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February 23, 2006

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Via Courier Service

Federal Communications Commission  
Office of Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW – Lobby Level  
Washington, D.C. 20554

Re: WC Docket No. 05-333

Dear Ms. Dortch:

Yesterday, AT&T Inc. was unsuccessful in attempting to file electronically its reply comments in the above docket due to a malfunction in AT&T's equipment. Accordingly, AT&T filed a paper copy of its pleading with the Commission.

Attached is a certificate of service indicating that AT&T served today all other parties in the docket by facsimile and first class US mail. Please file a copy of this letter in the docket.

Thank you for your attention to this matter.

Yours truly,

/s/ Richard H. Rubin

Richard H. Rubin

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEB 22 2006

Federal Communications Commission  
Office of Secretary

In the Matter of )

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(c) )

WC Docket No. 05-333

REPLY OF AT&T INC.

AT&T Inc., on behalf of its affiliates ("AT&T"), submits the following reply to the comments filed in response to Qwest Communications International's ("Qwest's") petition for forbearance from enforcement of the Commission's dominant carrier rules after sunset of its Section 272 obligations ("Petition").

The evidence now before the Commission – and in the marketplace generally – clearly demonstrates that no carrier has or could exercise market power over the provision of *any* interexchange service.<sup>1</sup> Thus, the most appropriate course for the Commission is to complete the *LEC Non-dominant Proceeding*<sup>2</sup> promptly and rule that all carriers providing interexchange services lack market power and thus should be treated as non-dominant.<sup>3</sup>

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<sup>1</sup> AT&T Comments at 2-5; BellSouth Comments at 1-4.

<sup>2</sup> *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliated and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112 and CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) ("*LEC Non-dominant Proceeding*").

<sup>3</sup> AT&T Comments at 1-2.

The opponents to Qwest's Petition<sup>4</sup> offer no credible evidence to challenge the Petition's description of the competitive realities that Qwest and all interexchange carriers ("IXCs") must face. Nor could they do so, because the Commission has repeatedly recognized for more than a decade that interexchange services are vigorously competitive. Instead, the opponents resort to a host of procedural and other arguments in their transparent efforts to game the competitive process by saddling Qwest with regulatory handicaps. None of the opponents' arguments has merit.

The CLEC opponents' procedural arguments<sup>5</sup> are largely based on references to the Commission's *SBC IP Platform Order*,<sup>6</sup> but that order is entirely inapplicable to the situation presented here.<sup>7</sup> In that case, SBC had asked the Commission to forbear from applying Title II regulations to "IP Platform Services," to the extent those regulations applied to such services and without conceding they did. The Commission denied SBC's petition on two grounds. First, it held that the petition was procedurally improper insofar as it sought forbearance from hypothetical or uncertain regulatory obligations. Second, it held that SBC's petition was deficient because it did not permit the Commission "to determine with certainty which services

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<sup>4</sup> Oppositions to the Petition were filed by CompTel, Level 3 and the New Jersey Division of the Ratepayer Advocate "NJRA".

<sup>5</sup> CompTel Comments at 3-7; Level 3 Comments at 5.

<sup>6</sup> *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, 20 FCC Rcd 9361 (2005) ("*SBC IP Platform Order*"), *appeal pending*, *SBC Communications, Inc. v. FCC & USA*, Case No. 05-1186, D.C. Cir.

<sup>7</sup> AT&T strongly believes that the *SBC IP Platform Order* was improperly decided and that the very points in the order the opponents rely upon are unlawful. Nevertheless, we assume *arguendo* that the decision would be upheld on appeal and show that opponents' claims here are still unsupported.

and facilities SBC's petition is meant to cover, as well as the specific statutory and regulatory provisions from which SBC seeks forbearance."<sup>8</sup>

The situation here is exactly the opposite. First, there is nothing "hypothetical" or uncertain about Qwest's petition.<sup>9</sup> Under current rules, Qwest's non-section 272 affiliates are dominant carriers in the provision of integrated interexchange interLATA interstate services. It is irrelevant that Qwest's section 272 affiliates are nondominant in their provision of interLATA interexchange interstate services,<sup>10</sup> because the Petition addresses only the status of its *local operating company* affiliates, not its long-distance affiliates. Nor does it matter, as the CLEC opponents claim,<sup>11</sup> that the Commission might make the findings Qwest seeks here in a pending rulemaking proceeding. The D.C. Circuit has squarely held that the Commission may not refuse to decide a forbearance request on the ground that it prefers to use a different regulatory mechanism to address the issues raised in a forbearance petition. *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) ("the availability of an alternative route . . . does not diminish the Commission's responsibility to fully consider petitions under § 10"). There also is no question as to the scope of the relief sought in Qwest's petition. The services at issue are clearly defined as Qwest's "in-region interstate interLATA interexchange services." (Petition at 1) And as CompTel acknowledges, Qwest's Petition expressly cites to the Commission's "Part 61 tariffing and price cap regulations." Moreover, the Petition (n.5) identifies the subject regulations as "47 C.F.R. § 61.31, *et seq.*," which the Commission's Rules themselves define as "General Rules for

