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BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor, to SBC Communications Inc., Transferee, WC Docket No 05-65 – REDACTED FOR PUBLIC INSPECTION***

Dear Ms. Dortch:

Ever since it launched its failed attempt to acquire MCI, Qwest has been on a desperate mission to sabotage other BOC mergers to serve its own ends. Its initial agenda was to convince MCI shareholders that a Verizon/MCI merger could never be approved. Once that strategy failed, it set its sights on obtaining assets on the cheap through forced divestitures.[1] The problem facing Qwest, as we have repeatedly shown, is that the mergers will promote, not reduce, competition, and there is no basis in fact or law for any of the remedies it is seeking. That, however, has not deterred Qwest, as it has made a series of false claims and even repeated those claims in the face of documented evidence of their inaccuracy.

Qwest's latest ploy is a September 21 *ex parte* and associated media campaign that purports to present "evidence that SBC already is using its increased market power arising from its acquisition of AT&T."[2] As shown below, these latest allegations, which relate to SBC's recent special access price flex contract negotiations with Qwest and the change of control

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[1] Qwest's CEO has made no secret of this strategy. *See, e.g.,* Yuki Noguchi, "After MCI Miss, Qwest Aims at Other Targets," Washington Post, at E5 (May 25, 2005) (quoting Qwest Chairman Richard Notebaert as stating that SBC-AT&T and Verizon-MCI mergers "creat[e] other opportunities for Qwest to pick up assets").

[2] Letter from Robert L. Connelly, Jr., Vice President – Deputy General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, Sept. 21, 2005, at 1 ("Qwest *ex parte*").

provision in certain contracts under which SBC buys services from other carriers, are no more accurate or relevant than Qwest's others. Indeed, far from demonstrating some new-found market power, SBC's negotiations with Qwest reveal quite the opposite. And the change of control provisions in the contracts cited by Qwest reflect standard, longstanding commercial practices of a wide range of businesses, large and small, and, in fact, are similar to provisions in Qwest's own contracts with its suppliers.

Price Flex Negotiations: Grooming Restrictions and Access Service Ratios

After months of negotiation, Qwest recently agreed to a new pricing flexibility (price flex) contract with SBC.[3] During those negotiations, SBC made significant concessions to address Qwest's business needs. At the outset of the negotiations, Qwest indicated that it sought to reduce its special access spend with SBC in 2005 and subsequent years by a specified amount. SBC accommodated that request by ***[REDACTED]***.

These substantial concessions to Qwest are nowhere mentioned in Qwest's *ex parte*. Instead, Qwest complains in isolation about two aspects of SBC's offer: the number of grooms it will be permitted under the new arrangement,[4] and the continued application of a 95% access service/UNE ratio – a provision that has been part of SBC's MVP tariff, and hence has applied to Qwest, since 2000. Qwest's specific allegations with respect to these two provisions are, in a number of respects, flatly untrue. Before turning to those allegations, however, SBC notes that the mere fact that Qwest did not obtain *everything* it wants in these negotiations is hardly indicative of SBC market power, much less, as Qwest puts it, "increased market power 'muscle.'"[5] The fact of the matter is that Qwest's new price flex contract is a substantially *better* deal for Qwest than the MVP tariffs under which Qwest has taken service for the past five years. Were that not the case, Qwest could have simply exercised other options, including its right to renew under the MVP tariff. Thus, if anything, Qwest and SBC's new arrangement illustrates that SBC no longer has whatever market power it may once have enjoyed in special access. ***[REDACTED]***

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[3] Under the contract, SBC will provide special access services ***[REDACTED]*** to Qwest, most of which Qwest has obtained for the past five years pursuant to SBC's MVP tariffs.

[4] "Grooming" refers to the rearrangement or reconfiguration of "live" network facilities, almost always during evening or nighttime maintenance window hours. SBC's grooming limits do not apply to those grooms that are performed during normal business hours.

[5] Qwest *ex parte* at 1.

