

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**OPPOSITION OF CENTURYLINK**

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CenturyLink hereby files this Opposition to Granite’s Petition for Declaratory Ruling in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY.**

Granite Telecommunications, LLC (Granite) asks for “clarification” of the *Triennial Review Order*<sup>2</sup>—a clarification that would be flatly inconsistent with that 2003 decision, as confirmed both by the language of the *TRO* and a 2011 *amicus* brief filed by the Commission. In particular, Granite asks the Commission to adopt rules—pursuant to Sections 202(a) and 201(b) of the Act<sup>3</sup>—requiring a Bell Operating Company (BOC) to refrain from separating “Section 271 elements”<sup>4</sup> that are already combined in the BOC’s network; to combine, upon request, Section

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<sup>1</sup> 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 (filed May 4, 2015) (*Petition*). These comments are filed by, and on behalf of, CenturyLink, Inc. and its regulated subsidiaries.

<sup>2</sup> *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, 18 FCC Rcd 16978 (2003) (subsequent history omitted) (*TRO*).

<sup>3</sup> 47 U.S.C. §§ 201(b), 202(a).

<sup>4</sup> Section 251 defines “unbundled network elements” or UNEs as those network elements that meet the impairment standard in Section 251(d)(2). 47 U.S.C. § 251(d)(2). In 2005, the

271 elements that are not already combined; and to commingle, or allow CLECs to commingle, Section 271 elements with wholesale services obtained from an ILEC—unless the BOC has a reasonable basis for refusing to do one or more of these actions.<sup>5</sup>

Yet the Commission ruled just the opposite in the *TRO*. There, it found that BOCs are not required “to combine network elements that no longer are required to be unbundled under section 251.”<sup>6</sup> And the Commission confirmed in an *amicus* brief just four years ago that it “has determined that BOCs are not required to combine section 271 checklist items with one another. . . . Thus, 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.”<sup>7</sup>

Even in the absence of this crystal clear precedent, Sections 201 and 202 could not support the retail/wholesale parity obligations Granite seeks to impose on the BOCs. Indeed Granite cites not a single case in which the Commission or a court has found, for purposes of a nondiscrimination analysis, that functions or facilities a carrier provides to itself are “like” a service that is provided to one or more customers. This is not surprising, as the Commission

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Commission determined that local switching and shared transport do not meet this standard and therefore are not required to be provided as UNEs pursuant to Section 251(c)(3). *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 ¶ 199 (2005) (*TRRO*), *aff’d sub nom. Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). For clarity’s sake, CenturyLink therefore refers to network elements unbundled pursuant to Section 271 as “Section 271 elements,” rather than “Section 271 UNEs.”

<sup>5</sup> Petition at 2. Granite does not ask the Commission to address whether BOCs are required to commingle, and allow CLECs to commingle, Section 251 UNEs with Section 271 elements, which Granite claims has already been settled in the courts. Petition at 14.

<sup>6</sup> *TRO*, 18 FCC Rcd 16978, 17385 ¶ 655 n. 1990.

<sup>7</sup> *BellSouth Telecommunications Inc. d/b/a AT&T Kentucky v. Kentucky Public Service Commission*, Case No. 10-5310/10-5311, Brief for Amicus Curiae Federal Communications Commission in Support of Defendants-Appellants, *Cross Appellees and Partial Reversal of the District Court* (filed Dec. 6, 2011).

found long ago that Congress intended the nondiscrimination standard in Section 251 to be “more stringent” than that in Section 202(a).<sup>8</sup> In any case, the unprecedented expansion of Sections 202(a) and 201(b) sought by Granite certainly could not be undertaken in response to a petition for declaratory ruling, as Granite’s proposed regulations conflict with both the *TRO* and the Commission’s subsequent statements regarding the applicability of its combination rules to Section 271 elements.

