

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996)	CC Docket No 96-98
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	

REPLY OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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REPLY OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby respectfully submits these reply comments in support of BellSouth’s Petition for Clarification and/or Partial Reconsideration (“BellSouth Petition”) of the *Triennial Review Order*,¹ regarding unbundling obligations arising from section 271 of the Communications Act of 1934, as amended (“Act”).² As demonstrated below, the establishment of an independent and ongoing unbundling obligation

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 and 98-147, FCC 03-36, rel. Aug. 21, 2003 (“*Triennial Review Order*”).

² 47 U.S.C. § 271. To the extent necessary, Qwest respectfully requests a waiver of the page limit in section 1.429(g) of the Federal Communications Commission’s (“Commission”) rules. Under Rule 1.3, the Commission may waive any provision of its rules “if good cause therefore is shown.” As discussed in these reply comments, the adoption of an independent unbundling obligation under section 271 threatens to undermine in large measure the findings of non-impairment that were made in the *Triennial Review Order*, and which may occur in pending state proceedings. This is particularly true if there is found to be an obligation to combine or commingle network elements offered pursuant to section 271 with other elements provided under

under section 271 is fundamentally inconsistent with the Act, as interpreted by relevant court decisions, and will impose substantial and unjustifiable operating and financial burdens on the Bell operating companies (“BOC”). This is particularly true if there is found to be an obligation to combine or commingle section 271 elements with other section 271 elements or network elements unbundled pursuant to section 251, because such an obligation may allow CLECs to preserve a variation of UNE-P, with all of its market-distorting consequences, despite a finding of non-impairment in a particular market.

Accordingly, the Commission should grant the relief requested in the BellSouth Petition and find that there is no independent unbundling obligation under section 271. In the event the Commission does not take this action, it should at least confirm that there is no need for network elements unbundled under section 271 to be combined or commingled with other section 271 elements or network elements offered pursuant to section 251.

I. AN INDEPENDENT AND ONGOING UNBUNDLING OBLIGATION UNDER SECTION 271 IS FUNDAMENTALLY INCONSISTENT WITH THE ACT

In the *Triennial Review Order*, the Commission concluded that BOCs have an “independent and ongoing access obligation” under section 271(c)(2)(B) to provide unbundled access to certain network elements that are no longer subject to unbundling under section 251.³ Such obligation applies in particular to checklist items 4 (local loop transmission), 5 (local transport), 6 (local switching), and 10 (databases and associated signaling) of the competitive checklist in section 271(c)(2)(B).⁴ The establishment of such an independent and ongoing obligation, especially as it relates to broadband network elements, is clearly contrary to the

section 251 or 271. It is essential that these issues be given the serious consideration that they deserve.

³ *Triennial Review Order* ¶¶ 652, 654.

⁴ *Triennial Review Order* ¶ 654.

purposes and provisions of the Act as well as recent court decisions that have limited the scope of unbundling obligations under the Act.

A. The *Triennial Review Order*'s Interpretation of Section 271 Is Inconsistent with the Act's Narrowly Circumscribed Unbundling Obligations

In the first 400 pages of the *Triennial Review Order*, the Commission adopted and applied a detailed, multi-factored test for each category and variation of network element to determine when incumbent local exchange carriers (“ILECs”) are required to provide unbundled access to that element pursuant to section 251. Then, based on almost no analysis, the Commission in large measure undid the section 251 impairment analysis in the preceding 400 pages, by concluding that the BOCs are subject to an additional undefined independent unbundling obligation under section 271. By deciding that the BOCs must unbundle a network element under section 271 for an indefinite period of time, even after CLECs are no longer deemed to be impaired without access to such element pursuant to section 251, the Commission has dramatically broadened the scope of the BOCs’ unbundling obligations. This is a result that is wholly inconsistent with recent court decisions that have interpreted the Act as *limiting* the ILECs’ unbundling obligations to clearly defined circumstances.

The Supreme Court has unambiguously stated that in making unbundling decisions, the Commission must “apply *some* limiting standard, rationally related to the goals of the Act[.]”⁵ The Commission’s section 271 unbundling decision -- to which no limiting standard was applied and which, as explained below, is directly contrary to the goals of the Act -- is clearly at odds with the Supreme Court’s admonition in *Iowa Utilities Board*. Indeed, the Commission did not even *attempt* to undertake an impairment analysis in the section 271 context.

