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VIA ECFS

EX PARTE

January 16, 2007

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

Re: *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*, WC Docket No. 05-333

Dear Ms. Dortch:

On November 22, 2005, Qwest Communications International Inc. ("Qwest") filed a forbearance petition in the above-captioned proceeding requesting that the Federal Communications Commission ("Commission") forbear from enforcing its dominant carrier rules against Qwest in the provision of in-region interstate interexchange carrier services ("in-region-IXC services")[1] post-sunset of Section 272 requirements, whether these services are provided by Qwest Corporation ("QC"), Qwest's incumbent local exchange carrier ("ILEC"), on an integrated basis or separately through some other Qwest affiliate that is not complying with the full array of the Commission's Section 272 rules in existence prior to sunset ("non-Section 272 affiliate").[2] In its petition and in subsequent filings with the Commission, Qwest has demonstrated that its request satisfies Section 10's forbearance criteria and should be granted. In this written *ex parte*, Qwest further addresses the Commission's dominant carrier rules. Specifically, this *ex parte* demonstrates that the cost of imposing dominant carrier regulation

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[1] This *ex parte* presentation uses the term "in-region IXC services" to refer generally to all Qwest interexchange services that may originate in a Qwest state and terminate at a location either in another state or outside the United States and the term "IXC services" refers generally to all interexchange services that may originate in any state and terminate at a location either in another state or outside the United States.

[2] *See* Petition for Forbearance of Qwest, filed on Nov. 22, 2005 (corrected version of Petition filed on Nov. 30, 2005) ("Qwest Nov. 22, 2005 Petition").

post-sunset would far exceed any potential benefits and would distort what is now a highly competitive market. Indeed, no worthwhile purpose would be served by imposing dominant carrier regulation on Qwest in the provision of in-region IXC services regardless of whether Qwest provides these services through its ILEC or a "non-Section 272 affiliate."

Request for Relief from the Dominant Carrier Rules

In requesting relief, Qwest noted that a grant of its petition would include forbearance from enforcing Part 61's dominant carrier tariff and price cap requirements as they apply to the provision of in-region IXC services post-sunset (when these services are provided by Qwest's ILEC or a non-Section 272 affiliate).[3] Qwest also asked the Commission to forbear from applying "any other Commission dominant carrier rules as they might be applied to Qwest['s] provision of in-region IXC services post-sunset."[4] Qwest believes that, if the Commission forbears from classifying Qwest as a dominant carrier in the provision of in-region IXC services, as Qwest has requested in its petition, there are numerous ancillary rules that will no longer apply to either Qwest's Bell Operating Company ("BOC") or a non-Section 272 affiliate (depending upon which entity provides in-region IXC service). Indeed, such a ruling would be self-effectuating in the sense that no dominant carrier regulation would thereafter apply to Qwest in the provision of in-region IXC services. In any event, in its Reply to oppositions, Qwest identified with more specificity the rules for which it is seeking forbearance and clarified that these rules include at least the following dominant carrier rules with regard to Qwest's provision of in-region IXC services:

- Part 61's dominant carrier tariff requirements – including Sections 61.31-.38, 61.41-.49 and 61.58-.59 (and including 61.28, the ancillary rule governing international carriers) that require dominant carriers to file cost-supported tariffs.[5]

- Part 61's dominant carrier price cap requirements – including Sections 61.41-.49.[6]

- Part 65 which contains rate-of-return regulations which apply to dominant carriers.[7]

- Sections 214(a), (c), and (d) of the Act and those portions of Part 63 of the Commission's rules that apply to entry and discontinuance of services or

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[3] *See* Petition at 2 and note 5 (citing 47 C.F.R. § 61.31, *et seq.*).

[4] *Id.* at 2 (footnote omitted).

[5] 47 C.F.R. §§ 61.28, 61.31-.38, 61.41-.49 and 61.58-.59.

[6] 47 C.F.R. §§ 61.41-.49.

