

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Petition of Qwest Communications)
International Inc. for Forbearance from) WC Docket No. WC 05-333
Enforcement of the Commission's)
Dominant Carrier Rules As They Apply)
After Section 272 Sunset Pursuant)
To 47 U.S.C. § 160)

OPPOSITION

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OPPOSITION

Level 3 Communications, LLC ("Level 3") hereby opposes the above-captioned petition filed by Qwest Communications International, Inc. ("Qwest") seeking forbearance from dominant carrier regulation of its provision of long distance service on an integrated basis with local service or through a separate affiliate that does not comply with Section 272 of the Communications Act of 1934, as amended ("Act").¹ Because Qwest seeks relief from hypothetical application of regulations and the Commission is considering issues identical to those posed by Qwest's petition in a pending rulemaking and has not addressed important questions raised in that proceeding, the Commission must deny Qwest's petition.

I. INTRODUCTION AND SUMMARY

Although Qwest tries to divert the Commission's attention from the issue, Qwest maintains significant – in many cases monopoly – market power in provision of access to end user locations throughout its territory. The Commission has already determined that most of Qwest's local exchanges lack competitive alternatives sufficient to find impairment under Section 251 of the Act. Indeed, Qwest provides exclusive access to a large number of

¹ Petition of Qwest Communications International, Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunset Pursuant To 47 U.S.C. § 160 ("Petition"), at 4-5.

commercial and governmental buildings. With this market power, Qwest is able to charge significantly above-cost special access rates to companies seeking to provide end-to-end services to enterprise customers in Qwest's region, giving Qwest an unfair advantage in that market. The Commission must address this anti-competitive situation quickly.

As the Commission has recognized, allowing Qwest to combine its local and long distance operations while enjoying this market power could exacerbate this market distortion by providing a greater incentive and ability for Qwest to discriminate against its competitors, subsidize its long distance services and make detection of such activity more difficult. By asking the Commission to forebear from applying dominant carrier safeguards, Qwest seeks to short-circuit an important FCC proceeding established to address precisely this concern. In the *LEC Dominant Carrier FN*, the Commission recognized Bell Operating Company ("BOC") dominance in the local exchange and the possibility they could leverage this dominance to hinder end-to-end competition in the enterprise market.² The FCC sought comments on how to restrain anticompetitive behavior once Section 272 protections sunset and the BOCs were no longer required to separate their local and long distance affiliates. These questions have not been answered. Rather than granting Qwest the broad relief that it now seeks, the Commission must conclude its crucial investigation and implement effective safeguards to prevent Qwest and other BOCs from further leveraging their market power in the special access market.

² *Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10914 (2003) ("*LEC Dominant Carrier FN*") at ¶ 29.

II. FORBEARANCE WOULD NOT SERVE THE PUBLIC INTEREST BECAUSE THE COMMISSION HAS AN OPEN PROCEEDING INVESTIGATING THE SAME ISSUES

The forbearance requested by Qwest would not serve the public interest because it seeks relief from regulations that do not currently apply³ and about which the Commission has an ongoing general proceeding. The Commission already has determined that such a request is improper. On May 5, 2005, the Commission rejected SBC's request for forbearance from Title II regulation of IP Platform Services, in part because "it is not in the public interest to forbear from requirements before the Commission has fully considered whether and under what technical conditions the requirements apply in the first place."⁴ The Commission stated that "permitting petitions seeking such relief would regularly require us to prejudge important issues pending in broader rulemakings and otherwise distort the Commission's deliberative process."⁵ In the *Fast Packet Order*, the Commission recently determined that complex issues concerning the state of competition are better addressed in rulemaking proceedings rather than in response to waiver or forbearance petitions.⁶ Qwest's use of the forbearance petition here is no less inappropriate.

On May 19, 2003, the Commission issued the *LEC Dominant Carrier FN* to address the proper treatment of ILECs as to whom Section 272 competitive safeguards have sunset and who choose to stop complying with those regulations. The Commission recognized that BOCs that choose to comply with 272 safeguards may provide long distance services as non-dominant

³ Qwest's Section 272 safeguards have not sunset in each Qwest state, yet Qwest seeks forbearance from dominant carrier safeguards throughout its territory. Moreover, Qwest asserts that it is continuing to comply with Section 272 safeguards. Accordingly, Qwest seeks forbearance from a regulation that only hypothetically applies to it.

⁴ *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, Memorandum Opinion and Order (rel. May 5, 2005) ("*SBC IP Platform Order*"), ¶ 6.