The Commission’s decision on the section 271 issue is also inconsistent with the findings

⁵ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (emphasis in original) (1999).

in *United States Telecom Ass’n v. FCC*.⁶ In that case, the D.C. Circuit rejected the notion that “in this area more unbundling is better[,]” stating that “Congress did not authorize so open-ended a judgment.”⁷ The court in *USTA* also held that in the absence of genuine impairment, the Commission must “point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.”⁸ Warning against the “synthetic competition” that would result from over-reliance on unbundling the court also held:

[M]andatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource. *Iowa Utilities Board*, 525 U.S. at 428-29. And, as we said before, the Court’s opinion in *Iowa Utilities Board*...plainly recognized that unbundling is not an unqualified good. . . . In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs [noted in Justice Breyer’s separate opinion in *Iowa Utilities Board*] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition.”⁹

While the *Iowa Utilities Board* and *USTA* cases dealt with the ILECs’ unbundling obligations under section 251, these courts’ findings on the pernicious effects of excessive unbundling apply with equal force to any independent unbundling obligations under section 271. In either case, such mandatory unbundling will result in “disincentives to research and development” and the “tangled management inherent in shared use of a common resource.”¹⁰ Moreover, it would make absolutely no sense for Congress to place strict limits on one unbundling provision of the Act (section 251), while including another unbundling provision (section 271) that has no limits at all. As AT&T freely admits, the Commission has not engaged in any “balancing” to consider the potential adverse consequences of unbundling a network

⁶ *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (2002).

⁷ *Id.* at 425.

⁸ *Id.*

⁹ *Id.* at 429.

¹⁰ *Id.*

element pursuant to section 271.¹¹ In addition, in establishing an independent and ongoing unbundling obligation under section 271, the Commission failed to make any showing that its decision would “bring on a significant enhancement of competition,” as required by *USTA*. As such, the Commission’s attempt to unbundle through section 271 what no longer needs to be unbundled pursuant to section 251 would operate to circumvent the clear-cut holdings of the above-described court decisions.

B. The Act Clearly Contemplates Removal of the Section 271 Unbundling Obligation Once the Corresponding Section 251 Unbundling Obligation Has Been Removed

The Commission has previously acknowledged the clear-cut link between the unbundling obligations arising under sections 251 and 271. In the *UNE Remand Order*,¹² the Commission recognized that “there is a common purpose between sections 251 and 271 of the Act of opening the incumbents’ monopoly local exchange networks to competition,” and that “Congress intended section 251(c)(3) of the Act and the competitive checklist to contain similar, if not identical, obligations.”¹³ Given the Commission’s reasoning, if a market has been opened to competition sufficient to eliminate an unbundling obligation pursuant to section 251, then logically the “common purpose” reflected in the section 271 unbundling requirement should also be deemed satisfied with respect to that element. Furthermore, even if the unbundling obligations under sections 251 and 271 are “not identical,” surely they cannot be interpreted to

¹¹ See AT&T Comments at 22, 24.

¹² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”).

¹³ *Id.* at 3748 ¶ 109. The Commission’s statements in the *UNE Remand Order* regarding the “common purpose” of sections 251 and 271 and the “similar, if not identical, obligations” arising under those two sections is wholly inconsistent with the Commission’s finding in the *Triennial Review Order* that “it is reasonable to interpret section 251 and 271 as operating independently.” *Triennial Review Order* ¶ 655.

be so entirely dissimilar that one can remain in effect, potentially in perpetuity, even after the other has been eliminated based on a finding of non-impairment. Once an element no longer meets the section 251(d)(2) standard, the purpose underlying the matching checklist item (namely opening the market to competition) has been fully achieved. In this regard, as BellSouth notes, the Commission in practice has treated the section 271 checklist unbundling obligations as co-extensive with those contained in section 251.¹⁴

In reaching its decision to establish an independent and ongoing unbundling obligation under section 271, the Commission misinterprets the plain meaning of section 271(c)(2)(B). The Commission claims that (A) checklist item 2 (which covers all network elements that must be unbundled pursuant to sections 251(c)(3) and 251(d)(2)) is duplicative of checklist items 4, 5, 6 and 10; (B) that had Congress wished to make items 4, 5, 6 and 10 subject to section 251, it would have explicitly done so as it did with checklist item 2; and (C) that to conclude otherwise would render items 4, 5, 6, and 10 “entirely redundant.”¹⁵

