardless of merit), has been made. The Commission should reject each of these specious theories.

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80 *See* Section 271(c)(2)(B), which states: "COMPETITIVE CHECKLIST- Access or interconnection provided or generally offered by a Bell operating company to *other telecommunications carriers* meets the requirements of this subparagraph if such access and interconnection includes each of the following [lists specific elements]…" (emphasis supplied).

81 For the same reason, Qwest's suggestion that the Coalition's proposal improperly disregards the "substantial costs imposed by unbundling" is irrelevant to an analysis of the Petition. *Qwest Comments*, at 22. Consideration of the costs of unbundling may be relevant to a Section 251(c)(3) impairment analysis, but it is inappropriate to a review of the RBOCs' unqualified Section 271 unbundling obligations. Moreover, Section 271 only applies if an RBOC chooses to seek in-region interLATA operating authority. Consequently, the Act positions each RBOC to decide whether the benefits of Section 271 exceed its costs to implement, and the decision by each RBOC to seek interLATA operating authority is persuasive evidence that the provision's benefits exceed its costs.

VI. QWEST'S REPRESENTATIONS REGARDING THE STATE OF COMPETITION IN THE OMAHA MSA POST-FORBEARANCE ARE FALSE AND MISLEADING

In the Petition, the Coalition provided the Omaha "forbearance experiment" as evidence of the competitive harm that follows from Section 271 Checklist obligations not being translated into meaningful wholesale offerings.[82] In the *Omaha Forbearance Order*, the Commission relied upon the theoretical availability of Checklist elements at just and reasonable and not unreasonably discriminatory rates and terms to justify granting Qwest partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in nine wire centers in the Omaha Metropolitan Statistical Area ("MSA").[83] Unfortunately, the Commission's predictive judgment that Qwest would honor its Checklist obligation to offer unbundled loops and transport at just and reasonable rates and terms once forbearance from Section 251(c)(3) UNE obligations was granted has proven incorrect. The Petition noted the repeated unsuccessful attempts by McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services ("McLeodUSA") to obtain replacement loop and transport arrangements with Qwest and Qwest's conclusive refusal to provide such elements.[84] Ultimately, McLeodUSA made the decision that, in the absence of unbundling and wholesale alternatives, it had to withdraw from the Omaha market.

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82 *See Petition*, at 13-15.

83 *Omaha Forbearance Order*, at ¶ 64.

84 *Petition*, at 14-15.

Qwest disputes this characterization of the post-forbearance Omaha market.[85] First, Qwest contends that "contrary to the Coalition's assertion, McLeod has not exited from the business market in Omaha, and still serves many business customers in the MSA."[86] In reality, prior to the grant of forbearance, McLeodUSA was the largest facilities-based competitive local exchange carrier ("CLEC") in the Omaha MSA. Qwest's post-forbearance behavior has forced McLeodUSA to cease selling services to new customers in Omaha and it has undertaken a long and expensive withdrawal from the residential and small business markets. The limited customers that McLeodUSA has retained in Omaha are almost exclusively national enterprise customers that McLeodUSA continues to serve using T1 and above facilities in order to maintain its valuable strategic relationships. The turn down of residential and small business customers represents more than 90% of the lines McLeodUSA had in service as of December 31, 2007.[87]

Qwest also disputes that McLeodUSA's withdrawal from the Omaha MSA was the direct result of the partial grant of Section 251(c)(3) forbearance to Qwest.[88] Contrary to Qwest's intimation, McLeodUSA's exit from the Omaha MSA had everything to do with the forbearance that Qwest received under the *Omaha Forbearance Order*, which resulted in McLeodUSA's loss of reasonable access to facilities that are essential to its ability to compete.

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85 Although we respond in detail here to Qwest's characterization of the retail Omaha market, in our view the debate misses the mark. The question in this proceeding is how to determine whether Qwest's Section 271 Checklist element offerings are priced at just and reasonable levels. As such, the only relevant competitive metrics that might prove Qwest's wholesale prices as just and reasonable would be metrics addressing the *wholesale* market. Even if Qwest could demonstrate robust retail competition from Cox, that observation says nothing concerning the reasonableness of Qwest's wholesale network element prices.

86 *Qwest Comments*, at 6.

87 Letter from William A. Haas, Vice President, PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-97 (filed Jul. 10, 2008) ("*McLeodUSA July 10th Letter*"), at 5.

88 *Qwest Comments*, at 6.

McLeodUSA repeatedly has detailed how the grant of forbearance "caused McLeodUSA to turn down service to a significant portion of its existing customer base."[89] Although forbearance only affected 9 wire centers, those wire centers account for over 70% of McLeodUSA's business market opportunity in the Omaha MSA.[90] By taking the most viable wire centers out of play through forbearance, Qwest succeeded in forcing a significant facilities-based competitor to curtail service in the entire Omaha MSA.

Finally, Qwest points to the avowed success of Cox Communications in the Omaha MSA to refute the claim that partial forbearance from Section 251(c)(3) unbundling obligations has led to a dramatic decline in competition.[91] In truth, the telecommunications market in Omaha has effectively become a duopoly consisting of Qwest and Cox. While Qwest is correct that "Cox has been a very successful competitor in Omaha" and has increased its number of access lines post-forbearance,[92] such shifts in the market merely demonstrate a consolidation of the duopoly structure – not effective competition. This fact is aptly demonstrated by data from McLeodUSA which shows that since forbearance, 97.5% of former McLeodUSA customers in the Omaha MSA have taken their service to Qwest or Cox.[93]

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89 *McLeodUSA July 10th Letter*, at 5. *See also In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) ("*McLeodUSA Petition*"); Letter from Andrew D. Lipman, Counsel, PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 04-223, 09-135 (filed Dec. 11, 2009) ("*McLeodUSA Dec. 11th Letter*").

