

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	§	
	§	
Petition for Expedited Rulemaking to Adopt	§	WC Docket No. 09 -222
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	§	

**COMMENTS OF COMPSOUTH**

Pursuant to the Commission’s Public Notice requesting comment,<sup>1</sup> the Competitive Carriers of the South, Inc. (“CompSouth”)<sup>2</sup> files the following comments in support of the Petition for Expedited Rulemaking in the above-captioned proceeding.<sup>3</sup> As explained below, the absence of clear, enforceable pricing standards for the elements required by Section 271, implemented through specific public disclosure and review procedures, has effectively transformed Section 271 into a meaningless provision in direct contravention of what Congress intended.

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

<sup>2</sup> CompSouth is a trade association representing competitive carriers in regulatory and legislative matters in nine Southeastern states. CompSouth’s members include Access Point, Inc., Birch Communications, Cbeyond, Covad Communications Company, Deltacom, NuVox, Sprint Nextel Corporation, tw telecom inc., and XO Communications.

<sup>3</sup> *See Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act*, WC Docket No. 09-222 (filed Nov. 9, 2009) (“*Section 271 Petition*”).

CompSouth, its predecessor association the Southeastern Competitive Carriers Association (SECCA) and some of its current member companies actively participated in the proceedings leading to the grant of Section 271 authority to BellSouth (now AT&T) in each of its states. Those proceedings implemented a fundamental bargain established by Congress: If BellSouth took specific enumerated steps to fully open its local network to competition in accordance with the specific requirements of the Section 271 Competitive Checklist,<sup>4</sup> the FCC was authorized to grant its request to provide in-region interLATA services (so long as such grant was in the public interest).

Section 271 was intended by Congress as a critical vehicle to open local markets. As the Commission has previously explained:

[S]ection 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements 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.<sup>5</sup>

Consider the importance attached to Section 271 elements in the discussion cited above: Additional. Specific. Unique. The obligations of the Competitive Checklist were intended to provide a meaningful, additional and specific check on the unique

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<sup>4</sup> See 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

<sup>5</sup> *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, at ¶ 655 (2003) ("Triennial Review Order" or "TRO") (footnotes omitted, emphasis added).

market position of the Regional Bell Operating Companies (“RBOCs”) – a position that has only been enhanced in the Southeast through the absorption of BellSouth into AT&T.

Despite the critical importance of the Competitive Checklist, the Commission does not today have any clear rules that establish *how* Checklist elements should be offered and, therefore, lacks basic rules requiring public disclosure and providing affected parties an opportunity to dispute proposed rates as unjust and unreasonable. The 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.<sup>6</sup>

Moreover, the concerns expressed by the Section 271 Coalition – specifically, that in the absence of meaningful oversight, the RBOCs are charging rates that are not just and reasonable – has been demonstrated to be the case in the Southeast. Three times in the BellSouth/AT&T region, state commissions have investigated proposed rates of BellSouth/AT&T, and in each instance the state commission concluded that BellSouth/AT&T’s rates were *not* just and reasonable.

In Tennessee, arbitrators concluded that “... existing case law holds that a just and reasonable rate includes a utility’s operating expenses as well as a fair return on

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<sup>6</sup> As explained by the Section 271 Coalition, competitors have attempted to rely upon the Section 252 process to adjudicate disagreements concerning the terms, conditions and prices of Section 271 elements, but the courts have ruled that the FCC is the exclusive forum for such disputes. *See* Section 271 Petition, at 15-17.

investments”<sup>7</sup> and rejected BellSouth’s rates in favor of an interim rate recommended by ITC^DeltaCom that included these components. More recently, the Kentucky Public Service Commission adopted rates based on a methodology similar to that used by the Tennessee Regulatory Authority, again rejecting BellSouth’s proposed rates.<sup>8</sup>

