WC 06-187

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| Petition for Waiver of Pricing Flexibility | ) | WC Docket No. 06- |
| Rules for Advanced Communications | ) | |
| Networks Services | ) | |

**QWEST PETITION FOR WAIVER TO ALLOW IT TO EXERCISE PRICING FLEXIBILITY FOR ADVANCED COMMUNICATIONS NETWORKS SERVICES WHERE THE COMMISSION HAS GRANTED RELIEF FOR OTHER SPECIAL ACCESS SERVICES**

Qwest Corporation ("Qwest") hereby requests that the Federal Communications Commission ("Commission" or "FCC") waive certain requirements under the Commission's price cap rules and regulations to allow Qwest to exercise pricing flexibility for its Advanced Communications Networks Services ("ACS") similar to the pricing flexibility Qwest already has for other special access services. ACS uses packet-switched technology and Qwest seeks the same pricing flexibility relief for these packet-based services that the Commission recently granted to Verizon.[1] Specifically, Qwest seeks Phase I pricing flexibility for these services in the Metropolitan Statistical Areas ("MSAs") where Qwest has already qualified for Phase I or Phase II pricing flexibility for other special access services. Qwest also requests that the waiver extend

[1] *In the Matter of Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services; Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005) ("*Verizon Fast Packet Services Pricing Flexibility Order*").

to any new ACS that it introduces in its FCC Tariff in the future for the MSAs where Qwest has qualified for or seeks pricing flexibility.[2]

## I. BACKGROUND

### A. Qwest ACS are Special Access Services

ACS, which are Qwest services that use packet-switched technology, currently include the following services for which Qwest seeks pricing flexibility: Frame Relay Service ("FRS"), Asynchronous Transfer Mode ("ATM ") Service, LAN Switching Service ("LSS") and Metro Optical Ethernet ("MOE"). These services are offered through Section 8 of Qwest FCC Tariff No. 1 and are generally purchased by small business and enterprise customers including government and education customers that require packet-switched applications to transmit their own data, video and voice. These services reach the end user through a special access line connection. Like Verizon's packet-based advanced services, Qwest's ACS are dedicated facilities that enable an end-user customer to connect two or more of its locations, and thus are special access services.[3] The special access line consists of a "channel termination" facility between the end user and the Qwest office serving the end user, and may include a dedicated

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[2] On March 19, 2006 the FCC granted Verizon forbearance relief such that its broadband services are now regulated under Title I. FCC News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services is Granted by Operation of Law*, WC Docket No. 04-440 (Mar. 20, 2006). In its forbearance petition filed on June 13, 2006, Qwest seeks the same relief. *See In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Qwest Petition for Forbearance, WC Docket No. 06-125. *And see* Public Notice, DA 06-1464, rel. July 19, 2006. Until such time as Qwest's broadband services -- which include the packet-switched services that are the subject of this petition -- are also regulated under Title I, the relief sought in this petition will allow Qwest greater regulatory freedom than it has currently to compete in the market for these packet-switched services. Should the Commission grant Qwest's Title II forbearance petition prior to addressing this petition, this petition will be moot.

[3] *See Verizon Fast Packet Services Pricing Flexibility Order*, 20 FCC Rcd at 16845 ¶ 10 and n.39 (explaining why Verizon's packet-based advance services are special access services).

transport facility between Qwest's offices.[4] In other words, Qwest's ACS use a channel termination facility between the end user and Qwest's office serving that end user, and the equivalent of non-channel termination facilities provide the rest of the service.[5]

### B. Qwest ACS Services are Currently Tariffed Outside of Price Cap Regulation

In its *Second Report and Order* regarding Policy and Rules Concerning Dominant Carriers, the Commission excluded packet-switched services from price cap regulation.[6] As a result, Qwest has retained its packet-switched services outside of price caps in accord with that *Order*. In turn, these Qwest services remain subject to rate-of-return regulatory treatment.

Meanwhile, for its special access and dedicated transport services that are under price caps, Qwest has sought and obtained certain Phase I and Phase II pricing flexibility for these services by demonstrating sufficient competition to permit such pricing flexibility.[7] Specifically, Qwest received Phase I and/or Phase II pricing flexibility for dedicated transport, special access services, and channel terminations in a total of thirty-three MSAs.[8] Different thresholds apply to obtain pricing flexibility for channel terminations versus special access and dedicated transport

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[4] There can be different terms for the "channel termination" facility for different products. The channel termination type facility may be called a "channel termination" in the case of FRS, an "access link" in the case of FRS, ATM and MOE, or a "LAN link" in the case of LSS.

[5] For example, in the case of ATM service, Qwest channel termination facilities are the access links identified in tariff section 8.5.1.B and the non-channel termination facilities that provide the rest of the service are the ports and logical connections described later in that tariff section.

[6] *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6810 ¶ 195 (1990), ("*Dominant Carriers Second R&O*") (stating that packet-switched service was "not subject to scrutiny as part of our investigation of LEC productivity," and thus should be excluded from price cap regulation).