Remarkably, Granite’s only justification for seeking this reversal of long-settled law (in the guise of a petition for declaratory ruling) is a simple recitation of this law in reply comments recently filed by the United States Telecom Association (USTelecom). Granite points to no instance in the past dozen years of a BOC engaging in the conduct Granite seeks to prohibit. For its part, CenturyLink has voluntarily combined Section 271 elements for Granite and other CLECs on a commercial basis throughout this period and continues to do so today. CenturyLink provides these commercial services voluntarily, because it makes business sense—not because Section 271 provides some type of “regulatory backstop.” Granite also acknowledges that it purchases a similar commercial offering from the other two BOCs.<sup>9</sup> It is therefore baffling why Granite believes that the Commission should waste its limited resources on such an unnecessary issue—an issue that becomes less relevant each day as additional customers migrate away from TDM voice services.

Granite’s proposed rule would also impinge on the BOCs’ ability to manage their networks, which is increasingly important given falling demand for copper-based services. The

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<sup>8</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 15612 ¶ 217 (1996) (*Local Competition Order*).

<sup>9</sup> See Petition at 7.

ongoing IP migration requires that BOCs (like other providers) have flexibility in reconfiguring their network facilities to conform to market realities. The regulation sought by Granite would reduce this flexibility and therefore impede the transition to IP facilities and services.

The Commission thus need not address Granite’s misguided petition. To the extent it does, it should confirm that it has already found that the BOCs are not obligated to do the combining sought by Granite (even if they generally have chosen to do so voluntarily on a commercial basis).<sup>10</sup>

## **II. THE COMMISSION HAS ALREADY DECIDED THAT BOCS ARE NOT REQUIRED TO COMBINE AND COMMINGLE SECTION 271 ELEMENTS.**

In the *TRO*, the Commission eliminated Section 251 unbundling obligations for certain network elements, while noting that BOCs must provide some of those elements pursuant to the Section 271 Competitive Checklist. In doing so, the Commission made clear that BOCs have no obligation to combine such de-listed facilities with each other: “We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251.”<sup>11</sup> But Granite now suggests that this clear holding is actually a nullity, maintaining that two *different* sections of the Act—both of which predate the 1996 Act—impose the very same obligations specified in Section 251. Granite argues that Sections 202(a) and 201(b) prohibit the BOCs from separating Section 271 elements that are already combined, requires them to combine upon request Section 271 elements that are not already

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<sup>10</sup> The Commission should also grant the forbearance from Sections 271 and 272 sought by USTelecom. As USTelecom explained in detail, these provisions are now outdated and unnecessary, and their elimination will serve the public interest by eliminating costs and allowing BOCs to more efficiently invest resources in modern networks and services. *See* Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks, WC Docket No. 14-192 (filed Oct. 6, 2014).

<sup>11</sup> *TRO*, 18 FCC Rcd 16978, 17385 ¶ 655 n. 1990.

combined, and requires them to commingle, or allow CLECs to commingle, Section 271 elements with wholesale services obtained from an ILEC—unless a BOC has a reasonable basis for refusing to take one or more of these actions.

Granite’s proposed rules make no sense as a matter of law. They ignore Congress’s conscious decision (acknowledged by the Commission) to *omit* Section 251’s combination duties (of which the commingling rules are simply a broader implementation) from the terms by which BOCs must offer facilities under Section 271. It also would stretch Sections 201 and 202 beyond their intended purpose to render the *TRO*’s specific decision *not* to require Section 251/271 combinations as surplusage. Nor does the argument make any sense as a policy matter. The very premise for removing an element from the Section 251(c)(3) unbundling list is that the Commission has found that CLECs would not suffer any impairment *if the ILEC stopped giving access to that element altogether*. If CLECs would not be prevented from competing if the facilities in question were withdrawn entirely, it cannot be the case that they are injured if the ILEC *does* make the facilities available but not combined with other Section 271 elements or commingled with a wholesale service provided by an ILEC.