In fact, the meaning of the statute is clear and entirely consistent with the relief sought in BellSouth’s Petition. Section 271(c)(2)(B) is worded as it is because it contemplated a situation where a network element (for example, switching) came off the section 251 list of unbundled elements *before* a BOC applied for in-region interLATA service authorization pursuant to section 271. In this situation, the BOC would have an obligation (at least until it received its section 271 authorization) to continue to provide unbundled access to circuit switching pursuant to section 271(c)(2)(B)(vi), even if there were no corresponding unbundling obligation under section 251. In addition, the inclusion of items 4, 5, 6, and 10 in the checklist ensured that, before approving an application under section 271, the Commission would specifically confirm

¹⁴ BellSouth Petition at 13.

that a BOC applicant is in fact providing unbundled access to loops, switching, transport, databases and associated signaling. Contrary to Z-Tel's suggestion (at 10-11), the Act did not require the BOCs to wait to file a section 271 application until the Commission adopted rules pursuant to section 251.

The Commission's reading of the statute is nonsensical -- among other things, it would keep alive a BOC's unbundling obligation with respect to items 4, 5, 6 and 10 in perpetuity, no matter how competitive the telecommunications market becomes. Moreover, in the situation where a BOC has obtained in-region interLATA service authorization, there is no reason to keep any of the unbundling obligations in these checklist items in effect once the corresponding section 251 obligations have been eliminated. If competitors would not be impaired without access to a network element, there is no justification for continuing to require that element to be unbundled.

The Commission also distinguishes between sections 251 and 271 on the grounds that the former applies to ILECs and the latter to BOCs.¹⁶ In fact, this distinction highlights how irrational it would be to remove unbundling obligations for ILECs under section 251, yet keep unbundling obligations in effect for the identical network elements under section 271 for the BOCs, which cover some 80% of all incumbent local access lines.

In fact, the Commission's section 271 unbundling decision is a resounding endorsement of the "more unbundling is better" principle that was specifically rejected by the court in *USTA*. The practical effect of this decision will be to render the section 251 impairment analysis largely superfluous. The pernicious effects arising from this decision will only be heightened in view of the high probability that CLECs and state commissions will attempt to drive down section 271

¹⁵ *Triennial Review Order* ¶ 654.

unbundled element prices to TELRIC-like levels,¹⁷ and to require BOCs to combine or commingle section 271 elements with other section 271 elements and elements unbundled pursuant to section 251. Such a result would essentially lead to the continuation of the “synthetic competition” brought about by UNE-P, despite a finding of non-impairment in a nine-month mass market switching proceeding. While the Commission clearly did not intend this result, the CLECs will undoubtedly attempt to game the system and seek unilateral advantage through the state regulatory process, resulting in time-consuming and expensive litigation and ongoing regulatory uncertainty.

Continuing litigation and uncertainty on these issues is also likely given that the scope of the section 271 unbundling obligations are completely undefined. In response to the *Iowa Utilities Board* and *USTA* cases, the Commission has adopted a nuanced impairment standard under section 251 that resulted in several hundred pages of explanation regarding when unbundling is required and when it is not. For example, the Commission required differing degrees of unbundling under section 251, depending on the capacity of the network element, the services that are to be provided over the element, and the customers to be served. All of this is missing with regard to the independent unbundling obligation under section 271. Where a section 251 unbundling obligation has been eliminated for a particular network element, the scope of any remaining section 271 unbundling obligation is completely undefined. Obviously, this is a recipe for continuing controversy and uncertainty.

¹⁶ *Id.* ¶ 655. *See also* AT&T Comments at 23.

¹⁷ *See* Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, CC Docket No. 01-338 (Oct. 23, 2003), quoting NARUC as stating that “CLECs say states do have a role [in] setting prices under 201 and 202 for UNEs required under section 271.”

C. An Independent and Ongoing Section 271 Unbundling Obligation Is Contrary to the Act’s Objective of Stimulating Facilities-Based Competition, Particularly in the Broadband Area

One of the central purposes of the Act is the promotion of facilities-based competition. This goal has been repeatedly acknowledged, not only by the courts,¹⁸ but by the Commission itself. For example, the Commission has recognized that “in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition” because “only facilities-based competition can fully unleash competing providers’ abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.”¹⁹ Similarly, the Commission has recognized that unbundling rules that “encourage competitors to deploy their own facilities . . . will provide incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops.”²⁰ In the *Triennial Review Order* itself, the Commission stressed its awareness that “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”²¹

¹⁸ See, e.g., *Competitive Telecommunications Association v. Federal Communications Commission*, 309 F.3d 8, 16 (2002), where the Court of Appeals for the District of Columbia Circuit found that “the Supreme Court’s discussion of the incentive effects of TELRIC in *Verizon Communs., Inc. v. FCC* . . . would be meaningless if the Court had not understood the Act to manifest a preference for facilities-based competition[.]” and that the Supreme Court “obviously” accepted “the ILECs’ view that Congress preferred ‘facilities-based competition’ over ‘parasitic free-riding[.]’” (citation omitted).