[7] 47 C.F.R. § 65.1, *et seq.*

transfers of control by dominant carriers to the extent the Commission may deem them to apply to the services at issue here, including but not limited to Sections 63.03, 63.10, 63.18, 63.19, 63.21, 63.23 and 63.60-.90.[8]

- Those portions of Section 43 of the Commission's rules relating to contract filing and reporting as they might apply to the provision of in-region IXC services as a dominant carrier including Sections 43.21, 43.43 and 43.51.[9]

- Any portion of Section 272 of the Act, the *Competitive Carrier Proceeding* or other Commission rules that would require Qwest to provide in-region IXC services post-sunset through a Section 272 affiliate or any other separate affiliate in order to be deemed non-dominant in the provision of in-region IXC services.[10]

A Dominant Carrier Classification Requires Market Power

It is important to keep in mind, in connection with Qwest's forbearance request, that a finding of market power is a necessary prerequisite to a finding that a carrier is a dominant provider. The Commission has found carriers with market power in the provision of a service to be dominant providers since the adoption of the dominant/non-dominant regulatory framework

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[8] 47 U.S.C. §§ 214(a), (c) and (d) and 47 C.F.R. § 63.01, *et seq.*

[9] 47 C.F.R. §§ 43.21, 43.43 and 43.51.

[10] 47 U.S.C. § 272. *Also see, generally, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) ("*Competitive Carrier Fourth Report and Order*"), *vacated sub nom., AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984) ("*Competitive Carrier Fifth Report and Order*"); *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *vacated sub nom., MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *affirmed, MCI v. AT&T*, 512 U.S. 218, 114 S. Ct. 2223 (1994). *And see In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15840-41 ¶ 143, 15858-59 ¶ 179, 15860 ¶ 183, 15862-63 ¶ 188 (1997) ("*LEC Classification Order*").

in the early 1980s.[11] Market power is defined as the ability of a carrier to unilaterally raise and sustain price above a competitive level by restricting output.[12] Accordingly, if a carrier does not have market power, regulation is not necessary to ensure that rates and practices are just and reasonable and not unreasonably discriminatory nor is regulation necessary to protect consumers.

The competitive data that Qwest has provided in this proceeding strongly supports the opposite conclusion here[13] -- that Qwest does not have market power in the provision of in-region IXC services.[14] Competition in this market is vibrant, if not brutal, throughout Qwest's region and the rest of the United States. Prices continue to decline and customers have the choice of a large number of providers, both wireline and wireless. No one has argued, nor could it be reasonably argued, that Qwest has the power to increase the price of in-region IXC services

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[11] *See* note 10, *supra*. *See also In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3274-75 ¶¶ 5-6, 3346-47 ¶¶ 138-39 (1995). Non-dominant carriers are simply defined to be carriers that have not been found to be dominant. *See* 47 C.F.R. § 61.3(y).

[12] *See LEC Classification Order*, 12 FCC Rcd at 15762-63 ¶ 6, 15765-66 ¶ 11. *Also see, Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558 ¶ 7. The Commission's analytical framework for determining market power is based on the Department of Justice's Horizontal Merger Guidelines. The Commission, in looking at market power, has sometimes also discussed the ability to raise rivals' costs through the control of an essential input (*e.g.*, exchange access). For the reasons discussed in its petition and recent *ex parte* addressing competitive issues, Qwest lacks the ability to engage in either practice and, consequently, neither concern provides a basis for denying Qwest's requested relief. Furthermore, Qwest's obligation to offer interstate exchange access service on a non-discriminatory basis at tariffed rates that are capped by the Commission's current pricing regulations plainly precludes it from unilaterally raising the access costs of its in-region long distance competitors. Qwest *ex parte* filed Dec. 7, 2006, WC Docket No. 05-333 at 2-3 for further discussion of this issue ("Qwest Competition *ex parte*").

[13] In fact, no one has claimed that the market for in-region IXC services is anything other that highly competitive.

[14] *See* Qwest Competition *ex parte* and Qwest's January 8, 2007 and January 16, 2007 *ex parte* (Confidential) responses to Mr. Thomas J. Navin's January 5, 2007 data request. Nowhere is competition greater than in the provision of IXC services to mid-sized and large business customers -- so-called "Enterprise" customers. Qwest presented revenue share data from TNS Telecoms showing that Qwest was the fourth largest provider of interLATA services to the Enterprise market on a national basis and the second largest provider within its own region. Neither national nor regional revenue share data provides any evidence to support a finding that Qwest has market power in serving Enterprise customers. In fact, the data points to exactly the opposite conclusion -- that Qwest has no market power. *See* Qwest Competition *ex parte*.

by restricting the amount of service that it sells.[15] Thus, but for the fact that Qwest is presumed to be a dominant provider of in-region IXC services under the Commission's rules post-sunset,[16] there is little or no possibility that Qwest could be found to be a dominant provider under the Commission's existing standard because Qwest lacks market power.

