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 - ___

PETITION FOR EXPEDITED RULEMAKING

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Pursuant to Sections 1.401, 1.49, 1.52, and 1.419(b) of the Commission’s Rules,\(^1\) the Section 271 Coalition (“Coalition”),\(^2\) by its attorneys, hereby files this petition seeking adoption, on an expedited basis, of rules to govern the provision of certain network elements by the Bell Operating Companies (“BOCs”) pursuant to Section 271(c)(2)(B) of the Communications Act of 1934, as amended (“Act”).\(^3\)

I. INTRODUCTION AND SUMMARY

The fundamental goal of the Telecommunications Act of 1996\(^4\) was to create robust competition in all telecommunications markets, including broadband markets, while protecting against possible backsliding and re-concentration by the BOCs. To that end, Congress

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\(^1\) 47 U.S.C. §§ 1.401, 1.49, 1.52, and 1.419(b).
\(^2\) The Section 271 Coalition is comprised of the following members: 360networks (USA) inc., Broadview Networks, Inc., Cbeyond, Inc., COMPTEL, Covad Communications Company, NuVox, PAETEC Holding Corp., Sprint Nextel Corporation, and tw telecom inc.
\(^3\) 47 U.S.C. § 271(c)(2)(B).
set forth specific additional unbundling obligations in Section 271 that each BOC must agree to before being permitted to offer in-region interLATA interexchange and information services. These threshold protections were needed to maximize narrowband competition in the short term and to set the stage for robust broadband competition over time. Among these unbundling obligations are access to critical last-mile and middle-mile facilities that competitors need to reach end users (and entire communities).

There is no question that the BOCs have fully exploited the competitive opportunities provided to them by Section 271, not only by offering in-region interLATA and information services, but by achieving dominant share positions in their incumbent operating territories. What is missing is the regulatory oversight needed to ensure the economically-viable wholesale offerings required by Section 271 that would foster a continuing competitive environment and serve as a long-term check on the BOCs' market power.

The development of facilities-based competition since passage of the 1996 Telecom Act has made it economically and practically feasible in some limited cases for competitors to supply their own middle-mile or last-mile facilities. In some other limited locations, there may be non-ILEC wholesale local loop and/or interoffice transport products available for purchase on reasonable rates and terms. In the vast majority of locations, however, BOC loops and transport facilities continue to be the only viable means available to most service providers to reach end users and aggregation locations. In those situations, access to unbundled loops and transport under Section 251(c)(3) of the Act\(^5\) or, where Section 251(c)(3) unbundled access is no longer available, pursuant to the terms of the Section 271(c)(2)(B) Competitive Checklist, is still essential to enable narrowband and broadband competition.

\(^5\) 47 U.S.C. § 251(c)(3).
A recently released draft report by the Berkman Center for Internet and Society at Harvard University confirms the importance of unbundling to the deployment of first and next generation broadband services. The Berkman Study, which reviewed "the current plans and practices pursued by other countries in the transition to the next generation of connectivity, as well as their past experience" found that:

"open access" policies -- unbundling, bitstream, access, collocation requirements, wholesaling, and/or functional separation -- are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.

The Berkman Study discovered that open access, which requires incumbents "to make available to their competitors, usually at regulated rates, the most expensive, and in the case of local loop and shared access, lowest-tech elements of their networks," enables non-incumbents to compete through investment in the more technology-sensitive and innovative elements of the network. Regulated access, the Study found, "provides one important pathway to make telecommunications markets more competitive than they could be if they rely solely on

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7 Id., at 9.

8 Id., at 11.

9 Id., at 77.
competition among the necessarily smaller number of companies that can fully replicate each other’s infrastructure.”

The Study directly attributed the United States’ status as a middle-of-the-pack performer on most first generation broadband measures to the fact that the Commission, between the fall of 2001 and the spring of 2002, “passed a series of decisions that abandoned the effort to implement open access …” The Study concluded that the weight of the evidence supports the conclusion that “the original judgment made by Congress in the Telecommunications Act of 1996 represented the better course … Open access policies, where seriously implemented by an engaged regulator, contribute[] to a more competitive market and better outcomes.” In sum, the Study noted that the “most surprising findings [of the Study] to an American seeped in the current debate in the United States are the near consensus outside the United States on the value and importance of access regulation, [and] the strength of the evidence supporting that consensus …”

The need to make certain that carriers have ongoing access to BOC unbundled loops and transport at reasonable rates and terms under the Section 271(c)(2)(B) Competitive Checklist is important not only as the availability of comparable elements as Section 251(c)(3) UNEs continues to decrease for competitive local exchange carriers (“CLECs”), but also as long distance and mobile wireless carriers – who are precluded from access to Section 251(c) UNEs –

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10 Id.
11 The attributes benchmarked by the Berkman Study are penetration, capacity, and price. Id., at 9-10.
12 Id., at 82.
13 Id., at 83.
14 Id., at 77.
face unprecedented pressure from AT&T and Verizon. While these essential network elements remained available to CLECs ubiquitously as Section 251(c)(3) UNEs, their availability as Checklist Elements was not critical to local wireline competition. As these elements have become “de-listed” as Section 251(c)(3) UNEs, however, either through application of non-impairment triggers or through the granting of Section 10 forbearance petitions, their ongoing availability as Checklist Elements has increased in importance. Further, as AT&T and Verizon have become by far the two largest carriers in the long distance and mobile wireless markets, the lack of access to unbundled elements for the provision of long distance and mobile wireless services has become a critical competitive concern.

The Commission has held repeatedly that the rates, terms and conditions for Checklist items are subject to the just and reasonable and nondiscrimination requirements of Sections 201(b) and 202(a) of the Act.\textsuperscript{15} To date, however, despite being presented with various opportunities, the Commission has declined to exercise its responsibility to oversee or enforce these standards. Not unexpectedly, the BOCs have seized on this inaction to flout their obligation to make Checklist Elements available and the result has been extremely detrimental to competition. Where service providers must rely on BOC Competitive Checklist elements for middle-mile and/or last-mile access to end user customers, they are forced to accept non-negotiable terms and conditions and prices for these critical elements that do not permit them to effectively compete.

It has been nearly a decade since the BOCs began realizing the benefits they were afforded by Section 271. It is time for the Commission to act. The failure to develop and administer procedures to police the BOCs’ ongoing compliance with their Competitive Checklist

\textsuperscript{15} 47 U.S.C. §§ 201(b), 202(a).
obligations has allowed the BOCs to essentially ignore these competitively-critical statutory requirements. The purpose of this petition is to provide the Commission with a framework to remedy this situation by proposing rules to govern the provision of Checklist Elements by the BOCs that are straightforward, fair, and simple to apply and enforce. The Coalition urges the Commission to adopt these rules on an expedited basis.16

II. SECTON 271 IS NOT FUNCTIONING AS INTENDED BY CONGRESS

The overriding goal of the 1996 Telecom Act is to open all telecommunications markets to competition.17 Before the 1996 Act’s passage, major segments of the telecommunications industry were precluded, by law and economics, from entering each others’ markets. The BOCs were barred from entering certain lines of business, including long distance services.18 This restriction was determined to be necessary to preserve competition in the interexchange and information services markets.19 The MFJ court found that if the BOCs were permitted to compete in the interexchange market, they would have substantial incentives and opportunity, through their control of local exchange and exchange access facilities and services, to discriminate against their interexchange rivals and to cross-subsidize their interexchange operations.20

16 The Coalition’s proposed rules are appended hereto as Attachment A.
18 Under the Modification of Final Judgment (“MFJ”) settling the U.S. Department of Justice’s antitrust suit against AT&T, the BOCs were prohibited from providing interLATA services. The MFJ did not bar the BOCs from providing intraLATA toll services. See United States v. Western Elec. Co., 552 F. Supp 131 (D.D.C. 1882), aff’d sub nom. Maryland v. United States, 460 U.S. 1001 (1983).
19 Id., at 188.
20 Id.
Through Section 271, Congress required the BOCs to demonstrate that they have opened their local telecommunications markets to competition before they are authorized to provide in-region interLATA interexchange and information services, and provided an unambiguous blueprint for the unbundling that would be required of these carriers as a condition of entry.\textsuperscript{21}

Given their unique scale and national footprints, Congress established additional obligations for the BOCs to ensure that the competitive benefits of the MFJ would not be undermined as the line-of-business restrictions were lifted.

Section 251, by its own terms, applies to all incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 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. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.\textsuperscript{22}

An essential component of the obligations imposed on a BOC in return for permission to provide in-region interLATA services is compliance with the Competitive Checklist contained in Section 271(c)(2)(B). The Competitive Checklist specifies the access and interconnection obligations a BOC must meet. A BOC must demonstrate that it has "fully

\textsuperscript{21} The Act permitted the BOCs to begin providing interLATA interexchange services outside their incumbent local operating territories upon the Act's enactment. See 47 U.S.C. § 271(b)(2).

implemented the Competitive Checklist in subsection(c)(2)(B)." More specifically, a BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis. The nondiscrimination standard has been defined by the Commission in orders addressing Section 271 interLATA entry applications as follows:

"[F]or those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."

Several of the items enumerated in the Checklist are identical to items the Commission has deemed to be UNEs under the standards of Section 251(c)(3) of the Act. In particular, Checklist items 4 through 6 and 10 require: "[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services;" "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;" "[l]ocal switching unbundled from transport, local loop

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25 New York InterLATA Entry Order, at ¶ 44 (footnotes and citations omitted).


transmission, or other services;" and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."  

The Commission repeatedly has made clear that the obligation to provide these Checklist Elements applies regardless of whether the network element is subject to unbundling under Section 251(c)(3). In the 1999 _UNE Remand Order_, the Commission first noted that the BOCs must continue to provide access to those network elements described in Checklist items 4-6 and 10, even if such access is not mandated under Section 251. The Commission also concluded in that Order that it has independent authority to ensure that such network elements “are provided on a reasonable, nondiscriminatory basis.” Importantly, the Commission held that the applicable prices, terms and conditions for Checklist Elements that do not satisfy the Section 251 unbundling standard are to be determined in accordance with Section 201(b) and 202(a) of the Act. The Commission explained:

Section 201(b) provides a basis for the Commission to scrutinize the prices, terms, and conditions under which the checklist network elements are offered. Section 201(b) states that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication services, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared unlawful.” Section 202(a) mandates that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities,

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31 Id., at ¶ 471.
32 Id., at ¶ 470. If a checklist element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252.
or services for or in connection with like communication service."\(^{33}\)

Not surprisingly, the BOCs challenged the Commission's UNE Remand Order determination that Section 271 establishes a separate BOC access obligation for network elements no longer listed under Section 251(c)(3) and its conclusion that the requirements of Section 201(b) and 202(a) govern the prices and terms of delisted network elements under Section 271. Specifically, the BOCs contended that once the Commission has determined that a network element is not necessary under Section 251, the corresponding Checklist Element should be construed as being satisfied.\(^{34}\) In response, in the Triennial Review Order, the Commission "reaffirm[ed] that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so under just and reasonable rates."\(^{35}\) The Commission stated:

> [T]he plain language and structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271 ... were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.

* * *

\(^{33}\) Id., at ¶ 472 (footnotes omitted, emphasis in original).

\(^{34}\) See, e.g., Comments of the Verizon Telephone Companies, CC Docket Nos. 01-338, 96-98, 98-147 (filed Apr. 5, 2002), at 66-67.