¹⁹ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Market, Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd. 12673, 12676 ¶ 4 (footnote omitted), 12685-86 ¶ 23 (1999).

²⁰ *UNE Remand Order*, 15 FCC Rcd. at 3701 ¶ 7.

²¹ *Triennial Review Order* ¶ 3.

Creating an independent and ongoing unbundling obligation under section 271 with respect to network elements that are no longer subject to unbundling pursuant to section 251 -- because CLECs are not impaired without unbundled access to those elements -- is clearly at odds with the well-founded policy described above. In particular, the independent and ongoing section 271 unbundling obligation will lead to more unbundling over a much longer period,²² thereby discouraging the development of effective facilities-based competition. AT&T acknowledges that “the potential negative impact on investment incentives from unbundling . . . is irrelevant to the scope of § 271 unbundling.”²³ The availability of these elements will have a particularly deleterious effect where there has been a formal finding of non-impairment, indicating that conditions are right for facilities-based competition. The availability of unbundled network elements (or “UNEs”) with no end point in sight will only make it less likely that CLECs will ever have the economic motivation to make a serious investment in their own facilities. In fact, the Commission’s decision is bound to achieve exactly the opposite of the Act’s objective of promoting facilities-based competition.

This is particularly true with respect to broadband network elements. As correctly noted in the BellSouth Petition, the Commission’s section 271 unbundling decision will unquestionably frustrate the fulfillment of section 706(a) of the Act, which requires the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans[.]” Section 706(a) explicitly encourages the Commission to use all means consistent with the public interest, including “regulatory forbearance,” to “promote competition in the local telecommunications market[.]” and “remove barriers to infrastructure investment.” In the

²² While the *Triennial Review Order* refers to an “ongoing” obligation, it provides no guidance as to when and how such obligation could be lifted, suggesting that unbundling could in principle be required in perpetuity.

Triennial Review Order, the Commission acknowledged that section 706 requires the Commission to “craft unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities.”²⁴

Enforcing an independent and ongoing unbundling obligation under section 271 will create profound disincentives for both BOCs and CLECs to invest in facilities for advanced telecommunications services. In particular, CLECs would be able to enjoy a substantial portion of the benefits arising from the BOCs’ investments in broadband facilities without assuming any portion of the risk taken on by the BOCs in making such investments. Such a situation would give rise to precisely the sort of “parasitic free-riding” that Congress sought to avoid in adopting the Act.²⁵

Even in the case of narrowband facilities, unbundling obligations that survive beyond a finding of non-impairment will undermine the development of facilities-based competition. This will be particularly true if the CLECs’ prevail in their effort to preserve UNE-P through section 271.²⁶ If CLECs are permitted to obtain network elements pursuant to section 271 that are commingled with elements provided pursuant to section 251, the “synthetic competition” noted by the *USTA* court could continue beyond a finding of non-impairment. The most direct way to avoid this perverse result is to conclude that the obligation to provide unbundled access to a

²³ AT&T Comments at 24.

²⁴ *Triennial Review Order* ¶ 213. *See also, id.* ¶198 (recognizing the Commission’s “mandate . . . to promote the rapid deployment of advanced services throughout the nation[]”); ¶ 177 (acknowledging that section 706 reflects Congressional intent of factors to be taken into account in making unbundling decisions); and ¶ 288 (stating that unbundling decisions that “would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities” would be “in direct opposition to the express statutory goals authorized in section 706[]”).