The Georgia proceeding, in particular, underscores the critical need for clear process of oversight.<sup>9</sup> In Georgia, almost no facts were in dispute. CompSouth applied a methodology – the FCC’s “New Services Test” – that BellSouth acknowledged was a sound methodology for establishing just and reasonable rates.<sup>10</sup> The cost studies used to establish direct cost were BellSouth’s cost studies, using BellSouth’s own input assumptions.<sup>11</sup> With no facts in dispute, BellSouth’s defense of its rates collapsed (for all

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<sup>7</sup> See *Petition for Arbitration of ITC^DeltaCom Communications Inc., with BellSouth Telecommunications Inc. Pursuant to the Telecommunications Act of 1996*, Tennessee Regulatory Authority, Docket 03-00119 (Oct. 20, 2005), at 37-38 (footnotes omitted).

<sup>8</sup> See *Petition of SouthEast Telephone, Inc., for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications Inc. Concerning Interconnection Under the Telecommunications Act of 1996*, Order, Public Service Commission of Kentucky, Case No. 2006-00316 (Mar. 28, 2007), at 7.

<sup>9</sup> As explained herein, the Georgia Commission transmitted the entire record of this proceeding to the Commission accompanied by a petition requesting that the FCC either use its authority to adopt the rates recommended by the Georgia Commission, or at least use the record developed by the Georgia Commission to conduct its own investigation. See *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006) (“*Georgia Petition*”).

<sup>10</sup> When asked how a regulatory body would go about establishing just and reasonable rates, the BellSouth witness identified the new services test as “the famous one” used by regulators to develop just and reasonable rates. Tr. at 83 (Taylor).

<sup>11</sup> BellSouth has previously claimed that its loop model reflects BellSouth’s actual network routing choices and engineering rules:

The BSTLM development team recognized that a major deficiency in the existing proxy models exists in that they unsuccessfully capture the realistic

practical purposes) to a claim that the FCC allows it to charge what it wants. Ultimately, the Georgia Commission asked the FCC to adopt its just and reasonable findings, although the FCC has never ruled on the request.<sup>12</sup>

Although the decisions by Tennessee, Kentucky and Georgia were derailed by legal controversy,<sup>13</sup> it is the factual determinations that are relevant here. Nowhere has BellSouth been able to demonstrate that its rates are just and reasonable; it has succeeded only in evading an evidentiary review. And it is this problem – the absence of any defined procedure for the public disclosure, review and adjudication of the rates, terms and conditions for Section 271 elements – that the *Section 271 Petition* is designed to correct.

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routing that occurs between points in actual telecommunications networks. BSTLM represents the implementation of the next generation of model routing. It combines the aspects of the MST with the knowledge of roads and the rights-of-way that the telecommunications network will typically route over.... This is a breakthrough approach in that it “builds” the minimum amount of plant that connects points following the road network.

Direct Testimony of Mr. James W. Stegeman on behalf of BellSouth Telecommunications, Inc., Before the Georgia Public Service Commission, Docket No. 14361-U (Oct. 1, 2001), pp. 23-24.

<sup>12</sup> See *Georgia Petition*, n. 9.

<sup>13</sup> The decisions in Georgia and Kentucky were overturned on appeal because of the jurisdictional issue. In Tennessee, the arbitrator’s decision in the cited proceeding (*see* fn. 7) was not appealed since the parties extended their then-existing interconnection agreement pursuant to the BellSouth-AT&T merger conditions, *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5664, at Appendix F (2007), and the arbitration proceeding was subsequently terminated. However, a later decision by the TRA affirming the agency’s jurisdiction over 271 rates, *In Re: BellSouth’s Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket 04-00381 (Nov. 28, 2007), was appealed by BellSouth but the appeal has not yet been heard. CompSouth will have the opportunity to request that the court either affirm the TRA’s decision or delay a ruling on the appeal pending a decision by the FCC in this docket.

The Commission should adopt the rules proposed by the Section 271 Coalition.

Respectfully submitted,

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President  
Competitive Carriers of the South, Inc.