[W]e find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.\textsuperscript{36}

The Commission went on to explain its application of the just and reasonable and nondiscriminatory pricing standard of Sections 201 and 202. It noted that the Supreme Court has held that the last sentence of Section 201(b), which authorizes the Commission “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act” empowers it to adopt rules to implement the provisions of the 1996 Act and that “Section 271 is such a provision.”\textsuperscript{37} It concluded that “[a]pplication of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress’s intent that Bell companies provide meaningful access to network elements.”\textsuperscript{38}

Between 1999 when the Commission first addressed this issue in the \textit{UNE Remand Order} and December 2003, the BOCs were granted permission to enter the in-region interLATA market in each state in their incumbent operating territories.\textsuperscript{39} The BOCs’ success in gaining interLATA operating authority in no way altered their “independent and ongoing access obligation under section 271” however.\textsuperscript{40} As far back as 1997, the Commission specified that compliance with the Competitive Checklist – as well as the other market-opening provisions of

\textsuperscript{36} \textit{Triennial Review Order}, at ¶¶ 654, 656 (footnotes omitted).
\textsuperscript{37} \textit{Id.}, at ¶ 663.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} The first application for in-region interLATA entry (by Bell Atlantic for New York) was granted in December 1999 and the final application (by Qwest for Arizona) was granted in December 2003.
\textsuperscript{40} \textit{Triennial Review Order}, at ¶ 654.
the 1996 Act—"continue after [the BOCs’] entry into the long distance market." The Commission held that "[i]t is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance."  

A. The BOCs Are Reaping the Rewards of InterLATA and Information Services Entry Without Meaningful Checklist Compliance

It has been ten years since the Commission approved the first request for interLATA entry to (what was then) Bell Atlantic for the state of New York. In that time, the BOCs have largely recaptured the interexchange market in their regions. AT&T and Verizon have consolidated much of the BOC footprint and have acquired the nation’s largest interexchange (and, at the time, local) competitors, all the while reducing competitive opportunities for carriers leasing network facilities from them as contemplated by the Act. Today, AT&T and Verizon each enjoy revenues exceeding $100 billion per year, an order of magnitude beyond the largest of their local competitors.  

The entry of the BOCs into the long distance market has effectively eliminated long distance service as a stand-alone market, with the majority of customers today obtaining long distance service from the same carrier that provides their local exchange service. Within this emerging "full service market"—that is, the market of subscribers who choose a single

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41 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, 12 FCC Rcd 20543, at ¶ 22 (1997).
42 Id.
43 In comparison, Comcast will receive approximately $11 billion in revenue from telephone and high speed Internet services in 2009. See Comcast Corp. Quarterly Report 10-Q, Securities and Exchange Commission (filed Nov. 4, 2009).
44 See Local Telephone Competition: Status as of June 30, 2008, Industry Analysis and Technology Division, FCC, at Table 6, Presubscribed Interstate Long Distance Lines (Jul. 2009).
provider for their local and long distance needs – the BOCs now enjoy a market share of 72%, with the remaining 28% share spread among all other providers of local/long distance service.45 A similar pattern is occurring in the mobile wireless services market where AT&T and Verizon Wireless combined enjoy nearly 61% (and rising) market share.46

It was precisely this dominance that Section 271 – and its unambiguous requirement to lease each element of the local network at just and reasonable rates without restriction – was intended to check. Yet, as explained in more detail in the following section, over the past several years the availability of network facilities under Section 251 has contracted, without any enforcement of the BOCs’ continuing unbundling obligations under Section 271.

The Omaha “forbearance experiment” provides additional evidence of the competitive harm that follows from Section 271 obligations not having been translated into meaningful wholesale offerings. 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 the Omaha Metropolitan Statistical Area (“MSA”).47 The Commission noted the BOCs’ ongoing access requirement under the Competitive Checklist, stating that post-forbearance “competitive LECs continue to … have

45 Share calculated as (Number of Lines Presubscribed to BOCs)/(Number of Lines Presubscribed to BOCs + Lines Presubscribed to CLECs).


rights under section 271(c)(2)(B)(iv)-(vi) to access Qwest’s loops, switching and transport throughout Qwest’s service area, except where Qwest’s obligations already have been lifted by the Section 271 Broadband Forbearance Order."\(^{48}\) And the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a BOC/cable duopoly on the ground that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct."\(^{49}\)

Unfortunately (but not unexpectedly), the Commission’s predictive judgment that Qwest would honor its Competitive 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. McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services ("McLeodUSA"), a former competitor in the Omaha MSA dependent on access to Qwest’s last-mile facilities, has petitioned the Commission to reinstate Qwest’s Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission’s "predictive judgment" that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of

\(^{48}\) *Omaha Forbearance Order,* at ¶ 62.

\(^{49}\) *Id.*, at ¶ 71. Similarly, the Commission’s decision to grant ACS forbearance from its Section 251(c)(3) unbundling obligations in certain wire centers in Anchorage was conditioned on the continued availability of loop access. Noting that because ACS is not a BOC, and therefore is not subject to the requirements of Section 271, the Commission conditioned its grant of forbearance on an obligation that "mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval ..." *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, Memorandum Opinion and Order, 22 FCC Rcd 1958,* at ¶ 41 (2007) ("Anchorage Forbearance Order").
Section 251(c) has proven incorrect.\textsuperscript{50} McLeodUSA detailed its repeated good faith attempts to obtain replacement loop and transport arrangements with Qwest and Qwest’s conclusive refusal to provide such elements.\textsuperscript{51} Ultimately, McLeodUSA made the decision that, in the absence of unbundling and wholesale alternatives, it had to leave the Omaha market.

B. The Courts Have Rejected State Enforcement of Checklist Obligations and The FCC Has Failed to Exercise its Oversight Responsibility

Over the years, competitive carriers and other interested parties have engaged in numerous attempts to obtain regulatory oversight and enforcement of the BOCs' Section 271(c)(2)(B) Competitive Checklist obligations. Some of these activities have been initiated before state regulators and several have been brought before the FCC. For various reasons, as explained below, to date none of these activities has resulted in meaningful enforcement of the BOCs’ ongoing obligation to make Checklist Elements 4, 5, and 6 available at rates and terms that comply with Sections 201(b) and 202(a) of the Act. Moreover, the critical transparency provided by the obligation in Section 252 to file interconnection agreements with state commissions – which affords competitive carriers the opportunity to review the pricing and terms of BOC offerings – does not now apply to Checklist Elements.

The FCC has been presented with several opportunities to preserve the role of state commissions to review – and make public – the terms, conditions, and prices of Checklist Elements. In July 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed an "emergency petition to enforce the unambiguous provisions of the 1996 Act and clear Commission precedent by 1) declaring that it, and not state commissions, enforce the provisions of Section 271, and 2)

\textsuperscript{50} See 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"), at 1.

\textsuperscript{51} Id., at 4. At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.
preempting a recent order of the Tennessee Regulatory Authority that illegally asserts enforcement authority. BellSouth sought preemption of a Tennessee Regulatory Authority ("TRA") order setting a rate for Checklist Element 6 in the context of a Section 252 arbitration proceeding.

Nearly two years later, the Georgia Public Service Commission ("GPSC") filed a petition seeking clarification that the GPSC is not preempted from setting just and reasonable rates under Section 271 for Checklist Elements 4, 5, and 6. Alternatively, the GPSC asked the FCC to declare that the rates that the GPSC set for high capacity loops, transport and line sharing are just and reasonable and compel BellSouth to abide by those rates.

Despite earnest appeals from numerous interested parties that it resolve this jurisdictional dispute, the Commission has refrained from ruling on either petition. Instead, this issue has played out first before state commissions and, subsequently, before various federal courts. State commissions in Arizona, Georgia, Kentucky, Illinois, Mississippi, Missouri, Maine, Michigan, New Hampshire, and Tennessee each have issued orders on this issue and each state commission ruling has been appealed to federal court. To date, U.S. appeals courts in five circuits have ruled on this issue and they each have held that state commissions have no authority under federal law to enforce Section 271 because Section 271 is a grant of authority to the FCC and does not provide any express role for the states beyond making recommendations to the FCC.

54 Id.
55 The BellSouth Petition was voluntarily withdrawn nearly two years after it was filed. See BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245, Voluntary Withdrawal of Petition (filed Apr. 29, 2008). The GPSC Petition remains pending at the Commission.
to be used in determining whether to grant Section 271 applications.\footnote{56} Regardless whether these circuit court opinions correctly reflect congressional intent, the practical result is that today the FCC is the only regulatory body sanctioned by the courts to ensure Checklist compliance by the BOCs.

The federal courts that have spoken have clearly and unambiguously held that Section 271 assigns exclusive duty to the FCC to police BOC post-interLATA entry compliance with the Competitive Checklist. However, the Commission has failed to adopt any regulations that establish parameters for or in any way govern the offering of Checklist Elements. There are no Commission guidelines describing the essential components of a Competitive Checklist offering or what form the offering must take. There are no procedures for challenging the sufficiency of a BOC’s Checklist offering.\footnote{57} And when Checklist compliance issues have been brought to the Commission for resolution, the Commission has ignored repeated requests to act.

Moreover, the Commission has avoided any explication of how the just and reasonable standard of Section 201(b) should be applied to assess the lawfulness of Checklist Element rates. As explained in detail in Section III.B, infra, competitive carriers maintain that the Commission can – and should – apply its well-established New Services Test to determine


\footnote{57} In the TRRO, the Commission acknowledged that Section 271(d)(6) of the Act grants it authority to determine whether a BOC “has ceased to meet any of the conditions required for [interLATA entry] approval …” 47 U.S.C. § 271(d)(6). There, the Commission suggested that “whether a particular checklist element’s rate satisfies the just and reasonable pricing standard of section 201 and 202” could be determined in an “enforcement proceeding brought pursuant to section 271(d)(6)” TRRO, at ¶ 664. That said, the Commission has failed to develop any procedures for review and analysis of Checklist compliance or to expand on how the just and reasonable standard should be applied.
the appropriate level of Checklist Element rates. In contrast, the BOCs contend that no regulatory oversight is needed and the market can be relied upon to set just and reasonable rates and terms for these elements. The lack of FCC involvement on this issue has resulted in the de facto adoption of the BOCs' position. The marketplace results, as explained below, have demonstrated that oversight and transparency are critically needed.

C. The BOCs Have Exploited the Regulatory Vacuum Created by the Courts

As a general matter, it is useful to note that the BOCs never have promoted their Competitive Checklist offerings. When pressed to identify which of their products constitute their Checklist Element offerings, they frequently sidestep the issue or provide incomprehensible or inconsistent responses. However, the past several years has revealed a pattern of abuse that it is time for the Commission to correct.

1. Checklist Item 4 (Loops) and Checklist Item 5 (Transport)

The BOCs at times have half-heartedly pointed to their special access tariffs as evidence of their compliance with Checklist Elements 4 and 5 (loops and transport, respectively). As McLeodUSA has represented, it has “made repeated good faith attempts to negotiate wholesale replacement agreements with Qwest” for Checklist items since release of the Omaha Forbearance Order. Qwest’s response has been “steadfast refusal to negotiate any wholesale pricing for high capacity facilities in the affected wire centers that deviates from its special access and RCP pricing.”

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58 See, e.g., Comments of Verizon, WC Docket No. 06-90 (filed May 19, 2006), at 16-18; Comments of AT&T, Inc, WC Docket No. 06-90 (filed May 19, 2006), at 16.
59 See, e.g., McLeodUSA Petition, at 5 (stating that in the Omaha MSA “[w]ith regard to DS1 and DS3 loops, Qwest has merely offered the tariffed ‘Regional Commitment Program’ (‘RCP’) from its special access tariffs.”).
60 McLeodUSA Petition, at 5.
61 Id.
Verizon has taken a similar tack. Carriers that must replace Verizon’s Section 251(c)(3) loop and transport elements in wire centers and on routes that have been delisted are presented with a take-it-or-leave-it choice among Verizon’s special access services. This issue was presented to the Commission several years ago in the context of Verizon’s petitions for forbearance from Section 251(c)(3) unbundling obligations in six major metropolitan areas. In support of its forbearance requests, Verizon represented that its ongoing obligation to make Checklist Elements 4, 5, and 6 available to competitive carriers would discipline its post-forbearance market behavior. In response, Commenters informed the Commission of Verizon’s heavy-handed approach to its Competitive Checklist obligations. Among other things, Commenters detailed Verizon’s introduction of a special access pricing plan that would raise carriers’ rates significantly while locking them into a multi-year contractual arrangement.

