

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of:</b>	)	
	)	
	)	
<b>Southwestern Bell Telephone Company</b>	)	<b>Transmittal No. 2966</b>
<b>Tariff FCC No. 73</b>	)	
	)	
<b>Pacific Bell Telephone Company</b>	)	<b>Transmittal No. 129</b>
<b>Tariff FCC No. 1</b>	)	
	)	
<b>Southern New England Telephone Company</b>	)	<b>Transmittal No. 801</b>
<b>Tariff FCC No. 39</b>	)	
	)	
<b>Nevada Bell Telephone Company</b>	)	<b>Transmittal No. 51</b>
<b>Tariff FCC No. 1</b>	)	
	)	
<b>Ameritech Operating Companies</b>	)	<b>Transmittal No. 1359</b>
<b>Tariff FCC No. 2</b>	)	
	)	

**MCI PETITION TO REJECT OR, IN THE ALTERNATIVE,  
SUSPEND AND INVESTIGATE**

WorldCom, Inc. d/b/a MCI (MCI), pursuant to Section 1.773 of the Commission's Rules, hereby petitions the Commission to reject or, in the alternative, suspend and investigate the above-captioned transmittals filed by Southwestern Bell Telephone Company (SWBT), Pacific Bell Telephone Company (Pacific Bell), Ameritech Operating Companies (Ameritech), Nevada Bell Telephone Company

(Nevada Bell), and the Southern New England Telephone Company (SNET) (collectively SBC).<sup>1</sup>

The above-captioned transmittals purport to implement paragraph 581 of the Triennial Review Order, which requires incumbent LECs “to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.”<sup>2</sup> Rather than “expressly permit” commingling, however, SBC seeks to permit commingling only to the extent that it is permitted by interconnection agreements or intrastate tariffs.<sup>3</sup> The proposed cross-references to interconnection agreements and intrastate tariffs, and the limitations on commingling that may be imposed by those cross-references, violate both the Commission’s rules and the Triennial Review Order.

## **I. The Transmittals’ Cross-References Violate the Commission’s Part 61 Rules**

The SBC transmittals’ cross-references to interconnection agreements and intrastate tariffs violate section 61.74(a) of the Commission’s rules, which provides that “no tariff publication filed with the Commission may make reference to any other tariff

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<sup>1</sup> Rejection of a proposed tariff or proposed changes to an existing tariff is warranted when the proposal is prima facie unlawful in that it can be demonstrated that it conflicts with the Communications Act or a Commission rule, regulation, or order. See, e.g., American Broadcasting Companies, Inc v. FCC, 633 F.2d 133, 138 (D.C. Cir. 1980); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971); MCI v. AT&T, 94 FCC 2d 332, 340-341 (1983); AT&T, 67 FCC 2d 1134, 1158 (1978); recon denied, 70 FCC 2d 2031 (1979)

Suspension and investigation of a proposed tariff or tariff modification is warranted when significant questions of lawfulness arise in connection with the tariff. See AT&T Transmittal No. 148, Memorandum Opinion and Order, FCC 84-421 (released Sept. 19, 1984); ITT, 73 FCC 2d 709, 719 (1979); AT&T, 46 FCC 2d 81, 86 (1974); see also Arrow Transportation Company v. Southern Railway Company, 372 U.S. 658 (1963).

<sup>2</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, released August 21, 2003 at ¶581 (Triennial Review Order).

<sup>3</sup> See, e.g., Ameritech Transmittal No. 1359, proposed 5<sup>th</sup> revised page 85.1.

publication or to any other document or instrument.”<sup>4</sup> The Commission has consistently rejected tariff transmittals that included cross-references to other documents.<sup>5</sup> Indeed, “[f]ailure to comply with [the Part 61] rules has always been recognized as grounds for rejection.”<sup>6</sup>

Moreover, the Commission has specifically held, in the Global NAPs decisions<sup>7</sup> that were upheld by the D.C. Circuit,<sup>8</sup> that tariffed cross-references to interconnection agreements violate section 61.74(a) of the Commission’s rules. Indeed, the Commission stated in the Global NAPs I Recon Order that a tariff’s cross-reference to an interconnection agreement “constitutes far more than a technical defect; it constitutes a fundamental flaw in the Tariff’s clarity.”<sup>9</sup> Given that the Commission has struck down a CLEC tariff for cross-referencing an interconnection agreement, it must clearly reject RBOC tariffs that violate the Commission’s rules in the same manner.

