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

In the Matter of Petition of Qwest Services Corp. for Forbearance From the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Sections 53.203(a)(2)-(3) of the Commission's Rules	)	CC Docket No. 96-149

OPPOSITION OF AT&T CORP. TO QWEST PETITION FOR FORBEARANCE

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October 29, 2003

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Pursuant to the Commission's Notice,[1] AT&T Corp. ("AT&T") hereby submits its opposition to Qwest Services Corporation's ("Qwest") Petition for Forbearance ("Pet."). Qwest seeks forbearance from the "crucial[ly] importan[t]"[2] provisions of section 272 that prohibit Qwest from having Bell Operating Company ("BOC") subsidiaries perform "operating, installation and maintenance" ("OI&M") services on behalf of its long distance subsidiary.

INTRODUCTION AND SUMMARY

Qwest's "me-too" petition presents no new arguments that have not already been advanced by the other BOCs' petitions for forbearance from the OI&M requirements. As described in AT&T's previous pleadings in this proceeding, forbearance is unlawful and, in all events, is not remotely justified by the record put forward by any of the BOCs.[3] In particular, AT&T has demonstrated that the prohibition against sharing of OI&M services remains critically necessary to help prevent cost misallocation and discrimination – and will continue to provide significant and unique benefits so long as Qwest and the BOCs retain their market power over local bottleneck facilities. AT&T has further explained that the BOCs have failed to provide any convincing support for their claims that compliance with the OI&M prohibition impose unnecessary and substantial costs.

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[1] Public Notice, DA 03-3113 (October 8, 2003).

[2] *Texas 271 Order*, 15 FCC Rcd. 18354, ¶ 395 (2000).

[3] *See generally* AT&T's Opposition to Verizon Petition for Forbearance (CC Docket No. 96-149, Sep. 9, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC (CC Docket No. 96-149, Nov. 15, 2002); Comments of AT&T Corp. on SBC Petition (CC Docket 96-149, July 1, 2003); *Ex Parte* Letter from C. Frederick Beckner III, AT&T, to Marlene Dortch, FCC, at 5-8 (CC Docket No. 96-149, July 9, 2003); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC (CC Docket No. 96-149 July 9, 2003) ("*AT&T July 9 Cost Ex Parte*"); AT&T's Opposition to BellSouth Petition for Forbearance (CC Docket No. 96-149, Aug. 6, 2003); *Ex Parte* Letter from Frank Simone, AT&T, To Marlene Dortch, FCC, (CC Docket No. 96-149, Oct. 1, 2003); *Ex Parte* Letter from C. Frederick Beckner III, AT&T, to Marlene Dortch, FCC (CC Docket No. 96-149, Oct. 21, 2003).

In this regard, Qwest's petition falls farthest from the mark, because Qwest flatly admits that it currently "incurs very few OI&M costs." Pet. at 7. Thus, the Commission is here presented with a record where it is being asked to forbear from applying a concededly costless but vitally important and pro-competitive regulation. There is thus no dispute here that the benefits of the OI&M ban far outweigh the (non-existent) costs. And the Commission cannot forbear from these critically important safeguards based on speculation that Qwest may soon begin to incur "future costs" (Pet. at 14) – particularly where no BOC has ever come forward with credible evidence that compliance with OI&M regulations is costly.

Qwest's further claim that its customers are hindered in obtaining "end-to-end" customer service because of the OI&M restriction is simply incorrect and inconsistent with marketplace realities. If, as Qwest claims, the OI&M restriction caused BOC customers to receive less efficient service, then Qwest and the other BOCs would not be winning new customers at the rates that they have proclaimed. In fact, the ban on joint provision of OI&M does not disadvantage BOCs, but rather places them on an equal playing field with their competitors. Neither Qwest nor any other BOC has demonstrated that long distance competitors are better able to provide end-to-end customer service than BOC section 272 affiliates – because Qwest and the other BOCs maintain a firm grip on critical inputs like special access, competitors (and their customers) also must endure the inefficiencies that result from relying on the BOCs.