The notion that the BOCs’ special access offerings satisfy their continuing obligation to make Checklist Elements 4 (loops) and 5 (transport) available at rates and terms that meet the requirements of Sections 201(b) and 202(a) of the Act would not be so problematic.

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65 Id., at 66-67.
if the evidence did not show that the BOCs are continuing to exercise market power to set supra-competitive special access prices. Since the Commission initiated a request for input on potential modifications to its special access regulatory regime in 2005, numerous parties have provided voluminous evidence that the BOCs retain market power in the provision of special access services and are abusing that market power with unjust and unreasonable rates and terms.66

For example, tw telecom inc. submitted comparisons between the prices it charges, the prices other competitors charge, incumbent LEC prices made available to tw telecom under volume-term agreements, and TELRIC-based prices.67 That comparison showed that “incumbent LECs price at least their DS1 and DS3 services well above competitors and even higher above TELRIC ... yield[ing] the conclusion that incumbent LECs are exercising market power in the provision of special access services.”68 Further, tw telecom demonstrated that in most cases the ILECs’ special access rates are higher in areas where they have been granted special access pricing flexibility than where they are subject to price cap regulation.69 The AdHoc Telecommunications Users Committee’s (“AdHoc’s”) economic analysis confirms these conclusions.70 In addition, AdHoc has detailed its members’ actual market experience that there

67 Declaration of Stanley M. Besen, attached as Attachment B to Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Jul. 9, 2009) (“tw telecom Letter”).
68 tw telecom Letter, at 2.
69 Id., at 6-7.
70 Comments of the AdHoc Telecommunications Users Committee, WC Docket 05-25 (filed Aug. 8, 2007), at 8-14.
are “no competitive alternatives to ILEC [special access] services to meet their broadband business services requirements in the overwhelming majority of their service locations.”

Sprint Nextel ("Sprint") has identified a “particularly pernicious effect of the current unjust and unreasonable special access rates” of the BOCs. Sprint notes that the inflated special access prices charged by the BOCs "deter the deployment of innovative, competitive broadband networks." Other competitors have raised similar concerns. T-Mobile has cautioned that “[c]onsumers ultimately suffer from the high cost of special access as companies like T-Mobile must expend their limited resources on exorbitant fees in lieu of investing in improved services, including wireless broadband, and expanded coverage areas.”

Knowledgeable members of Congress agree. In a letter to the Commission, Rep. Edward Markey noted that “unduly high prices may force carriers to expend funds on special access that would be better spent on upgrading their networks to provide broadband services.”

It would be illogical and contrary to basic principles of statutory construction to conclude that Congress intended to permit the BOCs to comply with their Competitive Checklist obligations by offering access services that were being offered well before passage of the 1996 Telecom Act. It is time for the Commission to begin enforcing the Act as written.

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71 Id., at 8 (footnote omitted).
72 Letter from Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Oct. 5, 2007), at 4.
73 Id.
74 Comments of T-Mobile USA, Inc., WC Docket No. 05-25 (filed Aug. 8, 2007), at 8.
2. Checklist Item 6 (Local Switching)

The BOCs’ approach to Checklist Element 6 (local switching) is similar to their approach to Checklist Elements 4 and 5. When challenged to identify their compliance efforts, the BOCs sometimes point to their highly problematic standard master wholesale unbundled network element platform (“UNE-P”) replacement service agreements (i.e., Verizon’s Wholesale Advantage, Qwest’s Local Services Platform (“QLSP”)) as evidence of their satisfaction of Checklist item 6. AT&T offers a stand-alone Section 271 local switching agreement pursuant to which the recurring charges for a two-wire DS0 analog line port are as high as $29.00 per month.76

This issue has arisen several times over the past several years in the context of BOC requests for forbearance from Section 251(c)(3) unbundling obligations. Verizon and Qwest each have pointed to their standard UNE-P replacement agreements to support their contention that sufficient competition for residential customers exists in a particular geographic market to justify forbearance.77 They also have alleged that the availability of these wholesale services proves that, post-forbearance, they would continue to offer economically-viable wholesale substitutes for Section 251(c)(3) UNEs.78 Unfortunately, their representations are baseless.79

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78 See, e.g., Verizon Petition – Boston, at 14; Qwest Second Phoenix Petition, at 22.
79 Even if the BOCs’ wholesale local switching offerings did not suffer from the fatal flaws discussed herein, competitors’ use of these wholesale services would have no legitimate impact on the Commission’s Section 251(c)(3) UNE forbearance analysis. The Commission has stated on numerous occasions that only facilities-based (i.e., competitive
The BOCs' wholesale local switching offerings universally suffer from fundamental defects that preclude their compliance with the Checklist obligation. These take-it-or-leave-it arrangements\(^\text{80}\) contain rates and terms that are not just and reasonable. This fact was brought to the Commission several years ago by Momentum Telecom, Inc. ("Momentum"), a small competitive carrier operating in the southeastern U.S. Momentum filed a formal complaint against BellSouth under Section 271(d)(6) of the Act,\(^\text{81}\) charging that BellSouth has offered Checklist Element 6 (local switching) only at rates that far exceed the Section 201(b) just and reasonable standard.\(^\text{82}\) Momentum produced an economic analysis showing that the rates offered by BellSouth are substantially in excess of BellSouth's costs of providing local switching, in violation of the just and reasonable standard and that despite repeated requests BellSouth has refused to offer any meaningful modifications to those rates.\(^\text{83}\)

Any doubts regarding whether the BOCs' post-UNE local switching offerings comply with the just and reasonable standard disappears upon review of Commission data on the number of unbundled loops with switching that are being provided to competitive carriers by the ILECs. The number of unbundled loops with switching provided by ILECs has steadily declined every year since elimination of local switching as a Section 251(c)(3) UNE. In June 2006,

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\(^{80}\) It is well documented that the BOCs are flatly unwilling to negotiate with CLECs regarding any material term of these agreements. See, e.g., *Momentum Telecom, Inc. v. BellSouth Telecommunications, Inc.*, Formal Complaint, File No. EB-05-MD-029 (filed Nov. 17, 2009) ("*Momentum Complaint*"), Legal Analysis, at 2-3.


\(^{82}\) *Momentum Complaint*, at ii. Momentum's complaint was withdrawn before a decision was reached by the Commission.

\(^{83}\) *Id.*, Affidavit of Joseph Gillan, at ¶¶ 30-34.
ILECs were providing 22% fewer UNE loops with switching than six months earlier. As of June 2007, that number had dropped another 26% and by June 2008 the number of UNE loops with switching provided by ILECs had dropped an additional 20%. Despite a 70% decline in loops with switching from December 2004, there was no parallel increase in stand-alone loops as predicted by the Commission in its local switching impairment analysis. It is not surprising that use of unbundled loops with switching has decreased precipitously, since carriers have been faced with non-negotiable rates that far exceed just and reasonable levels. The unfortunate but predictable result has been an exodus of competitors from the mass market, leaving (in most cases) only the ILEC and the incumbent cable company as duopoly wireline service providers.

III. COMMISSION RULES ARE NECESSARY TO ENSURE BOC COMPLIANCE WITH THE COMPETITIVE CHECKLIST

The preceding sections have explained why Commission action is needed to restore the competitive promise of Section 271 to economically viable offerings. Section 271 was intended to establish clear-cut additional obligations – obligations beyond those of Section

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84 Local Telephone Competition: Status as of June 30, 2006, Industry Analysis and Technology Division, FCC, at Table 4 (Jan. 2007).
86 Local Telephone Competition: Status as of June 30, 2008, Industry Analysis and Technology Division, FCC, at Table 4 (Jul. 2009).
87 Id.
88 It is well documented that non-incumbent service providers generally cannot economically serve residential customers absent cost-based access to ILEC network facilities. See, e.g., Initial Comments of the Arizona Corporation Commission, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009), at 11 (“Since the demise of UNE-P, CLECs find themselves in a nascent stage in the small business market [in the Phoenix MSA]; while at the same time having exited for the most part the residential market with the exception of the large cable provider, Cox.”).
251 that apply to all ILECs,\textsuperscript{89} and obligations beyond the Commission's special access duties already preserved by the Act.\textsuperscript{90}

The central purpose of the rules proposed here is to establish clear requirements describing what constitutes each individual Checklist item, as well as to give effect to the just and reasonable rate standard that the Commission has previously determined applies to Checklist Elements. Checklist Elements are clear and unambiguous obligations that were not circumscribed in any way by Congress. Congress specifically listed each element that it would require a BOC to offer in exchange for its ability to offer in-region interLATA service and expressly prohibited the FCC from modifying the list.\textsuperscript{91} Importantly, unlike unbundling obligations under Section 251 of the Act, Congress expressly mandated the availability of Checklist Elements under Section 271, whether or not the FCC could conclude that a carrier would be impaired without access to such elements.

Although the statute makes clear the central obligations of the Checklist (\textit{i.e.}, unencumbered access to Checklist Elements), the Commission lacks rules to ensure that Checklist Elements are offered free of restriction and discrimination, at rates that are just and reasonable, and offered under administrative processes that give affected parties an opportunity to object. The fundamental purpose of this petition is to correct this critical deficiency by adopting rules that:

\textsuperscript{89} Section 251 unbundling and interconnection requirements apply to all incumbent LECs other than Rural Telephone Companies which are exempt under Section 251(f) of the Act. 47 U.S.C. § 251(f).

\textsuperscript{90} Section 251(g) of the Act preserved rules and obligations relating to exchange access, including the Commission's special access rules and obligations that existed at the time of enactment of the Act. 47 U.S.C. § 251(g).

(a) Clearly define the requirements that must be satisfied for the provision of Checklist Elements to be nondiscriminatory in practice and effect (proposed §§ 53.601 to 53.608);

(b) Establish a safe-harbor contribution level to ensure that Checklist Element rates are just and reasonable (proposed § 53.609); and

(c) Set forth the filing requirements for the principal administrative device – a federally filed Statement of Generally Available Terms of Conditions (SGAT) – needed to ensure compliance with Competitive Checklist obligations (proposed §§ 53.610 to 53.614).

Attachment B provides a section-by-section comparison of the changes required to the Commission’s existing Section 251 rules to ensure that the rules applicable to Section 271 Checklist Elements track the statutory mandate of that provision. The most significant changes to current Section 251 rules are edits needed to eliminate all use and user restrictions, including those that deny access to mobile wireless service providers and interexchange carriers.92

The basis for the restrictions in Part 51 (which contains the rules applicable to Section 251 unbundled network elements) is the impairment analysis required by Section 251(d)(2).93 In adopting those restrictions in the Triennial Review Remand Order (“TRRO”), the Commission determined that whether a telecommunications carrier is eligible to access UNEs should “depend[] solely on [its] ‘impairment’ analysis and other factors that [it] consider[s] under section 251(d)(2).”94 More specifically, the Commission determined that access to Section 251 UNEs should be restricted to those cases where the requesting carrier seeks to provide

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92 The proposed rules also contain changes required to limit their application to BOCs (in contrast to all incumbent LECs).


service in a market that is not sufficiently competitive without the use of UNEs.95 The Commission found the mobile wireless market and the long distance services market to be markets “where competition has evolved without access to UNEs” and it therefore declined to order unbundling of network elements under Section 251 to provide service in those markets.96 Unfortunately, after the Commission’s 2005 decision to deny long distance and mobile wireless carriers access to Section 251(c)(3) UNEs, the BOCs’ market share in those markets increased significantly. Today, the BOCs enjoy substantial market power in the mobile wireless and long distance services markets.

