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

In the Matter of	)	
Verizon Telephone Companies Tariff FCC Nos. 1, 11, 14, 16 & 20	)	Transmittal No. 367
Qwest Corporation Tariff F.C.C. No. 1	)	Transmittal No. 173
BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1	)	Transmittal No. 745

JOINT PETITION
TO REJECT OR SUSPEND AND INVESTIGATE[1]

Pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, Joint Petitioners petition the Commission to reject or suspend and investigate the above-captioned tariff revisions filed on October 2, 2003 (with an effective date of October 17, 2003) by the Verizon Telephone Companies ("Verizon"), Qwest Corporation ("Qwest"), and BellSouth Telecommunictions, Inc. ("BellSouth").

The proposed tariff revisions of Verizon, Qwest and BellSouth purport to implement the Commission's *Triennial Review Order* command that all incumbent local exchange carriers ("LECs") "effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations."[2] In fact, however, the

[1] Joint Petitioners are: ACD Telecom, Inc., AT&T Corp., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, Choice One Communications, Inc., CompTel, Eschelon Telecom, Inc., Focal Communications Corporation, Global Crossing North America, Inc., KMC Telecom III LLC, KMC Telecom V, Inc., RCN Telecom Services, Inc., XO Communications, Inc., Z-Tel Communications, Inc.

[2] Report and Order and Order on Remand And Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;*

proposed tariff revisions, which would deny or delay carriers' rights to commingle on the basis of Statements of Generally Available Terms ("SGAT") or interconnection agreements that *do not even address commingling*, would unlawfully restrict the availability of commingling in direct violation of the Commission's rules and orders and the Communications Act itself.[3] In so doing, the proposed tariff revisions are patently unlawful in at least two independent respects.

First, and most fundamentally, by unilaterally imposing conditions on commingling rights, the proposed tariff revisions plainly fail to comply with the Commission's *Triennial Review Order* commingling command or the Commission rules that now prohibit restrictions on commingling of telecommunications services using unbundled network elements and other wholesale services, *see* 47 C.F.R. § 51.309. Second, the proposed tariff revisions flatly violate the Commission's tariff rules, which prohibit LECs from cross-referencing other agreements in interstate access tariffs. Accordingly, the proposed tariff revisions should be rejected.[4]

The Proposed Tariff Revisions Violate The Commission's Prohibition Against Commingling Restrictions. The proposed tariff revisions violate the Commission new rules that permit commingling, 47 C.F.R. § 51.309, and sections 201, 202 and 251(c)(3) of the 1996 Act (47 U.S.C. §§ 201 & 202). The Commission's rules state that "an incumbent LEC shall permit a

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(…continued)
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 03-36, CC Docket Nos. 01-338, 96-98, 98-147, ¶ 581 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

[3] *See id.*; 47 C.F.R. § 51.509; 47 U.S.C. §§ 201, 202 and 251(c)(3).

[4] A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order. *See, e.g., American Broadcasting Companies* v. *AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI* v. *AT&T*, 94 F.C.C.2d 332, 340-41 (1983). Suspension and investigation are appropriate where a tariff raises substantial issues of lawfulness. *See AT&T (Transmittal No. 148)*, Memorandum Opinion and Order, 56 R.R.2d 1503 (1984); *ITT (Transmittal No. 2191)*, 73 F.C.C.2d 709, 716, n.5 (1979).

requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC." 47 C.F.R. § 51.309. In adopting that rule, the Commission expressly held that any "restriction on commingling would constitute an 'unjust and unreasonable practice' under 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act," and also "would be inconsistent with the nondiscrimination requirements of section 251(c)(3) [of the Act]."[5]

Verizon and Qwest propose just such unlawful restrictions on commingling. Verizon's proposed tariff revisions, for example, would restrict commingling where an existing Statement of Generally Available Terms and Conditions or an interconnection agreement does "*not address commingling*, and the requesting carrier has not negotiated an interconnection agreement (or amendment) expressly permitting such commingling."[6] Similarly, Qwest's proposed tariff revisions would restrict commingling unless "explicitly" permitted by an existing interconnection agreement.[7] Under the Commission's new rules, however, where an interconnection agreement does not impose commingling restrictions on the use of network elements available under the agreement (as is often the case),[8] the incumbent LEC has no

[5] *See also Triennial Review Order* ¶ 581.

[6] Verizon D&J at 2.

[7] Qwest Proposed Revised F.C.C. Tariff No. 1, Page 2-14.1, § 2.2.2.

[8] Many interconnection agreements are silent on the issue of commingling, because Verizon, Qwest and other incumbent LECs *unilaterally* imposed commingling restrictions when the Commission authorized such restrictions, without any formal amendment to interconnection agreements. Other existing interconnection agreements provide that the LEC may impose whatever use restrictions are reflected in the Commission's rules. Here, too, the competitive carrier has an immediate right to commingle under the new rules, and neither Verizon nor Qwest has authority to condition that right on the re-negotiation and modification of interconnection agreements.

authority to restrict or delay those carriers' rights to commingle.[9] Yet, both Verizon's and Qwest's proposed tariff revisions would unilaterally and immediately impose such restrictions, in direct violation of the Commission's rules (47 C.F.R. § 51.309) and the 1996 Act (47 U.S.C. §§ 201, 202, and 251(c)(3)).[10]

The Proposed Tariffs Violate The Commission's Tariff Rules & The 1996 Act. The proposed tariff revisions also violate section 61.74(a) of the Commission's rules, which states that "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument." 47 C.F.R. § 61.74(a). This rule "by its terms plainly applies to all tariff filings"[11] and means that "cross-referencing of an exogenous document renders the challenged tariff provisions unlawful."[12] As the D.C. Circuit has explained, tariff language that "would require a customer to consult [an] . . . interconnection agreement to determine whether the tariff applied," "on its face violates the FCC's rules [61.74(a)]."[13] Moreover, the Commission has emphasized that compliance with 47 C.F.R.