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<sup>8</sup> *SBC IP Platform Order*, ¶ 14.

<sup>9</sup> CompTel Comments at 4; Level 3 Comments at 3 & n.3.

<sup>10</sup> *E.g.*, CompTel Comments at 6.

<sup>11</sup> CompTel Comments at 2; Level 3 Comments at 5-8.

Dominant Carriers.” This is clearly enough “specificity” to identify the rules for which forbearance is sought.<sup>12</sup>

The opponents’ remaining arguments fare no better. Level 3’s arguments focus entirely on its claim that Qwest exercises market power over *special access services*. It claims (at 8) that “[a]bsent 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.” This claim is specious for multiple reasons.

First, Level 3’s claims with regard to special access would not warrant dominant carrier regulation of *interexchange services*, even if those claims were valid. If the Commission’s regulation of special access services is in any way lacking, the proper remedy is for the Commission to make appropriate changes in those regulations. Indeed, the Commission has already initiated proceedings to review its regulation of special access services.<sup>13</sup> And in all

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<sup>12</sup> The Petition (n.6) also notes that “inherent” in its request is “forbearance from any requirement that Qwest must provide in-region IXC services through a Section 272 affiliate or any other separate affiliate in order to be deemed non-dominant in providing those services.” This also unambiguously identifies the relief the Petition seeks.

<sup>13</sup> Level 3 Comments at 10 & n.29. See *Special Access Rates for Price Cap Local Exchange Carriers and AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25 and RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); see also *Performance Measurements and Standards for Interstate Special Access Services; Petition of U S West, Inc., for a Declaratory Ruling Preempting State FCC Proceedings to Regulate U S West’s Provision of Federally Tariffed Interstate Access Services; Petition of Association for Local Telecommunications Services for Declaratory Ruling; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review — Telecommunications Service Quality Reporting Requirements; AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-

events, the Commission itself has found that dominant carrier regulation of interexchange services is a poor tool for addressing ostensible market power in access services.<sup>14</sup>

Further, Level 3 fails even to mention that section 271(e)(1) and (3) of the Act will still apply upon a grant of forbearance. Those provisions directly address Level 3's concerns here, because they require BOCs to provide telephone access and exchange access to unaffiliated entities within the same time that they provide those services to themselves (section 271(e)(1)) and to impute to themselves the same amount for such services that they charge unaffiliated entities (section 271(e)(3)). Finally, sections 201 and 202 and the Commission's complaint process will continue to apply both to Qwest's nondominant BOC interexchange services and to its special access services.<sup>15</sup> Thus, all of Level 3's concerns are properly, and directly, covered by other regulatory protections, making it wholly unnecessary to saddle Qwest with dominant carrier regulation if it provides interexchange services through its LEC affiliates.

Critically, neither Level 3 nor any of the other Qwest opponents even references the significant costs of dominant carrier regulation – both carrier-specific and societal – that the Commission has repeatedly recognized over the past decade. For example, the *AT&T Domestic Non-Dominance Order* identifies numerous costs of dominant carrier regulation, including

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147, 96-98, 98-141, 96-149, 00-229, RM 10329, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

<sup>14</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, (“*LEC Classification Order*”), 12 FCC Rcd 15756 (1997) ¶ 91 (“[w]e agree with DOJ that applying dominant carrier regulation to an affiliate in a downstream market would be ‘at best a clumsy tool for controlling vertical leveraging of market power by the parent, if the parent can be directly regulated instead’”).

<sup>15</sup> Level 3 (at 10) also makes passing reference to competitors' use of UNEs, but it seeks no modification of the Commission's unbundling rules and, of course, those rules will remain intact if the Commission grants the Petition.