The Commission has determined, in proceedings since 1983 when the BOCs were first created, that allowing a BOC to provide network-related services on behalf of an affiliate "would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors," and "would create substantial opportunities for improper cost

allocation."[4] Despite the Commission's repeated recognition of the need for and benefit of OI&M "separation," the BOCs have repeatedly sought to eliminate this pro-competitive requirement. Year-after-year, the Commission has consistently rebuffed those efforts, reasserting its determination that section 272 precludes shared OI&M services, and recognizing that any other ruling would "create a loophole around the separate affiliate requirement" and would provide for such "substantial integration of these essential functions . . . that independent operation would be precluded."[5] At the end of the day, Qwest and the other BOCs provide no new arguments why this longstanding conclusion should be revisited. Because the OI&M prohibition is just as vital today in fulfilling section 272's central purpose of "prohibit[ing] anticompetitive discrimination and cost-shifting," it must be retained.[6]

I. QWEST'S PETITION FOR FORBEARANCE IS PROSCRIBED BY SECTION 10(d).

Qwest's claim (Pet. at 9-13) that Section 10 provides the Commission with authority to forbear from applying its OI&M rules (47 C.F.R. §§ 53.203(a)(2)-(3)) flatly ignores the text of that section. As AT&T has previously explained in responding to a Verizon "white paper," section 10(d) explicitly limits the Commission from exercising forbearance authority in the manner requested by Qwest.[7] Because AT&T's *ex parte* responses are already in the record in

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[4] First Report and Order and FNPRM, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272,* 11 FCC Rcd. 21905, ¶ 163 (1996) ("*Non-Accounting Safeguards Order*") (relying on *BOC Separations Order*, 95 F.C.C.2d 1117 (1983)) (emphasis added).

[5] Third Order On Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 14 FCC Rcd. 16299, ¶ 20 (1999) ("*Non-Accounting Safeguards Third Order On Reconsideration*"); *see infra* note 21.

[6] *Non-Accounting Safeguards Order* ¶ 9.

[7] *E.g.*, *Ex Parte* Letter from C. Frederick Beckner III, AT&T, to Marlene Dortch, FCC, at 5-8 (CC Docket No. 96-149, July 9, 2003); *Ex Parte* Letter from Frank Simone, AT&T, to Marlene Dortch, FCC, (CC Docket No. 96-149, Oct. 20, 2003); *Ex Parte* Letter from C. Frederick Beckner III, AT&T, to Marlene Dortch, FCC (CC Docket No. 96-149, Oct. 21, 2003).

this proceeding, a lengthy response to Qwest's arguments is unnecessary. To put it simply, Section 10(d) of the Communications Act, entitled "Limitation," provides:

> Except as provided in section 251 of this title, *the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title* under subsection (a) of this section until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d) (emphasis added). Section 271(d)(3), in turn, explicitly requires that a BOC provide long distance service in accordance with the requirements of section 272. Specifically, the Commission "*shall not approve* the [long distance] authorization requested . . . unless it finds that . . . (B) the requested authorization will be carried out *in accordance with the requirements of section 272* of this title." 47 U.S.C. § 271(d)(3) (emphasis added). The plain language of section 271(d)(3), accordingly, incorporates "the requirements of section 272" into section 271, and the equally plain text of section 10(d) forbids the Commission to "forbear from applying the requirements of . . . 271" until that statute is "fully implemented" – a demanding standard that Qwest does not even claim to satisfy. The combination of these provisions leads inexorably to the conclusion that the Commission is forbidden to forbear from applying any of the "requirements" of section 272 that have been incorporated by reference into section 271.

Further, it is clear that the "requirements" referred to in section 10(d) include both the provisions of the Act *and* the Commission's implementing regulations, including the OI&M safeguard. Other sections of the Communications Act make clear that Congress used the term "requirement" to include the Commission's implementing regulations. For example, section 252(e)(2)(B) forbids a state commission from approving an interconnection agreement "if it finds that the agreement does not meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title*, or the standards

set forth in subsection (d) of this section." 47 U.S.C. § 252(e)(2)(B) (emphasis added).[8] Thus, a "requirement" is clearly, *inter alia*, a "regulation" for which the Commission is barred from granting forbearance until it makes an affirmative finding that section 251(c) and 271 have been fully implemented.[9]