²⁵ *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

²⁶ *See, e.g.*, AT&T Comments at 24-25; MCI Comments at 22-23; Z-Tel Comments at 14-17.

network element under section 271 is extinguished upon a finding that the network element need not be unbundled pursuant to the section 251 impairment test.²⁷

II. IF THE COMMISSION RETAINS AN INDEPENDENT UNBUNDLING OBLIGATION UNDER SECTION 271, IT SHOULD CONFIRM THAT THERE IS NO OBLIGATION TO COMBINE OR COMMINGLE SECTION 271 ELEMENTS WITH OTHER NETWORK ELEMENTS OBTAINED UNDER SECTION 251 OR 271

As shown above, there are compelling reasons for the Commission to reverse its holding in the *Triennial Review Order* that there is an independent unbundling obligation under section 271. If the Commission fails to do so, it will surely be faced with a host of questions regarding the scope of the unbundling obligation. Despite the Commission's clear pronouncements in the *Triennial Review Order*, the CLECs already contend that BOCs are required to combine and commingle section 271 elements with other elements unbundled pursuant to section 251 or 271. Clearly, this is the first step of the CLECs' two-pronged attack to resurrect a UNE-P-type offering, in the event a state commission eliminates the section 251 obligation to provide unbundled mass market switching in a particular market. The second step of this offense will be to force rates for section 271 elements toward TELRIC. While the Commission made it clear that TELRIC is not the appropriate standard for these elements,²⁸ and that it is the Commission, and not the state commissions, that have oversight over the rates for these elements,²⁹ the CLECs may well receive a receptive audience to their arguments on these issues in certain states. Thus, a finding of non-impairment in a nine-month switching proceeding will likely not result in the regulatory certainty that the Commission contemplated in the *Triennial Review Order*.

²⁷ Another route to address these issues is to forbear from any section 271 unbundling obligations. See, e.g., Petition for Forbearance of SBC Communications Inc., WC Docket No. 03-235 (filed Nov. 6, 2003); *Public Notice*, DA 03-3608, rel. Nov. 10, 2003.

²⁸ *Triennial Review Order* ¶ 657.

²⁹ *Id.* ¶ 664.

If the Commission does not reconsider the independent unbundling obligation under section 271, it should at a minimum clarify that there is no need to combine or commingle section 271 elements with network elements provided pursuant to section 251 or 271. Any other result would completely undermine the framework established in the *Triennial Review Order*.

In the section of the *Order* specifically discussing what section 271 obligations BOCs have with respect to facilities taken off the section 251 unbundling list, the Commission made clear that BOCs have no obligation to combine such de-listed facilities with the unbundled network elements that BOCs must continue to provide under section 251: “We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251.”³⁰ But several parties now suggest that this clear holding is actually a nullity, maintaining that a *different* section of the *Order* -- one not specifically addressed to facilities provided under section 271, and, indeed, *one specifically edited by the Commission after the Order’s release to avoid any mention of section 271 at all* -- reimposes those very same obligations.³¹ These parties argue that the *Triennial Review Order’s* new “commingling” rules, which direct ILECs to permit CLECs to replace special access services with UNEs in some circumstances by “perform[ing] the functions necessary to commingle an unbundled network element . . . with one or more facilities or services that . . . [the CLEC] has obtained at wholesale” from the ILEC,³² require Qwest to build combinations containing both

³⁰ *Id.* ¶ 655 n.1990.

³¹ *See, e.g.,* Allegiance, *et al.* Comments at 21-22; ALTS Comments at 27; Covad Comments at 16; Z-Tel Comments at 15.

³² 47 C.F.R. § 51.309(f) (*Triennial Review Order*, App. B at 3).

section 251(c)(3) unbundled network elements such as loops and the market-priced switching that Qwest will offer under section 271.³³

The CLECs' argument makes no sense as a matter of law. It ignores Congress' 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 a section of the *Triennial Review Order* having nothing to do with section 271 to render the *Order's* specific decision *not* to require section 251/271 combinations as surplusage. Nor does the argument make any sense as a policy matter. As discussed above, the very premise for removing an element from the section 251(c)(3) unbundling list is that this Commission or a state commission has found, after extensive investigation, 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 does not combine or commingle them with other incumbent facilities.

The Commission has always based the element combination requirement on the express language of section 251(c)(3). Section 251(c)(3) says “[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 service.” In the *Local Competition Order*, the Commission read this language to require ILECs to combine elements

³³ See, e.g., ALTS Comments at 27.

for requesting CLECs, and not to dismantle already combined elements.³⁴ 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.”³⁵

As the Commission explains in the *Triennial Review Order*, 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).”³⁶ Instead, the language in section 271’s checklist items 4-6 merely requires BOCs to provide access or interconnection to facilities that is “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’ 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).

