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
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

On November 9, 2009, 360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, NuVox, PAETEC Holding Corp., Sprint Nextel Corporation, and tw telecom inc. (collectively, "Section 271 Coalition") filed a petition with the Federal Communications Commission ("FCC" or "Commission") for expedited rulemaking seeking adoption of rules to govern the provision of certain network elements by Bell Operating Companies ("BOCs") pursuant to section 271(c)(2)(B) of the Communications Act of 1934, as amended ("Act"). On December 14, 2009, the FCC put the Section 271 Coalition's Petition out for public comment.[1] Pursuant to the Public Notice, comments were filed on January 12, 2010.

[1] DA 09-2590 (rel. December 14, 2009).

The National Association of State Utility Consumer Advocates ("NASUCA")[2] hereby files reply comments. Based on a review of the Petition and the filed comments, NASUCA expresses support for the Petition. The reasons set forth in the comments of those opposing the Petition – i.e., the three BOCs that remain subject to the requirements of § 271(c)(2)(B)[3] – do not outweigh the clear need for rules governing the availability of network elements under § 271, in order to allow competition to continue.

In the first place, as the Commission has held and the Section 271 Coalition points out, the unbundling obligations imposed by § 271(c)(2)(B) on the BOCs are separate from and independent of the unbundling obligations imposed by 47 U.S.C. § 251.[4] Therefore, the BOCs' extensive arguments regarding the impairment standards of § 251 – which do not appear in § 271[5] – simply do not apply here.[6]

The BOCs understandably point to the Commission's reliance on "market-based" pricing to establish compliance with the "just and reasonable" standard of 47 U.S.C. §

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[2] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[3] Being AT&T Inc. ("AT&T"), Qwest Communications International Inc. ("Qwest"), and Verizon. These three are what now remain – due to mergers -- from the original seven BOCs.

[4] Petition at 9, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Further Notice of Proposed Rulemaking**,** 15 FCC Rcd 3696, ¶¶ 465-73 (1999) ("*UNE Remand Order*"); see also *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of1996;Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand, 18 *FCC* Rcd 16978, ¶ 652 (2003) *("Triennial Review Order*" or *"TRO").*

[5] See 47 U.S.C. § 271(d)(4).

[6] See AT&T Opposition at 2-3, 7-20; Qwest Comments at 3-5, 14-16, 22-25; Verizon Comments at 8-10.

201(b) and 202(a)[7] – which the Section 271 Coalition acknowledge are controlling, rather than the § 252(d)(1) standard.[8] But the BOCs ignore – or gloss over – the extensive demonstration by the Section 271 Coalition that the "market" is not working. For example, Verizon criticizes the "Berkman study" as if it were the centerpiece of the Section 271 Coalition's argument[9] – rather than being mentioned only in the Petition's Introduction[10] – and asserts that the Commission has never found claims about Qwest's post-forbearance wholesale offerings in Omaha "to have merit."[11] It is equally true, however, that the Commission has never found that those claims **lacked** merit.[12]

The Section 271 Coalition Petition addresses

- The BOCs dominant share in the interLATA market to which § 271 allowed them entrée[13];
- The lack of alternatives to BOC loop and transport[14];
- The lack of alternatives to BOC local switching[15]; and
- The real problems with wholesale access in Omaha.[16]

The BOCs' nitpicking around the edges of these issues does not diminish the need for the

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[7] AT&T Opposition at 30; Qwest Comments at 19-21; Verizon Comments at 8.

[8] Petition at 9.

[9] Verizon Comments at 11, referring to the Study by the Berkman Center for Internet and Society, put out for public comment by NBP Public Notice No. 13. See also AT&T Opposition at 21-23.

[10] See Petition at 3-4.

[11] Verizon Comments at 12.

[12] Indeed, the Commission's lack of action on many of these issues – including special access – is partly responsible for the uncertain state of intramodal competition today. NASUCA has recently addressed AT&T's misleading and erroneous characterization (AT&T Opposition at 24-25) of the state of the local service market. See GN Docket No. 09-137, et al., NASUCA Reply Comments (January 27, 2010).

[13] Petition at 2, 12-13. (AT&T and Verizon's share of the wireless market is also relevant here. See id. at 5.)

[14] Id. at 2, 18-21.

[15] Id. at 22-24.

[16] Id. at 14-15.

rules proposed by the Section 271 Coalition.

The Section 271 Coalition has demonstrated the need for new policy. The Commission should, therefore, adopt a new policy. These circumstances are precisely those identified by the United States Supreme Court:

> [T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[17]

The FCC can easily justify this change under the Supreme Court's requirement. In particular, the Commission could find that the predicted circumstances that led it to allow "market-based" pricing for the § 271 elements have not been proved out, and now a different pricing regime will provide a better means to administer the Checklist obligations.

With regard to that pricing, it must be noted that the BOCs' harping that the Section 271 Coalition is proposing that the § 271 elements be priced at "TELRIC (or

[17] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (emphasis in original; citation omitted). Verizon actually cites this case. Verizon Comments at 11.

near-TELRIC) rates"[18] (which are "subsidized" rates[19]) is untrue, and therefore is a classic straw man. The Petition makes clear that pricing for recurring charges is to be at direct forward-looking economic cost – plus a reasonable allocation of common costs.[20] This is the Commission's New Services Test, not TELRIC.[21] It provides a cost-based, rather than "market-based" standard.[22] In this instance, cost is a better measure for rates because the "market" is not a truly competitive market.

NASUCA urges the Commission to grant the Section 271 Coalition's Petition.

Respectfully submitted,

/s/ David C. Bergmann

David C. Bergmann
Assistant Consumers' Counsel
Chair,
NASUCA Telecommunications Committee

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475
bergmann@occ.state.oh.us

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[18] Id. at 1, 2, 3, 11, 15; AT&T Opposition at 1, 3, 14-15, 17; Qwest Comments at 3, 19.

[19] AT&T Opposition at 18-19. Indeed, the rules proposed by the CLEC 271 Coalition (e.g., Petition at 40) ensure that the § 271 elements are, in classic economic terms, neither being subsidized nor providing a subsidy to other services.

[20] Petition at 33. Prices for non-recurring costs are to be at TELRIC, however. See id. at 34. As the Petition states, "Because these charges present a possible barrier to service initiation or customer choice, they are some of the most competitively sensitive charges in the market." Id. Even if the non-recurring costs were priced using the New Services Test – as the Section 271 Petitioners propose for recurring charges – this would likely be a significant improvement over the current "market-based" pricing.

[21] Id. at 32, 34.

[22] Id. at 35-39.

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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