90 Letter from William A. Haas, Deputy General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-223 (filed Nov. 17, 2007), Presentation Attachment at 2.

91 *Qwest Comments*, at 8-10.

92 *Id.*, at 9.

93 *McLeodUSA Dec. 11th Letter*, at 3.

In short, the Omaha forbearance experience clearly and vividly illustrates why in the absence of defined rules and committed regulatory oversight the RBOCs cannot be relied upon to fulfill their Section 271 unbundling obligation in a manner that facilitates (rather than harms) competition.

VII. QWEST'S ARGUMENT THAT SECTION 271 RULES ARE SUPERFLUOUS GIVEN THE EXISTENCE OF SECTIONS 201 AND 202 IS SPECIOUS

Qwest claims that the existence of Sections 201 and 202 is enough to ensure compliance with Section 271Checklist requirements and that "regulations and procedures would be superfluous given the existence of [those provisions] of the Act."[94] According to Qwest, "the Commission's history of applying these provisions is more than sufficient to address any issues pertaining to Section 271 checklist items."[95] Qwest's claim is nonsensical.

Application of the logic of Qwest's position would lead to absurd results. If the mere existence of a statutory provision were deemed sufficient to provide enough notice, information and guidance to potentially interested and affected individuals to ensure protection of their rights and fulfillment of their legal obligations, there would be no need for the Commission rules that today interpret, apply and enforce many of the provisions of the Communications Act. The need for current rules specifying common carrier records preservation requirements,[96] common carrier reporting requirements,[97] dominant and non-dominant carrier tariffing requirements,[98] and infrastructure sharing,[99] for example, would disappear. Qwest no doubt would agree that this is not a result it intends or endorses but this is

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94 *Qwest Comments*, at 17.

95 *Id.*

96 47 C.F.R. Part 42.

97 47 C.F.R. Part 43.

98 47 C.F.R. Part 61.

99 47 C.F.R. Part 59.

the necessary outcome of the logical application of the principle Qwest espouses in its comments.

Qwest also suggests that rules to administer and enforce Section 271 Checklist obligations are not necessary because "a Section 271-specific enforcement mechanism was not needed when the RBOCs were just entering the long distance market."[100] Qwest claims "it is preposterous to suggest that years later a new regulatory mechanism is needed."[101] There are several problems with Qwest's argument.

As a threshold matter, Qwest is wrong that in 1997 when the Commission began its review of RBOC applications to enter the in-region interLATA market it affirmatively decided that regulations to clearly define and administer Section 271(d)(2)(B) Competitive Checklist unbundling obligations were unnecessary.[102] The Commission never made that determination. This is not surprising in light of the fact that at that time there was little need for rules to administer the unbundling of Checklist elements since all Checklist elements were required to be made available under Section 251(c)(3) and there were detailed rules governing the Section 251(c)(3) unbundling process. As noted in the Petition, "[w]hile these essential network elements remained available to CLECs ubiquitously as Section 251(c)(3) UNEs, their availability as Checklist Elements was not critical ... As these elements have become 'de-listed'

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100 *Qwest Comments*, at 18.

101 *Id.*

102 The first application was filed by Ameritech Michigan in January 1997. That application was withdrawn on February 12, 1997. *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Service in Michigan*, CC Docket No. 97-1, Order, DA 97-331 (rel. Feb. 12, 1997).

as Section 251(c(3) UNEs, however, … their ongoing availability as Checklist Elements has increased in importance."[103]

Even if that were the case, however, the absence of Section 271 Checklist unbundling rules in the past does not dictate whether such rules are necessary or appropriate today. Circumstances change and, as noted above, changed circumstances make Section 271 Checklist unbundling rules necessary now.

Finally, Qwest proudly touts its "excellent service"[104] as demonstrated by 2009 performance results for its Qwest Local Service Platform ("QLSP") product as evidence of the lack of need for rules to administer Section 271 unbundling obligations.[105] According to Qwest, it "provides more than adequate service to CLECs" and therefore no additional regulations are necessary "to assure [its] excellent performance."[106] Qwest's argument misses the point. Although carriers who purchase Qwest's QLSP commercial offering may be pleased that Qwest's Trouble Report, Mean Time to Restore, Installation Commitments Met, and Installation Interval statistics for QLSP are better than average, those statistics – and Qwest's wholesale service quality in general – only correspond to a fraction of the rules proposed by the Coalition. They have no bearing, for instance, on the proposed pricing rules or administrative processes which represent critical components of the Coalition's proposal.

That said, Qwest's service quality for QLSP bears no relevance to the issues raised in the Petition unless QLSP constitutes Qwest's Section 271 Checklist-compliant offering. In its comments, Qwest does not state whether its position is that QLSP fulfills its Section

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103 *Petition*, at 5.

104 *Qwest Comments*, at 12.

105 *Id.*, at Exhibit A.

106 *Id.*, at 12.

271(c)(2)(B)(iv) unbundling obligation for local switching. If that is Qwest's position, however, there is no question that the pricing and terms of QLSP do not meet the just and reasonable and nondiscrimination requirements of Sections 201 and 202.[107]

VIII. CONCLUSION

For all of the foregoing reasons, the Commission should reject the RBOCs' self-serving manipulations and obfuscations and expeditiously begin long overdue administration and enforcement of the Section 271 Checklist obligations through adoption of the rules proposed in the Petition.

Respectfully submitted,

360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, DSCI Corp., NuVox, PAETEC Holding Corp., Sprint Nextel Corporation, TDS Metrocom LLC, and tw telecom inc.

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107 *See Petition*, at 22-24.