Qwest claims that the "single statutory reference" to section 272 contained in section 271 cannot "expand" section 10(d)'s limitation on forbearance authority. Pet. at 10. But that limitation plainly applies to the "requirements" of section 271, and the fact that section 272 requirements are incorporated by reference into section 271 does not mean that they are not, as Qwest would have it, "requirements" of section 271. Indeed, in Qwest's section 271 applications, it pledged to the Commission that it would comply with the section 272 obligations, *including* the OI&M restrictions. And, crediting Qwest's claims, the Commission made express findings that Qwest would comply with section 272, findings that are a necessary predicate to granting a section 271 application.[10] Neither Qwest nor the Commission would have engaged in

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[8] Likewise in section 251(b)(2), local exchange carriers are obligated to provide "number portability in accordance with the requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).

[9] Even if there were ambiguity on this point, it has been resolved against Qwest. The Commission has already recognized that the term "requirement" in section 10(d) applies to "statutory provisions" and to "implementing regulations." Notice of Inquiry, *1998 Biennial Review*, 13 FCC Rcd. 21879, ¶ 32 (1998). The Commission has, therefore, made clear that the OI&M rules implementing section 272 constitute "requirements" of section 272, and thus of section 271(d)(3)(B).

[10] *E.g.*, *Qwest 9-State 271 Order*, 17 FCC Rcd. 26303, ¶¶ 387-88 (2002); *Qwest Minnesota Order*, 18 FCC Rcd. 13323, ¶¶ 62-65 (2003) (citing Qwest Application at 105 (pledging that "QLDC and QCC have not engaged and will not engage in OI&M")); *Qwest 3-State 271 Order*, 18 FCC Rcd. 7325, ¶¶ 112-115 (2003) & Qwest Application at 157 (same).

this exercise if the OI&M prohibition were not a "requirement" of section 271.[11] The section 272 requirements "expand" the showing required for section 271 authorization and, by the same token, limit the Commission's authority to forbear from them just as though they were set forth directly into the text of section 271.

Qwest also contends that the lone authority addressing this issue – a decision by the Common Carrier Bureau rejecting the same reading of the Act that Qwest advanced here and finding that "prior to their full implementation, *we lack authority to forbear from application of the requirements of section 272* to any service for which the BOC must obtain prior authorization under section 271(d)(3)"[12] – need not be followed. *See* Pet. at 11. According to Qwest, the Commission's Staff has not been delegated authority to act on questions that present novel questions of law and that cannot be resolved by "outstanding precedents or guidelines." Pet. at 11 n.28 (quoting 47 C.F.R. § 0.291(a)(2)).[13] But the Bureau resolved the issue before it by looking at the most appropriate "guideline" – the text of the Act – and it therefore properly determined that section 10(d) prohibited forbearance from the requirements of section 272 prior to full implementation of section 251(c) and 271. In any event, and regardless of the Bureau's authority to resolve the issue or otherwise bind the full Commission, the Commission, too, is

[11] By the same token, if Qwest suddenly refused to comply with the OI&M restriction, it would no longer be complying with section 272, which would, as the Commission has recognized, justify a finding under section 271(d)(6) that Qwest is violating a condition of its section 271 authorization and that such authority should be suspended or revoked.

[12] *Section 272 Forbearance Order*, 13 FCC Rcd. 2627, ¶ 22 (C.C.B. 1998) (emphasis added); *see also id.* ¶ 23 (sections 10(d) and 271(d)(3) "preclude[] [the Commission's] forbearance for a designated period from section 272 requirements with regard to any service for which a BOC must obtain prior authorization pursuant to section 271(d)(3)").

[13] Of course, if the Bureau literally had no authority to "act on [the BOCs' forbearance] requests" (*id.*), then the Bureau's orders authorizing them to provide non local-directory service would be voided.

undoubtedly bound by the plain terms of the Act.[14] It therefore cannot forbear from the OI&M requirement unless it can explain what its own Staff could not: that section 272 requirements are not also requirements of section 271, even though Congress expressly required the Commission to find that a BOC complied with the requirements of section 272 as a necessary precondition to section 271 authorization.[15] Absent such an explanation, the Commission's authority to forbear from the OI&M rules is squarely limited by section 10(d).

