Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Qwest Communications International, Inc.	)	
PETITION FOR FORBEARANCE From Enforcement of the Commission's Circuit-Conversion Rules as They Apply to Post-Merger Verizon/MCI and SBC/AT&T	)	WC Docket No. 05-294
(Petition for Forbearance Under 47 U.S.C. § 160(c))	)	

AT&T INC.'S OPPOSITION TO QWEST'S PETITION FOR FORBEARANCE

Pursuant to the Commission's Public Notice (DA 05-2895, released November 5, 2005), AT&T Inc. ("AT&T") submits its comments in opposition to Qwest Communications International, Inc.'s ("Qwest's") Petition for Forbearance from the Commission's rules governing conversions of special access circuits to unbundled network elements ("UNEs"). As shown below, Qwest's petition is premised on claims that were squarely rejected in the AT&T/SBC *Merger Order*[1] and that, in all events, are fundamentally inconsistent with the Commission's impairment test.

Summary

Qwest's Petition asserts that the mergers of SBC with AT&T Corp. and Verizon with MCI would create "'MegaBOCs with enormous capital resources and unprecedented scopes of

[1] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, 20 FCC Rcd 18290 (2005) ("*Merger Order*").

operation," and that this fact alone is sufficient to deny the merged companies the right to convert any special access circuits to UNEs. (Petition at ii, iii) Qwest's petition must be denied because it is inconsistent with both the *SBC/AT&T Merger Order* and the Commission's impairment test.

The Commission's rules permit requesting telecommunications carriers to convert special access circuits to UNEs under certain circumstances. AT&T believes those rules are unlawful as to *all* carriers, and that the widespread use of special access services demonstrates that carriers are not impaired without access to equivalent UNEs, especially when the carrier is attempting to convert an existing special access circuit to a UNE. AT&T has stated those views before the Commission and in its appellate briefs and will not repeat them here. Nevertheless, Qwest provides no valid basis upon which the Commission can or should selectively relieve Qwest from the obligation to follow the Commission's conversion rules while forcing other ILECs to comply with them.[2] As shown below, the Petition must be denied for several reasons.

First, the Petition is not an independent claim but rather is based entirely upon speculation about possible effects of the mergers. Indeed, Qwest acknowledges (Petition at iii) that it would *withdraw* the Petition as to the relevant parties if a merger did not occur. Given the direct link between the Petition and the mergers, Qwest's claims against AT&T here were rejected by the Commission's *Merger Order*, in which the Commission found that the merger will not have anticompetitive effects in any relevant market and did not identify any need for the extraordinary relief the Petition seeks.

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[2] In effect, the Petition seeks to allow Qwest to retain the benefit of making special access conversions while denying them to other ILECs. The Commission should reject this request for such patently unequal treatment.

Second, Qwest's assertion that the sheer size of the merged company makes a difference under the Commission's impairment and unbundling rules flies in the face of the rules themselves and is also inconsistent with Qwest's own description of those rules. In fact, the Commission has found impairment (and required unbundling) only where it has concluded that it would be unreasonable to expect that *any* reasonably efficient carrier – large or small – could compete viably without UNEs. Moreover, the Commission has repeatedly held that its UNE rules apply to all requesting carriers without exception. Thus, the Petition is simply wrong that the size of a requesting carrier has any relevance to the Commission's impairment and unbundling rules under Section 251(c)(3).

ARGUMENT

I. The *Merger Order* Disposes of the Petition's Competition Claims, and the Merger of Two Non-Dominant Carriers Provides No Basis to Disfavor the Merged Company.

As a threshold matter, the Petition is not an independent request at all. Rather, it is part of Qwest's efforts to impose additional restrictions on the merged companies solely because of the mergers themselves. Qwest's Petition was filed in the flow of a series of lengthy *ex partes* that opposed the mergers and proposed a wide array of conditions that Qwest asserted were necessary to avoid what it claimed would be the mergers' market effects.[3] Indeed, the Petition itself specifically acknowledges the direct link between the mergers and the relief sought here,

[3] *See ex parte* letters from Melissa E. Newman, Qwest, to Marlene H. Dortch, FCC, dated May 18, September 22 and September 27, 2005; Joint *ex parte* letter from Ad Hoc Telecommunications Users *et al*. (including Qwest) to Marlene H. Dortch, FCC, dated October 21, 2005.

stating "if one or both mergers fail to occur, Qwest will withdraw this Petition as to the non-merging parties." (Petition at iii, 11)[4]