The Dominant Carrier Rules Are Burdensome And Unnecessary

If Qwest's in-region IXC services are subjected to dominant carrier regulation post-Section 272 sunset, it would impose a costly and unnecessary burden on Qwest. Qwest's in-region IXC services would be subject to completely unnecessary mandatory tariffing requirements including price cap regulations.[17] Furthermore, more stringent entry and discontinuance provisions would apply (*i.e.*, under rules implementing Section 214 of the Act) to facilities used in the provision of in-region IXC service and the Commission's depreciation rules and reporting requirements would apply to Qwest investment used in the provision of such service.[18] Qwest believes that dominant carrier regulation, in its entirety, is unduly costly and unnecessarily burdensome, *a priori*, for a carrier such as Qwest that lacks the ability to increase the price of in-region IXC services. More specifically:

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[15] It is self-evident that Qwest does not have market power in the provision of IXC services today and will not have market power at anytime in the foreseeable future. There are few barriers facing new entrants and there is more than enough telecommunications capacity in place to meet the needs of all customers. Even if specific companies exit the market, most telecommunications assets are fixed and simply will be re-sold to another competitor or new entrants. Furthermore, most customers view IXC services as commodities -- with little, if any, distinction between the services provided by different carriers to most customers.

[16] Tat is, if these services are not provided through a Section 272 compliant affiliate. Qwest is presumed to be a dominant provider until the Commission finds otherwise. *See In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Memorandum Opinion and Order, 17 FCC Rcd 26869, 26870 n. 8 (2002); *see also LEC Classification Order*, 12 FCC Rcd at 15802 ¶ 82, 15825-26 ¶ 119; 47 U.S.C. § 272; 47 C.F.R. § 64.1901, *et seq.*

[17] Qwest acknowledges that in the *Pricing Flexibility Order* the Commission revised its rules to provide for streamlined regulation of in-region interstate intraLATA toll services. *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 (1999).

[18] Qwest acknowledges that it has a waiver petition pending before the Commission which seeks relief from the Commission's depreciation rules. *See* Petition for Waiver of Qwest Corporation, WC Docket No. 05-259, filed July 22, 2005 ("Qwest Depreciation Waiver").

(a) Mandatory Tariffing, Price Cap and Rate-of-Return

The most harmful effect -- on Qwest, competition and the Commission, itself -- of classifying Qwest as a dominant provider of in-region IXC services would be the imposition of mandatory tariffing requirements. The requirement to file tariffs would restrict Qwest's ability to respond to competitors' pricing initiatives and require Qwest to give advance notice to competitors of its pricing plans and promotions. Thus, regardless of the length of the notice period, competitors would be made aware of Qwest's pricing plans and new product introductions before Qwest had an opportunity to implement them. Likewise, Qwest would be delayed in responding to the offerings of competitors as a result of the tariff filing requirement. This is the antithesis of how competition works in a free market where innovators are rewarded, rather than punished, for creative behavior.[19] With dominant carrier regulation, the Commission's tariffing rules would control (and limit) Qwest's behavior, rather than the market.

Mandatory tariffing of Qwest's in-region IXC services would harm customers in numerous ways. First, customer choice would be reduced given Qwest's limited ability under dominant carrier tariff requirements to respond to competitors' pricing and product initiatives. It is inevitable that with dominant carrier regulation, Qwest would offer fewer alternatives and promotions to customers. Moreover, with Qwest services subject to mandatory tariffing, the inclination of competitors would be to look to Qwest, rather than to customers for pricing signals -- thereby skewing the competitive landscape. In fact, in the *Mandatory Detariffing proceeding* the Commission opined that "eliminating [interstate, domestic interexchange service] tariffs for mass market services will increase carriers' incentive to reduce prices for such services, and reduce their ability to engage in tacit price coordination" and, thereby, benefit customers.[20] Next, rather than having the benefit of resolving disagreements with Qwest (*i.e.*, concerning the pricing and provisioning of in-region IXC services) based on standard contract law that normally governs commercial arrangements, customers' rights would be determined by tariff provisions, including the filed rate doctrine.[21] The interests of most mass market customers would be better protected by standard contract law than by tariffs. In summary, customers are best served by competitive markets. In such instances, customers have a broader array of product choices at

[19] How successful would Apple Computer be today if it had been required to tell its competitors about the i-Pod before it was launched and to cost justify its pricing structure?

[20] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730, 20752 ¶ 41 (1996) ("*Mandatory Detariffing Order*"), *on recon.*, 12 FCC Rcd 15014 (1997) ("*Mandatory Detariffing Reconsideration Order*").