**A. BOCs Have No Obligation To Combine Or Commingle Section 271 Elements.**

While the *TRO* requires BOCs to provide access to certain facilities as “unbundled” checklist items under Section 271 of the Act even if those items are taken off the Section 251(c)(3) unbundling list,<sup>12</sup> the Commission specifically found that Section 271 imposes no obligation on the BOCs to “combine” these checklist items with each other. The Commission explicitly “decline[d] to require BOCs, pursuant to section 271, to combine network elements

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<sup>12</sup> See *TRO*, 18 FCC Rcd 16978, 17384 ¶ 652.

that no longer are required to be unbundled under section 251.”<sup>13</sup> Nor did it extend the commingling obligation to Section 271 elements.

The Commission has always based the element combination requirement on the express language of Section 251(c)(3). Section 251(c)(3) states that “[a]n incumbent local exchange carrier shall provide . . . unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications services.” In the *Local Competition Order*, the FCC read this language to require ILECs to combine elements for requesting CLECs, and not to dismantle already combined elements.<sup>14</sup>

As the Commission explained in the *TRO*, however, Section 271 contains no such language and thus imposes no such requirement: “Unlike section 251(c)(3), items 4-6 and 10 of section 271’s competitive checklist contain no mention of ‘combining’ and . . . do not refer back to the combination requirement set forth in section 251(c)(3).”<sup>15</sup> Instead, the language in Section 271’s checklist items 4-6 merely requires BOCs to provide access or interconnection to facilities that are “unbundled” from other elements and services. As the Commission correctly held, the distinction in the language of these two provisions must be given effect, and Congress’s omission of the “combination” language in Section 271 must be understood to reflect clear Congressional intent to exempt items provided under Section 271 from the combination requirement that is imposed under Section 251(c)(3). The D.C. Circuit agreed.<sup>16</sup>

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<sup>13</sup> *TRO*, 18 FCC Rcd 16978, 17385 ¶ 655 n 1990.

<sup>14</sup> See *Local Competition Order*, 11 FCC Rcd 15499, 15645-49 ¶¶ 289-97. The Commission held that the phrase “‘allows requesting carriers to combine them,’ does not impose the obligation of physically combining elements exclusively on requesting carriers . . . if the [requesting] carrier is unable to combine the elements, the incumbent must do so.” *Id.* at 15647 ¶ 294.

<sup>15</sup> *TRO*, 18 FCC Rcd 16978, 17385 ¶ 655 n. 1990.

<sup>16</sup> *U.S. Telecom Ass’n v. FCC, et al.*, 359 F.3d 554, 589-90 (D.C. Cir. 2004).

Statutes must be read to carry out clear expressions of congressional intent,<sup>17</sup> and to give effect to *every* provision of the statute, rendering none of them surplusage.<sup>18</sup> Granite, by contrast, reads Section 202(a) and 201(b) to override Congress’s careful crafting of Section 271. It simply pretends that Congress’s decision to omit from Section 271 the specific duty to combine Section 271 elements does not exist. However, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>19</sup> In the *TRO*, the Commission appropriately gave effect to Congress’s clear intent.

Since that time, the Commission has twice confirmed that BOCs are not required to combine Section 271 elements. In 2005, the Commission noted that Qwest had offered “a commercial product designed to replace UNE-P—and to keep customers on its network—even in the absence of a legal mandate to do so.”<sup>20</sup> Qwest’s commercial product contained a combination of two Section 271 elements—local switching and shared transport. In 2011, the Commission filed an *amicus* brief in the Sixth Circuit that was even more explicit. In response to a request from the court, the Commission addressed the scope of its combination and

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<sup>17</sup> See, e.g., *Flora v. United States*, 357 U.S. 63, 65 (1958) (“In matters of statutory construction the duty of this Court is to give effect to the intent of Congress . . .”) (subsequent case history omitted); *United States v. Neal*, 776 F.3d 645, 652 (9<sup>th</sup> Cir. 2015).