Given the intimate connection between Qwest's claims here and the SBC/AT&T Corp. merger, the Petition's assertions that the merger would result in significant anticompetitive effects (which are based mainly on the same information used to support its prior *ex partes*) are flatly refuted by the Commission's own findings in the *Merger Order*.[5] There, the Commission found that the SBC/AT&T Corp. merger "is not likely to result in anticompetitive effects" in *any* "relevant markets."[6] Indeed, with regard to the enterprise market in particular (the principal market addressed in the Petition), the Commission specifically found that "the merger will not likely have anticompetitive effects for enterprise customers," and that "competition for medium and large enterprise customers should remain strong after the merger."[7] Thus, the *Merger Order* itself negates Qwest's claims of competitive harm here and requires denial of the Petition.[8]

While the *Merger Order* is thus dispositive of the Petition, there is certainly no conceivable justification *at this time* for imposing the limitations Qwest seeks. Now that the SBC/AT&T Corp. and Verizon/MCI mergers are completed, the only change in Qwest territory

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[4] *See also* Petition at 28 (Qwest's concerns regarding the merged companies' ability to affect its efforts to expand into SBC's and Verizon's in-region markets are "specific to the SBC-AT&T and Verizon-MCI mergers").

[5] *Merger Order*, ¶¶ 2-4.

[6] *Id.*, ¶ 3.

[7] *Id.*; *see also id.*, ¶¶ 56-80.

[8] The Petition's bald assertions (*e.g.*, at 20) that the Commission "should take steps now to ensure that the merging entities do not turn the enterprise market into a duopoly" are particularly unavailing in light of the fact that the Commission considered both merger applications simultaneously and approved them both without any need for the condition that Qwest seeks here.

is that AT&T Corp. and MCI will become affiliates of two other *separate* companies that also operate as non-dominant carriers in that territory, [9] each of which has about the same special access purchases and market share they held the day before the mergers were consummated.[10] Thus, the mergers create no material changes in the competitive marketplace in Qwest's region, and the Petition fails at even the threshold level.

II. A Requesting Carrier's "Sheer Size" Is Irrelevant To Impairment.

Beyond the threshold bar to Qwest's claims, the Petition's main substantive argument boils down to a single sentence: The merged companies' "sheer size" (Petition at 4) is too great to consider them "impaired" and allow them to convert any special access circuits to UNEs. That claim is wrong, because it is inconsistent with the Commission's definition of impairment, especially as it has been applied to the loop and transport facilities that comprise special access circuits.

The Petition (at 13-14) shows that Qwest correctly understands the Commission's definition of "impairment" as defined in the *TRRO*:[11]

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[9] The D.C. Circuit has repeatedly held that the Commission may not give preferences to one group of non-dominant carriers at the expense of another, which would clearly result if the Petition were granted. *See Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

[10] Notably, the Petition is focused exclusively on AT&T Corp.'s and MCI's special access purchases and does not even identify the pre-merger special access purchases of SBC or Verizon. In addition, the Petition's attempts to aggregate the IXC market position of AT&T Corp. and MCI to show a shared "dominance" (*e.g.*, Petition at 2, 19-20) are misguided and inappropriate. That is especially true in this case since, as shown below, the size of a requesting carrier is irrelevant to the Commission's impairment analysis.

[11] *Unbundled Access to Network Elements*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, 20 FCC Rcd. 2533 (2005) ("*TRRO*").

> In the case of high-capacity loops, the rules provide that a LEC is "impaired" *with respect to a particular wire center* if that wire center is home to fewer than four "fiber based collocators," [and] does not serve more than a predetermined number of business lines (38,000 for DS3 capacity loops and 60,000 for DS1 capacity loops) . . . (emphasis added; footnotes omitted).

But despite Qwest's correct statement of the unbundling requirements, the Petition ignores their clear meaning.

As the italicized words in the quotation above demonstrate, actual loop impairment is determined by the objective market characteristics applicable to *each individual wire center*.[12] The Commission specifically chose those characteristics because it deemed them to be predictors of whether it would be economic for any reasonably efficient requesting carrier to construct its own facilities in the geographic market in question.[13] Under the Commission's test (with which AT&T disagrees), if these *objective* market facts – none of which is related to any specific actual carrier's "size" – demonstrate that competitive options are unlikely to be available, then requesting carriers are "impaired" and UNEs must be made available.

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[12] Similar to loops, "impairment" with regard to DS3 or DS1 transport is determined by the objective market characteristics applicable to the specific *pairs* of wire centers that form each transport route. 47 U.S.C. § 51.319(e).

