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

In the Matter of Petition of Granite Telecommunications, LLC for Declaratory Ruling Regarding the Separation, Combination, and Commingling of Section 271 Unbundled Network Elements	WC Docket No. 15-114

COMMENTS OF AT&T

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COMMENTS OF AT&T

AT&T Services, Inc., on behalf of itself and its affiliates, hereby submits Comments in response to the Petition for Declaratory Ruling of Granite Telecommunications, LLC.

INTRODUCTION AND SUMMARY

Today's telecommunications marketplace looks nothing like it did in 1996, when Congress passed the 1996 Act, including the preconditions for allowing Bell Operating Companies ("BOCs") to provide long-distance service. In the ensuing 19 years, the marketplace has become robustly competitive, and any market power the BOCs once had in the provision of telephony services has dissipated completely. Indeed, incumbent LECs in AT&T states served fewer than 25% of all housing units at the end of 2013, and are estimated to serve fewer than 20% today. Incumbent LECs' local networks thus bear no resemblance to the bottleneck facilities that animated the market-opening provisions of the 1996 Act. Meanwhile, long-distance service, which was the basis for section 271 requirements hardly remains a distinct service at all, as all-distance services offered over a plethora of competing platforms have all but displaced long-distance service as a discrete offering.

Despite these cataclysmic changes, incumbent LECs continue to face anachronistic and burdensome wholesale obligations pursuant to section 251. Those obligations include unbundling and resale requirements pursuant to which competitive local exchange carriers ("CLECs") may obtain combinations of network elements and finished services at wholesale rates. It is long past time for the Commission to revisit its impairment analysis and to put to bed many if not all of these requirements. But, regardless, there is absolutely no reason why Bell Operating Companies (BOCs) should remain subject to section 271 unbundling, let alone the expanded section 271 requirements sought by Granite. The Commission should reject the Granite petition ("Petition") and promptly grant US Telecom's petition for forbearance from section 271 requirements.[1]

As discussed below, Granite's request that the Commission extend to section 271 services, the network element combination and comingling rules that govern the provision of unbundled network elements under section 251 is both substantively and procedurally flawed. It is substantively flawed, not only because it seeks an expansion of obligations that no longer serve any useful purpose, and should therefore be eliminated, but because it ignores the operative statutory language. Unlike section 251, section 271 specifies that BOCs provide loops, switching, and transport "unbundled from . . . other services." That is why in the *Triennial Review Order*, the Commission "decline[d] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[2] And it also is why, in a brief submitted more recently to the Sixth Circuit Court of Appeals, the Commission

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[1] *Petition for Forbearance of the United States Telecom Association*, WC Docket No. 14-92, October 6, 2014 ("USTelecom Petition" or "*USTelecom Pet.*").

[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*, 18 FCC Rcd 16978, ¶ 655 n.1990 (2003) ("*Triennial Review Order*" or "*TRO*").

stated that "[s]ection 271 . . . does not require BOCs to combine the checklist items upon a CLEC's request."[3] Moreover, the Commission confirmed that its commingling rule applies only where a CLEC seeks to link a section 251(c)(3) UNE with a wholesale facility or service, and does not require linking of two wholesale facilities or services.[4]

Each of the three declaratory rulings Granite seeks, therefore, is squarely contrary to the text of the statute and the Commission's existing regulations. Moreover, Granite clearly seeks those declaratory rulings in an effort to recreate a regulatorily-mandated UNE Platform, which it currently obtains through commercial agreements.[5] But the Commission assured the Sixth Circuit — in no uncertain terms — that "no BOC is obligated under the FCC's rules . . . to combine the unbundled local circuit switching and shared transport pieces of what used to comprise the now-defunct UNE-Platform to satisfy its commingling duties."[6]