<sup>18</sup> See *Saunders ex. rel Saunders v. Secretary of Dep’t of Health and Human Servs.*, 25 F.3d 1031, 1035 (Fed. Cir. 1994) (“it is a settled rule of statutory interpretation that a statute is to be construed in a way which gives meaning and effect to all of its parts . . .”) (citation omitted); see also *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (it is a “settled rule that a statute must . . . be construed in such fashion that every word has some operative effect.”) (citation omitted).

<sup>19</sup> *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5<sup>th</sup> Cir. 1972); see also *Russello v. United States*, 464 U.S. 16, 23 (1983).

<sup>20</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415, 19455-56 (2005) (subsequent history omitted) (*Qwest Omaha Forbearance Order*).

commingling rules. In that context, it noted that the Commission “has determined that BOCs are not required to combine section 271 checklist items with one another. . . . Thus, 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.”<sup>21</sup> Notably, as in the *Qwest Omaha Forbearance Order*, the Commission did not state that BOCs are not required *by Section 271* to combine Section 271 elements, but rather have no legal mandate to do so under the Commission’s rules in general.<sup>22</sup> Given such a clear articulation of its rules, the Commission cannot “clarify” that BOCs are required to combine Section 271 elements, as Granite asks it to do.

This same rationale applies to the Commission’s “commingling” requirement as well as “Commingling,” as defined in the *TRO* and in the Commission’s rules, is simply an expanded combination requirement and thus differs from the combination requirement that the Commission found *inapplicable* under Section 271 only in degree. In the *TRO*, the Commission defined a new commingling requirement pursuant to which ILECs are obligated to “permit a requesting telecommunications carrier to commingle [*i.e.*, connect, attach, or otherwise link] a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act.”<sup>23</sup> The Commission made clear that the commingling requirement includes the obligation to “perform the functions necessary to commingle a UNE” with a

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<sup>21</sup> *BellSouth Telecommunications Inc. d/b/a AT&T Kentucky v. Kentucky Public Service Commission*, Case No. 10-5310/10-5311, Brief for Amicus Curiae Federal Communications Commission in Support of Defendants-Appellants, *Cross Appellees and Partial Reversal of the District Court* (filed Dec. 6, 2011).

<sup>22</sup> *Id.*

<sup>23</sup> *TRO*, 18 FCC Rcd 16978, 17342 ¶ 579.

wholesale service.<sup>24</sup> In effect, then, commingling simply expands the Commission’s combination rule to apply not only to combinations of Section 251 UNEs with each other, but to apply to combinations of Section 251 UNEs and wholesale services generally. There was no indication that BOCs should be required to commingle *Section 271 elements* with wholesale services. Thus, as a matter of law, Granite’s proposed combination and commingling obligations cannot be found in the Commission’s rules or orders.

No other interpretation makes sense from a policy perspective. The combination and commingling rules are premised on ensuring that CLECs receive full access to ILEC network facilities without which they would be “impaired” within the meaning of the Act—a premise that has been found not to exist for de-listed facilities. Both sets of rules are based on the assumption that, *because* CLECs need access to a particular element to enter the market, they must receive *full* access to that element, including the ability to demand that the ILEC provide that element in combination with other Section 251 UNEs. The Supreme Court has stated, for example, that the element combination rules “are best understood as meant to ensure that the statutory duty to provide unbundled elements gets a practical result[.]”<sup>25</sup> and that “duty” exists *only* with respect to those facilities for which “the failure to provide access . . . would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>26</sup> Likewise, the *TRO*’s discussion of its modified “commingling” rules is entirely focused on effectuating the provisioning of access to Section 251 UNEs (*i.e.*, those elements as to which

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<sup>24</sup> *Id.*

<sup>25</sup> *Verizon Communs, Inc. v. FCC*, 535 U.S. 467, 532 (Sup. Ct. 2002).

<sup>26</sup> 47 U.S.C. § 251(d)(2)(B). *See also Local Competition Order*, 11 FCC Rcd 15499, 15616 ¶ 227.