Importantly, no such impairment analysis applies to Checklist Elements, which are mandatory offerings for any BOC that chooses to provide interLATA services within its incumbent operating territory. Thus, there is no legal justification for the Commission to dilute the network element obligations required under Section 271 by limiting their availability or use. Indeed, to do so would directly conflict with Congress’s directive that the Commission “not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).”97

Structurally, the petition proposes a new Subpart G to the Commission’s existing Part 53 Rules – Special Provisions Concerning Bell Operating Companies.98 As a threshold matter, the petition proposes that five new definitions be added to §53.3 – Terms and Definitions:

*Checklist Network Element.* A Checklist Network Element is any facility or equipment, including the features, functions, and capabilities that are provided by

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95 *Id.*
96 *Id.*, at ¶ 36 (footnote omitted).
98 Subpart G – Compliance with Section 271 Checklist Requirements.
means of such facilities or equipment, enumerated in Section 271(c)(2)(B)(iv)-(x) of the Act.

**Customer’s Premises.** A customer’s premises as referred to in Section 271(c)(2)(B)(iv) of the Act is any technically feasible point designated by the requesting telecommunications carrier.

**Statement of Generally Available Terms.** A Statement of Generally Available Terms ("SGAT") is a statement of the terms and conditions and prices that a BOC generally offers to fulfill its obligations under Section 271(c)(2)(B)(iv)-(x) of the Act.

**Telecommunications Carrier.** Telecommunications Carrier has the same meaning as that term is defined in Section 153(a)(49) of the Communications Act of 1934, as amended.

These definitions set the stage for new Subpart G – Compliance with Section 271 Checklist Requirements, setting forth rules to govern the filing and approval of a federal Statement of Generally Available Terms ("federal SGAT") so central to the nondiscriminatory offering of Checklist Elements.

The rules appropriate to each area are discussed separately below. The full text of the proposed rules can be found in Attachment A. In addition, Attachment B compares (in “track changes” format) the differences between the proposed Section 271 rules and their Section 251 counterparts with respect to those rules addressing the provisioning and processes required to form combinations of Checklist Elements and other services, facilities, and unbundled network elements.

**A. Rules Relating to Provisioning and Non-Discrimination: Proposed §§ 53.601 Through 53.608**

Proposed rules 53.601 through 53.608 set forth basic requirements for Checklist Elements to ensure that they remain free of unlawful use restrictions or discrimination. In large part, these rules are patterned after comparable rules applicable to Section 251 UNEs, adjusted to eliminate restrictions or other factors that are not relevant to Checklist Elements.
As indicated above, the Section 271 Competitive 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 that carrier. The only limitation on Checklist Elements is that their availability is restricted to telecommunications carriers. 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 that are grounded in the impairment analysis unique to Section 251 must be removed.

The following provides an overview of the goals and structure of the first group of proposed rules (§§ 53.601 to 53.608).

§ 53.601 Applicability and Compliance

This rule is new, and makes clear that Subpart G applies in any state where a BOC has obtained approval to provide interLATA services. The rule establishes an affirmative obligation to have on file an approved federal SGAT describing the rates, terms and conditions of service for each Checklist Element. In addition, the rule makes clear that a BOC may negotiate alternative agreements (which must be filed and be made available to other carriers); provided, however, that such alternative negotiated agreements do not relieve the BOC of its obligation to have available an approved SGAT.

§ 53.602 General Terms and Conditions

This rule is patterned on the existing § 51.307 – Duty to Provide Access on an Unbundled Basis to Network Elements, modified primarily to conform to the editorial requirements of Subpart G (i.e., by referencing BOC instead of ILEC and referring to Checklist Elements in place of Section 251 UNEs). Two new rules are added, however.

First, § 53.602(e) has been added to make clear that BOCs are required to perform routine network modifications necessary to make available a Checklist Element.

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99 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).
Second, § 53.602(g) has been added to require that Checklist Elements remain subject to the performance and/or remedy plans applicable to corresponding Section 251 UNEs. This provision is particularly appropriate because most performance/penalty plans were adopted to gain Section 271 authority and, as such, should be retained for all Section 271 Checklist Elements.

§ 53.603 Use of Checklist Network Elements

This rule is patterned on existing § 51.309 – Use of Unbundled Network Elements. The principal modifications were necessary for editorial conformance. In addition, any language that imposes a use restriction on a network element has been removed because no such restrictions are permitted for Checklist Elements.100

Finally, the existing parallel § 51.309(g), which in the context of Section 251 network elements is intended to preserve some access rights potentially weakened by the Commission’s impairment-based use restrictions, is unnecessary in this context (and, therefore, not repeated) because of the unambiguous requirements in the proposed Subpart G that no use restrictions are permitted.

§ 53.604 Nondiscriminatory Access to Checklist Network Elements

This rule is patterned after § 51.311 – Nondiscriminatory Access to Unbundled Network Elements, modified for editorial conformance.

§ 53.605 Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Checklist Network Elements

This rule is patterned after § 51.311 – Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements, modified for editorial conformance to the unique circumstances of proposed Subpart G, with one notable addition.

This addition, § 53.605(c), prohibits a BOC from conditioning any term, condition or price of a Checklist Element through a volume or term commitment to purchase additional BOC services or facilities. The purpose of this provision is to ensure that a BOC may not frustrate the competitive deployment of facilities through financial penalties designed to keep a carrier chained to BOC services.

100 Specifically, provisions in comparable § 51.309 which deny access to a Checklist Element for the exclusive provision of wireless or interexchange service, or which require that the element be used to provide a telecommunications service, have been eliminated.
§ 53.606 Combination of Checklist Network Elements
This rule parallels § 51.305 – Combination of Unbundled Network Elements, with the editorial changes needed to conform to Subpart G, as well as additional clarity to ensure that Checklist Elements can be connected to any other facility or service, irrespective of its label (i.e., Checklist Element, unbundled network element, or wholesale service).

In addition, § 53.606(g) has been added to ensure that any charge for combining or commingling any Checklist Element with any other facility or wholesale service shall not exceed the direct cost of performing the requested functions.

§ 53.607 Methods of Obtaining Interconnection and Access to Checklist Network Elements
This rule adopts the existing requirements of § 51.321 – Methods of Obtaining Interconnection and Access to Unbundled Network Elements without modification. That is, each of the rules applicable to the methods to obtain interconnection and access to Section 251 UNEs applies with equal force to the Checklist Elements required under Section 271.

§ 53.608 Conversion
This rule is generally patterned after comparable § 51.316 – Conversion of Unbundled Network Elements and Services.

The principal (non-editorial) modifications to these rules is to make clear that the obligation to convert an existing arrangement to its equivalent Checklist Element offering or combination is not affected by whether the existing arrangement is comprised of services or facilities purchased as unbundled network elements, combinations of unbundled network elements, commingled arrangements of unbundled network elements and other wholesale services (including special access) or any other arrangement.

In addition, § 53.608(d) has been added to require that any charge to effect a conversion shall not exceed the direct cost and that, unless agreed to by the BOC and requesting telecommunications carrier, no conversion should require any physical rearrangement of network elements or wholesale services.

By adopting the rules summarized above, the Commission would be explicitly establishing that Checklist Elements must comply with those provisions intended to prevent discrimination and other unreasonable terms that currently apply to unbundled network elements.
required under Section 251. Most of the changes in the proposed rules set forth in §§ 53.601 through 53.608 are required for editorial conformance to the particular requirements of the new proposed Subpart G (i.e., that the rules apply only to BOCs and that the impairment-based use restrictions applicable to Section 251 UNEs do not apply to the Checklist Elements required by Section 271). Other changes (as explained above) incorporate provisions to ensure that the Commission’s existing policies relating to combinations apply with equal force to the various combinations that will now include Checklist Elements or otherwise correct gaps in the Commission’s rules created by this additional category of wholesale offering.

B. Rules Relating to Just and Reasonable Pricing: Proposed § 53.609

The Triennial Review Remand Order concluded that Checklist Elements would be held to Sections 201 and 202 of the Act, but did not provide any meaningful guidance as to how compliance would be judged.101 Proposed § 53.609 fills this gap by offering a safe-harbor methodology by which Checklist Element prices would be presumed reasonable. The safe harbor methodology proposed herein is based on the Commission’s conventional methodology to determine just and reasonable rate levels by comparing prices to a measure of direct cost plus a reasonable contribution (sometimes known as the New Services Test).102

There are few rules implementing the proposed safe-harbor pricing standard, but they collectively ensure that rates are (and remain) just and reasonable with a minimum of administrative oversight. The rules provide that the cost measure used for direct cost remains the Commission’s TELRIC rules, which have been implemented through contested case state

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101 The TRRO hypothesized ways that a BOC might be able to demonstrate compliance with Sections 201 and 202 but provided no explanation as to how such demonstrations would satisfy the traditional Section 201 and 202 standard or provide guidance as to how the demonstration could actually be made. See TRRO, at ¶ 664.

proceedings and which the Commission has already relied upon in granting BOCs the authority to provide in-region interLATA services. The key variable addressed by the safe-harbor approach is a limit on the level of contribution that would be considered just and reasonable.\textsuperscript{103} 

Before turning to the justification for (and calculation of) the safe-harbor contribution level, the following presents and explains the very narrowly drawn pricing rules proposed for Checklist Elements:

\section*{§ 53.609 Pricing}

(a) \textit{Non-recurring charges}. Non-recurring charges for Checklist Elements shall equal non-recurring charges applicable to comparable network elements required under Section 251(c)(3) of the Act.

(b) \textit{Recurring charges}. Recurring charges for a Checklist Element shall recover the direct costs of the element, plus a reasonable allocation of the BOC’s common overheads.

(c) \textit{Direct cost calculation}. Direct cost shall be the forward-looking economic cost determined in compliance with § 51.505, prior to the inclusion of any allocation of forward-looking common costs calculated in accordance with § 51.505(c).

(d) \textit{Common cost allocation}. A BOC shall not include in the price of a Checklist Element more than a reasonable allocation of the company’s common costs. Common cost allocations less than or equal to 22% shall be presumptively reasonable.

(e) \textit{Stand-alone cost}. In no event shall the sum of the direct costs plus a reasonable allocation of common costs exceed the stand-alone costs associated with the network element. For purposes of this section, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

\textsuperscript{103} The existing TELRIC rules also limit contribution to a reasonable allocation of forward-looking common costs (§ 51.505(a)(2)), subject to a number of conditions. See § 51.505(c). As explained herein, however, traditional regulation has generally viewed the allocation of common costs as establishing a \textit{range} of just and reasonable outcomes and we propose here that the Commission adopt a safe-harbor maximum value for the pricing of Checklist Elements.
(f) *Imputation.* No interstate service offered by a BOC shall be priced below its direct cost as computed by the sum of the prices of those Checklist Elements comprising the facilities used to provision the service.

First, § 53.609(a) adopts a pricing rule which requires that *non-recurring* charges for Checklist Elements mirror those applicable to unbundled network elements required under Section 251. The principal reason for this rule is to prevent, to the maximum extent practical, the creation of new barriers to customer choice. By definition, non-recurring charges – for service initiation or reconfiguration – apply to one-time events that largely happen at the point of customer choice (i.e., to start a service or change a provider). 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. Consequently, the Commission should not permit any higher contribution level from non-recurring charges than the levels embedded in existing Section 251 UNE rates.

With respect to the pricing of the *recurring* rates for Checklist Elements, the proposed rules (a) set forth the New Services test (direct cost plus a reasonable contribution),\(^{104}\) (b) establish the appropriate measure of direct cost as the forward-looking economic cost already described by Commission rules less any contribution,\(^{105}\) and (c) provide a safe-harbor maximum contribution markup that would presumptively be just and reasonable.\(^{106}\)

This methodology – grounded in existing Commission pricing rules – is fully consistent with prior Commission orders requiring that the rates for Checklist Elements be just and reasonable. In the *TRRO,* the FCC applied a pricing standard drawn from traditional

\(^{104}\) 47 U.S.C. § 53.609(b).