As the Commission has explained, the requirement that the terms and conditions applicable to access services are governed by the four corners of the tariff ensures both certainty and even-handed treatment of all access customers.<sup>10</sup> Ensuring such even-handed treatment is particularly essential in the case of commingling, where the

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<sup>4</sup> 47 C.F.R. § 61.74(a).

<sup>5</sup> See, e.g., AT&T Communications, Revisions to Tariff FCC No. 15, Order, 8 FCC Rcd 2559 (1993); Ameritech Operating Companies et al., Order, 8 FCC Rcd 4589, 4605 ¶ 89 (1993).

<sup>6</sup> Global NAPs II Order at ¶ 23 (citing Amendment of Part 61 of the Commission’s Rules Relating to Tariffs and Part I of the Commission’s Rules Relating to Evidence, Memorandum Opinion and Order, 40 FCC 2d 149, 150 at ¶ 5 (1973)).

<sup>7</sup> Bell Atlantic-Delaware et al. v. Global NAPs, Memorandum Opinion and Order, 15 FCC Rcd 12946, ¶ 24 (1999) (Global NAPs I); Bell Atlantic-Delaware et al. v. Global NAPs, Order on Reconsideration, 15 FCC Rcd 5997, ¶¶ 24-25 (2000) (Global NAPs I Recon Order); Bell Atlantic-Delaware et al. v. Global NAPs, Memorandum Opinion and Order, 15 FCC Rcd 20665 (2000) (Global NAPs II); Bell Atlantic-Delaware et al. v. Global NAPs, Order on Reconsideration, 17 FCC Rcd 7902, ¶ 22 (2002) (Global NAPs II Recon Order).

<sup>8</sup> Global NAPs, Inc. v. FCC, 247 F.3d 252, 258 (D.C. Cir. 2001).

<sup>9</sup> Global NAPs I Recon Order at ¶ 25.

<sup>10</sup> Ameritech Operating Companies et al., Order, 8 FCC Rcd 4589, 4605 ¶ (1993)

Commission has found that restrictions on commingling constitute an “undue and unreasonable prejudice or advantage” under section 202 of the Act.<sup>11</sup>

Furthermore, the proposed tariffs must be rejected as unlawfully vague and ambiguous in violation of section 61.2 of the Commission’s rules.<sup>12</sup> Because customers must consult the interconnection agreements, a customer cannot determine if the tariff applies simply by reading the tariff language itself.<sup>13</sup> Moreover, given the variety of existing interconnection agreements, and the possibility of future amendments to interconnection agreements, the Commission cannot readily determine whether the conditions set forth in the proposed tariffs are unambiguous.

## **II. The SBC Transmittals Violate the Triennial Review Order**

SBC’s proposal to condition the availability of commingling violate the Triennial Review Order in at least three respects:

- ? Pursuant to the Triennial Review Order, the incumbent LECs are required to “expressly permit” commingling. Obviously, tariff provisions that condition or limit the availability of commingling in any way are inconsistent with the requirement that incumbent LECs “expressly permit” commingling. Consequently, the Commission should require SBC to implement the Triennial Review Order’s commingling requirement without limitations or conditions. As other ILECs have shown (and BellSouth showed in Transmittal

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<sup>11</sup> Triennial Review Order at ¶ 581.

<sup>12</sup> 47 C.F.R. § 61.2.

<sup>13</sup> See, e.g., Global NAPs II Order at ¶ 22.

No. 742),<sup>14</sup> the “expressly permit” requirement can be tariffed in a straightforward manner by simply adding a single sentence that states that commingling is permitted.