⁵ *Id.* at ¶ 9.

⁶ *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246 (rel. October 14, 2005) ("*Fast Packet Order*"), ¶ 14 (citing *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, 16 FCC Rcd 22745 (2001)).

carriers, just like other companies not affiliated with the BOC.⁷ The Commission noted, however, that companies seeking to provide long distance combined with local services must comply with dominant carrier safeguards and sought comment on whether this regime should continue or be replaced by a new set of safeguards.⁸ Specifically, the Commission sought comment on a number of important questions, including:

- (1) The relevant service market – e.g., mass market or enterprise, in-region interLATA or in-region intraLATA - for determining dominant carrier treatment;⁹
- (2) The relevant geographic market;¹⁰
- (3) The effect of BOCs' increasing long distance presence, especially in the enterprise market space;¹¹
- (4) The effect of bundled service offerings on BOC market power;¹²
- (5) The effect of competition (including the extent to which competitors are BOC affiliates) on BOC market power;¹³
- (6) The "incentives and abilities of [BOCs] to misallocate their costs, discriminate, and engage in predatory price squeezes to ... increase market share and attain market power in the interstate and international interexchange markets";¹⁴
- (7) The extent to which integration of BOC affiliates would affect these incentives and abilities or would diminish the ability to detect these anticompetitive activities;¹⁵
- (8) The effect of pricing flexibility relief on these incentives and abilities;¹⁶
- (9) What regulatory requirements are necessary to protect against these incentives and abilities;¹⁷

⁷ *LEC Dominant Carrier FN* at ¶¶ 5, 23

⁸ *Id.* at ¶ 1-3.

⁹ *Id.* at ¶¶ 10-16.

¹⁰ *Id.* at ¶¶ 17-21.

¹¹ *Id.* at ¶¶ 23-24.

¹² *Id.* at ¶ 25.

¹³ *Id.* at ¶ 28.

¹⁴ *Id.* at ¶ 29.

¹⁵ *Id.* at ¶ 31.

¹⁶ *Id.* at ¶ 32.

¹⁷ *Id.* at ¶¶ 35-40.

- (10) The extent to which Section 272(e) requirements will continue to apply to BOCs and whether they adequately address concerns.¹⁸

After a round of comments and a number of *ex parte* presentations, the proceeding remains pending.

Comments in that proceeding clearly demonstrated the need for additional safeguards. Several parties urged the Commission to maintain dominant carrier regulation until it adopts effective performance measurements and mechanisms to enforce them.¹⁹ Many companies sought continued dominant carrier regulation until the Commission reforms its special access regulation.²⁰ Others suggested other solutions.²¹

While the *LEC Dominant Carrier FN* remains pending, no BOC has sought relief from 272 obligations until now. Other BOCs will follow Qwest's forbearance request with their own. Granting Qwest's request for unilateral relief would preclude the Commission from developing transparent standards understood by the industry and applicable to all BOCs. Rather, the Commission will be required to set standards in this complex area on a case-by-case basis without having the benefit of knowing the market characteristics of the companies that will seek to take advantage of the decision.²² In denying SBC's petition for forbearance in the *SBC IP Platform Order*, the Commission recognized that eclipsing generally-applicable proceedings with carrier-specific forbearance relief, as requested by Qwest, does not serve the public interest.

In its petition, Qwest seeks broad relief from dominant carrier regulations, without distinguishing between product or geographic markets and without answering the questions raised by the Commission in its rulemaking. Indeed, Qwest makes no attempt to dispel any

¹⁸ *Id.* at ¶¶ 45-48.

¹⁹ *LEC Dominant Carrier FN*, Comments of Sprint at 3, 13; Reply Comments of Time Warner Telecom at 2, 15-19.

²⁰ *LEC Dominant Carrier FN*, Comments of AT&T Corp. ("*AT&T FN Comments*") at 69-70; Reply Comments of Ad Hoc Telecommunications Users Committee ("*Ad Hoc Telecommunications Users Committee Reply*") at 8.

²¹ *LEC Dominant Carrier FN*, MCI Comments ("*MCI LEC Dominant Carrier FN Comments*") at 26-32.

²² Given the lack of any special access market information in Qwest's petition, the Commission will have the same handicap in addressing Qwest's forbearance request.

concerns about Qwest's ability to leverage its special access market power into competitive markets. Nor does Qwest provide evidence that its current regulatory treatment is harming it in any significant way. In short, Qwest asks the Commission to stop enforcing its dominant carrier regulations without undertaking a proper investigation into Qwest's market power in applicable markets or the effect on Qwest's competitive capabilities. Because this investigation is necessary before granting Qwest's petition, the Commission must reject Qwest's blatant attempt to avoid scrutiny of its market power and proceed to implement effective safeguards to address it.