CLECs would be “impaired” without unbundled access) by requiring them to be connected or attached to wholesale services.<sup>27</sup>

But the entire reason that an element is taken off the Section 251(c)(3) unbundling list is that the Commission has formally decided that CLECs would not be “impaired” *if they could not get access to that element from the ILEC at all*. For example, given that the Commission has found that a CLEC can still feasibly enter the market if the incumbent does not provide it with unbundled switching *at all*, there is no reason why the CLEC would be impaired if the BOC *does* continue to offer unbundled switching pursuant to Section 271 but does not combine or commingle it with other Section 271 elements in the manner Granite seeks. In those circumstances, the BOC should not be penalized simply because it is obligated to continue to provide the CLECs with *more* options by making switching available under Section 271. Indeed, a CLEC that is guaranteed the right to continue to obtain unbundled switching because of the BOC’s continuing obligations under Section 271 is in a better position than the Commission has deemed necessary for competitive purposes under Section 251 of the Act: imposing still *more* obligations or restrictions on the BOCs would thus serve no valid purpose.

Any other result would have the effect, contrary to Congress’s intent and the FCC’s own interpretation, of imposing a combination requirement specifically *because* of the applicability of a BOC’s Section 271 obligations. And as noted, it also would make no sense under Section 251: additional impairment as to the loop cannot materialize because a BOC is required to provide CLECs with switching even though other ILECs are not. The Commission accordingly should decline Granite’s invitation to impose combination and commingling obligations with respect to Section 271 elements.

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<sup>27</sup> See *TRO*, 18 FCC Rcd 16978, 17342-48 ¶¶ 579-84.

**B. Sections 202(a) And 201(b) Do Not Support The Relief Sought By Granite.**

As noted, the obligation to combine and commingle Section 251 UNEs arises from explicit language in Section 251 itself, which the Commission has interpreted to bar ILECs from separating Section 251 UNEs that are ordered in combination, require ILECs to combine requested Section 251 UNEs upon request, and allow CLECs to commingle Section 251 UNEs with facilities or services that the CLEC has obtained at wholesale.<sup>28</sup> In the *TRO*, the Commission also found that the BOCs' unbundling obligations under Section 271 do not include a duty "to combine network elements that no longer are required to be unbundled under section 251,"<sup>29</sup> and the D.C. Circuit upheld this finding.<sup>30</sup> Unable to rely on Section 251 or Section 271, Granite claims that Sections 202(a) and 201(b) give the Commission authority to adopt parallel combination and collocation obligations for Section 271 elements. They do not.

Like Section 251, Section 202(a) prohibits certain types of discrimination.<sup>31</sup> But the nondiscrimination standards in the two statutory provisions are not synonymous, and Section 202(a) is in fact less stringent.<sup>32</sup> As the Commission concluded in the *Local Competition Order*, "[f]inding otherwise would fail to give meaning to Congress's decision to use different language."<sup>33</sup> In particular, Section 202(a) permits "reasonable" discrimination, while the

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<sup>28</sup> See *Local Competition Order*, 11 FCC Rcd 15499, 15646-48 ¶¶ 292-96; *TRO*, 18 FCC Rcd 16978, 17343 ¶ 581 ("section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services").

<sup>29</sup> *TRO*, 18 FCC Rcd 16978, 17385 ¶ 655 n. 1990.

<sup>30</sup> *USTA*, 359 F.3d 554, 589-90.

<sup>31</sup> 47 U.S.C. § 202(a).

<sup>32</sup> *Local Competition Order*, 11 FCC Rcd 15499, 15928 ¶ 859; *McLeodUSA Telecom. Servs. Inc. v. Iowa Util. Bd.*, 550 F.Supp.2d 1006, 1017-18 (S.D. Iowa 2008).