In addition to being substantively flawed, Granite's petition is procedurally improper. For one thing, Granite identifies no pending controversy warranting the declaratory ruling it seeks. On the contrary, Granite and AT&T recently renewed their commercial agreement for section 271 services, and Granite's CEO praised that agreement as being "great" for Granite and its customers. Granite asserts that a statement in USTelecom's reply comments in support of its Petition for Forbearance created "uncertainty," but USTelecom simply stated that the

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[3] *See* Brief for Amicus Curiae Federal Communications Commission in Support of Defendants-Appellants, Cross-Appellees and Partial Reversal of the District Court at 6, *BellSouth Telecomms. Inc. v. Kentucky Pub. Serv. Comm'n*, Case Nos. 10-5310 & 10-5311 (6th Cir. filed Dec. 6, 2011) ("FCC *Amicus* Brief"), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-311384A1.pdf (last checked June 12, 2015).

[4] *See id.* at 16.

[5] *See* Petition at 7 (claiming that Granite "purchas[es] combinations of unbundled DS0 loops, shared transport, and local switching from the BOCs," pursuant to "commercial negotiations").

[6] FCC *Amicus* Br. at 17.

Commission has held that BOCs are not required to combine section 271 services with each other — exactly what the Commission told the Sixth Circuit. Beyond that, Granite's requests flout the Administrative Procedure Act by seeking new rules under the guise of declaratory rulings. When the Commission required combinations of section 251(c)(3) UNEs and comingling of those UNEs and wholesale services, it did so in a rulemaking proceeding. No reasonable argument can be made that those decisions required combinations of section 271 services or commingling sections 271 services with other wholesale services. Thus, even if the Commission were to take the astounding step of *expanding* section 271 obligations at this time, it would have to do so through a notice and comment rulemaking proceeding, not a declaratory ruling purporting to clarify existing law.

DISCUSSION

I. FAR FROM CREATING NEW REGULATORY OBLIGATIONS UNDER § 271 THE COMMISSION SHOULD FORBEAR FROM THE REMAINING ONES

Instead of creating new regulatory requirements under section 271, the Commission should forbear altogether from any requirements that the BOCs provide local loop transmission, local transport, and local switching under section 271. These requirements were enacted to ensure that a BOC's markets were open to competition before it was permitted to provide in-region interLATA services.[7] It has now been twelve years since the Commission granted the last section 271 application, and there can be no question that the purpose of these provisions has been fully realized.[8] Indeed, at the end of 2013, incumbent LECs in AT&T states served fewer

[7] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al*., WC Docket No. 01-338, et al., Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004).

[8] The last 271 application approval was granted in 2003. *See* Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services

than 25% of all housing units, and it was projected that just one year later, they would serve fewer than 20%. This precipitous decline in the percent of households served was a direct result of surging competition across multiple platforms – circuit-switched telephony services provided by CLECs, facilities-based VoIP services; over-the-top VoIP services; text messaging and email services and other applications provided over broadband platforms, and, of course, wireless services, prices for which have dropped precipitously, even amidst extraordinary advances in service quality and functionality.

Meanwhile, interLATA service, which was the carrot offered for complying with section 271 requirements, and the basis for its market-opening provisions, hardly remains a distinct service at all. Instead, it has been displaced by all-distance services offered over a plethora of competing platforms. Under these circumstances, there is no ongoing need for section 271 checklist requirements at all.[9]

In its Petition for Forbearance, USTelecom catalogues these seismic changes in the telecommunications landscape with statistics derived from the Commission reports. Among other facts, it notes:

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in Arizona, WC Docket No. 03-194, *Memorandum Opinion and Order*, 18 FCC Red 25504, ¶ 2 (2003).

[9] Because the BOCs, as ILECs, are also bound by the requirements of section 251(c), including the requirement to provide section 251(c)(3) UNEs, forbearing from the section 271 checklist requirements will not prevent CLECs from obtaining loops or transport in those areas where the Commission has found that impairment exists. Although a strong argument could be made that, in this competitive marketplace, the Commission's 2005 impairment findings are no longer sustainable and section 251(c)(3) UNE requirements should be eliminated — or substantially reduced — there clearly is no sound basis to maintain the section 271 checklist requirements given the backstop of the Commission's 10-year-old section 251(c)(3) UNE rules. As discussed further herein, the Commission should promptly grant USTelecom's Petition for Forbearance.

