Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Corporation	)	Transmittal No. 173
Tariff F.C.C. No. 1	)	

REPLY OF QWEST CORPORATION
TO PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE

Qwest Corporation ("Qwest") respectfully submits its Reply to the petitions filed by WorldCom, Inc. d/b/a MCI ("WorldCom") and 14 petitioners ("Joint Petitioners"), including AT&T Corp., to reject or suspend and investigate Qwest's above-captioned tariff revisions, which were filed on October 2, 2003.

Qwest filed these tariff revisions to implement the Federal Communications Commission's ("Commission") modification of its rules in the *Triennial Review Order* regarding the commingling of unbundled network elements ("UNE") and combinations of UNEs with interstate access services. In particular, Qwest modified its interstate access tariff, as required by paragraph 581 of the *Triennial Review Order*, "to expressly permit connections with UNEs and UNE combinations."[1] WorldCom and the Joint Petitioners object to Qwest's proposed tariff revisions, on the grounds that Qwest's tariff would require requesting carriers to go through the change of law process in order to take advantage of the Commission's new commingling rules. Since this is exactly the process contemplated in the *Triennial Review Order*, the Commission

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 ¶ 581 (rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*Order*"), *appeals pending sub nom. United States Telecom Association and SBC Communications Inc. v. FCC*, Nos. 03-1310, *et al.* (D.C. Cir. Oct. 1, 2003).

should reject the petitions and allow Qwest's tariff revisions to go into effect without further investigation.

I. QWEST'S PROPOSED TARIFF REVISIONS ARE FULLY CONSISTENT WITH THE *TRIENNIAL REVIEW ORDER*

As directed by the *Triennial Review Order*, Qwest has modified its interstate access tariffs "to expressly permit connections with UNEs and UNE combinations."[2] Qwest's proposed tariff revisions impose no restrictions on the availability of commingling, other than those that the Commission itself adopted in the *Triennial Review Order,* namely: (1) that the new commingling rules must be implemented through the change of law process that applies to all rule changes in the *Order*, and (2) that the requesting carrier satisfy the service eligibility criteria of 47 C.F.R. § 51.318(b) in order to obtain access to high-capacity loop-transport circuits.

In their petitions, WorldCom and the Joint Petitioners attempt to avoid both of these Commission-imposed conditions on commingling. This fact is best illustrated by the position articulated in WorldCom's petition. WorldCom argues that, regardless of the language in a carrier's interconnection agreement, the carrier is entitled to engage in commingling immediately pursuant to the incumbent's tariff.[3] Moreover, WorldCom asserts that the detailed restrictions on commingling adopted in the *Triennial Review Order* simply do not apply to commingling via tariff.[4] The Joint Petitioners take a similarly extreme position, contending that the new

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2 *Id.*

3 WorldCom Petition at 4-5. *See also* Joint Petition at 2-3.

4 WorldCom Petition at 5 ("The RBOCs proposed references to the conditions set forth in section 51.318(b) of the Commission's rules are not permitted by the Triennial Review Order."). Since WorldCom asserts that commingling will never occur pursuant to interconnection agreement, *id.,* it is not clear how it believes the restrictions in section 51.318(b) of the Commission's rules will ever come into play.

commingling rules can be implemented without a modification of a competitive local exchange carrier's ("CLEC") interconnection agreement.

The petitioners ignore the clear language of the *Triennial Review Order*. In the *Order*, the Commission adopted an entirely new set of rules for enhanced extended links ("EELs"), replacing the "local usage" requirements established in the *Supplemental Order Clarification*[5] with new "service eligibility" criteria that are intended to ensure that the circuits will be used for the provision of local telecommunications services. The Commission also eliminated the commingling restriction adopted in the *Supplemental Order Clarification*, subject to satisfaction of the service eligibility criteria for high-capacity loop-transport circuits. In doing so, the Commission acknowledged the existence of significant billing and operational issues that must be overcome in order to make commingling available, but found that these issues "can be addressed through the same process that applies for other changes in our unbundling requirements adopted [in the *Triennial Review Order*], *i.e.*, through change of law provisions in interconnection agreements."[6]

This statement is in line with the Commission's general approach to the implementation of new or modified rules adopted in the *Triennial Review Order*: "we believe that individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules."[7] The Commission

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5 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. CompTel v. FCC*, 309 F.3d 8 ("*CompTel*") (D.C. Cir. 2002)

6 *Triennial Review Order* ¶ 583.

7 *Id.* ¶ 700.

concluded that "the lag involved in negotiating and implementing new contract language [does not] warrant[] the extraordinary step of the Commission interfering with the contract process."[8]

The Commission also found that the section 252 change of law process would serve the useful purpose of providing a *de facto* "transition period" to give carriers time to adjust their business practices, and to make arrangements to accommodate their customers.[9] This was especially true with regard to the implementation of the new commingling rules, where the Commission expressed the expectation that "change of law provisions will afford incumbent LECs sufficient time to complete all actions necessary to permit commingling."[10]

Consistent with this language, Qwest has already initiated the section 252 process to negotiate and implement interconnection agreement language to cover all the requirements of the *Triennial Review Order*, including the new commingling rules. Qwest is also implementing the substantial changes to its systems and processes that are necessary to permit commingling of UNEs with wholesale services. WorldCom and the Joint Petitioners seek to short circuit these processes, by obtaining the ability to commingle immediately via tariff, without any need to modify their interconnection agreements or allow the incumbents an opportunity to take the steps necessary to implement this requirement.