It is true that, in return for these significant concessions, SBC asked Qwest to limit its grooming activity and ultimately insisted that Qwest agree to roughly the same relative limits as other SBC customers that engage in significant grooming.[6] But that is simply a reflection of what Qwest itself acknowledges – that "reasonable non-discriminatory grooming policies are necessary to permit orderly processing of orders, consistent with the ILEC's technical capabilities."[7] Grooming is a resource-intensive activity that requires significant planning and coordination and that is almost always performed during nighttime maintenance windows at higher overtime or night shift rates. Further, because demand for grooms is sporadic, with significant peaks and valleys, SBC is constrained in its ability to dedicate resources to accommodate the grooming schedules of every customer. These difficulties are exacerbated by frequent last-minute changes in grooming schedules requested by customers due to difficulties they may have in obtaining cooperation of their end-user customers or other reasons. In short, grooming is expensive and difficult to perform efficiently.[8] Efforts by SBC to reduce this expense in a nondiscriminatory manner as it simultaneously agrees to substantial new price discounts and other concessions do not evidence market power. They are a rational and reasonable way of controlling expenses to offset revenue reductions.

Qwest claims that SBC's grooming limits are discriminatory, applying only to circuits moving from SBC to a CLEC and not to circuits moving onto SBC's network. But that is simply untrue; the limits apply to all grooms performed during evening or nighttime maintenance windows, irrespective of whether the circuits are being groomed onto or off of SBC's network.[9] It is, moreover, ironic that Qwest would even raise this inaccurate allegation, given that Qwest actually *asked* SBC to modify its grooming policy so that the restrictions would apply only to

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[6] The grooming limits applicable to Qwest were calculated so as to permit Qwest roughly the same relative number of grooms – *i.e.,* roughly the same number of grooms per special access circuit – as other SBC customers. Qwest had sought preferential, higher limits, even as it demanded and received steep contract discounts and other concessions.

[7] Qwest *ex parte* at 5.

[8] Issues relating to the need for grooming limits and the dissatisfaction of some carriers with those limits are not new to the Commission. *See, e.g.,* letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, and 98-147, December 13, 2002 (responding to WorldCom *ex parte* regarding grooming limits).

[9] Although, as Qwest notes, grooming limits do not apply to "new installs or customer initiated moves from Location A to Location B," that is because those activities do not require work on live circuits and can be performed during normal business hours. Similarly, disconnect orders need not be processed outside of normal business hours and, hence, also are not subject to SBC's grooming limits. If, however, a circuit is being moved onto a live SBC facility, that work would be performed after-hours and would be subject to SBC's grooming limit in the same way as the transfer of a live circuit from an SBC facility to a competitor's facility.

grooms off of SBC's network.[10]

Qwest also suggests that the removal by SBC of the grooming restrictions from the price flex agreement somehow constituted a unilateral exercise of market power by SBC. In fact, Qwest *asked* SBC to remove the restrictions from the agreement so that Qwest could sign the agreement without acceding to them and presumably thereby better position itself in the event it sought subsequently to challenge the restrictions.[11] SBC agreed to do so as a *concession* to Qwest. Again, far from evidencing market power, this concession evidences a *lack* of market power. If SBC had market power, it would have forced Qwest to agree to the grooming limits instead of allowing the parties to "agree to disagree" by removing them from the signed document.[12]

Qwest's claims about the 95% access service/UNE ratio fare no better. For one thing, contrary to what Qwest claims, this provision is not new. Each of SBC's MVP tariffs, which, as noted, have been in effect for the past five years, contain the very same provision and expressly provide that the access service/UNE ratio is to be calculated with reference to the traffic of the customer *and its affiliates.*[13] Moreover, the Commission has received comment on these and various other types of provisions commonly found in price cap LEC discount tariffs in the *Special Access NPRM* proceeding, and it is in that context that they should be addressed, not

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[10] *See* Attachment A.