- As of June 2013, ILECs served a total of 78.5 million switched voice and VoIP access lines – *just 44 percent* of the 178 million they served at the end of 2000;[10]

- Traditional switched lines had fallen to 70.5 million by June 2013, or only 40 percent of lines served at the end of 2000[11].

- Fixed broadband subscriptions for telecommunications, cable, satellite, and fixed wireless providers have grown from seven million at the end of 2000 to 94 million mid-2013[12];

- Mobile broadband subscriptions from multiple national and regional wireless providers have grown from three million at the end of 2005 to 181 million mid-2013[13];

- By the end of 2012, virtually 100 percent of all U.S. households were located in Zip Codes with at least one non-ILEC interconnected VoIP provider, and 92 percent were in Zip Codes with ten or more such providers[14];

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[10] *USTelecom Pet.* at 9, *comparing* Industry Analysis and Technology Div., FCC, *Local Telephone Competition: Status as of June 30, 2009* at 12, Table 1 (Sept. 2010) *("2009 Local Telephone Competition Report"), available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-305297A1.pdf *with* Industry Analysis and Technology Div., FCC, *Local Telephone Competition: Status as of June 30, 2013* at 12, Table 1 (June 2014) *("Mid-2013 Local Telephone Competition Report"), available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327830A1.pdf. (last checked June 12, 2015).

[11] *See id., comparing 2009 Local Telephone Competition Report* at 12, Table 1, with *Mid-2013 Local Telephone Competition Report* at 5, Figure 4. Indeed, last year, Chairman Wheeler himself remarked, "[d]ue in part to outdated rules, the majority of the capital investments made by U.S. telephone companies from 2006 to 2011 went toward maintaining the declining telephone network, despite the fact that only one-third of U.S. households use it at all." *See* Tom Wheeler, Chairman, FCC, Prepared Remarks at Silicon Flatirons, University of Colorado Law School, Boulder, Colorado at 5 (Feb. 10, 2014), available at https://www.fcc.gov/document/fcc-chairman-tom-wheeler-remarks-silicon-flatirons (last checked June 12, 2015).

[12] *USTelecom Pet*. at 8, *comparing* Industry Analysis Div., FCC, *High Speed Services for Internet Access: Status as of December 31, 2000* at Table 1 (Aug. 2001), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0801.pdf *with* Industry Analysis and Technology Div., FCC, *Internet Access Services: Status as of June 30, 2013* at Table 1 (June 2014) *("Mid-2013 Internet Access Report"), available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327830A1.pdf. (last checked June 12, 2015).

[13] *See id.*

[14] *See id.* at 9.

- Approximately 97 percent of the U.S. population is covered by the networks of at least four mobile voice providers, close to 93 percent is covered by the networks of at least four mobile voice providers, and about 80 percent is covered by five[15]; and

- There were more than 305 million wireless voice connections in the U.S. as of mid-2013; more than double the number of in-service access lines mid-2013[16].

USTelecom also showed that wireless and cable companies have had stunning success in winning over former ILEC wireline customers:

- 41 percent of U.S. households were using wireless voice service in lieu of a landline connection by the second half of 2013;[17]

- According to NCTA's website, in October 2014, there were 28 million cable telephony subscribers, which is more than a tenfold increase since 2004[18]; and

- Comcast is the third largest provider of residential voice services in the country.[19]

The statistics for the long distance marketplace tell an even more compelling tale of competition and displacement of traditional, stand-alone wireline long-distance service:

- Interstate switched access minutes of use, the most readily available proxy for interstate long distance traffic, declined from 567 billion in 2000 to 161 billion in 2013, a drop of 72 percent[20];

- Interstate switched access minutes declined by 188 billion minutes from 2007 to 2013, and were falling at a rate of 24 billion minutes per year in 2013[21]; and

- As of June 30, 2013, ILEC lines represented just 18 percent of voice connections — with switched ILEC lines representing 16 percent of voice connections and interconnected voice ILEC lines representing another 2 percent.[22]

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[15] *See id*. at 11.