\(^{105}\) 47 U.S.C. § 53.609(c).

methods of regulation, i.e., the “basic” just and reasonable rate standard that had “historically been applied” under most federal and state statutes:

Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress’s intent that Bell companies provide meaningful access to network elements.\(^{10}\)

Significantly, when determining that Sections 201 and 202 should apply to Checklist Elements, the Commission did not adopt a new and unique perspective on those statutory provisions but rather clearly expressed the intention that Sections 201 and 202 be applied as they had traditionally been. Importantly, the just and reasonable rate standard contained in Section 201(b) has required a reasonable nexus between cost and price even though, over the years, different approaches to cost have been used. If the FCC is to advance “Congress's intent that Bell companies provide meaningful access to network elements,”\(^{108}\) it must continue to apply its traditional view that prices must be judged in relation to their underlying cost.

\(^{107}\) TRRO, at ¶ 663 (footnotes omitted).

\(^{108}\) Id.
The just and reasonable rate standard is a foundation of traditional regulation, whether that regulation is outlined in a federal or state statute.\textsuperscript{109} The touchstone to judging just and reasonableness has commonly been cost. As the Commission has explained:

The Communications Act requires that rates be just and reasonable and not create unreasonable discrimination or undue preference. Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a). \textit{Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates, because cost-based rates both deliver price signals which contribute to efficient use of the networks and generally distribute network costs to the customer who causes those costs.}\textsuperscript{110}

Over time, as FCC regulation has adapted to changing conditions, its underlying commitment that rates should bear a reasonable nexus to cost has not changed. For instance, when the FCC adopted price cap regulation, it made clear that it designed its price cap system to reflect costs:

\textit{We proposed to adjust price caps each year according to a predetermined formula that is designed to ensure a continuing \textit{nexus between tariffed rates and the underlying cost of providing service.}}

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A carrier’s services are grouped together in accordance with common characteristics, and the weighted prices in each group are adjusted annually pursuant to formulas designed to ensure that rates are based on cost …

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\textsuperscript{109} The just and reasonable rate standard is not limited to telecommunications, but is commonly applied to other regulated utilities. The Commission recognized the widespread application of the rate standard in the \textit{TRRO}, describing the standard as having roots in “most federal and state statutes.” \textit{Id.}

\textsuperscript{110} \textit{Memorandum Opinion and Order, Investigation of Special Access Tariffs of Local Exchange Carriers, 4 FCC Red 12, at ¶ 32 (1988)} (emphasis supplied).
... the foundation of the price cap regulatory approach is to ensure that rates follow costs, while creating incentives to reduce costs... 111

Retaining the touchstone of cost to judge the reasonableness of rates is a common thread throughout a wide range of Commission decisions, including those decisions that granted temporary deviations from cost. For instance, the Commission once permitted the BOCs to strategically price special access services, due to the “dislocations” of the AT&T divestiture and the fear of bypass from high initial access rates. Even then, however, the Commission’s approach was to “bracket” allowed pricing relationships in an effort to reflect costs:

As the Commission found in the Strategic Pricing Order, the six to one ratio represents the most likely approximation of the cost relationship between HiCap and VG services based on the record. The 4 to 8 range should be broad enough to encompass a “cost based” rate that might be produced by any rational cost allocation methodology used by an exchange carrier in the near future. 112

The cost standard initially used in traditional regulation was based on “accounting” cost, also called historical or embedded costs. 113 Under this approach, the actual book costs incurred by the incumbent would be assigned or allocated to its services through a “fully distributed costing” approach. Fully distributed costing, particularly the fully distributed costing of individual services, relies extensively on allocation methods because many of the firm’s costs cannot be directly attributed to a particular service. For this (and other reasons), the

111 Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313 (rel. Apr. 17, 1989), at ¶¶ 8, 38, 865 (emphasis supplied).
113 For instance, as recently as the TRRO, the Commission noted: “Special access prices are regulated pursuant to the Communications Act’s ‘just and reasonable’ standard, which predates and bears no necessary relation to this [TELRIC] cost-based standard, relying instead on historical costs.” TRRO, at ¶ 51.
regulatory trend has been to move away from using fully distributed historical costs, in favor of more efficient cost-based approaches.\footnote{Concerns relating to cost allocation become far less relevant when the cost object is a network element because the goal is to identify the cost of discrete facilities, not individual services.}

The Commission began moving toward more forward-looking cost analyses prior to the 1996 Act. In developing its Open Network Architecture ("ONA") policies (a form of unbundling predating the 1996 Telecom Act), the FCC replaced the fully distributed costing approach with a more flexible "direct cost plus reasonable allocation" standard that did not require the incumbent to fully assign all costs to all services.\footnote{The Commission explained that ONA was designed to unbundle certain services provided by BOCs, both to promote efficient and innovative use of the network by independent enhanced service providers ("ESPs") and to prevent discrimination by BOCs in their offerings to competing ESPs and BOC-owned ESPs. The Commission concluded that the provision of unbundled basic service "building blocks" would promote the ability of the BOCs' ESP competitors to compete effectively. Hence, the Commission ordered the BOCs to unbundle from their existing feature group access arrangements optional features called BSEs. \textit{See Open Network Architecture Tariffs of Bell Operating Companies}, Order, 9 FCC Rcd 440, at ¶ 4 (1993) ("ONA Tariff Order").} The FCC described the approach as follows:

In the Part 69/ONA Order the Commission ... replaced the traditional FDC price ceiling with a more flexible cost-based test. The new test retained the "direct cost" component of the traditional approach but afforded the LECs greater leeway in the application of overhead loadings.\footnote{Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, at ¶ 212 (1994) ("Video Dialtone Reconsideration").}

As recently as 2002, the FCC again relied on the basic "direct cost plus reasonable contribution" methodology to evaluate rates:

The Bureau Order summarized the guidelines to be applied under \textit{Computer III} and other Commission proceedings concerning the application of the new services test and cost-based ratemaking principles to services that incumbent...
LECs offer to competitors. The Bureau explained that, to satisfy these requirements, an incumbent LEC must demonstrate that the proposed payphone line rates do not recover more than the direct costs of the service, plus "a just and reasonable portion of the carrier's overhead costs."\(^{117}\)

The just and reasonable rate standard has remained a cost-based standard, even as it has evolved through price caps and other policies. Whether rates are just and reasonable must include an examination of the relationship of those prices to cost, particularly in markets, such as local markets, where incumbents continue to enjoy substantial market power.

Proposed § 53.609(d) adopts a safe-harbor allocation of common costs that would be presumptively reasonable. The actual calculation of the proposed safe-harbor allocation is presented in Section IV, infra. There are a number of advantages to the Commission adopting a safe-harbor approach, however, that are addressed here.

To begin, by adopting a safe-harbor value through rulemaking the Commission can ease its subsequent administration of the federal SGATs that must be filed under these proposed rules. Although each BOC would have the opportunity to propose alternatives – and, of course, each could voluntarily implement lower contribution levels if they so desired – a safe-harbor contribution level would enable the Commission to quickly determine compliance with its rules without conducting complex costs analyses. Each BOC would need only to produce its TELRIC-compliant rates, accompanied by a simple calculation removing the common cost allocation approved by the state commission and substituting the safe-harbor value recommended here.

\(^{117}\) Wisconsin Payphone Order, at ¶ 23 (footnotes omitted, emphasis supplied).
Moreover, a single nationwide safe-harbor common cost loading would promote uniform common-cost recovery policies across states, thereby promoting universal service and rate comparability.\(^{118}\) The safe-harbor common cost approach would permit underlying differences in cost to be reflected in rates, but these differences would not be further exacerbated by different common cost allocations. Overall, a safe-harbor approach would reduce administrative costs and promote federal policy.

Two additional rules in § 53.609 are intended to cap the level of common cost allocations from becoming excessive. First, § 53.609(e) prohibits the total charge (i.e., direct cost plus a reasonable allocation of common costs) from exceeding the stand-alone cost of a Checklist Element. This provision mirrors an identical provision in § 51.505(c)(2)(a) intended to ensure that the prices for any individual Checklist Element not exceed the level that would be charged by an efficient provider in a competitive market.\(^{119}\)

Finally, § 53.609(f) requires that no other interstate service offered by a BOC shall be priced below its direct cost, as computed by the sum of the prices of those Checklist Elements comprising the facilities used to provision the service. Such an imputation standard provides additional protection from excessive Checklist Element rates by ensuring that a BOC’s own services may not be priced at rates below the costs the BOC is imposing on rivals.\(^{120}\)

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\(^{118}\) See 47 U.S.C. § 254(b)(3), which calls for “access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”


\(^{120}\) Of course, this narrow imputation standard, by being limited to interstate services, would not (by itself) prevent a BOC from affecting a price squeeze for intrastate services, including local services, offered by competitors leasing Checklist Elements. In practice, the Commission may find it necessary to review intrastate rate levels to determine
C. Rules Relating to the Filing and Approval of SGATs and Negotiated Agreements: Proposed §§ 53.610 to 53.614

The final area of proposed rules govern the filing of the SGATs needed to establish Checklist Elements as a generally available offering at just and reasonable rates.

Although the SGAT is the baseline requirement to satisfy these obligations, the rules recognize that carriers may negotiate alternative arrangements. Any such alternatives, however, must be filed with the Commission and made available to other carriers. The administrative processes to file an SGAT are described in § 53.610:

§ 53.610 Rules Applicable to SGAT Filings

(a) The general rules (including definitions), regulations, exceptions, and conditions which govern an SGAT must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the SGAT must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition from or to any other SGAT or tariff.

(b) Every proposed SGAT filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least 45 days notice.

whether particular common cost allocations are reasonable, even if they conform to the safe-harbor provision recommended here. We would expect, however, that such challenges would be made on a case-by-case basis, and would be dependent on the facts unique to a particular state and/or allocation. Limiting § 53.609(f) to interstate services is intended merely to acknowledge the FCC’s direct jurisdiction over interstate rates, but is not meant to suggest that a common cost allocation that produced Checklist Element charges higher than a BOC’s intrastate prices would be reasonable. Rather, in such instances, the Commission’s authority necessarily would permit it to decrease the appropriate allocations, but would not extend directly to requiring that the intrastate rate at issue be raised.
(c) The notice period begins on and includes the date the SGAT is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

Proposed § 53.611 sets forth the minimum term requirement that a carrier can rely upon when subscribing to an SGAT. This provision is intended to ensure that telecommunications carriers enjoy a stable planning horizon when relying upon Checklist Elements to provide service to their customers. Under this provision, carriers are assured a three-year term for the SGAT, and can subscribe to the SGAT for a full three-year term any time during the first 2 ½ years that the SGAT is available.\textsuperscript{121}

§ 53.611     SGAT Term Requirements

SGATs shall be made available without modification for a minimum three year term from the effective date. A carrier may subscribe to the initial SGAT for the full term at any time prior to 180 days before the expiration of the SGAT’s initial term.

Although the hope and expectation is that BOC SGAT filings would fully comply with the rules set forth herein, additional Commission scrutiny and action may be required. As such, proposed § 52.612 sets forth provisions applicable to petitions to reject or suspend an SGAT.

§ 53.612     Petitions for Suspension or Rejection of SGAT Filings

(a) Content. Petitions seeking investigation, suspension, or rejection of a new or revised SGAT filing or any provision thereof shall specify the items against which protest is made, and the specific reasons why the protested SGAT filing warrants investigation, suspension, or rejection under the Communications Act. No petition shall include a prayer that it also be considered a formal complaint.

\textsuperscript{121} For instance, if a lawful SGAT becomes effective January 1, 2010, a carrier would be able to subscribe to that SGAT for a full three years beginning on any date up to (and including) June 30, 2012.
(b) When filed. All petitions seeking investigation, suspension, or rejection of an SGAT filing shall be filed and served within 15 days after the date of the SGAT filing. If the date for filing the petition falls on a weekend or holiday, the petition shall be filed on the next succeeding business day.