[7] *In the Matter of Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services,* Memorandum Opinion and Order, 17 FCC Rcd 7363 (2002) ("*Qwest Pricing Flexibility Order*").

[8] *Id.* at 7369 ¶ 14.

other than channel terminations (non-channel terminations).[9] Qwest received Phase I pricing flexibility for its price cap special access services in all thirty-three MSAs for both channel terminations and non-channel terminations.[10]

Yet, because Qwest's packet-switched services were excluded from price caps and consequently pricing flexibility, Qwest does not have the service offering flexibility for these special access services that it otherwise would have. If the Commission had not excluded packet-switched services from price cap regulation, Qwest's ACS would have been within the categories for which Qwest has since obtained pricing flexibility.[11]

## II. THE COMMISSION SHOULD GRANT A WAIVER TO PERMIT QWEST TO EXERCISE PHASE I PRICING FLEXIBILITY FOR ITS PACKET-SWITCHED SERVICES WHERE IT ALREADY HAS PHASE I & PHASE II PRICING FLEXIBILITY FOR ITS OTHER SPECIAL ACCESS SERVICES

Qwest seeks a waiver of the general requirement that services must be in price caps to be eligible for pricing flexibility for Phase I and II relief and of the specific requirements for demonstrating that these services are eligible for Phase I pricing flexibility where Qwest already has Phase I and II pricing flexibility for other special access services. Specifically, Qwest seeks

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[9] See 47 C.F.R. § 69.711 (setting out requirements for obtaining pricing flexibility for channel terminations); 47 C.F.R. § 69.709 (setting out requirements for obtaining pricing flexibility for dedicated transport and special access other than channel terminations).

[10] *Qwest Pricing Flexibility Order*, 17 FCC Rcd at 7366-67 ¶ 8.

[11] Another price cap carrier, BellSouth, included its packet-switched services in its Trunking Basket, and is now able to exercise pricing flexibility for those services pursuant to the Commission granting the carrier certain pricing flexibility for special access and dedicated transport services. *See In the Matter of BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 23725, 23735-36, Appendix A (2002). In contrast to BellSouth's actions of tariffing its "new" packet-switched services as price-cap services, Qwest understood that all packet-switched services -- those existing at the time of the FCC's *Dominant Carriers Second R&O* and future packet-switched services -- were to be excluded from price cap regulation until the Commission ordered otherwise, and thus Qwest continued to tariff its ACS as rate-of-return services. The Commission's acceptance of those Qwest tariffs confirmed that these services were appropriately tariffed outside of price cap regulation.

a waiver of sections 1.774 (pricing flexibility proceedings), 69.709 (requests for pricing flexibility for most dedicated transport and special access services), 69.711 (requests for pricing flexibility for channel terminations between LEC end offices and customer premises) and 69.727 (re: Phase I and Phase II relief) of the Commission's pricing flexibility rules for its packet-switched services.[12]

It is appropriate for the Commission to grant the waiver Qwest seeks because Qwest meets the requirements for granting such relief. In accord with 47 C.F.R. § 1.3 the Commission may waive its regulations when good cause is demonstrated. To show good cause a carrier must demonstrate that (1) there are special circumstances warranting deviation from the general rule and (2) waiver will serve the public interest.[13]

### A. Special Circumstances Warrant Deviation from the General Rule

Three unusual situations warrant the Commission granting the requested waiver. The first is the regulatory treatment of these services compared to the regulatory treatment of Qwest's other special access services in today's competitive marketplace for these services. The general approach underlying the Commission's access charges reform efforts is to lessen regulation of incumbent local exchange carrier pricing for interstate access services as market competition for those services increases.[14] Qwest has already demonstrated that there is sufficient competition to warrant pricing flexibility for its advanced services in the MSAs where it received pricing

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[12] These sections are found at 47 C.F.R. §§ 1.774, 69.709, 69.711 and 69.727, respectively.

[13] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *In the Matter of Ameritech Operating Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, Southwestern Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Order, 21 FCC Rcd 5172, 5173 ¶ 2 (2006) (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998)).

flexibility in 2002.[15] Yet, Qwest's ACS remain subject to greater regulatory constraints than Qwest's other special access services in these markets. The requested waiver is needed to correct this inequitable regulatory situation.

Second, Qwest seeks the exact relief that the Commission previously granted to Verizon.[16] Given that Qwest seeks nothing more than the relief received by Verizon for the same type of services and for the same reasons, there is no reasonable basis for the Commission not to afford Qwest the same relief. It is a fundamental tenet of administrative law that an agency cannot treat similarly situated entities differently without a reasoned explanation, and that explanation must be more than merely an enumeration of factual differences but must explain the relevance of those differences to the purposes of the legislation that the agency is administering.[17] Otherwise, the agency action affording disparate treatment must be struck down as arbitrary and an abuse of agency discretion.[18] Consequently, Qwest is entitled to the same relief that the Commission granted Verizon unless the Commission can articulate a rational basis grounded in the purposes of the Act for denying Qwest the relief that Verizon received.