[21] In its *Mandatory Detariffing Orders*, the Commission "found that elimination of the possible invocation of the 'filed-rate' doctrine is in the public interest because, pursuant to the 'filed-rate' doctrine articulated by the courts, where a filed tariff rate, term, or condition differs from a rate, term, or condition in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate, term, or condition." *Mandatory Detariffing Reconsideration Order*, 12 FCC Rcd at 15017 ¶ 3.

more favorable terms and conditions and at lower prices than they would have where one or more providers in the market are subject to dominant carrier regulation and accompanying tariff requirements.

Lastly, mandatory tariffing requirements would place an unnecessary burden on the Commission's already limited resources. The Commission's Part 61 rules contain a litany of requirements associated with the filing, composition and preparation of dominant carrier tariffs. Each one of these requirements would impose a costly burden on Qwest and on the Commission in its administrative and oversight role. And for what good? The Commission exercised its forbearance authority years ago to require mandatory detariffing of domestic interstate interexchange services because it concluded that tariffs for such services were not necessary to protect consumers.[22] This conclusion should not change now that Section 272 has sunset.

The Commission summarized the negative impacts of mandatory tariff filing requirements best in its *Mandatory Detariffing Order* in which it stated:

> requiring non-dominant interexchange carriers to file tariffs for interstate, domestic, interexchange services impedes vigorous competition in the market for such services by: (1) removing incentives for competitive price discounting; (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs. [footnotes omitted][23]

The same negative impacts would apply equally to tariffing Qwest's in-region IXC services if the Commission found that these services were subject to dominant carrier regulation post-sunset.

If Qwest were classified as a dominant carrier in the provision of in-region IXC services, those services presumably would also be subject to the Commission's price cap rules. In that case, in-region IXC prices/rates would be governed by Qwest's price cap mechanism and subject to price cap tariffs, unless the Commission found otherwise.[24] Although price cap regulation is generally regarded as a regulatory regime that is superior to traditional rate base/rate-of-return, price regulation is both unnecessary and anticompetitive if it is used to regulate the prices of

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[22] *Mandatory Detariffing Order*, 11 FCC Rcd at 20752 ¶ 41; *Mandatory Detariffing Reconsideration Order*, 12 FCC Rcd at 15019 ¶ 6.

[23] *Mandatory Detariffing Order*, 11 FCC Rcd at 20760-61 ¶ 53.

[24] The Commission's *Price Cap Order* specifically identified Qwest Corporation, formerly U S WEST Communications, as a LEC that was subject to mandatory price cap regulation. *See In the Matter of Policy and Rules Concerning Rates for Dominant* Carriers, Second Report and Order, 5 FCC Rcd 6786, 6787 ¶ 6 n. 4 (1990) (subsequent history omitted).

competitive services. Price cap regulation was never intended to be a substitute for the competitive market.

If in-region IXC services became subject to price cap regulation, Qwest would presumably be required to place in-region IXC services in a separate service basket and to establish prices (*i.e.*, tariff rates) in accordance with the relevant price cap indices. Not only would this be a costly exercise in frustration for Qwest, it would be entirely unnecessary since in-region IXC services are competitive products. Price cap limits may not be a great problem, in and of themselves, since the price of many in-region IXC services have declined precipitously in recent years. However, the establishment of and ongoing administration of price cap indices for these services would be costly. Additionally, price cap regulation would add needlessly to the costs that Qwest incurs in developing and deploying innovative products and services.

Lastly, while price cap carriers are exempt from most Part 65 rate-of-return requirements, price cap carriers continue to be subject to certain portions of Part 65. For example, price cap carriers must continue to: 1) comply with Part 65's interstate rate-of-return reporting requirements;[25] 2) use the prescribed interstate rate-of-return in offering services under Section 61.42(f) of the Commission's price cap tariff rules;[26] and 3) employ the prescribed interstate rate-of-return in complying with applicable Part 36 and Part 69 rules.[27]

Ironically, the Commission allowed price cap LECs to remove interstate intraLATA toll services from price cap regulation in 1999 when it found in its *Pricing Flexibility Order* that "LECs will be unable to exploit any individual market power over a sustained period of time in their provision of corridor and interstate intraLATA toll services."[28] It would make little sense and would be a step backward to subject Qwest's in-region IXC services to price cap regulation and associated rate-of-return rules post-sunset. Any benefits of such regulation would be far outweighed by the costs.