[11] This is documented in the attachments to Qwest's own *ex parte*. *See* Qwest *ex parte,* Exhibit 6, at 1 ***[REDACTED]***

See also id., Exhibit 4, at 1. ***[REDACTED]***

[12] Qwest states that "in some circumstances grooming one DS3 circuit containing 28 DS1s would count as 29 grooms[.]" Qwest letter at n. 2. That is incorrect. The grooming policy statement provided to Qwest expressly states that non-channelized T3s count as one circuit as do channelized T3s that are groomed in their entirety. The only circumstance in which a channelized T3 would count as more than one circuit would be if the circuit were not treated as an individual circuit for grooming purposes – in other words, if only some of the T1 circuits on the T3 were groomed. In that case, the circuits designated for grooming would count towards the limit. Again, this is evidenced by Qwest's own exhibits. *See* Qwest *ex parte,* Exhibit 1, at 8. *See also* email from Kathy King, Director, Access Sales, SBC Industry Markets, to Maria Masi, Qwest Carrier Relations, Aug. 25, 2005, attached hereto as Attachment B.

[13] *See* Ameritech FCC Tariff No. 2, Section 19.3(D); Southwestern Bell Telephone Company, FCC Tariff No. 73, Section 38.3(D); Pacific Bell Telephone Company, FCC Tariff No. 1, Sections 22.3(B)(3) and 22.3(D), copies of which are attached as Attachment C.

here.[14] In any event, as SBC showed in more detail in its filings in that proceeding, there is no reason why SBC should not be free to ensure, when it enters into a negotiation for discounted rates, that the negotiated rate is something close to the actual rate that the customer pays for the high capacity facilities and services it obtains from SBC. Such assurances enable SBC to offer the maximum discounts possible and should be encouraged. Indeed, they are fully consistent with the 1996 Act, which favors negotiated business-to-business deals for, *inter alia,* UNE availability and pricing.

Change of Control Provision

Qwest's *ex parte* also seeks to make much of the change of control provisions in two of SBC's contracts: its contract with WilTel Communications for wholesale long-distance service, and its contract with Time Warner Telecom for out-of-region special access service. However, these change of control provisions are run-of-the mill terms commonly found in commercial contracts of all sorts. Change of control provisions do not, as Qwest suggests, indicate "massive marketplace clout;" indeed, no credible claim could be made that SBC has massive marketplace clout in its procurement of out-of-region local access facilities or wholesale long-distance capacity. Rather, those provisions reflect the rather unremarkable fact that companies have a right to decide from whom they will purchase goods and services. If the seller becomes affiliated with certain other entities, the buyer reserves the right to renegotiate the contract or walk.

In fact, Qwest itself is party to at least one contract that has a directly analogous provision. In Qwest's agreement to resell Sprint wireless service, Sprint agreed to allow Qwest to assign the agreement to a third party, but in turn Qwest agreed to allow Sprint to change the rates that Sprint would charge if the assignee is AT&T Wireless, Nextel, Verizon, Verizon Wireless, T-Mobile, SBC, BellSouth, or Deutsche Telekom. In other words, Sprint was willing to provide heavily discounted wholesale wireless service to Qwest, but not to the other national wireless carriers or their corporate parents. By the same token, SBC is willing to purchase out-of-region special access or wholesale long-distance services from Time Warner and WilTel, respectively, at the terms specified in its contracts, but reserves the right to take another look at those terms if the contracts are assigned to certain other carriers.

It is untrue, as Qwest maintains, that SBC has become more aggressive in seeking to include such clauses in light of the "increased market power" that Qwest claims SBC is accumulating. ***[REDACTED]***

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Qwest's latest attempt to derail the SBC/AT&T merger is no more availing than its

[14] Notably, while Qwest purports to attribute great significance to these issues in its *ex parte,* it did not avail itself of the opportunity to comment on these issues in that proceeding.

earlier attempts. Far from showing increased market power, the price flex deal that Qwest negotiated with SBC reflects a loss of market power. And the change of control provisions to which Qwest points are nothing more than standard commercial fare. The Commission should rebuff Qwest's efforts and expeditiously approve the merger.

Sincerely,

SBC Communications Inc.

/s/ Gary L. Phillips

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