Though it would have the Commission ignore the Bureau's decision and its dispositive analysis, Qwest relies heavily on the Commission's cases regarding forbearance in connection with "incidental interLATA services" provided under section 271(g)(4). Like Verizon, Qwest argues as follows: section 271(g)(4) authorizes BOCs to provide "incidental interLATA services"; section 272(a)(2)(B)(i) requires a BOC to provide certain "incidental interLATA services" through a separate affiliate; the Commission has exercised its forbearance authority in connection with the latter provision; and therefore, section 10(d)'s bar on forbearance in connection with section 271 does not extend to section 272. *See* Pet. at 12.

The central, erroneous premise of this argument is that section 271(d)(3) incorporates all of the requirements of section 272 into 271. It does not. Section 271(d)(3) incorporates (and thus shields from forbearance) only those section 272 requirements that relate to the BOCs' provision of interLATA services that require Commission "authorization." Put differently, section 271(d)(3) incorporates only the section 272 requirements that must be satisfied as a

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[14] *See GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) ("the Commission must operate within the limits of 'the ordinary and fair meaning of [the Communications Act's] terms'") (quoting *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999)).

[15] Further, the courts of appeals have found that the Commission *is* obligated to reconcile its precedents with Staff rulings. *E.g.*, *Northampton Media Ass'n* v. *FCC*, 941 F.2d 1214, 1216 (D.C. Cir. 1991).

prerequisite to long distance authorization under section 271(d). The BOCs are not required to obtain Commission authorization to provide "incidental interLATA services," and thus section 271(d)(3) does not incorporate section 272(a)(2)(B)(i) (the "incidental interLATA services" provision) by reference and forbid forbearance.[16] The authority cited by Qwest – which permitted forbearance of the separate affiliate requirement in connection with "incidental interLATA services" under section 271(g) – is, consequently, utterly irrelevant to the scope of the exception to the Commission's forbearance authority established in section 10(d).

Qwest also claims – by citing to nothing other than a Verizon *ex parte* – that the Commission has more authority to forbear from its own regulations than from statutory provisions. *See* Pet. at 12-13 & n.32. But that finds no support either in the text of section 10(d), which applies to "requirements" of section 271 and thus equally to the Act or implementing regulations, or generally in administrative law, which holds that agencies are bound by their own rules in like manner to their organic Act.[17] Qwest's claim that the Commission could revisit its original interpretation of section 272 in the OI&M rules reveals its actual and inappropriate agenda: in the guise of seeking forbearance that is forbidden to it by statute, Qwest is in fact attempting to obtain the elimination of a rule, but by avoiding the trouble of filing a petition for

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[16] The Forbearance Order recognized this precise distinction. *Section 272 Forbearance Order* ¶ 2 (Our "authority to forbear" from the application of section 272 to a BOC's provision of enhanced 911 services is "not affected by the limitation in section 10(d) of the Act on the Commission's authority to forbear from applying the requirements of section 271 prior to their full implementation. *Although section 271(d)(3) requires the Commission's prior approval of a BOC's application to provide in-region, interLATA service and the criteria for approval include compliance with section 272, prior Commission approval pursuant to section 271(d)(3) is not required, where, as here, the BOCs provide services that are either previously authorized within the meaning of section 271(f) of the Communications Act or incidental interLATA services as defined by section 271(g) of that Act*") (emphasis added).

[17] *E.g.*, *United States* v. *Shaughnessy*, 347 U.S. 260, 265-67 (1954); *Reuters Ltd.* v. *FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

notice and comment rulemaking and in the hope of requiring the Commission to act on Qwest's "forbearance" petition within the statutory time frame in Section 10. If Qwest believes that the OI&M rules should be amended, it is free to file a petition seeking the changes that it desires. But Qwest should not be permitted to distort section 10(d) – and to eliminate the statutory safeguard against the premature lifting of the vital safeguards to competition found in the requirements of section 271 and portions of section 272 – just so that it can invoke a statutory deadline to which it is not entitled.[18]

II. QWEST'S PETITION FOR FORBEARANCE DOES NOT MEET ANY OF THE SECTION 10 FORBEARANCE CRITERIA.

Even if the Commission were not prohibited by Section 10(d) from granting Qwest's petition prior to full implementation of Sections 251(c) and 271, Qwest's petition still must be denied because Qwest does not meet any of the Section 10 criteria for forbearance. In order to grant forbearance from a Commission regulation, the Commission must find that (i) "enforcement of such regulation" is "not necessary" to ensure that a carrier's rates and practices are "just and reasonable;" (ii) that enforcement "is not necessary for the protection of consumers;" and (iii) that "forbearance . . . is consistent with the public interest." 47 U.S.C. § 160(a). Qwest's showing on each of these requirements is patently insufficient, and has already been rejected by the Commission numerous times.