(c) Replies. Replies to petitions seeking investigation, suspension, or rejection of an SGAT filing shall be filed and served within 5 days after service of the petition.

(d) Copies, service. An original and four copies of each petition shall be filed with the Commission as follows: The original and three copies of each petition shall be filed with the Secretary, 236 Massachusetts Ave., NE., Washington, DC 20002; one copy must be delivered directly to the Commission's copy contractor. Additional, separate copies shall be served simultaneously upon the Chief, Wireline Competition Bureau, and the Chief, Pricing Policy Division.

In addition to the obligation to have a lawful SGAT on file, BOCs would be permitted to negotiate other arrangements. Proposed §§ 53.613 and 53.614 address the filing of negotiated agreements, as well as the rules that would govern protests to such filings.

§ 53.613 Filing of Negotiated Agreements

(a) In addition to having an effective SGAT on file with the Commission, a BOC may also provide Checklist Elements pursuant to one or more negotiated agreements filed in accordance with this section.

(b) The general rules (including definitions), regulations, exceptions, and conditions which govern a negotiated agreement must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the negotiated agreement must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate.

(c) Every filed negotiated agreement shall bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least 15 days notice.

(d) Notice is accomplished by filing the negotiated agreement with the Commission. The notice period begins on and includes the date the filing is received by the Commission, but does not include the effective date. In
computing the notice period required, all days including Sundays and holidays must be counted.

(e) Negotiated agreements shall be offered for opt-in to any similarly-situated telecommunications carrier. Any telecommunications carrier shall be presumed similarly-situated to any other telecommunications carrier for purposes of this section.

§ 53.614 Petitions for Suspension or Rejection of Negotiated Agreements

(a) All petitions seeking investigation, suspension, or rejection of a negotiated agreement shall be filed and served within 7 days after the date of the filing. If the date for filing the petition falls on a holiday, the petition shall be filed on the next succeeding business day.

(b) Replies to petitions seeking investigation, suspension, or rejection of a negotiated agreement shall be filed and served within 4 days after service of the petition.

(c) A negotiated agreement shall be rejected if it (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement, or if the implementation of such agreement is not consistent with the public interest, convenience and necessity.

As explained in proposed § 53.614(c) above, a negotiated agreement can only be rejected if it discriminates against another telecommunications carrier, or if implementation of the agreement would not be consistent with the public interest, convenience and necessity. This standard is identical to the standard governing state commission review of negotiated agreements addressing network elements required to be unbundled under Section 251 of the Act.122

IV. CALCULATION OF THE SAFE HARBOR COMMON COST ALLOCATION

As indicated above, the most appropriate just and reasonable rate standard to apply to Checklist Elements is the New Services Test that combines the direct cost of a Checklist Element with a reasonable allocation of common cost (i.e., overhead):

The new services test is a cost-based test that sets the direct cost of providing the new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the new service. The Commission has applied this test to new interstate access service proposed by LECs subject to price regulation.\textsuperscript{123}

Generally, the burden to demonstrate the reasonableness of any proposed overhead loading rests with ILEC: “[U]nder the new services test and our precedent, BOCs bear the burden of affirmatively justifying their overhead allocations.”\textsuperscript{124} The Commission has in the past, however, suggested an approach that can be used to develop an estimate of a presumptively reasonable overhead loading to simplify the filing of SGATs. Specifically, the Commission has suggested that the overhead loadings for inputs to competitors should be no higher than overhead loadings for “comparable services” for which the incumbent and its competitors compete. For instance, when establishing rates for physical collocation the Commission explained:

\begin{quote}
We have previously determined that, absent justification, LECs may not recover, in charges for physical collocation, a share of overhead costs greater than they recover in charges for comparable services.
\end{quote}

***

Comparable services are those for which the LEC and the interconnector compete or potentially compete for the same customers.\textsuperscript{125}

This same policy is appropriate here in determining a reasonable allocation of overhead to

Checklist Elements.

\textsuperscript{123} Wisconsin Payphone Order, at ¶ 12 (footnotes omitted).
\textsuperscript{124} Id., at ¶ 56.
\textsuperscript{125} Local Exchange Carriers’ Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, 12 FCC Rcd 18730, at ¶¶ 308, 309 (1997). See also Wisconsin Payphone Order, at ¶ 25, addressing a Bureau analysis of rates charged to payphone providers (“Absent justification, the Bureau Order states, the Wisconsin LECs may not recover a greater share of overheads in rates for the service under review than they recover for comparable services.”).
Applying these prior Commission precedents requires an estimate, from publicly-available sources, of the average overhead loading for the services that the BOCs offer in competition with telecommunications carriers using Checklist Elements. In evaluating the reasonableness of overhead loadings when evaluating the rates for ONA elements (which are similar in function and purpose to Checklist Elements), the Commission relied upon an analysis of "overhead ratios" defined as the quotient of price divided by direct unit costs.\textsuperscript{126}

Because there are no lawful restrictions on the services that may be offered by a purchaser of Checklist Elements in competition with the BOC, a reasonable method to determine the overhead ratio for all "comparable services" is to calculate a ratio of total revenue-to-operating cost based on ARMIS.\textsuperscript{127} In this calculation, Total Revenue is a proxy for unit price,\textsuperscript{128} while Total Operating Expense is a proxy for unit cost.\textsuperscript{129} Applying this calculation to 2007 reported data,\textsuperscript{130} the average overhead ratio for the BOCs is 22\%.\textsuperscript{131}

\textsuperscript{126} See ONA Tariff Order, at ¶ 48 and n. 80. The FCC reiterated its support for the overhead methodologies relied upon in its ONA Tariff Order in the Wisconsin Payphone Order. See Wisconsin Payphone Order, at ¶ 54.

\textsuperscript{127} In the ONA Tariff Order, the Commission concluded that ARMIS was a reasonable data source to calculate overhead loadings. ONA Tariff Order, at n. 73 ("The ARMIS data is a reasonable basis for alternative overhead calculations, and is the only verifiable alternative method available. Our use of ARMIS in the ONA context should not be construed as approving ARMIS as an ideal standard, or as applicable to all circumstances where overhead calculations are questioned, but its use appears reasonable in this instance").

\textsuperscript{128} See 2007 ARMIS 43-01, Row 1090 "Total Operating Revenues," Column "Total."

\textsuperscript{129} See 2007 ARMIS 43-01, Row 1190 "Total Operating Expense," Column "Total."

\textsuperscript{130} The analysis above is based on 2007 data because the Commission no longer requires the BOCs to file ARMIS 43-01 (although more current data must be provided if requested by the FCC). See Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, 23 FCC Rcd 18483, at ¶ 12 (2008).

\textsuperscript{131} Because Checklist Elements will only be available in BOC regions in states subject to Section 271, the calculation eliminates data for the former GTE companies, as well as Southern New England Telephone.
Consequently, based on the most recent publicly-available information, the Commission should establish a safe-harbor common cost allocation of no more than 22%. This overhead ratio is higher than a similar ratio developed from the financial reports of the BOCs, which average approximately 15%. Thus, the ratio based on ARMIS data is a reasonable limit on overhead loadings under the New Services Test.

V. CONCLUSION

For all of the foregoing reasons, the proposed rules set forth herein to govern the provision of certain network elements by the BOCs pursuant to the Section 271(c)(2)(B) Competitive Checklist should be adopted by the Commission on an expedited basis.

Respectfully submitted,

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Attachment A
PART 53 -- SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

Subpart A – General Information

Sec.
53.3 Terms and Definitions

§ 53.3 Terms and Definitions

Checklist Network Element. A Checklist Network Element is any facility or equipment, including the features, functions, and capabilities that are provided by means of such facilities or equipment, enumerated in section 271(c)(2)(B)(iv)-(x) of the Act.

Customer’s Premises. A customer’s premises as referred to in section 271(c)(2)(B)(iv) of the Act is any technically feasible point designated by the requesting telecommunications carrier.

Statement of Generally Available Terms. A Statement of Generally Available Terms ("SGAT") is a statement of the terms and conditions, and prices that a BOC generally offers to fulfill its obligations under section 271(c)(2)(B)(iv)-(x) of the Act.

Telecommunications Carrier. Telecommunications Carrier has the same meaning as that term is defined in section 153(a)(44) of the Communications Act of 1934, as amended.

Subpart G – Compliance with Section 271 Checklist Requirements

Sec.
53.601 Applicability and Compliance
53.602 General Terms and Conditions
53.603 Use of Checklist Network Elements
53.604 Nondiscriminatory Access to Checklist Network Elements
53.605 Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Checklist Network Elements
53.606 Combinations of Checklist Network Elements
53.607 Methods of Obtaining Interconnection and Access to Checklist Network Elements
53.608 Conversion
53.609 Pricing
53.610 Rules Applicable to SGAT Filings
53.611 SGAT Term Requirements
53.612 Petitions for Suspension or Rejection of SGAT Filings
53.613 Filing of Negotiated Agreements
53.614 Petitions for Suspension or Rejection of Negotiated Agreements
§ 53.601 Applicability and Compliance

(a) The requirements of this section apply to a BOC in any state in which it has been authorized pursuant to section 271(d) to provide in-region interLATA services.

(b) A BOC shall comply with section 271(c)(2)(B)(iv)-(x) of the Act through the filing and approval by the Commission of an SGAT in accordance with the requirements of this Part.

(c) In addition to the requirements of subsection (b) of this section, a BOC may negotiate an agreement that contains terms and conditions and prices for Checklist Network Elements that differ from those contained in its SGAT, provided that such agreement is filed in accordance with this Part. The filing of a negotiated agreement does not relieve a BOC from its obligation to have an effective SGAT on file with the Commission.

(d) SGATs and negotiated agreements must meet the requirements of sections 201(b), 202(a) and 271 of the Act.

§ 53.602 General Terms and Conditions

(a) A BOC shall provide to a requesting telecommunications carrier nondiscriminatory access to Checklist Network Elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory.

(b) The duty to provide access to Checklist Network Elements pursuant to section 271 of the Act includes a duty to provide a connection to the Checklist Network Elements independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) A BOC shall provide a requesting telecommunications carrier access to a Checklist Network Element, along with all of the features, functions, and capabilities of the network element, in a manner that allows the requesting telecommunications carrier to provide any service that can be offered by means of that Network Element.

(d) A BOC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested Checklist Network Element separate from access to the facility or functionality of other Checklist Network Elements or network elements provided under section 251(c)(3) of the Act, for a separate charge.

(e) A BOC shall make all routine network modifications necessary to provide Checklist Network Elements pursuant to sections 271(c)(2)(B)(iv) and (v) of the Act where the requested Checklist Network Element facilities have already been constructed. Such routine network modifications shall be performed in accordance with §§ 51.319(a)(7) and 51.319(e)(4). Routine network modifications to Checklist Network Elements as provided for in this section shall be performed at no additional charge to the rates established in
accordance with § 53.609. Routine network modifications to Checklist Network Elements as provided for in this section shall be performed within the intervals and subject to the performance measurements and associated remedies for corresponding network elements provided under section 251(c)(3) of the Act.

(f) A BOC shall provide a requesting telecommunications carrier technical information about the BOC's network facilities sufficient to allow the requesting telecommunications carrier to achieve access to Checklist Network Elements consistent with the requirements of this section.

(g) Checklist Network Elements shall remain subject to any performance and/or penalty plans filed by a BOC for corresponding network elements provided under section 251(c)(3) of the Act.

§ 53.603 Use of Checklist Network Elements

(a) A BOC shall not impose limitations, restrictions, or requirements on requests for, or the use of, Checklist Network Elements.

(b) A telecommunications carrier purchasing access to a network facility as a Checklist Network Element is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to a Checklist Network Element does not relieve the BOC of the duty to maintain, repair, or replace the Checklist Network Element.

(c) A BOC shall permit a requesting telecommunications carrier to commingle a Checklist Network Element or a combination of Checklist Network Elements with one or more wholesale services or facilities, including network elements provided under section 251(c)(3), obtained from a BOC.