[13] *See TRRO*, ¶ 43, which is cited by Qwest (Petition at n.36) ("we rely, where possible, on correlations between business line counts and/or fiber collocations in a particular wire center, on the one hand, and the deployment of competitive dedicated transport or high-capacity loops on the other. . . . [T]he record shows a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served by that wire center. . . .We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are the highest. . . . Thus, in lieu of the Triennial Review Order's approach . . . we adopt below a regime that accounts for actual and potential deployment by inferring from competitors' facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner").

It is essential for these purposes to recognize that the characteristics that define impairment are generic, and the Commission specifically designed them to apply to *all* requesting carriers that seek to use UNEs to provide local service[14] in competition with the incumbent in a particular area. Indeed, the Commission's unbundling orders have *never* embraced distinctions based on the characteristics of individual carriers, opting instead for unbundling rules of general applicability.

As clarified in the *TRRO*, the Commission's impairment analysis is not in any way based on the characteristics of specific carriers. Rather, impairment:

> refer[s] to whether entry is economic by a hypothetical competitor acting reasonably efficiently. In analyzing entry from the perspective of the reasonably efficient competitor, *we do not attach weight to the individualized circumstances of the actual requesting carrier*. Thus, we do not presume that a hypothetical entrant possesses *any* particular assets, legal entitlements or opportunities. *Id*., ¶ 26 (emphasis added).[15]

In addition, the *TRRO* further explains that:

> The reasonably efficient competitor . . . is more like a conceptual goal than an abstract entity with particular characteristics. Our goal under this standard is to make our impairment determination *by placing little or no relevance on the specific facts of an individual carrier, such as that carrier's competitive position vis-à-vis other market participants, or that carrier's particular business strengths or weaknesses*. *Id.*, n.76 (emphasis added); *see also id*., n.156.

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[14] The Petition (at 13) recognizes that UNEs may not be used to provide exclusively long distance service.

[15] *See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 115 (2003).

Because the Commission's impairment analysis is not carrier-specific and does not rely on the "individualized circumstances of the actual requesting carrier," a carrier's "sheer size" is simply irrelevant to the Commission's impairment calculus.[16]

Put differently, assuming *arguendo* that, as the Commission has found, permitting unbundling of these facilities and special-access/UNE conversions are consistent with the public interest and the interests of consumers, there is no reason why AT&T, unlike other carriers, should be prohibited from engaging in this practice.[17] And although AT&T disagrees with the Commission's test for unbundling of high-capacity loops and transport, the fact of the matter is that under that test, which is the law of the land for now, there is no practical or logical nexus between a requesting carrier's total assets and impairment. The Commission has identified the areas where it believes there are insufficient customers in a wire center (for a loop) or in the pair of offices that form a transport route to support facilities construction. Assuming for these purposes that that is the case, it doesn't matter how much money a carrier has in its bank account. Under the Commission's analysis, *any* construction in such cases would be

[16] No legitimate question was ever raised before the merger that AT&T Corp.'s or MCI's size – or any even their combined size – justified any restriction on their rights to make special access conversions. This, of course, is fully consistent with the Commission's longstanding position that "restricting the competitiveness" of larger carriers "only reduces competitive performance in the market." *Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, 11 FCC Rcd 17963, ¶ 8 (1996).

[17] If the Commission concluded that these policies were contrary to the public interest as evinced in the policies of the 1996 Act, it presumably would have, at the least, used its "at a minimum" authority under section 251(d)(2) to prohibit them.

uneconomic.[18] And despite Qwest's repeated references to the merged companies' stated willingness to construct additional facilities and the importance of maintaining their incentives to build (*e.g.*, Petition at 2, 3, 23, 24, 27), no rational company – including AT&T – would invest in facilities that it knew in advance would be uneconomic. Thus, taking the Commission's impairment test at face value, Qwest's unsubstantiated assertion that granting forbearance would advance competition by promoting facilities investment is simply false.

CONCLUSION

Qwest's Petition is without foundation and must be denied.

Respectfully submitted,

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[18] Although the Commission's rules are properly crafted to provide incentives for facility construction, the Commission has concluded that requiring uneconomic construction is counterproductive for individual carriers, competition and society in general. *See TRRO* n.475 ("[i]n . . . areas where competitive deployment is uneconomic, the premature elimination of DS1 or DS3 loop UNEs could discourage competitive deployment that otherwise might occur where revenue opportunities can be appropriately aggregated using UNEs and form a foundation for further loop deployment").