<sup>33</sup> *Local Competition Order*, 11 FCC Rcd 15499, 15928 ¶ 859.

nondiscrimination provisions in Section 251 do not.<sup>34</sup> And, the Commission has found, Section 251(c)(3) “encompasses more than the obligation to treat carriers equally.”<sup>35</sup>

Interpreting this provision “in light of the 1996 Act’s goal of promoting local exchange competition, and the benefits inherent in such competition,” the Commission concluded that Section 251(c)(3) requires ILECs to provide Section 251 UNEs “under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.”<sup>36</sup> This means that ILECs may not provision Section 251 UNEs “that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete.”<sup>37</sup> ILECs also must provide the pre-ordering, ordering, provisioning, maintenance and repair and billing functions of its operations support systems “under the same terms and conditions that they provide these services to themselves or their customers.”<sup>38</sup>

Dating back to 1934, Section 202(a) contains no such focus on promoting local competition or ensuring that CLECs have a meaningful opportunity to compete. Instead, it is intended to prevent common carriers from engaging in unreasonable discrimination, with regard to the telecommunications services they provide to their customers. It thus does not impose a retail/wholesale parity obligation on common carriers, as Granite seems to imply.<sup>39</sup> CenturyLink is not aware of any case in which the Commission or a court has deemed a functionality the

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<sup>34</sup> *See McLeodUSA*, 550 F.Supp.2d 1006, 1018 (S.D. Iowa 2008).

<sup>35</sup> *Local Competition Order*, 11 FCC Rcd 15499, 15660 ¶ 315.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 15660-61 ¶ 316.

<sup>39</sup> *See* Petition at 9 (“When a BOC provides a preexisting combination of network elements to itself and to a requesting carrier, it is providing “like” services under Section 202(a).”) (citation omitted).

carrier “provides” to itself to be “like” a service it provides to a customer, for purposes of Section 202(a).<sup>40</sup>

While Section 201(b) bars unjust and unreasonable practices, it also lacks Section 251(c)(3)’s focus on local competition. Particularly given the Commission’s holding in the *TRO* that BOCs are not required to combine Section 271 elements, a BOC’s refusal to comply with Granite’s proposed combination and commingling requirements is hardly “unjust” or “unreasonable,” as applied under Section 201(b). Whether a practice is unjust or unreasonable in violation of Section 201(b) is determined based on the specific circumstances of the situation.<sup>41</sup> Here, where the Commission has repeatedly stated that its rules do not require BOCs to combine or commingle Section 271 elements, the failure to do so cannot violate Section 201(b). Indeed, even the Commission’s rule requiring ILECs to combine Section 251 UNEs was initially struck down,<sup>42</sup> and was only upheld because the Supreme Court twice deferred to the Commission’s interpretation of Section 251(c)(3).<sup>43</sup>

For all these reasons, the Commission could not use Section 202(a) or 201(b) to extrapolate its Section 251 combination and commingling rules to Section 271 elements. And, from a procedural standpoint, the Commission could not impose such a requirement in response to a petition for declaratory ruling.<sup>44</sup>

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<sup>40</sup> Notably, the Section 202(a) case Granite cites predated the 1996 Act. *See* Petition at 9 n. 26 (citing *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990)).

<sup>41</sup> *See Himmelman v. MCI Communs. Corp.*, 17 FCC Rcd 5504, 5508 ¶ 14 (2002).

<sup>42</sup> *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8<sup>th</sup> Cir. 1997).

<sup>43</sup> *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 394 (1999); *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 529-38 (Sup. Ct 2002).