(d) A BOC shall perform the functions necessary to commingle a Checklist Network Element or a combination of Checklist Network Elements with one or more wholesale services or facilities, including network elements provided under section 251(c)(3), that a requesting telecommunications carrier has obtained from a BOC.

§ 53.604 Nondiscriminatory Access to Checklist Network Elements

(a) The quality of a Checklist Network Element, as well as the quality of the access to the Checklist Network Element, that a BOC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that Network Element.

(b) To the extent technically feasible, the quality of a Checklist Network Element, as well as the quality of the access to such Network Element, that a BOC provides to a requesting
telecommunications carrier shall be at least equal in quality to that which the BOC provides to itself. If a BOC fails to meet this requirement, the BOC must prove that it is not technically feasible to provide the requested Checklist Network Element, or to provide access to the requested Checklist Network Element, at a level of quality that is equal to that which the BOC provides to itself.

(c) Previous successful access to a Checklist Network Element or a network element provided under section 251(c)(3) of the Act at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful provision of access to a Checklist Network Element or a network element provided under section 251(c)(3) of the Act at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

§ 53.605 Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Checklist Network Elements

(a) The terms and conditions pursuant to which a BOC provides access to Checklist Network Elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which a BOC offers to provide access to Checklist Network Elements, including but not limited to, the time within which the BOC provisions such access to such network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the BOC provides such elements to itself.

(c) A BOC may not condition any term, condition or price of a Checklist Network Element on a telecommunications carrier’s commitment to fulfill set quantities or percentages of the telecommunications carrier’s demand using the BOC’s wholesale network facilities or services including, but not limited to, special access services.

(d) A BOC must provide a carrier purchasing access to Checklist Network Elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the BOC's operations support systems.
§ 53.606 Combination of Checklist Network Elements

(a) A BOC shall provide Checklist Network Elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide service.

(b) Except upon request, a BOC shall not separate requested Checklist Network Elements that the BOC currently combines.

(c) Upon request, a BOC shall perform the functions necessary to combine Checklist Network Elements with other Checklist Network Elements or with network elements provided under section 251(c)(3), or other wholesale services, in any manner, even if those elements or services are not ordinarily combined in the BOC's network, provided that such combination:

(1) Is technically feasible; and

(2) Would not undermine the ability of other carriers to obtain access to network elements or to interconnect with the BOC's network.

(d) Upon request, a BOC shall perform the functions necessary to combine Checklist Network Elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) A BOC that denies a request to combine network elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove that the requested combination is not technically feasible.

(f) A BOC that denies a request to combine network elements pursuant to paragraph (c)(2) of this section must demonstrate that the requested combination would undermine the ability of other carriers to obtain access to network elements or to interconnect with the BOC's network.

(g) Charges for performing the functions necessary to commingle or combine a Checklist Network Element with any other Checklist Element, network element provided under section 251(c)(3), or wholesale service shall not exceed the direct cost of the incremental functions necessary to commingle or combine facilities that are not yet combined and/or commingled when ordered.

§ 53.607 Methods of Obtaining Interconnection and Access to Checklist Network Elements

Access to Checklist Network Elements shall comply with § 51.321 of this title.
§ 53.608 Conversion

(a) Upon request, a BOC shall convert a wholesale service or group of wholesale services or facilities including, but not limited to, unbundled network elements or combinations of unbundled network elements required under section 251(c)(3) of the Act, and commingled combinations of network elements required under section 251(c)(3) of the Act and other wholesale services or facilities including special access, to the equivalent Checklist Network Element, combination of Checklist Network Elements, or commingled combination of Checklist Network Elements available under the Act and this part.

(b) A BOC shall perform any conversion required under this section without adversely affecting the service quality perceived by the requesting telecommunications carrier's end user customer.

(c) Except as agreed to by a requesting telecommunications carrier, a BOC shall not impose any untariffed termination charges, or any disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with any conversion permitted under this section.

(d) Charges for conversions permitted under this section shall not exceed the direct cost to effect conversion. Unless agreed to by a BOC and a requesting telecommunications carrier, a BOC shall not require any physical rearrangement of network elements or wholesale services subject to a conversion request.

§ 53.609 Pricing

(a) Non-recurring charges. Non-recurring charges for Checklist Network Elements shall equal non-recurring charges applicable to comparable network elements required under section 251(c)(3) of the Act.

(b) Recurring charges. Recurring charges for a Checklist Network Element shall recover the direct costs of the element, plus a reasonable allocation of the BOC's common overheads.

(c) Direct Cost Calculation. Direct cost shall be the forward looking economic cost determined in compliance with § 51.505 of this title, prior to the inclusion of any allocation of forward-looking common costs calculated in accordance with § 51.505(c) of this title.

(d) Common cost allocation. A BOC shall not include in the price of a Checklist Network Element more than a reasonable allocation of the company's common costs. Common cost allocations less than or equal to 22% shall be presumptively reasonable.

(e) Stand-alone Cost. In no event shall the sum of the direct costs plus a reasonable allocation of common costs exceed the stand-alone costs associated with the network
element. For purposes of this section, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(f) **Imputation.** No interstate service offered by a BOC shall be priced below its direct cost as computed by the sum of the prices of those Checklist Network Elements comprising the facilities used to provision the service.

§ 53.610 **Rules Applicable to SGAT Filings**

(a) The general rules (including definitions), regulations, exceptions, and conditions which govern an SGAT must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the SGAT must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition from or to any other SGAT or tariff.

(b) Every proposed SGAT filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least 45 days notice.

(c) The notice period begins on and includes the date the SGAT is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

§ 53.611 **SGAT Term Requirements**

SGATs shall be made available without modification for a minimum three year term from the effective date. A carrier may subscribe to the initial SGAT for the full term at any time prior to 180 days before the expiration of the SCAT’s initial term.

§ 53.612 **Petitions for Suspension or Rejection of SGAT Filings**

(a) **Content.** Petitions seeking investigation, suspension, or rejection of a new or revised SGAT filing or any provision thereof shall specify the items against which protest is made, and the specific reasons why the protested SGAT filing warrants investigation, suspension, or rejection under the Communications Act. No petition shall include a prayer that it also be considered a formal complaint.

(b) **When filed.** All petitions seeking investigation, suspension, or rejection of an SGAT filing shall be filed and served within 15 days after the date of the SGAT filing. If the
date for filing the petition falls on a weekend or holiday, the petition shall be filed on the next succeeding business day.

(c) Replies. Replies to petitions seeking investigation, suspension, or rejection of an SGAT filing shall be filed and served within 5 days after service of the petition.

(d) Copies, service. An original and four copies of each petition shall be filed with the Commission as follows: The original and three copies of each petition shall be filed with the Secretary, 236 Massachusetts Ave., NE., Washington, DC 20002; one copy must be delivered directly to the Commission's copy contractor. Additional, separate copies shall be served simultaneously upon the Chief, Wireline Competition Bureau; and the Chief, Pricing Policy Division.

§ 53.613 Filing of Negotiated Agreements

(a) In addition to having an effective SGAT on file with the Commission, a BOC may also provide Checklist Elements pursuant to one or more negotiated agreements filed in accordance with this section.

(b) The general rules (including definitions), regulations, exceptions, and conditions which govern a negotiated agreement must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the negotiated agreement must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate.

(c) Every filed negotiated agreement shall bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least 15 days notice.

(d) Notice is accomplished by filing the negotiated agreement with the Commission. The notice period begins on and includes the date the filing is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

(e) Negotiated agreements shall be offered for opt-in to any similarly-situated telecommunications carrier. Any telecommunications carrier shall be presumed similarly-situated to any other telecommunications carrier for purposes of this section.

§ 53.614 Petitions for Suspension or Rejection of Negotiated Agreements

(a) All petitions seeking investigation, suspension, or rejection of a negotiated agreement shall be filed and served within 7 days after the date of the filing. If the date for filing the petition falls on a holiday, the petition shall be filed on the next succeeding business day.
(b) Replies to petitions seeking investigation, suspension, or rejection of a negotiated agreement shall be filed and served within 4 days after service of the petition.

(c) A negotiated agreement shall be rejected if it (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement, or if the implementation of such agreement is not consistent with the public interest, convenience and necessity.
Attachment B
Comparison of Checklist Element Rules to Section 251 UNE Rules
Availability, Combinations and Non-Discrimination

<table>
<thead>
<tr>
<th>Proposed Rules</th>
<th>Comparison to Existing Rules</th>
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<tbody>
<tr>
<td>§ 53.601 Applicability and Compliance</td>
<td>Entire § 53.601 added</td>
</tr>
</tbody>
</table>

(a) The requirements of this section apply to a BOC in any state in which it has been authorized pursuant to section 271(d) to provide in-region interLATA services.

(b) A BOC shall comply with section 271(c)(2)(B)(iv)-(x) of the Act through the filing and approval by the Commission of an SGAT in accordance with the requirements of this Part.

(c) In addition to the requirements of subsection (b) of this section, a BOC may negotiate an agreement that contains terms and conditions and prices for Checklist Network Elements that differ from those contained in its SGAT, provided that such agreement is filed in accordance with this Part. The filing of a negotiated agreement does not relieve a BOC from its obligation to have an effective SGAT on file with the Commission.

(d) SGATs and negotiated agreements must meet the requirements of sections 201(b), 202(a) and 271 of the Act.

§ 53.602 General Terms and Conditions

Patterned on § 51.307 - Duty to Provide Access On An Unbundled Basis To Network Elements with the following changes:

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1 The chart above identifies substantive changes/additions to existing rules applicable to Section 251 unbundled network elements. As such, the table does not use strikeout and underlining to identify formatting and editorial changes that do not have substantive effect.
## Comparison of Checklist Element Rules to Section 251 UNE Rules
### Availability, Combinations and Non-Discrimination

<table>
<thead>
<tr>
<th>Proposed Rules</th>
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<tbody>
<tr>
<td>(a) A BOC shall provide to a requesting telecommunications carrier nondiscriminatory access to Checklist Network Elements at on an unbundled basis any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory.</td>
<td>(a) An incumbent LEG, A BOC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to Checklist network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.</td>
</tr>
<tr>
<td>(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.</td>
<td>(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.</td>
</tr>
<tr>
<td>(c) A BOC shall provide a requesting telecommunications carrier access to a Checklist Network Element, along with all of the features, functions, and capabilities of the network element, in a manner that allows the requesting telecommunications carrier to provide any service that can be offered by means of that Network Element.</td>
<td>(c) An incumbent LEG, A BOC shall provide a requesting telecommunications carrier access to an unbundled Checklist network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.</td>
</tr>
<tr>
<td>(d) A BOC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested Checklist Network Element separate from access to the facility or functionality of other Checklist Network Elements or network elements provided under section 251(c)(3) of the Act, for a separate charge.</td>
<td>(d) An incumbent LEG, A BOC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested Checklist network element separate from access to the facility or functionality of other Checklist network elements or network elements provided under section 251(c)(3) of the Act, for a separate charge.</td>
</tr>
</tbody>
</table>
### Proposed Rules

(e) A BOC shall make all routine network modifications necessary to provide Checklist Network Elements pursuant to sections 271(c)(2)(B)(iv) and (v) of the Act where the requested Checklist Network Element facilities have already been constructed. Such routine network modifications shall be performed in accordance with §§ 51.319(a)(7) and 51.319(e)(4). Routine network modifications to Checklist Network Elements as provided for in this section shall be performed at no additional charge to the rates established in accordance with § 53.609. Routine network modifications to Checklist Network Elements as provided for in this section shall be performed within the intervals and subject to the performance measurements and associated remedies for corresponding network elements provided under section 251(c)(3) of the Act.

(f) A BOC shall provide a requesting telecommunications carrier technical information about the BOC’s network facilities sufficient to allow the requesting telecommunications carrier to achieve access to Checklist Network Elements consistent with the requirements of this section.