In many cases, Qwest's interconnection agreements contain a prohibition on commingling, consistent with the Commission's ruling in the *Supplemental Order Clarification*, and the D.C. Circuit's decision in *CompTel*[11] that affirmed that ruling. Other Qwest interconnection agreements are silent on this issue, neither explicitly allowing commingling nor

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8 *Id.* ¶ 701.

9 *Id.*

10 *Id.* ¶ 583.

11 *CompTel v. FCC*, 309 F.3d 8.

explicitly prohibiting it. Both categories of interconnection agreements must be modified through the change of law process in order to implement the new commingling rules. It would be wrong to conclude that no contract amendment is necessary for the second category of agreements. At least in this case, silence cannot be interpreted to mean assent. Prior to the *Triennial Review Order*, the issue of commingling had either been irrelevant or was specifically prohibited by the Commission's rules.[12] Thus, silence on this issue in an interconnection agreement could just as easily be interpreted as either a bar on, or allowance of, commingling. In short, WorldCom and the Joint Petitioners are seeking to "negate" the terms of these interconnection agreements, which the Commission specifically declined to do in the *Triennial Review Order*. Surely, the Commission did not intend for the Wireline Competition Bureau to take such action in its review of the tariff revisions required by paragraph 581 of the *Order*.

There is no question that the Commission's new commingling rules should be addressed in the parties' interconnection agreements. Despite the detailed nature of the Commission's commingling and EELs rules, there will be numerous implementation and operational issues that need to be resolved by the parties. Furthermore, given the complexity of the commingling rules, there is a significant possibility that the parties will have "differing interpretations" of the

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[12] This issue has a complex procedural history. In the *Local Competition First Report and Order*, the Commission adopted a transition mechanism to avoid the conversion of interstate access services to UNEs. Prior to the expiration of this transition period, relevant portions of the Commission's UNE rules were stayed by the Eighth Circuit and then remanded by the Supreme Court. Thus, the commingling issue did not have significance until the *UNE Remand Order*, when the Commission allowed requesting carriers to obtain combinations of loops and transport on an unrestricted basis. Shortly after the *UNE Remand Order*, the Commission adopted the commingling prohibition that persisted until the *Triennial Review Order*. *See Supplemental Order Clarification*, 15 FCC Rcd at 9599-00 ¶ 22, 9602 ¶ 28.

Commission's rules, which, in the first instance, are best resolved through the section 252 process.[13]

In addition to their attempt to undermine the change of law process, the petitioners also seek to evade the other restrictions on commingling adopted by the Commission in the *Triennial Review Order*. In reviewing the *Supplemental Order Clarification*, "the D.C. Circuit deduced that a commingling ban would appear to prevent gaming because 'commingling will allow the entire base of the loop or "channel termination" portion of special access circuits to be converted into unbundled loops.'"[14] While the Commission eliminated this ban in the *Triennial Review Order*, it took other steps to prevent wide scale conversion by long-distance providers.[15] The *Order* allows a requesting carrier to commingle a high capacity unbundled loop with special access transport, only if the commingled circuit would satisfy the service eligibility criteria set forth in section 51.318(b) of the Commission's rules.[16] Despite this clear language, WorldCom remarkably asserts that Qwest's tariff must be rejected if it "condition[s] or limit[s] the availability of commingling *in any way*."[17] The Commission specifically rejected this position in the *Triennial Review Order* and must reject it here as well.

Contrary to petitioners' assertion, the tariffing requirements of paragraph 581 cannot be read in isolation, divorced from the principles established by the Commission in the commingling section of the *Triennial Review Order* and the *Order* as a whole. Qwest's

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13 *Triennial Review Order* ¶ 700.

14 *Id.* ¶ 593 (citing *CompTel*, 309 F.3d at 17-18).

15 *See id.* ¶ 599.

16 47 C.F.R. § 51.318(b). This rule imposes similar restrictions on other types of commingling as well.

17 WorldCom Petition at 4 (emphasis supplied).

proposed tariff revisions properly include the conditions on commingling established by the Commission in the *Order*.

II. QWEST'S TARIFF REVISIONS DO NOT VIOLATE THE COMMISSION'S TARIFFING RULES

Both WorldCom and the Joint Petitioners assert that Qwest's tariff should be rejected or suspended because it refers to the Commission's rules and requesting carriers' interconnection agreements. As discussed above, the *Triennial Review Order* specifically contemplates that the obligation to permit commingling is conditioned on the modification of a carrier's interconnection agreement and its compliance with the restrictions in section 51.318(b) of the Commission's rules. Thus, to the extent the Commission's rules generally prohibit the conditioning of a tariff obligation on an interconnection agreement or other outside document, the Commission effectively carved out an exception to that rule in the *Triennial Review Order* regarding tariff changes to effectuate commingling.

III. CONCLUSION

For the reasons discussed above, the Commission should reject the petitions filed by WorldCom and the Joint Petitioners and permit Qwest's proposed tariff revisions to go into effect without further investigation.

Respectfully submitted,

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October 15, 2003

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY OF QWEST CORPORATION TO PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE** to be filed with the FCC via its Electronic Tariff Filing System, and served on the parties on the attached service list as indicated below, either via email or facsimile and/or First Class United States mail, postage prepaid.

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