<sup>44</sup> The fact that the FCC’s rules permit *non-BOC ILECs* to refuse to provide unbundled local switching and shared transport altogether strongly suggests that the failure to offer such elements in combination cannot be an unjust or unreasonable practice under Section 201(b) or unjust or unreasonable discrimination under Section 202(a). *Metro Teleconnect Co. v. Verizon Maryland*,

### **III. THE REGULATIONS SOUGHT BY GRANITE ARE PLAINLY UNNECESSARY AND WOULD HINDER THE IP TRANSITION.**

Ten years ago, the Commission concluded that CLECs are not “impaired” without unbundled access to local switching and shared transport and therefore removed those network elements from the list of Section 251 UNEs ILECs must provide, thus marking the end of UNE-P. Since that time, and without regulatory compulsion, CenturyLink’s former Qwest affiliate, CenturyLink QC, has offered a commercial substitute for UNE-P. Currently, CenturyLink QC offers a number of CenturyLink™ Local Service Platform (CLSP™) products, including CLSP™ Business, CLSP™ Residential, CLSP™ Centrex, CLSP™ ISDN and CLSP™ PBX.<sup>45</sup>

CenturyLink offers these loop-switching-shared transport combinations not because it is compelled to do so by Sections 271, 202(a) and/or 201(b), but because it makes business sense to do so. Indeed, CenturyLink’s non-BOC affiliates offer a commercial UNE-P replacement as well,<sup>46</sup> even though they are not subject to Section 271’s unbundling requirements. It is CenturyLink’s understanding that CLECs can also purchase commercial UNE-P replacement

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*Inc.*, Memorandum Opinion and Order, File No. EB-02-MD-016, 18 FCC Rcd 9033, 9034-35 ¶ 3 (2003) (denying claims under sections 201(b) and 202(a) because there was “no explanation as to how [the complained of conduct] could comply with section 251(c)(4), but still violate the reasonableness standard of sections 201(b) and 202(a).”

<sup>45</sup> See CenturyLink website, *Wholesale: Products & Services: CenturyLink Local Services Platform (CLSP™) – General Information – V 18.0*, <http://www.centurylink.com/wholesale/pcat/localservicesplatform.html> (last visited June 9, 2015).

<sup>46</sup> See CenturyLink website, *CenturyLink Wholesale Product Guide: Local Wholesale Solutions Complete for Plain Old Telephone Service*, [http://www.centurylink.com/wholesale/docs/guides/lws\\_complete\\_guide.pdf](http://www.centurylink.com/wholesale/docs/guides/lws_complete_guide.pdf).

products from AT&T and Verizon as well, and it appears that Granite is taking advantage of these offerings.<sup>47</sup>

Thus, Granite does not, and cannot, claim that it is being deprived of combinations of Section 271 elements. Nor does Granite claim that BOCs are engaging in any of the conduct that would be prohibited by those regulations—unreasonably separating Section 271 elements that are already combined, refusing to combine Section 271 elements, or refusing to commingle, or allow CLECs to commingle, Section 271 elements with wholesale services obtained from an ILEC. Instead, Granite merely cites to a recent statement of the relevant law by USTelecom—an uncontroverted statement that the Commission has said repeatedly that BOCs are not obligated to combine Section 271 elements. This thin justification is not nearly sufficient to compel the Commission to devote its limited resources to the declaratory ruling sought by Granite.

Nor is such effort necessary. In addition to the UNE-P replacement products it already obtains from the BOCs and other ILECs, Granite can obtain Ethernet local access to commercial locations from numerous alternative providers, including cable providers. For example, Time Warner Cable announced earlier this year that it “connected nearly 70,000 buildings to our network in 2014, bringing the total number of connected buildings to 930,000.”<sup>48</sup> Granite also can offer VoIP as an alternative to TDM voice service to commercial customers, which in fact it already does.<sup>49</sup> As long as a customer has Internet connectivity, such as for a point-of-sale

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<sup>47</sup> See Petition at 7.

<sup>48</sup> Time Warner Cable’s (TWC) CEO Rob Marcus on Q4 2014 Results - Earnings Call Transcript (2015), available at <http://seekingalpha.com/article/2864536-time-warner-cables-twc-ceo-rob-marcus-on-q4-2014-results-earnings-call-transcript?page=4>.