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[25] *See* 47 C.F.R. § 65.600(d).

[26] *See* 47 C.F.R. § 65.1(b)(3).

[27] *See* 47 C.F.R. § 65.1(b)(1).

[28] *See 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 14249-50 ¶ 56 (1999), *aff'd, WorldCom, Inc. v. FCC,* 238 F.3d 449 (D.C. Cir. 2001). In the *Pricing Flexibility* proceeding, the Commission declined to find that LECs were non-dominant providers of interstate intraLATA services on the grounds that the record was insufficient. *Id.* at 14247-48 ¶ 53.

(b) Entry, Exit and Transfer of Control Requirements

Section 214 of the Act and Part 63 of the Commission's rules lay out the entry and discontinuance requirements for dominant and non-dominant providers.[29] Non-dominant carriers may discontinue service much faster than dominant carriers when there is no opposition (*i.e.*, 30 days versus 60 days).[30] If there is opposition, there is no question that the burden of proof on a dominant carrier will be significantly greater than on a non-dominant carrier since non-dominant carriers, by their classification, are presumed not to be the sole provider of service (*i.e.*, there are substitutes available). Likewise, dominant carriers are often presumed to be either the sole or an essential provider of many services. Dominant carriers also face more stringent transfer of control regulation. In competitive markets, like in-region IXC services, there are numerous providers, any one of whom could exit the market tomorrow with no discernable impact on the quality and quantity of service available to the public. As such, burdening Qwest with a dominant carrier classification and resulting heightened regulation of entry and exit is costly and serves no purpose when there are numerous providers of in-region IXC service.

The same logic holds true with respect to transfers of control. The Commission's existing rules contain provisions where most transfer of control applications of non-dominant providers are eligible for streamlined processing.[31] These provisions allow an applicant "to transfer control of [the] domestic lines or authorization to operate on the 31st day after the date of [the Commission's] public notice …"[32] Dominant carriers do not have the same opportunity for streamlined processing of transfers of control. It would be inappropriate not to allow Qwest to take advantage of the Commission's streamlined transfer of control processes with respect to its in-region IXC operations which provided service in a highly competitive market and where most other providers would qualify for streamlined processing.

(c) Depreciation Rules, Contract Filing and Reporting Requirements

As noted above, Qwest's in-region IXC services would also be subject to the Commission's depreciation rules and associated reporting requirements if these services were classified as dominant carrier services post-sunset. Requiring Qwest to comply with these rules would impose costs on Qwest with no corresponding benefit to the Commission because all of them are requirements that the Commission applies to carriers with market power. Nothing would be gained by subjecting investment used in the provision of in-region IXC services to the Commission's depreciation rules.

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[29] While a literal reading of the Commission's discontinuance rules would appear to limit the application of these rules to the discontinuance of all telecommunications service (*i.e.*, facilities) to a given geographic area, the Commission has applied these rules on a service by service basis.

[30] 47 C.F.R. § 63.71.

[31] 47 C.F.R. § 63.03.

[32] 47 C.F.R. § 63.03(a).

In addition to Part 43's depreciation requirements, Part 43.51 contains burdensome filing requirements for written contracts and certification requirements for oral contracts covering certain matters including the exchange of services and routing of traffic, among other things, for carriers that have been classified as dominant carriers.[33] These rules require dominant carriers to file such contracts within thirty days of execution. Part 43.21 also contains additional filing requirements that could apply to Qwest and its affiliates if it is classified as a dominant provider of in-region IXC services. Any marginal benefits associated with applying such reporting requirements to Qwest's in-region IXC operation would be far out-weighed by the costs associated with complying with these requirements.

Section 10's Requirements

Section 10 of the Act directs the Commission to remove needless regulation and creates a strong presumption in favor of deregulation.[34] Under Section 10, the Commission is required to forbear from applying any regulation or statutory provision of the Act if the Commission finds that:

(1) enforcement is not necessary to ensure that rates and practices associated with the provision of a service are just and reasonable and are not unreasonably discriminatory;

(2) enforcement is not necessary to protect consumers;

(3) forbearance is consistent with the public interest.[35]

Satisfaction of Section 10's Requirements

The above analysis of the absence of the initial requirement for dominant carrier regulation (*i.e.*, market power) and the unnecessary and costly nature of dominant carrier regulation points to one conclusion -- Section 10's forbearance criteria are clearly satisfied in this proceeding.