(g) Checklist Network Elements shall remain subject to any performance and/or penalty plans filed by a BOC for corresponding network elements provided under section 251(c)(3) of the Act.

### Comparison to Existing Rules

(e) A BOC shall make all routine network modifications necessary to provide Checklist Network Elements pursuant to sections 271(c)(2)(B)(iv) and (v) of the Act where the requested Checklist Network Element facilities have already been constructed. Such routine network modifications shall be performed in accordance with §§ 51.319(a)(7) and 51.319(e)(4). Routine network modifications to Checklist Network Elements as provided for in this section shall be performed at no additional charge to the rates established in accordance with § 53.609. Routine network modifications to Checklist Network Elements as provided for in this section shall be performed within the intervals and subject to the performance measurements and associated remedies for corresponding network elements provided under section 251(c)(3) of the Act.

(f) An incumbent LEC A BOC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC’s BOC’s network facilities sufficient to allow the requesting carrier to achieve access to unbundled Checklist network elements consistent with the requirements of this section.

(g) Checklist Network Elements shall remain subject to any performance and/or penalty plans filed by a BOC for corresponding network elements provided under section 251(c)(3) of the Act.
### Proposed Rules

**§ 53.603 Use of Checklist Network Elements**

(a) A BOC shall not impose limitations, restrictions, or requirements on requests for, or the use of, Checklist Network Elements.

(b) A telecommunications carrier purchasing access to a network facility as a Checklist Network Element is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to a Checklist Network Element does not relieve the BOC of the duty to maintain, repair, or replace the Checklist Network Element.

### Comparison to Existing Rules

Patterned on § 51.309 - Use of Unbundled Network Elements with the following changes:

(a) Except as provided in Sec. 51.318, an incumbent LEC A BOC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled Checklist network elements for the service a requesting telecommunications carrier seeks to offer.

—(b) A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.

(c) A telecommunications carrier purchasing access to an unbundled network facility as a Checklist Network Element is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled Checklist network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled Checklist network element.

—(d) A requesting telecommunications carrier that accesses and uses an unbundled network element consistent with paragraph (b) of this section may provide any telecommunications services over the same unbundled network element.
### Proposed Rules

<table>
<thead>
<tr>
<th>Proposed Rules</th>
<th>Comparison to Existing Rules¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>(c) A BOC shall permit a requesting telecommunications carrier to commingle a Checklist Network Element or a combination of Checklist Network Elements with one or more wholesale services or facilities, including network elements provided under section 251(c)(3), obtained from a BOC.</td>
<td>(e) Except as provided in Sec. 51.318, an incumbent LEC A BOC shall permit a requesting telecommunications carrier to commingle an unbundled Checklist network element or a combination of unbundled Checklist network elements with one or more wholesale services provided under section 251(c)(3), obtained from an incumbent LEC A BOC.</td>
</tr>
<tr>
<td>(d) A BOC shall perform the functions necessary to commingle a Checklist Network Element or a combination of Checklist Network Elements with one or more wholesale services or facilities, including network elements provided under section 251(c)(3), that a requesting telecommunications carrier has obtained from a BOC.</td>
<td>(f) Upon request, an incumbent LEC A BOC shall perform the functions necessary to commingle an unbundled Checklist network element or a combination of unbundled Checklist network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale, including network elements provided under section 251(c)(3), from an incumbent LEC A BOC.</td>
</tr>
</tbody>
</table>

### § 53.604 Nondiscriminatory Access to Checklist Network Elements

<table>
<thead>
<tr>
<th>§ 53.604 Nondiscriminatory Access to Checklist Network Elements</th>
<th>Patterned on § 51.311 - Nondiscriminatory Access to Unbundled Network Elements with the following changes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) The quality of a Checklist Network Element, as well as the quality of the access to the Checklist Network Element, that a</td>
<td>(a) The quality of an unbundled Checklist network element, as well as the quality of the access to the unbundled Checklist</td>
</tr>
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</table>
**Attachment B**

**Comparison of Checklist Element Rules to Section 251 UNE Rules**

**Availability, Combinations and Non-Discrimination**

<table>
<thead>
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<tr>
<td>BOC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that Network Element.</td>
<td>network element, that an incumbent LEC BOC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element.</td>
</tr>
<tr>
<td>(b) To the extent technically feasible, the quality of a Checklist Network Element, as well as the quality of the access to such Network Element, that a BOC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the BOC provides to itself. If a BOC fails to meet this requirement, the BOC must prove that it is not technically feasible to provide the requested Checklist Network Element, or to provide access to the requested Checklist Network Element, at a level of quality that is equal to that which the BOC provides to itself.</td>
<td>(b) To the extent technically feasible, the quality of an unbundled Checklist network element, as well as the quality of the access to such unbundled Checklist network element, that an incumbent LEC BOC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the BOC incumbent LEC provides to itself. If an incumbent LEC BOC fails to meet this requirement, the incumbent LEC BOC must prove to the state commission that it is not technically feasible to provide the requested unbundled Checklist network element, or to provide access to the requested unbundled Checklist network element, at a level of quality that is equal to that which the incumbent LEC BOC provides to itself.</td>
</tr>
<tr>
<td>(c) Previous successful access to a Checklist Network Element or a network element provided under section 251(c)(3) of the Act at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.</td>
<td>(c) Previous successful access to an unbundled Checklist Network Element or a network element provided under section 251(c)(3) of the Act at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.</td>
</tr>
<tr>
<td>(d) Previous successful provision of access to a Checklist Network Element or a network element provided under section</td>
<td>(d) Previous successful provision of access to an unbundled Checklist Network Element or a network element provided under</td>
</tr>
</tbody>
</table>
### Proposed Rules

251(c)(3) of the Act at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

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### Comparison to Existing Rules

section 251(c)(3) of the Act at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

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### § 53.605 Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Checklist Network Elements

(a) The terms and conditions pursuant to which a BOC provides access to Checklist Network Elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which a BOC offers to provide access to Checklist Network Elements, including but not limited to, the time within which the BOC provisions such access to such network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the BOC provides such elements to itself.

(c) A BOC may not condition any term, condition or price of a Checklist Network Element on a telecommunications carrier’s commitment to fulfill set quantities or percentages of the telecommunications carrier’s demand using the BOC’s wholesale network facilities or services including, but not limited to, special

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### Comparison to Existing Rules

Patterned on § 51.311 - Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements with the following changes:

(a) The terms and conditions pursuant to which an incumbent LEG BOC provides access to unbundled Checklist network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEG BOC offers to provide access to unbundled Checklist network elements, including but not limited to, the time within which the incumbent LEG BOC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEG BOC provides such elements to itself.

(c) A BOC may not condition any term, condition or price of a Checklist Network Element on a telecommunications carrier’s commitment to fulfill set quantities or percentages of the telecommunications carrier’s demand using the BOC’s wholesale network facilities or services including, but not limited to, special
## Proposed Rules

access services.

(d) A BOC must provide a carrier purchasing access to Checklist Network Elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the BOC's operations support systems.

### § 53.606 Combination of Checklist Network Elements

(a) A BOC shall provide Checklist Network Elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide service.

(b) Except upon request, a BOC shall not separate requested Checklist Network Elements that the BOC currently combines.

(c) Upon request, a BOC shall perform the functions necessary to combine Checklist Network Elements with other Checklist Network Elements or with network elements provided under section 251(c)(3), or other wholesale services, in any manner, even if those elements or services are not ordinarily combined in the BOC's network, provided that such combination:

(1) Is technically feasible; and

### Comparison to Existing Rules

access services.

(d) An incumbent LEC BOC must provide a carrier purchasing access to unbundled Checklist network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's BOC's operations support systems.

Patterned after § 51.315 - Combination of Unbundled Network Elements with the following changes:

(a) An incumbent LEC BOC shall provide unbundled Checklist network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC BOC shall not separate requested Checklist network elements that the incumbent LEC BOC currently combines.

(c) Upon request, an incumbent LEC BOC shall perform the functions necessary to combine unbundled Checklist network elements with other Checklist Network Elements or with network elements provided under section 251(c)(3), or other wholesale services, in any manner, even if those elements or services are not ordinarily combined in the incumbent LEC's BOC's network, provided that such combination:

(1) Is technically feasible; and
## Proposed Rules

(2) Would not undermine the ability of other carriers to obtain access to network elements or to interconnect with the BOC’s network.

(d) Upon request, a BOC shall perform the functions necessary to combine Checklist Network Elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) A BOC that denies a request to combine network elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove that the requested combination is not technically feasible.

(f) A BOC that denies a request to combine network elements pursuant to paragraph (c)(2) of this section must demonstrate that the requested combination would undermine the ability of other carriers to obtain access to network elements or to interconnect with the BOC's network.

(g) Charges for performing the functions necessary to commingle or combine a Checklist Network Element with any other Checklist Element, network element provided under section 251(c)(3), or wholesale service shall not exceed the direct cost of the incremental functions necessary to commingle or combine facilities that are not yet combined and/or commingled when ordered.

## Comparison to Existing Rules

(2) Would not undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC’s BOC’s network.

(d) Upon request, an incumbent LEC BOC shall perform the functions necessary to combine unbundled Checklist network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC BOC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine unbundled network elements pursuant to paragraph (c)(2) of this section must demonstrate to the state commission that the requested combination would undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC’s BOC’s network.

(g) Charges for performing the functions necessary to commingle or combine a Checklist Network Element with any other Checklist Element, network element provided under section 251(c)(3), or wholesale service shall not exceed the direct cost of the incremental functions necessary to commingle or combine facilities that are not yet combined and/or commingled when ordered.
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<tr>
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<tbody>
<tr>
<td>Access to Checklist Network Elements shall comply with § 51.321 of this title.</td>
<td></td>
</tr>
<tr>
<td>§ 53.608 Conversion</td>
<td>§ 51.316 Conversion of Unbundled Network Elements and Services with the following changes.</td>
</tr>
<tr>
<td>(a) Upon request, a BOC shall convert a wholesale service or group of wholesale services or facilities including, but not limited to, unbundled network elements or combinations of unbundled network elements required under section 251(c)(3) of the Act, and commingled combinations of network elements required under section 251(c)(3) of the Act and other wholesale services or facilities including special access, to the equivalent Checklist Network Element, combination of Checklist Network Elements, or commingled combination of Checklist Network Elements available under the Act and this part.</td>
<td>(a) Upon request, an incumbent LEC BOC shall convert a wholesale service, or group of wholesale services, or facilities including, but not limited to, unbundled network elements or combinations of unbundled network elements required under section 251(c)(3) of the Act, and commingled combinations of network elements required under section 251(c)(3) of the Act and other wholesale services or facilities including special access, to the equivalent unbundled Checklist network element, or commingled combination of unbundled Checklist Network Elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Act and this part.</td>
</tr>
<tr>
<td>(b) A BOC shall perform any conversion required under this section without adversely affecting the service quality perceived by the requesting telecommunications carrier's end user customer.</td>
<td>(b) An incumbent LEC BOC shall perform any conversion required under this section from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.</td>
</tr>
</tbody>
</table>
### Proposed Rules

(c) Except as agreed to by a requesting telecommunications carrier, a BOC shall not impose any untariffed termination charges, or any disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with any conversion permitted under this section.

(d) Charges for conversions permitted under this section shall not exceed the direct cost to effect conversion. Unless agreed to by a BOC and a requesting telecommunications carrier, a BOC shall not require any physical rearrangement of network elements or wholesale services subject to a conversion request.

### Comparison to Existing Rules

(c) Except as agreed to by a requesting telecommunications carrier the parties, an incumbent LEC BOC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion permitted under this section between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

(d) Charges for conversions permitted under this section shall not exceed the direct cost to effect conversion. Unless agreed to by a BOC and a requesting telecommunications carrier, a BOC shall not require any physical rearrangement of network elements or wholesale services subject to a conversion request.