[16] *See id.*

[17] *See id*. at 12.

[18] *See id*. at 55.

[19] *See id.*

[20] *See id.* at 19.

[21] *See id.*

[22] *See id.* at 20. In contrast, 69 percent of voice connections were wireless, and the rest were interconnected VoIP. *See id.*

These figures unquestionably demonstrate both that consumers have myriad competitive options to using the traditional wireline network for voice service and that they are using them in large and ever-increasing numbers. Accordingly, far from expanding section 271 unbundling requirements, as Granite requests, the Commission should forbear from any further application of those requirements.

II. THE DECLARATORY RULINGS GRANITE SEEKS ARE FORECLOSED BY THE TEXT OF THE STATUTE AND THE COMMISSION'S INTERPRETATION OF THE STATUTE AND ITS REGULATIONS

The competitive checklist requires BOCs that seek, or have obtained, long-distance authority under section 271 to provide "local loop transmission," "[l]ocal transport," and "[l]ocal switching."[23] In each case, the checklist requires BOCs to provide those section 271 services "*unbundled from . . . other services*," including from other 271 services.[24] Thus, local loops must be provided "unbundled from local switching or other services."[25] Local transport must be provided "unbundled from switching or other services."[26] And local switching must be provided "unbundled from transport, local loop transmission, or other services."[27] These overlapping provisions make clear that there is no statutory obligation for BOCs to provide section 271 services in combination with the other section 271 services these checklist items require, or with other services, such as those provided under tariff.

This is exactly how the Commission has consistently applied section 271. In the *Triennial Review Order*, the Commission stated clearly that it would not "require BOCs, pursuant to section 271, to combine network elements that no longer are required to be

[23] 47 U.S.C. § 271(c)(B)(iv)-(vi).

[24] *See* id. (emphasis added).

[25] *See id.* § 271(c)(2)(B)(iv).

[26] *See id.* § 271(c)(2)(B)(v).

[27] *See id.* § 271(c)(2)(B)(vi).

unbundled under section 251."[28] The Commission noted further that, "[u]nlike section 251(c)(3)," the competitive checklist "contain[s] no mention of 'combining' and . . . do[es] not refer back to the combination requirement set forth in section 251(c)(3)."[29]

The Commission reiterated that interpretation in an *amicus* brief filed at the request of the Sixth Circuit in 2011. In that case, the Kentucky Public Service Commission had required AT&T Kentucky to commingle section 271 services with section 251(c)(3) UNEs or combinations of section 251(c)(3) UNEs.[30] The Commission explained to the Sixth Circuit that such commingling of section 251(c)(3) UNEs and section 271 services is required by the Commission's commingling rule, which implements the section 251(c)(3) unbundling duty.[31] But the Commission went on to explain that BOCs' combination and commingling obligations with respect to section 271 services are limited to commingling them with section 251(c)(3) UNEs.

First, the Commission stated that "[s]ection 271 . . . does not require BOCs to combine checklist items upon a CLECs' request," but instead "require[s] BOCs to offer those items . . . unbundled from one another."[32] The Commission noted that the D.C. Circuit had endorsed the Commission's understanding that the absence of "a duty to combine network elements" is one of the "important respects" in which the obligations under the checklist differ from the section

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[28] *Triennial Review Order* ¶ 655 n.1990.

[29] *See id.* Section 251(c)(3), in addition to requiring the unbundling of network elements for which the Commission makes the statutorily required impairment finding, requires incumbent LECs to provide section 251(c)(3) UNEs "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). No such obligation appears in section 271.

[30] *See BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 708 (6th Cir. 2012).

