Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Qwest's Petition for Forbearance from	)	
Enforcement of the Commission's Dominant	)	WC Docket No. 05-333
Carrier Rules as They Apply After	)	
Section 272 Sunsets	)	
	)	

COMMENTS OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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On the Comments:

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I. INTRODUCTION

Pursuant to the pleading cycle set forth by the Federal Communications Commission ("Commission" or "FCC"), the New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") hereby submits its initial comments regarding the petition filed by Qwest Communications International Inc. ("Qwest") for forbearance pursuant to section 10 of the Communications Act of 1934, as amended.[1]

[1] / Qwest submitted its original petition on November 22, 2005, and then filed a corrected version on November 30, 2005. 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, filed Nov. 30, 2005 ("Qwest Petition"). Public Notice DA 05-3163, issued December 8, 2005 ("FCC Public Notice"), establishes February 22, 2006 for the reply comment due date.

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.[2] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and will "produce a wider selection of services at competitive market-based prices."[3] Although New Jersey ratepayers do not reside or work in Qwest's territory, the Commission's deliberations in this proceeding affect New Jersey households and businesses because the policies that the Commission establishes in response to Qwest's Petition may set precedent for the resolution of any future petitions submitted by Verizon.

B. OVERVIEW OF PETITION

Qwest filed a petition on November 22, 2005, requesting forbearance from the Commission's application of its dominant carrier rules to Qwest's provision of integrated in-region, interstate, and interLATA interexchange services after section 272 of the Act sunsets in Qwest's region on

[2]/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

[3]/ *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

December 12, 2006.[4] Specifically, Qwest seeks forbearance from Part 61 tariffing and price cap requirements "and any other Commission dominant carrier rules as they might be applied to Qwest provision of in-region IXC services post-sunset."[5] According to Qwest:

> The competitive facts, the Commission's regulatory standard for nondominance and Commission precedent all strongly support a finding of nondominance if Qwest provides in-region IXC services out if its ILEC or by a non-272 affiliate after sunset. In any event, enforcement of the Commission's dominant carrier rules is not necessary to protect consumers or to ensure that rates and practices are just and reasonable and not unreasonably discriminatory.[6]

Qwest contends that forbearance would further the public interest because it would enable Qwest to provide in-region interexchange ("IXC") services "in the most efficient manner post-sunset."[7] Qwest also submitted the declaration of David L. Teitzel in support of its petition.

II. ANALYSIS OF PETITION

Overview of dominant carrier obligations.

At stake in this proceeding is the level of regulatory oversight that will be afforded Qwest after Section 272 of the Act sunsets in Qwest's 14-state region. Presently, Qwest offers in-region IXC services through two affiliates, Qwest Communications Corporation ("QCC") and Qwest LD Corporation ("QLDC").[8] The sunsetting of Section 272 requirements means that Qwest need no

[4] / FCC Public Notice, at 1.

[5] / Qwest Petition at 1-2, citing 47 C.F.R. § 61.31, *et seq*.

[6] / *Id*., at 2.

[7] / *Id*.

[8] / *Id*.

longer offer in-region long distance services through a separate affiliate, but rather may offer them on an integrated basis. The elimination of the separate affiliate requirements removes a significant form of protection for consumers and competitors from anticompetitive behavior by Qwest. As these initial comments demonstrate, the Commission should deny Qwest's petition for forbearance and regulate Qwest as a dominant carrier in its provision of in-region long distance services. As explained by the Commission:

> Our rules define a dominant carrier as one that possess market power, and a non-dominant carrier as a carrier not found to be dominant (i.e., one that does not possess market power). Under our rules, non-dominant carriers are not subject to rate regulation, and currently may file tariffs that are presumed lawful on ones day's notice and without cost support. Non-dominant carriers are also subject to streamlined section 214 requirements. In contrast, dominant interexchange carriers are subject to price cap regulation, when specified by Commission order, and must file tariffs on 14, 45, or 120 days' notice, with cost support data for above-cap and out-of-band tariff filings, and with additional information for new service offerings. Dominant domestic carriers must also obtain specific prior Commission approval to construct a new line or to acquire, lease or operate any line, as well as to discontinue, reduce, or impair service.[9]

A dominant carrier is one that can unilaterally raise and sustain prices above competitive levels and that can exercise market power by restricting its output or by its control of an essential input such as access to bottleneck facilities.[10]

Qwest must demonstrate that its Petition meets a three-part test.