III. QWEST'S FORBEARANCE PETITION FAILS THE OTHER ELEMENTS OF THE FORBEARANCE TEST

Even if the Commission were to consider Qwest's petition, it must find the petition does not meet the statutory requirements for forbearance. Qwest maintains overwhelming market power in the vast majority of its in-region markets. This market power provides Qwest with the ability to maintain unjust and unreasonable prices for special access services. Long distance companies that compete with Qwest for customers seeking end-to-end services subsidize Qwest's provision of such services and thereby provide Qwest with a competitive advantage. Under these circumstances, allowing Qwest to integrate its local and long distance operations or otherwise without appropriate safeguards would exacerbate this anti-competitive situation by allowing Qwest more effectively to veil its subsidies and to discriminate against its competitors without fear of Commission or other enforcement actions. Absent special access reform or the imposition of effective safeguards that would prevent Qwest from further leveraging its access monopoly, the Commission must retain dominant carrier treatment of Qwest's combined local and long distance businesses.

A. Dominant carrier regulation is required to ensure that rates and practices are just, reasonable and not unreasonably discriminatory

The Commission must retain dominant carrier treatment of Qwest's integrated operations to ensure just and reasonable rates and prevent discrimination. Qwest's market power in the provision of access to end user locations gives it the ability and incentive to discriminate against unaffiliated service providers and to cross-subsidize its provision of end-to-end services. There can be little doubt that Qwest possesses market power in the provision of access, whether as UNEs or special access, because the Commission found in the *Triennial Review Remand Order* that competitive LECs ("CLECs") rarely have alternatives to BOCs' high capacity loop and transport services.²³ As a result, Qwest already has the ability to reduce competition for these services within its region, resulting in higher prices. Allowing Qwest to combine operations without adequate safeguards will accelerate this process. Dominant carrier regulation constrains this anticompetitive activity by preventing Qwest from combining its entities or requiring it to cost justify its local and long distance operations, both of which make Qwest's activities more transparent.²⁴ Accordingly, in the absence of other safeguards to ensure just, reasonable and nondiscriminatory rates and practices, dominant carrier regulation is clearly necessary.

1. FCC Regulation and Competition have Failed to Constrain Qwest's Dominance in the Special Access Market

Level 3 is a major competitive provider of long-haul voice, video, and data transport services to other carriers, broadcasters, ISPs, CATV companies, and small to mid-size enterprise customers.²⁵ The company operates throughout Qwest's territory. To provide the end-to-end

²³ *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand (rel. Feb. 4, 2005) ("TRRO"), ¶¶ 187-194

²⁴ *AT&T FN Comments* at 46-52.

²⁵ On December 23, 2005, Level 3 consummated a transaction under which it obtained 100% indirect ownership of WilTel Communications, LLC.

solutions that its customers demand, Level 3 depends on Qwest's special access services to reach customer premises. Competitive providers simply do not provide a realistic alternative to Qwest in much of its territory. Under the Commission's test for determining whether carriers are impaired without access to UNEs, for example, Qwest maintains that only 46 of Qwest's wire centers are unimpaired for dedicated transport and only 11 are unimpaired for loops.²⁶ This analysis means that carriers are not likely to be able to compete effectively with Qwest using special access or other services in all of the other Qwest wire centers.²⁷ Even with respect to the wire centers that Qwest maintains are unimpaired, moreover, long distance companies must rely on special access services, which have been shown to be unreasonably priced and difficult to compete against.²⁸ Level 3 and other buyers find it largely impossible to find viable alternatives to ILEC special access services. Few intramodal or intermodal alternatives exist, and most customers rely on BOC special access for all or nearly all of their special access needs.²⁹ Moreover, anticompetitive terms and behavior that tie customer purchases in one Qwest serving area to purchases in other service areas and inhibit grooming of circuits to competitive providers

²⁶ *Ex Parte* Letter, dated August 18, 2005, from Cronan O'Connell, Vice President-Federal Regulatory, Qwest, to Thomas Navin, Chief, Wireline Competition Bureau, Federal Communications Commission, Attachments A and B.