[31] *See* FCC *Amicus* Br. at 10-11, 22 (citing 47 C.F.R. § 51.309(e)).

[32] *See id.* at 6.

251(c)(3) unbundling duty.[33] Second, the FCC explained that its combination and commingling rules "only require ILECs to 'combine' section 251(c)(3) UNEs with other section 251(c)(3) UNEs" and to "commingle[] . . . a section 251(c)(3) UNE to . . . a wholesale facility or service, a universe that includes section 271 checklist offerings."[34] Third, the Commission stated specifically — and starkly — that "no BOC is obligated under the FCC's rules . . . to combine the unbundled local circuit switching [required under checklist item 6] and shared transport [required under checklist item 5]."[35]

The three declaratory rulings that Granite seeks run headlong into these clear, statutorily-mandated, Commission pronouncements. The first two declaratory rulings would require BOCs to provide a CLEC with combinations of section 271 services — whether by providing them as a pre-combined service where they are already attached in the BOC's network or by combining them at the CLEC's request where they are not already combined.[36] But that is precisely what the Commission held in the *Triennial Review Order* and stated clearly to the Sixth Circuit that BOCs are *not* required to do. The third declaratory ruling would require BOCs to commingle section 271 services with other wholesale services obtained from the BOC.[37] Again, the Commission stated clearly to the Sixth Circuit that the Commission's commingling rule implements section 251(c)(3) and, therefore, requires the presence of a section 251(c)(3) UNE in any commingling arrangement.

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[33] *See id., citing, USTA v. FCC*, 359 F.3d 554, 589 (D.C. Cir. 2004) ("*USTA II*").

[34] *See* FCC *Amicus* Br at 16.

[35] *See id.* at 17.

[36] *See* Petition at 2.

[37] *See id.*

Granite contends that sections 201 and 202(a) support the combination and commingling rules it seeks to impose.[38] But that position cannot be squared with the Commission's clear statements to the Sixth Circuit that "no BOC is obligated" to combine section 271 services.[39] Moreover, the Commission assured the Sixth Circuit that, under no circumstances, could a CLEC compel a BOC to "re-create the UNE-Platform" by combining local switching and shared transport provided as section 271 services and then commingling that combination with a section 251(c)(3) UNE loop.[40] Yet it is clear that this is precisely what Granite seeks to have the Commission mandate under sections 201 and 202(a). Granite notes that it offers service to retail customers "by purchasing combinations of unbundled DS0 loops, shared transport, and local switching from the BOCs."[41] Granite currently obtains that service pursuant to "commercial[ly] negotiat[ed]" agreements — such as AT&T's Local Wholesale Complete — and *not* pursuant to any regulatory mandate.[42]

In all events, Granite is wrong in claiming that sections 201 or 202(a) could provide the basis for a section 271 combinations rule, or a requirement to commingle section 271 elements with other wholesale services obtained from a BOC. As shown above, the competitive checklist requires BOCs to provide section 271 services unbundled from not only other section 271 services, but also from other services. And, unlike section 251(c)(3), the competitive checklist contains no combinations requirement. Because the specific terms of section 271 govern BOCs' obligations with respect to section 271 services, the Commission cannot rely on the general

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[38] *See, e.g.*, Petition at 9.

[39] *See* FCC *Amicus* Br. at 17.

[40] *See id.*

[41] Petition at 7.

[42] *See id.*

provisions of sections 201 or 202(a) to impose a combinations or commingling requirement that is contrary to the plain language of section 271.[43]

Furthermore, the Commission and D.C. Circuit have recognized that the competitive checklist does "not incorporate any of the specific requirements of § 251(c)(3), including the nondiscrimination prohibition specific to that section."[44] The Commission long ago found that "Congress did not intend that the term 'nondiscriminatory' in the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a *more stringent standard*" in § 251(c).[45] Because the Commission's combinations and commingling rule are both grounded in section 251(c)(3) and that more stringent nondiscrimination standard, the Commission could not locate identical obligations in sections 201 or 202(a).