A. The OI&M Rules Are Necessary To Ensure Just and Reasonable Rates

Qwest claims that the OI&M rules are not necessary to ensure reasonable rates because the Commission has already determined that BOC section 272 affiliates are non-dominant

[18] Even if this could be a proper subject for forbearance, Qwest did not caption its request for forbearance in the manner required by the Commission's rules. *See* 47 C.F.R. § 1.53. The Commission is therefore not required to rule on the request within the time frames required by Section 10.

carriers that do not have the ability to control prices. Qwest's argument is frivolous. The finding of non-dominance was specifically "predicated" on the BOCs' "full compliance" with the Section 272 safeguards and the FCC's implementing rules, including the prohibition on OI&M. *Regulatory Treatment of LEC Provision of Interexchange Services*, 12 FCC Rcd. 15756, ¶¶ 6, 104-05, 111-19, 134 (1997). Absent those safeguards, the BOC long distance affiliate would be deemed "dominant" by virtue of its affiliation with the BOC, which unquestionably does have market power and could use that power to control prices and set them above just and reasonable levels.

Specifically, the FCC has determined that, so long as a BOC controls bottleneck facilities, it will have the incentive to discriminate and to misallocate costs, so that it can "create a 'price squeeze'" by charging rival "firms prices for inputs that are higher than prices charged, or effectively charged, to the BOC's section 272 affiliate." *Non-Accounting Safeguards Order* ¶ 12. Then, "the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions." *Id.* And with respect to OI&M, the Commission has determined that allowing a BOC to provide network-related services on behalf of an affiliate "would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors," and "would create substantial opportunities for improper cost allocation." *Id.* ¶ 163 (emphasis added). Accordingly, the OI&M rules are vitally necessary to help prevent cost misallocation that would allow the Qwest BOC to act on its incentive to engage in anticompetitive price squeezes.

Qwest contends that these concerns have been eliminated by price caps and specifically

by recent reforms in the interstate price cap system that, Qwest claims, have "severed the link between costs and exchange access prices." Pet. at 14. Qwest's argument is flawed, for numerous reasons.

As an initial matter, price caps are designed only to reduce the LECs' *incentive* to misallocate costs, but because (as described below) price caps alone could never entirely eliminate these incentives, additional rules and safeguards, such as the OI&M rules, are necessary to limit the incumbent LECs' *ability* to misallocate costs to the detriment of captive ratepayers and competitors. That is why the Commission re-affirmed, in the same orders that promulgated the OI&M rules and other rules implementing Section 272, that the Commission has already rejected BellSouth's argument and determined that "interstate price cap regulation does *not* eliminate the need for cost allocation rules."[19] By the same token, the prohibition on OI&M remains necessary even with the existence of price caps.

Further, contrary to Qwest's claims, price cap regulation has not eliminated the incumbents' incentives to misallocate costs to their monopoly services. Indeed, the most that Qwest can claim is that regulation has "largely alleviated" the link between costs and rates (Pet. at 14) – but that admits that numerous links between costs and prices are still in place, and

[19] *Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd. 17539, ¶¶ 58, 271 (1996) ("*Accounting Safeguards Order*") (emphasis added). Further, the Commission's determination to create an outright ban on OI&M, rather than attempt to police cost misallocation in other ways is surely appropriate. The Commission has recognized since at least 1983 that "sharing of such services would require 'excessive, costly, and burdensome regulatory involvement in the operation, plans, and day-to-day activities of the carrier [in order] to audit and monitor the accounting plans necessary for such sharing to take place.'" *Non-Accounting Safeguards Order* ¶ 163 (quoting *BOC Separations Order*, 95 F.C.C.2d 1144, ¶ 70). Rather than attempt to engage in such oversight, the Commission properly determined to ban joint OI&M altogether. *See also Non-Accounting Safeguards Third Order On Reconsideration*, ¶ 20 (recognizing "the burdensome regulatory involvement that would be necessary to detect and deter such cost misallocation").