²⁷ *TRRO* at ¶ 48. UNEs in these wire centers cannot be used solely for long distance or mobile wireless services. *Id.* at ¶ 34 (denying access to UNEs "in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling"). Although the Commission found that the long distance market was competitive, it noted that it was examining the current long distance market and was not making any determination about the possibility of Qwest or other ILECs monopolizing the long distance services market. *Id.* at ¶ 36 n.110 (citing the *LEC Dominant Carrier FN*). Moreover, these UNEs are available only so long as Qwest does not place them on the list of impaired wire centers, potentially with little notice.

²⁸ See, e.g., Letter, dated January 9, 2006, from Brian R. Moir, attorney, eCommerce & Telecommunications Users Group, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachments.

²⁹ See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593 ("*Special Access Rulemaking*"), Declaration of Susan M. Gately, on behalf of Ad Hoc Telecommunications Users Committee, at ¶¶ 16-19 (June 13, 2005) ("RBOCs remain the sole source of dedicated access connectivity at roughly 98% of all business premises nationwide, even for the largest corporate users."); *Special Access Rulemaking*, Comments of PAETEC Communications, Inc., at 6 (Even in "high-density markets" . . . "PAETEC is dependent on ILECs for 95 percent of its special access lines").

reduce the opportunities for competitive LECs to offer a competing special access service.³⁰ As a result, purchasers are held hostage to the Qwest's inflated prices and onerous contractual terms.

If the special access market were, in fact, competitive, Qwest would not be able to impose such unreasonable terms and prices because customers would choose alternative providers. The reality is that competitive wireline alternatives are, at best, confined to a small number of concentrated business districts, a small number of buildings within those districts, and often to individual floors or suites within those buildings. Even where a competitive circuit is available, the last mile is commonly a resold Qwest circuit. This is not competition—this is general monopoly, subject to limited oligopolistic rivalry in a very limited number of locations.³¹ As many parties have already pointed out, the *de minimus* level of rivalry is clearly insufficient to stem the market failure stemming from monopoly pricing and restricted output.

These parties have urged the Commission to reform its special access rules to address this situation. In a more competitive special access market or with lower special access prices, Qwest would be unable to subsidize its long distance operations with its local access revenues because special access revenues would not support such activity. Moreover, with charges closer to cost, Qwest would be unable to discriminate effectively.

2. Absent Special Access Reform, Additional Safeguards are Necessary to Prevent Elimination of Competition in the End-to-End Market

In the absence of special access reform, eliminating dominant carrier treatment to encourage Qwest to combine operations would remove the only remaining mechanism in place to effectively monitor whether and how Qwest uses above-cost special access charge revenues to

³⁰ See generally, *Special Access Rulemaking*, Reply Comments of WilTel Communications, LLC ("WilTel Special Access Reply Comments"), at 26-32; *MCI LEC Dominant Carrier FN Comments* at 12.

³¹ *WilTel Special Access Reply Comments* at 10.

subsidize its non-monopoly services and discriminate in its provision of special access services.³² Dominant carrier treatment is therefore necessary to detect and defeat above-cost special access pricing and below-cost long distance pricing, both of which are unjust and unreasonable. Absent such controls, Qwest will be free to systematically eliminate competition and then raise prices in the provision of end-to-end services to customers throughout much of Qwest's territory.

Qwest argues that dominant carrier regulation should apply only if Qwest can raise prices for long distance services, but this claim is misleading and proves too much.³³ Dominant carrier treatment is justified to prevent a company with market power in one market – *i.e.*, special access – from extending it to another market – *i.e.*, the end-to-end leased circuit market. In this case, Qwest's unquestionable market power in special access has allowed it to charge its competitors significantly above cost prices for the essential services they require to compete with Qwest in the end-to-end market. Without the close scrutiny afforded by Qwest's compliance with 272 requirements of how Qwest's local and long distance operations transact business, Qwest will find it easier to engage in illegal subsidies and discrimination without detection. As a result, Qwest will eliminate competition and thereby preserve the ability to maintain uncompetitive or raise rates. If this scenario were not a concern, then the FCC would not have put in place accounting safeguards and maintained dominant carrier treatment of integrated BOC operations.

Nor do accounting safeguards or Section 201 or 202 complaints provide sufficient protection. As an initial matter, competitors can only use accounting safeguards to detect and prevent anticompetitive activity, and detect violations of such safeguards themselves, when it is too late to address the issue. Even with biennial audits required under Section 272(d), the information may not be available and assessable until the statute of limitations has expired. By

³² Ad Hoc Telecommunications Users Committee Reply at 6.