Finally, mandating that BOCs combine section 271 services or commingle them with other wholesale services would be inconsistent with the Commission's determination that, under § 201 and § 202, a BOC must offer section 271 services at *market* rates, terms, and conditions — such as where it has entered into "arms-length agreements" with its competitors — and not at rates, terms, and conditions established by *regulation*.[46] Because section 271 services are those

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[43] *See, e.g.*, *Norwest Bank Minnesota Nat. Ass'n v. FDIC*, 312 F.3d 447, 451 (D.C. Cir. 2002) ("When both specific and general provisions cover the same subject, the specific provision will control . . . .").

[44] *USTA II*, 359 F.3d at 589.

[45] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 217 (1996) (emphasis added). Although the Commission, there, was comparing the standards in § 251(c)(2) and § 202, the language in § 251(c)(2) that the Commission found dispositive also appears in § 251(c)(3). *Compare* 47 U.S.C. § 251(c)(2)(D) ("on rates, terms, and conditions that are just, reasonable, and nondiscriminatory") *and id.* § 251(c)(3) ("on rates, terms, and conditions that are just, reasonable, and nondiscriminatory") *with id.* § 202(a) ("unjust or unreasonable discrimination").

[46] *Triennial Review Order* ¶ 664; *see also* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the*

for which the Commission has concluded that competition is possible *without* unbundled access under section 251(c)(3), CLECs will have the option of going elsewhere, or self-provisioning, if they are dissatisfied with the BOC's offer.

III. IN ADDITION TO ITS SUBSTANTIVE FLAWS, THE PETITION IS PROCEDURALLY DEFECTIVE IN TWO CRITICAL RESPECTS

A. The Petition Fails to Raise a Claim or Controversy

Although the Commission is authorized to issue declaratory rulings "to terminate a controversy or remove uncertainty,"[47] Granite fails to identify any actual pending controversy, and its claim of "uncertainty" is entirely of its own creation.

First, Granite asserts that it will be unable "to obtain viable wholesale agreements with the BOCs" absent Commission action.[48] But Granite provides no support for that claim. On the contrary, Granite acknowledges that it already has commercial agreements with BOCs.[49] In fact, AT&T and Granite just last year reached an agreement to extend their commercial agreement through 2017.[50] At that time, Granite's CEO, President, and Founder stated that Granite "could not be more pleased to continue our successful collaboration with AT&T" and described the commercial agreement as "great for both AT&T and Granite, but most important is the benefit for Granite's customers, who can count on receiving high quality communications products and

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Telecommunications Act of 1996, 15 FCC Rcd 3696, ¶ 473 (1999) ("the market price should prevail" for 271 elements, "as opposed to a regulated rate").

[47] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

[48] Petition at 8.

[49] *See id.* at 7.

[50] *See* Granite Telecommunications, LLC Press Release (Oct. 28, 2014), *available at* http://www.granitenet.com/GetFile/Granite%20and%20ATT%20Extend%20Commercial%20Agreement.pdf (last checked June 12, 2015).

services for many years to come."[51] Granite plainly has a "viable" commercial agreement with AT&T. And the Petition contains no evidence calling into question the "viability" of Granite's commercial agreements with any other BOCs.

Second, the only evidence of "uncertainty" to which Granite points is a statement in USTelecom's reply comments in support of its Petition for Forbearance.[52] In those reply comments, USTelecom stated that "the Commission has held that the former Bell Operating Companies are not required to combine Section 271 network elements — like local switching and shared transport — with one another."[53] As shown above, that statement is entirely accurate. The Commission did, in fact, hold in the *Triennial Review Order* that BOCs are not required to combine section 271 services, as the Commission informed the Sixth Circuit in its *amicus* brief. USTelecom cannot create "uncertainty" by saying the same thing the Commission told a federal court of appeals. In any event, granting USTelecom's forbearance petition would moot any possible "uncertainty" about BOCs' commingling and combinations obligations with respect to section 271 services. As explained above, the Commission should grant that petition promptly.