- ? SBC’s proposal to permit commingling only “to the extent provided by . . . the requesting carrier’s interconnection agreement” is at odds with the Triennial Review Order. Because paragraph 581 states that incumbent LECs are to “effectuate” commingling through their interstate tariff filings, the Triennial Review Order precludes SBC from imposing the additional requirement that customers negotiate an interconnection agreement that permits commingling. Moreover, the Triennial Review Order’s requirement that incumbent LECs effectuate commingling through interstate tariff filings removes commingling issues from the state-supervised section 251/252 process.
- ? SBC’s proposal to tariff the conditions set forth in section 51.318(b) of the Commission’s rules is not permitted by the Triennial Review Order. First, the sole tariff change contemplated by the Triennial Review Order is an explicit statement that commingling is permitted. Second, tariffing of the conditions set forth in rule 51.318(b) is unnecessary because rule 51.318(b) does not even govern commingling; the sole purpose of rule 51.318(b) is to limit access to certain unbundled network elements.

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<sup>14</sup> See, e.g., ALLTEL Transmittal No. 130, filed October 2, 2003, proposed 1<sup>st</sup> revised page 6-1; 7-1; Cincinnati Bell Transmittal No. 786, filed October 2, 2003, proposed 2<sup>nd</sup> revised page 44; Frontier Telephone of Rochester Transmittal No. 71, filed October 2, 2003, proposed 3<sup>rd</sup> revised page 1-1

### **III. SBC's Anticipatory Terms and Conditions Are Unlawful**

In the above-captioned transmittals, SBC proposes language that states that the commingling provisions of its tariffs would cease to be effective “[i]n the event the Commission or a court . . . vacates, stays, remands, reconsiders or rejects the portion of the Triennial Review Order requiring ILECs to permit commingling.”<sup>15</sup> The proposed language states further that, unless customers converted the commingled UNEs or UNE combinations to a comparable service or disconnected such UNEs or UNE combinations within 30 days, SBC would begin billing for those facilities at month-to-month access rates.

The Commission should reject or, in the alternative, suspend and investigate the above-captioned transmittals because SBC's proposed anticipatory language is unlawful. First, SBC's proposed tariff language could be read to permit SBC to withhold commingling even if the commingling rule remains in effect, e.g., if the rule is merely remanded to the Commission. Second, SBC's proposal to tariff anticipatory language is both unjust and unreasonable. If the commingling rule is ultimately vacated, stayed, or reconsidered, SBC will have ample opportunity to amend its tariff to delete or modify the commingling language in its tariffs at that time. Any such tariff change would then be required to be consistent with the court or Commission decision, the potential for further appeals, and any new or interim rules subsequently adopted by the Commission.

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<sup>15</sup> See, e.g., SNET Transmittal No. 801 at proposed 5<sup>th</sup> revised page 5-1, footnote 1.

#### **IV. Conclusion**

For the reasons stated herein, the Commission should reject or, in the alternative, suspend and investigate the above-captioned transmittals.

Respectfully submitted  
WORLD COM, INC. d/b/a MCI

/s/ Alan Buzacott

Alan Buzacott  
1133 19<sup>th</sup> St. NW  
Washington, DC 20036  
(202) 887-3204  
FAX: (202) 736-6460

October 15, 2003

Statement of Verification

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on October 15, 2003.

/s/ Alan Buzacott  
Alan Buzacott  
1133 19<sup>th</sup> Street, NW  
Washington, DC 20036  
(202) 887-3204



## CERTIFICATE OF SERVICE

**I, Alan Buzacott, do hereby certify that copies of the foregoing Petition to Reject or, in the Alternative, Suspend and Investigate were sent via first class mail, postage paid, and by facsimile\*, to the following on this 15<sup>th</sup> day of October, 2003.**

Tamara Preiss\*\*  
Chief, Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

Judy Nitsche\*\*  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

Qualex International\*\*  
c/o FCC  
445 12<sup>th</sup> Street, SW  
Room CY-B402  
Washington, DC 20554

A. Alex Vega\*  
Area Manager – Tariff Administration  
Four Bell Plaza  
Room 1970.04  
Dallas, TX 75202  
FAX: (214) 858-0639

/s/ Alan Buzacott

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Alan Buzacott