This same rationale should apply with respect to the Commission’s newly minted “commingling” requirement as well. “Commingling,” as defined in the *Triennial Review Order* and in the Commission’s new rules, is simply an expanded combination requirement, and thus differs from the requirement that the Commission found *inapplicable* under section 271 only in degree. In the *Triennial Review Order*, the Commission defined a new commingling requirement pursuant to which ILECs are obligated to “permit a requesting telecommunications

³⁴ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15645-49 ¶¶ 289-97 (1996) (“*Local Competition Order*”).

³⁵ *Id.* at 15647 ¶ 294 (footnote omitted).

³⁶ *Triennial Review Order* ¶ 655 n.1990.

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.”³⁷ The Commission made clear that the commingling requirement includes the obligation to “perform the functions necessary to commingle a UNE” with a wholesale service.³⁸ In effect, then, commingling simply expands the Commission’s combination rule to apply not only to combinations of UNEs with other UNEs, but to apply to combinations of UNEs and wholesale services generally.

The commingling rule should not be read to apply to services or facilities provided pursuant to a BOC’s section 271 obligations. There is no plausible reason why the FCC would exempt BOCs from the combination rules with one hand, and then immediately reimpose those rules with the other through a newly devised commingling requirement.³⁹ And in fact, immediately after determining that there is no combination requirement with respect to elements provided pursuant to section 271, the Commission initially made clear, in the original release of the *Order*, that the newly modified commingling rules do *not* apply “to services that must be offered pursuant to [section 271’s checklist items].” *Pre-Errata, Triennial Review Order* ¶ 655 n.1990.

³⁷ *Id.* ¶ 579.

³⁸ *Id.*

³⁹ The CLECs’ reading would assume that the FCC intentionally adopted an order containing a blatant and ultimately self-defeating self-contradiction. As the courts have found, “[i]nternally inconsistent reasoning by a government agency is not entitled to any deference by the courts and is inherently arbitrary and capricious.” *Louisiana Fed. Land Bank Ass’n v. Farm Credit Admin.*, 180 F. Supp. 2d 47, 57 (D.D.C. 2001), rev’d on other grounds, 336 F.3d 1075 (D.C. Cir. 2003); *Air Line Pilots Assn. v. United States DOT*, 3 F.3d 449, 450 (D.C. Cir. 1993) (reversing internally inconsistent agency order as arbitrary and capricious); *General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (finding agency analysis internally inconsistent and thus arbitrary and capricious).

To be sure, the *Order* as originally drafted also contained the erroneous statement, in the general discussion of the commingling rule, that the wholesale services covered by the rule include “network elements unbundled pursuant to section 271”⁴⁰ But the Commission subsequently resolved this inconsistency, and corrected the latter erroneous conclusion, in an *Errata* to the *Triennial Review Order* issued several days after the *Order*’s release. The *Errata* deleted *both* statements, thereby making sure that the commingling discussion made no reference to section 271 whatsoever.⁴¹ The *Errata* thus leaves the *Triennial Review Order* with its initial, central conclusion: that Congress intended that no combination requirement be imposed pursuant to section 271 of the Act. The Commission’s decision to leave the commingling discussion silent with respect to section 271 is fully understandable: once the Commission held explicitly that section 271 facilities are not subject even to the core element combination rules, there was simply no need to rule further that the even more burdensome commingling rules should not be stretched to cover these facilities -- that conclusion follows *a fortiori*.⁴² And to the extent that any tension between the two sections of the *Triennial Review Order* remains, the part of the *Order* specifically addressing the application of combination duties to section 271 facilities (and holding that no such duties exist) must take precedence over the more generic commingling discussion, which makes no specific reference to section 271 at all.⁴³

⁴⁰ *Pre-Errata, Triennial Review Order* ¶ 584.

⁴¹ *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-227 at 3 (rel. Sept. 17, 2003).

⁴² *See, e.g., Armbruster v. K-H Corp.*, 206 F. Supp. 2d 870, 895 (E.D. Mich. 2002) (holding that because there is no duty to disclose changes in benefits before such changes are official, *a fortiori*, there is no duty to disclose the mere *possibility* of future changes in benefits).