therefore leave plenty of reasons why incumbents continue to have the incentive to inflate the costs of their regulated services and understate the costs of services that face some measure of competition. This is because, in practice, price cap regulation is effectively only a modified form of rate-of-return regulation. The "index" used to adjust rates is always subject to change by the regulator, and the typical basis for altering the index is that a company's costs have increased at a greater rate than the index. *See* Kenneth Train, *Optimal Regulation* 327 (1991) (under price cap regulation, a firm will have incentive to "waste so as to convince the regulator to allow a higher cap"). For that reason, as the Supreme Court held in 2002, "price caps do not eliminate gamesmanship," primarily because price caps are "simply . . . a rate-based offset" that, like rate-of-return regulation, still provides "monopolies too great an advantage." *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 487-88 (2002). And this is no theoretical concern: because the CALLS plan is due to expire soon, the incumbents have powerful incentives to shift costs in order to support higher exchange access price caps going forward.

Further, as AT&T has previously pointed out, the incumbent LECs are not even subject to "perfect" price cap regulation and therefore retain strong incentives to pad costs of regulated services. First, some states continue rate of return regulation for intrastate services, and in those areas there is a direct link between the incumbents' costs and prices – and thus the tremendous incentive for incumbents to inflate the rate base. Further, even in states that have adopted price caps for intrastate services, many such state price cap systems have retained sharing or other periodic earnings reviews, which likewise create a direct link from the costs incurred to the rate increases.

In addition, even though the interstate price cap system no longer includes a sharing obligation, Qwest and other incumbent LECs would nonetheless obtain significant benefits by

virtue of the fact that they could, in the absence of OI&M rules and other safeguards, misallocate costs to their regulated services. As described above, by manipulating its affiliates' costs to artificially low levels, an incumbent can effect price squeezes on its rivals even as it appears to comply with imputation requirements. Further, if Qwest and other incumbent LECs could shift a disproportionate share of the massive joint and common costs away from competitive services and onto regulated local services, they could be able to boost substantially prices for essential services, such as unbundled network elements, that they provide to downstream rivals.[20] For these reasons, even if "perfect" price cap regulation currently existed, price caps are not, by themselves, sufficient to eliminate incentives to misallocate costs. The Commission's OI&M rules are therefore vitally "necessary" to ensure just and reasonable rates and forbearance from those rules would patently violate section 10.[21]

B. The OI&M Rules Are Necessary To Protect Consumers

Because the OI&M rules prevent discrimination against other carriers, cost misallocation, price squeezes, and other anti-competitive abuses of bottleneck monopoly power, the rules promote competition and thus protect consumers. Qwest nevertheless contends that forbearance

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[20] To be sure, Congress has prohibited the prices for network elements to be based on historical costs, *see* 47 U.S.C. § 252(d)(1), and the Commission has adopted TELRIC pricing rules that examine the costs incurred by an efficient carrier, but that has not prevented the incumbent LECs from advancing cost models and UNE prices that are purportedly consistent with the Act and those rules but that in fact are rife with backward-looking data based on the incumbents' actual costs.

[21] Qwest also points to the existence of other safeguards that it claims would adequately protect against anticompetitive conduct should the OI&M ban be lifted, but the Commission has rejected that claim repeatedly, in 1999 (*Non-Accounting Safeguards Third Order On Reconsideration*), in 1997 (Second Order On Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 12 FCC Rcd. 8653, ¶¶ 11-12 (1997) ("*Non-Accounting Safeguards Second Order On Reconsideration*")), in 1996 (*Non-Accounting Safeguards Order*), and 1983 (*BOC Separations Order*); *see also AT&T July 9 Cost Ex Parte* at 6-8, 12-16 (demonstrating that other safeguards would not be effective and describing longstanding Commission precedent that structural remedies are only effective way to prevent this type of cost misallocation).

from the rules would serve consumers in two ways: by allowing Qwest to "compete more effectively" in the long distance market and to "streamline" OI&M functions for its customers and thereby improve customer service. Pet. at 15.