Again, in order to determine whether Section 10's requirements are satisfied, the Commission first must determine whether Qwest will have market power in the provision of in-region IXC services post-sunset if Qwest provides these services on an integrated basis out of its ILEC or through a non-Section 272 affiliate. Once the Commission concludes, as it should, that Qwest does not and will not have market power in the provision of in-region IXC services, there should be no question that Section 10's forbearance criteria are satisfied. Additionally, the

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[33] 47 C.F.R. § 43.51.

[34] 47 U.S.C. § 160.

[35] 47 U.S.C. § 160(a). In making its public interest determination the Commission is required to consider whether forbearance will promote competitive market conditions. *Id.* at § 160(b).

detailed analysis above of the burdensomeness of dominant carrier regulation demonstrates that the criteria of Section 10 are met.

Indeed, in conducting its analysis in the *Mandatory Detariffing* proceeding of whether it should forbear from requiring or allowing non-dominant carriers to file tariffs for interstate, domestic, interexchange services, the Commission concluded that the analysis for the first two forbearance criteria would be the same (because the relevant inquiries are the same).[36] Qwest believes this conclusion holds true with respect to the forbearance relief that it is seeking. Qwest also believes that the evidence in this proceeding supports a finding that enforcement of dominant carrier tariffing and price cap requirements to Qwest's in-region IXC services is not necessary to ensure that rates and practices associated with these services are just and reasonable and not unreasonably discriminatory nor is enforcement necessary to protect consumers. The Commission made such a finding in the *Mandatory Detariffing* proceeding and it is equally applicable with regard to Qwest's request for forbearance. The need for forbearance is even more compelling since none of the services for which Qwest is seeking relief are currently being provided under dominant carrier tariffs. In fact, as the Commission found in its *Mandatory Detariffing Order* and Qwest demonstrated above, consumers would be harmed by enforcement of dominant carrier tariffing requirements.[37]

Clearly, if dominant carrier tariffing requirements are unnecessary, dominant carrier entry and exit and transfer of control requirements and depreciation, contract filing and reporting requirements are equally unnecessary. The unnecessary burdensomeness of these regulations are detailed above.

In light of all of the above, the Commission should find that the first two forbearance criteria are satisfied since forbearance cannot possibly have a negative impact on in-region IXC rates; it can only enhance competition. Furthermore, forbearance should enhance competition by allowing Qwest to operate more efficiently and compete more effectively in the provision of in-region IXC services.

As to the third criteria, in the light of the foregoing analysis -- particularly the detailed outline above of the unnecessary burdens of dominant carrier regulation, there should be no question that forbearance from enforcing dominant carrier tariff and price cap rules post-sunset would serve the public interest. Indeed, forbearance will simply avoid unnecessary and inappropriate "re-regulation" of Qwest's in-region IXC services after Section 272 sunset. In making its public interest determination, the Commission is required to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services (*i.e.*, in this case providers of in-region IXC services).[38] It is self-evident that the market for in-region

[36] *Mandatory Detariffing Order*, 11 FCC Rcd at 20739 ¶ 15.

[37] *Id.* at 20752 ¶ 41.

[38] 47 U.S.C. § 160(b).

IXC services will be less competitive if Qwest is subject to dominant carrier regulations such as tariffing and price cap rules, entry, exit and transfer of control requirements, and depreciation, contract filing and reporting rules. No other provider is subject to these requirements. Such regulation results in needless and unjustified burdens, as detailed above. It creates asymmetric regulation that skews the competitive market for in-region IXC services, severely handicapping Qwest in the provision of such services. Thus, forbearance will clearly serve the public interest.

Conclusion

No purpose would be served in imposing dominant carrier regulation on Qwest in the provision of in-region IXC services after Section 272 sunset. The competitive facts, the Commission's regulatory standard for dominance and Commission precedent all strongly support the proposition that the Commission should forbear from applying dominant carrier regulation to Qwest in the provision of in-region IXC services, regardless of how these services are provided. Enforcement of the dominant carrier rules is not necessary to protect consumers and the public interest nor is it necessary to ensure that in-region IXC rates and practices are just and reasonable and not unreasonably discriminatory. Forbearance would enhance competition and eliminate unnecessary regulations. In the absence of forbearance from applying the dominant carrier rules, Qwest for all practicable purposes, will be limited to providing in-region IXC service through a Section 272 compliant affiliate and be burdened by unnecessary and costly regulation.

Respectfully submitted,

/s/ Timothy M. Boucher

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