³³ Petition at 4-5.

the time violations are detected and brought to the Commission's attention, competition could be eliminated.³⁴ Moreover, as 272 requirements sunset, the biennial audit requirements contained therein will expire. As a result, detecting violations of the Commission's rules against illegal cross-subsidies and discrimination will become even more difficult. Finally, it is difficult in any event for the Commission to enforce its rules against violations and impose an effective penalty. While the Commission has noted that antitrust laws might provide some deterrent to anticompetitive behavior, such an option may not exist after a recent United States Supreme Court decision.³⁵

B. Dominant carrier regulation is necessary to protect consumers.

Qwest's petition similarly fails the second prong of the forbearance test. To forbear, the Commission must find that dominant carrier regulation is no longer necessary to protect consumers. As discussed above, dominant carrier regulation is clearly necessary. Without dominant carrier regulation, Qwest will be able to eliminate long distance competition and raise prices for business services, resulting in higher prices for consumers. With above-cost special access prices, Qwest has the incentive and ability to eliminate competition by discriminating in favor of its long distance operations and subsidizing its provision of end-to-end services with special access revenues. In the absence of reasonable special access prices, dominant carrier safeguards are necessary to prevent a long distance price squeeze.

³⁴ *AT&T FN Comments* at 52-53.

³⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) ("1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access").

C. Forbearance is not consistent with the public interest.

Forbearance would allow Qwest to integrate companies and make it substantially more difficult to prevent Qwest from taking further actions to eliminate competition. So long as Qwest operates under Section 272 safeguards, the inter-company transactions that it undertakes between its long distance and special access operations are (or at least should be) relatively transparent. For example, Qwest's long distance operations cannot obtain services or information from the local operations unless they are also available to unaffiliated entities. So long as separate entities exist, it should be possible to track the availability of services or the exchange of information by issuing subpoenas for records showing exchanges between companies. Accordingly, if Qwest bids on a project that includes local special access services, competitors and the Commission can attempt to ensure that any information related to the local special access services were available on a nondiscriminatory basis to similarly-situated competitors. Biennial audits can help to ensure costs were allocated properly. Alternatively, dominant carrier treatment would help ensure that the long distance services provided by an integrated Qwest are not only available to unaffiliated customers but also that they are not impermissibly subsidized by revenues from Qwest's overpriced special access services. Although these are not the optimal means to regulate Qwest's end-to-end services, eliminating the Section 272 requirements without an adequate replacement would significantly degrade the Commission's already minimal ability to detect and punish anti-competitive activity engaged in by Qwest.

Moreover, Qwest presents no evidence that operating under the Section 272 safeguards or dominant carrier safeguards puts Qwest at any real disadvantage. For example, Qwest provides no information about the benefits it will attain by integrating its long distance and special access operations and its costs of complying with safeguards. To be sure, Qwest recites Commission

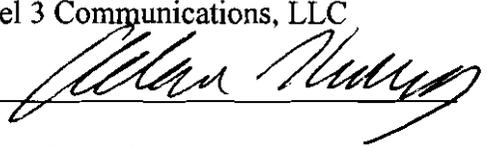
language that these requirements *could* put BOCs at a competitive disadvantage, and declares (without support) that its requested relief would allow it to operate more efficiently. Such language, however, does not justify providing Qwest with carrier-specific relief from the imposition of dominant carrier safeguards. Absent statistics showing that Qwest is disadvantaged by complying with Section 272 safeguards, the Commission lacks the information necessary to balance the potential harms with the benefits of lifting dominant carrier treatment and must assume that Qwest's only benefit would be to inhibit competitors from detecting anti-competitive activity that would result in less competition and higher prices.

IV. CONCLUSION

In its petition for broad relief from dominant carrier safeguards post-272 sunset, Qwest seeks to short-circuit the Commission's pending *LEC Dominant Carrier FN* and a proper analysis of all of the important issues raised in that proceeding. Qwest fails to specify in which product and geographic markets it seeks relief and conveniently overlooks the well-pleaded market distortion issues raised in that proceeding and the *Special Access Rulemaking*. Nor has Qwest provided any evidence that it is being harmed under the existing regulatory regime applicable to its end-to-end services, perhaps because such evidence does not exist or would show that Qwest really just seeks to eliminate the last remaining mechanisms available to detect and punish anti-competitive activity. For these reasons, the Commission must deny Qwest's petition and proceed to (a) reform the special access rules that require IXCs to subsidize Qwest's and other BOCs' end-to-end services by paying unreasonable special access charges and (b) develop new safeguards to prevent discrimination and cross-subsidies that will eliminate end-to-end competition and increase consumer prices.

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