<sup>49</sup> See Granite website, *VoIP Systems*, [http://www.granitecomm.com/voip-systems?\\_\\_hssc=94852675.1.1433894416514&\\_\\_hstc=94852675.6da35a07c9aef42498bdd46d43585ccc.1433894416514.1433894416514.1433894416514.1&hsCtaTracking=2809198e-92b9-452b-831b-bb0608f0412b%7Cbad3ab0f-a359-465d-ab05-44da87a0bb07](http://www.granitecomm.com/voip-systems?__hssc=94852675.1.1433894416514&__hstc=94852675.6da35a07c9aef42498bdd46d43585ccc.1433894416514.1433894416514.1433894416514.1&hsCtaTracking=2809198e-92b9-452b-831b-bb0608f0412b%7Cbad3ab0f-a359-465d-ab05-44da87a0bb07) (“We have been using

terminal—which is nearly a given for almost any business today—Granite can use that connection to provide VoIP. Indeed, millions of business and residential customers have disconnected their wireline voice connections over the past decade. In fact, CenturyLink now serves approximately *only 1 in 4 households* in its incumbent service territory.

Granite’s justification for its proposed commingling rule is particularly lacking. That rule would require BOCs to commingle, and allow CLECs to commingle, Section 271 elements “with wholesale services obtained from an incumbent LEC unless the BOC has a reasonable basis for refusing to do so.”<sup>50</sup> The rule thus would appear to require BOCs to commingle Section 271 elements with wholesale services that are not provided by the BOC itself. Yet, Granite does not even provide an example of these wholesale services or why such commingling is desirable, much less necessary, in practice.

In addition to being unnecessary, Granite’s proposed combination and commingling regulations would hinder the BOCs’ ability to manage their networks and participate in the ongoing migration to IP-based facilities and services. With the shift away from copper-based services, CenturyLink’s central offices and copper plant are increasingly underutilized. Given this falling demand, CenturyLink is exploring various ways of optimizing these assets to reduce maintenance costs and devote more resources to extending fiber deeper in its local networks. Such efficiency efforts sometimes naturally require CenturyLink to disconnect network elements and retire copper loops. As vendors cease support of CenturyLink’s circuit-switched equipment, CenturyLink is also planning the accelerating transition to IP-switched equipment, which again will result in the disconnection of Section 271 elements.

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VoIP technology since 2000 to help our customers be more competitive.”) (last visited June 9, 2015).

<sup>50</sup> Petition at 2.

Granite’s proposed rules would interrupt this natural migration to next-generation facilities and services, by second-guessing the BOCs’ separation of network elements for legitimate business reasons. This proposed regulatory overreach is particularly glaring given the lack of any evidence over the past decade of BOCs unreasonably separating or refusing to combine Section 271 elements in order to stifle CLECs’ ability to compete. Instead, Granite relies on speculative harm that the Commission cited way back in 1998, in justifying its Section 251 combination rules: that BOCs could “disconnect previously connected elements . . . not for any productive reason, but just to impose wasteful reconnection costs on new entrants . . . to ensure that their competitors either spend money unnecessarily . . . or stay out of the market altogether[, thus] raising a potential competitor’s costs of entry into the monopolist’s market.”<sup>51</sup> Such horror stories are just that—stories. In reality, the BOCs have provided UNE-P replacement products to Granite and other CLECs for a decade, despite no regulatory compulsion to do so. Granite’s proposed regulations would hinder reasonable network management even if it allow a BOC to prove that it has “a reasonable basis” for activities otherwise prohibited by those regulations. At a minimum, these regulations would create uncertainty, with a BOC facing potential challenges to their network management practices. Such a challenge would of course delay the network initiative in question, as the BOC justifies the disputed practice to the CLEC and potentially before a regulator.

Thus, Granite’s Petition falls far short of the justification necessary for the extreme and burdensome regulations it seeks to impose on the thriving voice marketplace.

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<sup>51</sup> Petition at 12-13 (citations omitted).

**IV. CONCLUSION.**

For the reasons noted herein, the Commission should deny the new unbundling mandates sought by Granite.

Respectfully submitted,

**CENTURYLINK**

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