First, Qwest provides no evidence that it is not able to compete effectively in the long distance market because of the OI&M rules. To the contrary, it is widely reported that the BOCs have gained unprecedented market share since they have received authorization to offer long distance services. For example, according to Verizon, it had won 20 percent of the residential long distance market within one year of receiving section 271 authority in New York and 34.2 percent within two years. And Qwest does not appear to be any exception: it recently touted claims that it has signed up 1.12 million long distance customers in 2003. *See* http://www.qwest.com/about/media/pressroom/1,1720,1346_archive,00.html.

In this regard, it is difficult to comprehend how Qwest is prevented from competing effectively when it admits that it "incurs very few OI&M costs." Pet. at 7. Even if compliance with the OI&M safeguards were shown to cause the BOCs to incur significant costs (a showing that no BOC has ever made), those rules would still be necessary and thus inappropriate for forbearance because there is a "strong connection" between those safeguards and the protection of long distance competition.[22] Here, where the rules are imposing virtually no costs, there is no benefit to competition or to consumers that would arise from forbearance.

Second, Qwest's claims that it could serve its customers more effectively without the OI&M safeguards are incorrect and, in all events, insufficient to justify forbearance. Once again, Qwest's claim is virtually identical to claims that the Commission considered and rejected in

[22] *See Ex Parte* Letter from C. Frederick Beckner, Counsel to AT&T, to Marlene Dortch, FCC, at 3, CC Docket No. 96-149 (filed July 9, 2003) (citing *CTIA* v. *FCC*, 330 F.3d 502 (D.C. Cir. 2003)).

1996. *See*, *e.g.*, *Non-Accounting Safeguards Order*, ¶¶ 153, 163 (rejecting BOCs' claim that OI&M restriction is inappropriate because it will "result in a loss of efficiency and economies of scope, decreased innovation, and fewer new services"). Qwest presents no basis to revisit the issue, particularly since it admits that it incurs virtually no OI&M costs.

Further, and as AT&T has previously explained in response to other BOCs' forbearance petitions, neither Qwest nor other BOCs face a competitive disadvantage by virtue of the OI&M prohibition. Thus, whatever the costs and inefficiencies the OI&M requirement imposes on BOCs and their section 272 affiliates, they are *no different* than the costs and inefficiencies faced by the BOCs' competitors, and they are outweighed by the potential anticompetitive effects that would result if the OI&M requirements were eliminated prematurely. Competitors, which remain dependent on the BOC's network, also cannot respond as a single team to provide end-to-end service. In this regard, if there were any error in the Commission's original balancing of costs and benefits in this area, it is that the Commission *underestimated* the competitive harm arising from shared BOC/272 affiliate services, and allowed *too much* sharing and too many opportunities for anticompetitive cost misallocations and discrimination. Any added burdens of the OI&M requirement, therefore, do not and cannot place BOCs and their section 272 affiliates at any competitive disadvantage vis-à-vis their competitors; instead, as the Commission previously has found, it places them on equal footing.

C. Forbearance From The OI&M Rules Would Not Serve The Public Interest.

Finally, forbearance from applying the OI&M rules is not necessary to the public interest. Qwest makes no serious showing otherwise. *See* Pet. at 16. In first imposing the OI&M services restriction, the Commission found that it was needed to promote full and fair competition, further the public interest, and protect consumers (and competition) from anticompetitive BOC conduct. *See Non-Accounting Safeguards Order* ¶¶ 163, 167; *Non-Accounting Safeguards Second Order*

On Reconsideration, ¶¶ 12, 53; *Non-Accounting Safeguards Third Order On Reconsideration* ¶¶ 15, 20. The Commission found that anticompetitive discrimination would be an inevitable consequence of lifting the ban on shared OI&M services. *Non-Accounting Safeguards Order* ¶ 163. Similarly, the Commission determined that this ban was needed to avoid "improper cost allocation that Section 272 was designed to prevent." *Non-Accounting Safeguards Second Order On Reconsideration*, ¶ 12. Qwest's Petition presents no reasonable basis or cognizable evidence to justify the Commission changing its prior considered judgment.

CONCLUSION

For the reasons stated above, Qwest's petition should be denied.

Respectfully submitted,

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October 29, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 29, 2003
Washington, D.C.

/s/ Peter M. Andros

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[23] Filed electronically via ECFS