B. The Commission Could Not Adopt New Combinations or Commingling Requirements Through a Petition for Declaratory Ruling

It is clear that BOCs are currently under no obligation to combine section 271 services or to commingle those services with other wholesale services. Any new rule imposing such obligations for the first time would work a substantive change in the law that could be achieved only through a rulemaking proceeding, pursuant to notice and comment.

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[51] *See id.*

[52] *See* Petition at 6.

[53] US Telecom Reply Comments at 11, WC Docket No. 14-192 (Dec. 22, 2014).

An agency cannot change its existing rules under the guise of a clarification or interpretation. The Supreme Court has made clear that, if an agency effects "a substantive change" in an existing regulation, a notice-and-comment rulemaking is required.[54] Likewise, the D.C. Circuit has held that new rules that work "substantive changes"[55] or "major substantive legal additions"[56] to prior regulations are subject to the APA's rulemaking procedures.[57] As the court in *Sprint* explained, "when an agency changes the rules of the game . . . more than a clarification has occurred."[58] Thus, "fidelity to the rulemaking requirements of the APA" bars courts from permitting agencies to use the declaratory ruling process to "avoid those requirements by calling a substantive regulatory change an interpretative rule."[59] Under these well-established tenets, the Commission has recognized that "a declaratory ruling may not be used to substantively change a rule" and avoid the APA's rulemaking requirements.[60]

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[54] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100-01 (1995) (internal quotation marks omitted); *see 5* U.S.C. § 553.

[55] *Sprint Corp.* v. *FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

[56] *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

[57] *See also Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) *("Alaska Prof'l Hunters")* ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule *....");Am. Mining Cong.* v. *Mine Safety & Health Admin., 995* F.2d 1106, 1109 (D.C. Cir. 1993) ("If a second rule repudiates or is irreconcilable with [a prior rule], the second rule must be an amendment of the first .... ") (quotation mark omitted).

[58] *Sprint*, 315 F.3d at 374; *see also SBC Inc.* v. *FCC*, 414 F.3d 486, 497-498 (3d Cir. 2005).

[59] *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 33-35 (D.C. Cir. 2005); *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

[60] *Auditory Assistance Device Order*, 26 FCC Red at 136031 ¶ 10 & n.22 (citing *U.S. Telecom Ass'n*, 400 F.3d at 35); *Travelers Information Stations, et al.*, 25 FCC Red 18117, 181211 ¶ 12 & n.37 (2010) ("[A] declaratory ruling may not be used to substantively change a policy.") (citing *U.S. Telecom Ass'n*, 400 F.3d at 35).

There is no question that in this instance, the Petition "bear[s] all the hallmarks of [the] product[ ] of rulemaking, not adjudication."[61] First, it has purely prospective effect, which is "the central distinction between rulemaking and adjudication."[62] Second, and relatedly, the Petition, if granted, would affect "the rights of broad classes of unspecified individuals" rather than "resolv[ing] [a] dispute[ ] among specific individuals in [a] specific case[ ]."[63] Third, the "basic distinction between rulemaking and adjudication" is between "proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."[64] Although agencies may announce general legal principles in adjudication,[65] the Supreme Court has explained that doing so may be appropriate only where "[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility."[66] Here, by contrast, Granite urges the Commission to establish a generalized standard to apply across various and as-yet-unidentified factual circumstances. Indeed, when the Commission required combinations of section 251(c)(3) UNEs and commingling of those UNEs and wholesale services, it did so in a rulemaking proceeding.

In short, the Petition would have the Commission promulgate new regulations. Such a result cannot be achieved through a petition for declaratory ruling, providing yet another reason for the Commission to deny the petition.

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[61] *City of Arlington v. FCC*, 668 F.3d 229, 242 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[62] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring); *see also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

[63] *Yesler*, 37 F.3d at 448.

[64] *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973).

[65] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[66] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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