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[9] By purporting to amend carriers' rights relating to commingling under the existing interconnection agreements, Verizon's and Qwest's proposed tariff revisions also violate the Due Process Clause of the United States Constitution.

[10] BellSouth's tariff is vague in this respect. It states that commingling will be permitted "to the extent that [an SGAT or interconnection agreement] . . . explicitly . . . requires the parties to complete the procedures set forth in the agreement regarding change of law prior to the implementing of such commingling." BellSouth Revised F.C.C. Tariff No. 1, Page 209, § 2.2.3. To the extent that this language would require carriers to invoke change of law provisions where the agreements are otherwise silent with respect to commingling or to the extent that this language would impose commingling restrictions beyond those that already exist in such agreements, BellSouth's proposed tariff revisions also are unlawful and must be rejected.

[11] Order on Reconsideration, 15 FCC Rcd. 5997, ¶ 26 (2000).

[12] Memorandum Opinion and Order, 15 FCC Rcd. 12946, ¶ 24 (1999); *Accord* Order on Reconsideration, 15 FCC Rcd. 5997, ¶ 26 (2000) (finding a tariff that "cross-referenced an external document (*i.e.* an interconnection agreement), in violation of section 61.74(a)").

[13] *Global NAPs* v. *FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001).

§ 61.74(a) is necessary "[i]n order to comply with section 201(b) of the act."[14] Both Verizon's and Qwest's proposed tariff revisions cross-reference and are expressly contingent upon the terms of individual interconnection agreements and SGATs, and thus violate section 61.74(a) of the Commission's rules and Section 201(b) of the 1996 Act. Verizon's proposed tariff revision states that commingling is permitted except to the extent that a "Statement of Generally Available Terms . . . [or an] interconnection agreement . . . (1) expressly prohibits commingling; or (2) does not address commingling and the requesting carrier has not negotiated an interconnection agreement (or amendments) expressly permitting such commingling."[15] And Qwest's proposed tariff revision states that commingling will be allowed only if commingling is permitted "either explicitly [in an interconnection agreement or SGAT] or through amendments resulting from the change of law process."[16]

Moreover, neither Qwest nor Verizon has received a waiver of Rule 61.74, nor could they. Neither carrier has "demonstrated good cause to waive Section 61.74, as required by Section 1.3" because there is no basis for the Commission to conclude that "it would be difficult or burdensome" for either of them to comply with the rule.[17] Indeed, as the proposed tariff revisions of Sprint and other carriers confirm, implementing the *Triennial Review Order* requirement that "incumbent LECs . . . effectuate commingling by modifying their interstate

[14] Order on Reconsideration, 15 FCC Rcd. 5997, ¶ 24 (2000).

[15] Verizon D&J at 1.

[16] Qwest Proposed Revised F.C.C. Tariff No. 1, Page 2-14.1, 2.2.2. BellSouth's proposed tariff revisions also appear to cross-reference interconnection agreements. Accordingly, BellSouth's tariff revisions also should be rejected.

[17] Second Order on Reconsideration, 8 FCC Rcd 8798, ¶ 29 (1993); *see also* Memorandum Opinion and Order, 3 FCC Rcd 6961, n.15 (1988) (a waiver of 61.74(a) requires a "demonstration of unique facts and circumstances justifying the requested waiver").

access service tariffs to expressly permit [commingling]" requires nothing more than a tariff revision stating that such commingling is permitted:

> Pursuant to the Federal Communications Commission's Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, adopted February 20, 2003, and the requirements of Section 51.309 of the Federal Communications Commission's Rules, the Telephone Company will permit a requesting telecommunications carrier to commingle an unbundled network element or combination of unbundled network elements with wholesale access services obtained from the Telephone Company under this tariff. The rates, terms and conditions of this tariff will apply only to the access services that are commingled. Unbundled network elements or combinations of unbundled network elements that are commingled with access services are not available through this tariff.[18]

Verizon's and Qwest's proposed tariff revisions unlawfully – and for no legitimate purpose – extend well beyond implementing the Commission's commingling mandate and rules, and thus must be rejected.

[18] Sprint F.C.C. Tariff No. 2, Transmittal No. 232, page 2-76 (filed Oct. 1, 2003, effective Oct. 16, 2003).

CONCLUSION

For the forgoing reasons, the Commission should reject or suspend and investigate the proposed tariff revisions of Verizon and Qwest.

Respectfully Submitted,

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October 9, 2003

CERTIFICATE OF SERVICE

I, Christopher T. Shenk, do hereby certify that on this 9th day of October, 2003, a copy of the foregoing Petition to Reject or Suspend and Investigate was served by facsimile and U.S. first class mail, postage prepaid, on the parties named below.

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