⁴³ *Cf. Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 375 (1990) (“It is an elementary tenet of statutory construction that ‘[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one’”) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); *In re Stoltz*, 315 F.3d 80, 93 (2d. Cir. 2002) (same);

In addition to misconstruing the *Triennial Review Order*, the CLECs' argument misreads the underlying statutory provisions. Statutes must be read to carry out clear expressions of congressional intent,⁴⁴ and to give effect to *every* provision of the statute, rendering none of them surplusage.⁴⁵ The CLECs, by contrast, read section 251(c)(3) and the Commission rules implementing that section to override Congress's careful crafting of section 271. They simply pretend that Congress' decision to omit from section 271 the specific duty to combine network facilities elements that Congress included in section 251 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."⁴⁶ The Commission should give effect to Congress' clear intent.

United States v. Navarro, 160 F.3d 1254, 1256 (9th Cir. 1998) ("It has long been understood that general statutory provisions . . . do not control specific ones . . . where some conflict seems to exist between them."); *Warren v. North Carolina Dep't of Human Res.*, 65 F.3d 385, 390 (4th Cir. 1995) (same).

⁴⁴ 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 . . ."); *Hernandez v. Ashcroft*, No. 02-70988, 2003 WL 22289896, at *11 (9th Cir. Oct. 7, 2003) ("We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will.") (quoting *Bedroc Ltd. v. United States*, 314 F.3d 1080, 1083 (9th Cir. 2002)).

⁴⁵ 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 . . ."); 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"); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) ("[a] basic rule of statutory construction is: '[a] provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.'" (quoting *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993)) (internal quotations omitted).

⁴⁶ *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also *Russello v. United States*, 464 U.S. 16, 23 (1983); see also *United States v. Wooten*, 688 F.2d 941, 949-50 (4th Cir. 1982); *Connecticut Student Loan Found. v. Riley*, 948 F. Supp 156, 161 (D. Conn. 1996).

No other interpretation makes sense from a policy perspective. The combination and commingling rules are premised on ensuring that CLECs receive full access to incumbent LEC 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 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,”⁴⁷ 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.”⁴⁸ Likewise, the *Triennial Review Order*’s discussion of its modified “commingling” rules is entirely focused on effectuating the provisioning of access to UNEs (*i.e.*, those elements as to which CLECs would be “impaired” without unbundled access) by requiring them to be connected or attached to wholesale services.⁴⁹

But the entire reason that an element is taken off the section 251(c)(3) unbundling list is that a state commission has formally decided, after exhaustive review, that CLECs would not be “impaired” *if they could not get access to that element from the ILEC at all*. And by taking that element off the list, the Commission implicitly recognizes that CLECs are not “impaired” as to *other* elements without access to that de-listed element because, by definition, they may self-provision *that* element without impairment. For example, if a state commission finds that

⁴⁷ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 532 (2002).

⁴⁸ 47 U.S.C. § 251(d)(2)(B). *See also Local Competition Order*, 11 FCC Rcd at 15616 ¶ 227.

⁴⁹ *See Triennial Review Order* ¶¶ 579-584.

CLECs are not “impaired” without unbundled access to mass-market switching, it will necessarily have “determine[d] that self-provisioning of local switching is economic,”⁵⁰ or that there are sufficient numbers of competing wholesale providers beyond the ILEC from whom the CLEC could obtain switching instead.⁵¹ Where a state commission has found that a CLEC can still feasibly enter the market if the BOC does not provide it with unbundled switching *at all*, there is no reason why the CLEC would be harmed if the BOC *does* continue to offer unbundled switching pursuant to section 271 but does not combine it or commingle it with other BOC facilities. In those circumstances, the BOC should not be penalized simply because it has been required -- erroneously in Qwest’s view -- 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 a 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 Commission’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 the CLECs’ invitation to impose combination or commingling obligations on the BOCs with respect to network elements the BOC provides solely pursuant to section 271 of the Act.

⁵⁰ 47 C.F.R. § 51.319(d)(2)(iii)(B). *See also Triennial Review Order* ¶¶ 494, 501.

III. CONCLUSION

For the foregoing reasons, the Commission should grant BellSouth's Petition and find that there is no independent unbundling obligation under section 271. In the event the Commission does not grant this relief, it should at a minimum clarify that there is no obligation to combine or commingle network elements provided pursuant to section 271 with other network elements that are provided under section 251 or 271.

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⁵¹ 47 C.F.R. § 51.319(d)(2)(iii)(A)(2). *See also Triennial Review Order ¶¶ 494, 504-5.*

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC's duplicating contractor Qualex International, Inc. and, 3) served via First Class United States mail, postage prepaid on the parties listed on the attached service list.

/s/ Richard Grozier
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