“inhibiting [an affected carrier] from quickly introducing new services and from responding quickly to new offerings by its rivals,” “reduc[ing] the incentive for [affected carriers] to initiate price reductions,” enabling competitors “to use the regulatory process to delay, and consequently thwart [affected carriers’] strategies” and “impos[ing] compliance costs on [affected carriers] and administrative costs on the Commission.”<sup>16</sup>

Similarly, in the *AT&T International Non-Dominance Order*, the Commission noted that once other competitors have the wherewithal to compete, “restricting the competitiveness of the largest carrier only reduces competitiveness in the market,”<sup>17</sup> a conclusion that it echoed in the *LEC Classification Order* (¶ 88) (“[t]he Commission has long recognized that the regulations associated with dominant carrier classification can dampen competition”). The Commission also found that forbidding nondominant carriers to file tariffs “enhance[s] competition . . . promote[s] competitive market conditions and achieve[s] other objectives that are in the public interest.” That is because that the mere filing of tariffs impedes competition by “reduc[ing] incentives for competitive price discounting, constrain[ing] carriers’ ability to make rapid, efficient responses to changes in demand and cost, impos[ing] costs on carriers that attempt to make new offerings, and prevent[ing] customers from seeking out or obtaining service arrangements specifically tailored to their needs.” *Id.* Given all of these costs,<sup>18</sup> together with the BOCs’ lack of market

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<sup>16</sup> *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, CC Docket No. 90-132, 11 FCC Rcd 3271 (1995) (“*AT&T Domestic Non-Dominance Order*”) ¶ 27.

<sup>17</sup> *Matter of AT&T Corp. to be Declared Non-Dominant for International Service*, CC Docket No. 90-132, 11 FCC Rcd 17963 (1996) (“*AT&T International Non-Dominance Order*”) ¶ 8.

<sup>18</sup> The opponents also never address the significant practical issues and costs that would be required to implement dominant carrier tariffing and price cap rules for Qwest’s interexchange services, most of which have never been tariffed, and none of which were offered under price caps.

power over interexchange services, it is obvious that the public interest would not be served by subjecting Qwest's, or any BOC's, interexchange services to dominant carrier regulation after the sunset of its section 272 structural separation requirements.

Finally, NJDRA's argument (at 12-13) regarding the effects of Qwest's asserted market power over local services is wrong.<sup>19</sup> According to NJDRA, "Qwest clearly dominates the *local* market," and its "phenomenal success in selling bundled telecommunications services poses the possibility of anticompetitive cross-subsidization." (*Id.* at 8 (emphasis added), 12) But its sole proof of the "success" supporting its concerns is mere a 4% increase in long distance penetration of total retail access lines sold by Qwest to a total of 36%. *Id.* at 12. Leaving aside the fact that mere market share facts are not dispositive proof of a carrier's market power,<sup>20</sup> the 36% market share figure that NJDRA relies upon is far below levels the Commission has found do not imply market power.<sup>21</sup>

THEREFORE, for the reasons stated in AT&T's Comments and this Reply, the Commission should promptly declare all BOCs to be nondominant in their provision of interstate interexchange interLATA services. Such a holding is compelled by precedent, the facts on the

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<sup>19</sup> Note that NJDRA (at 13) also reveals that it has a different agenda, *i.e.* revisions to the Commission's cost allocation rules that would modify the 75%/25% allocation of common costs between the intrastate and interstate jurisdictions. That is a matter far beyond the scope of the Petition and has no relevance to issues of dominant carrier regulation.

<sup>20</sup> *AT&T Domestic Non-Dominance Order* ¶ 68 ("[i]t is well established that market share, by itself, is not the sole determining factor of whether a firm possesses market power").

<sup>21</sup> *Id.*, ¶ 67 (AT&T's domestic market share approximately 55% and 59% in terms of revenues and minutes, respectively); *AT&T International Non-Dominance Order* ¶ 2 (AT&T's overall international MTS service share less than 60% and below 70% in all of the top 50 international markets).

ground, and sound economics. Conversely, the procedural and other arguments raised by the BOCs' competitors must be rejected as thinly veiled attempts to game the regulatory process to their own advantage.

Respectfully submitted,

By: /s/ Richard H. Rubin

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CERTIFICATE OF SERVICE

I, Shandee R. Parran , do hereby certify that a copy of **Reply Comments of AT&T, Inc. to Qwest's Petition for Forbearance** has been served to the parties below via facsimile and first class mail – postage prepaid on this 23<sup>rd</sup> day of February 2006.

By: /s/ Shandee R. Parran  
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