Third, in March of this year, the Commission deemed granted by operation of law, Verizon's Title II forbearance petition such that Verizon's broadband services are now regulated under Title I.[19] Qwest has filed a forbearance petition seeking the same relief.[20] The relief that

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[15] *Qwest Pricing Flexibility Order*, 17 FCC Rcd at 7369 ¶ 14.

[16] *See Verizon Fast Packet Services Pricing Flexibility Order*, 20 FCC Rcd at 16840 ¶ 1.

[17] *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

[18] *See Garrett*, 513 F.2d at 1060 (explaining that its prior rulings that agencies must treat similar situations in similar ways "vividly reflect the underlying principle, that agency action cannot stand when it is 'so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.'") (internal citations omitted).

[19] *See supra*, n.2.

Qwest seeks in this petition will allow Qwest greater regulatory freedom to compete against Verizon until such time as Qwest's packet-switched services are also regulated under Title I.

### B. Granting the Requested Waiver Will Serve the Public Interest

Granting this waiver serves the public interest because (1) doing so promotes competition for advanced services, resulting in more choices and better prices for consumers and (2) the administrative and regulatory burdens associated with requiring Qwest to satisfy an additional competitive showing for Phase I relief outweigh the benefits of such a showing.

First, granting this relief serves the public interest because it promotes competition for these services by enabling Qwest to better respond to competitive pressures by offering contract arrangements, including contract pricing, that are responsive to customer demand for these services. As the Commission has recognized, permitting this type of waiver for these services is consistent with the policies underlying the Commission's price cap and pricing flexibility rules.[21] In the identified markets, Qwest will be able to offer lower rates to meet competition. Qwest will be able to respond effectively to marketplace developments by offering customized pricing, discounts, and flexible contract terms that competitors can and do offer. Granting Qwest pricing flexibility would enable Qwest to price its services competitively and in turn exert downward pressure on rates. Also, by enabling Qwest to provide individualized competitive offers, customers will benefit from greater competition and more choices.

Second, granting this waiver serves the public interest because the administrative and regulatory burdens associated with requiring Qwest to satisfy an additional competitive showing for Phase I relief outweigh the benefits of such a showing. Qwest has already demonstrated in

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[20] *See id.*

[21] *Verizon Fast Packet Services Pricing Flexibility Order*, 20 FCC Rcd at 16848-49 ¶ 15.

the MSAs in question that pricing flexibility for special access services is warranted.[22] To make a competitive showing for the packet-switched services at issue in this petition would require Qwest to collect the same data and make the same demonstration that it made for the other special access services for which it previously received pricing flexibility relief. Duplication of this demonstration would create unnecessary administrative burdens and result in wasting resources.

To make a competitive showing for these advanced services Qwest would need to survey collocation in hundreds of wire centers, prepare substantial amounts of revenue data, and serve all of its collocators with notice of this process. Qwest would then need to file pricing flexibility petitions that would be subject to an administrative process that would take at least 90 days.[23] Meanwhile, Qwest has already collected all of this data, and performed this process once to demonstrate the existence of a sufficient competitive presence to warrant pricing flexibility in these same MSAs. Full duplication of this process is not needed to re-demonstrate the competitive market for these services. If these were "new services" going under price cap, Qwest would demonstrate which price cap bucket the new services fell into and the new services would be entitled to the same pricing flexibility as the services in that bucket.[24]

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[22] *Qwest Pricing Flexibility Order*, 17 FCC Rcd at 7369 ¶ 14.

[23] *See* 47 C.F.R. § 1.774 (c), (d) & (f).

[24] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14310 ¶ 173 (1999), *aff'd WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); 47 C.F.R. § 69.729.

The Commission has recognized that permitting a waiver in this circumstance does not undermine the rationale of the competitive showing required under its pricing flexibility rules.[25] The Commission recognized that Verizon's prior demonstration of competition sufficient to warrant Phase I pricing flexibility for its special access services meant that "Verizon has demonstrated that competitors have made irreversible investment in the facilities needed to provide special access services in the markets at issue. Accordingly, we find that Verizon demonstrates that sufficient competition exists to warrant pricing flexibility for its advanced services in those markets."[26] Applying that same analysis here, where Qwest, too, has made the same prior demonstration of competition, compels a finding that Qwest's requested waiver is appropriate.

## III. CONCLUSION

For the reasons just stated, Qwest respectfully requests that the Commission grant this petition.

Respectfully submitted,

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[25] *Verizon Fast Packet Services Pricing Flexibility Order*, 20 FCC Rcd at 16849 ¶ 16.

[26] *Id.*

## CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused a copy of the foregoing **QWEST PETITION FOR WAIVER TO ALLOW IT TO EXERCISE PRICING FLEXIBILITY FOR ADVANCED COMMUNICATIONS NETWORKS SERVICES WHERE THE COMMISSION HAS GRANTED RELIEF FOR OTHER SPECIAL ACCESS SERVICES** to be hand delivered on September 22, 2006 to the parties listed below.*

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/s/
Richard Grozier

September 21, 2006

* The original Qwest Petition, and the associated filing fee and Form 159, were transmitted via overnight delivery to the Mellon Bank in Pittsburgh on September 21, 2006 for filing with the FCC.