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

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

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 8, 2003 (with an effective date of October 23, 2003) by the Ameritech Operating Companies, Nevada Bell Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone Company, and Southern New England Telephone Company (collectively "SBC").

[1] Joint Petitioners are: AT&T Corp., Birch Telecom, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Choice One Communications Inc., CoreComm, Newco, Inc., Eschelon Telecom, Inc., Focal Communications Corporation, Global Crossing North America, Inc., McGraw Communications, Inc., RCN Telecom Services, Inc.; RCN Telecom Services of Illinois, LLC., XO Communications, Inc.

SBC's proposed tariff revisions 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 proposed tariff revisions, which would deny or delay carriers' rights to commingle on the basis of 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]

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[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; 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).

The Proposed Tariff Revisions Violate The Commission's Prohibition Against Commingling Restrictions. The proposed tariff revisions violate the Commission's 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 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]

SBC proposes just such unlawful restrictions on commingling. SBC's proposed tariff revisions appear to restrict commingling where an existing interconnection agreement does not address commingling. *See* Ameritech Proposed Revisions, Tariff F.C.C. No. 2, § 5.1.1 (limiting commingling "to the extent provided by and subject to the terms and conditions of the requesting telecommunications carrier's interconnection agreement with the Telephone Company").[6] Under the Commission's new rules, however, where an interconnection agreement does not expressly impose commingling restrictions on the use of network elements available under the agreement (as is often the case),[7] the incumbent LEC has no authority to restrict or delay those carriers'

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

[6] *See also* Nevada Bell Telephone Company Revisions, Tariff F.C.C. No. 51, § 5.1.1 (same); Pacific Bell Telephone Company Revisions, F.C.C. Tariff No. 1, § 5.1.1 (same); Southern New England Telephone Company Revisions, F.C.C. Tariff No. 39, § 5.1.1 (same); Southwestern Bell Telephone Company, F.C.C. Tariff No. 73, § 5.2.1 (same).

[7] Many interconnection agreements are silent on the issue of commingling, because SBC and

rights to commingle. Yet, SBC'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)).[8]

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"[9] and means that "cross-referencing of an exogenous document renders the challenged tariff provisions unlawful."[10] 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)]."[11] Moreover, the Commission has emphasized that compliance with 47 C.F.R. § 61.74(a) is necessary "[i]n order to comply with section 201(b) of the act."[12] SBC's proposed

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(…continued)
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 SBC has no authority to condition that right on the re-negotiation and modification of interconnection agreements.

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

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

[10] 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)").

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

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

tariff revisions cross-reference and are expressly contingent upon the terms of individual interconnection agreements, and thus violates section 61.74(a) of the Commission's rules and Section 201(b) of the 1996 Act. SBC's proposed tariff revisions state that commingling is permitted only to the extent "provided by and subject to the terms and conditions of the requesting telecommunications carrier's *interconnection agreement* with the Telephone Company (or, if applicable, the Telephone Company *intrastate tariffs*)."[13]

Moreover, SBC has not received a waiver of Rule 61.74, nor could it. SBC has not "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 it to comply with the rule.[14] 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 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

[13] Ameritech Proposed Revisions, Tariff F.C.C. No. 2, § 5.1.1. *See also* Nevada Bell Telephone Company Revisions, Tariff F.C.C. No. 51, § 5.1.1 (same); Pacific Bell Telephone Company Revisions, F.C.C. Tariff No. 1, § 5.1.1 (same); Southern New England Telephone Company Revisions, F.C.C. Tariff No. 39, § 5.1.1 (same); Southwestern Bell Telephone Company, F.C.C. Tariff No. 73, § 5.2.1 (same).

[14] 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").

> commingled. Unbundled network elements or combinations of unbundled network elements that are commingled with access services are not available through this tariff.[15]

SBC'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.

[15] 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 SBC.

Respectfully Submitted,

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October 15, 2003

CERTIFICATE OF SERVICE

I, Peter Andros, do hereby certify that on this 15th 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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