Section 10 of the Act includes a three-part test that governs whether the Commission shall

[9] / *In the Matter of Regulatory Treatment of LEC Provision of lnterexchange Services Originatinating in the LEC'S Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Markerplace,* 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.

[10] / *Id.* At 15802-15803.

forbear from applying any regulation or provision of its act. In broad terms, the three-part test requires the Commission to address the following:

1. Is the regulation necessary to ensure that the rates for the relevant services are just and reasonable?
2. Is the enforcement of the regulation necessary to protect consumers?
3. Would forbearance from applying the regulation be consistent with the public interest?[11]

Qwest, quoting from a Dissenting Statement issued in an earlier Commission Order, asserts that the "Commission has an affirmative duty under Section 10 to determine, 'not whether forbearance is warranted, but whether the challenged regulation is warranted any longer.'"[12] Qwest further asserts that forbearance "is not 'discretionary' – it is 'mandatory' once the Commission determines that the above conditions have been met."[13]

Qwest contends that it is constrained by existing dominant carrier rules and also implies that it could reduce its IXC costs if it had the authority it seeks to operate from an integrated entity instead of from a separate Section 272 affiliate.[14] Qwest asserts that with the sunset of Section 272, which will occur in all Qwest in-region states in December 2006,[15] Qwest's Section 272 affiliates (which are now classified as non-dominant providers of IXC services) will be classified as dominant carriers unless they continue to

[11]/ 47 U.S.C. § 160.

[12] / Qwest Petition at 7, citing *In the Matters of Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act, As Amended, to Certain Activities,* Memorandum Opinion and Order, 13 FCC Rcd 2627 (1998), Powell Dissenting Statement at 4.

[13] / Qwest Petition, at 7.

[14] / *Id.*, at 13.

[15] / *Id.*, at 3.

comply with the Commission's pre-sunset rules.[16] Qwest further contends that allowing Qwest's local exchange carrier ("QC") to provide IXC on an integrated basis or through a non-272 affiliate "would not have a detrimental impact on rates in either IXC or local exchange markets," and further claims that it "does not possess market power in either of these markets."[17] As these initial comments show, Qwest has not substantiated these assertions. Granting Qwest's Petition would expose consumers and competitors to unnecessary risks of anticompetitive behavior.

Contrary to Qwest's assertion, effective competition does not yet constrain its market power.

Mr. Teitzel, in his Declaration, describes what he contests is robust competition in Qwest's 14-state region. Among other things, Mr. Teitzel refers to a substantial increase in competitive local exchange carrier ("CLEC") lines in Qwest's territory between 2000 and 2004.[18] This comparative analysis is misleading, however, for several reasons. First, Mr. Teitzel does not analyze the impact of the FCC's unbundled network element ("UNE") remand case[19] on CLEC demand for unbundled network element platform ("UNE-P"). As Figure 1 shows, UNE-P demand is declining: UNE-P demand was 1,176,000 in September 2004, and presently (as of September 2005), UNE-P demand is 997,000.[20] Similarly, demand for the resale of Qwest's lines is declining. Figure 1, attached to these comments, illustrates the decline in

[16] / *Id.*, at 14.

[17] / *Id.*, at 15-16.

[18] / Declaration of David L. Teitzel ("Teitzel Declaration"), at para. 6. Table 1 in Mr. Teitzel's Declaration shows an increase between June 2000 and December 2004 from 1.3 million CLEC lines to 3.6 million CLEC lines.

[19] / *Unbundled Access to Network Elements; eview of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC WC Docket No. 04-313; CC Docket No. 01-338, *Order on Remand*, rel. February 4, 2005 ("Triennial Review Remand Order" or "TRRO").

[20] / Qwest Communications International, Inc., *Historical Financial Information As of September 30, 2005*, http://media.corporate-ir.net/media_files/IROL/11/119535/reports/q_statprofile3q05.xls ("Historical Financial Information").

competitive presence based on both of these modes of entry. Incumbent local exchange carriers ("ILEC") typically have significant success winning back customers that they lost to CLECs. Furthermore, CLECs' reliance on Qwest's wholesale facilities does not constrain Qwest's market power.

Between March 2003 and September 2005, Qwest-served access lines declined from 15,345,000 in March 2003 to 13,177,000 in September 2005, a decline of 2,168,000 lines.[21] However, this decline in retail lines has not diminished Qwest's market power for several reasons. First, an overall increase in demand for UNE-P between March 2003 and September 2005 explains approximately one-fourth of the decline in demand for Qwest's retail lines. Although this would appear to be evidence of CLECs' success, their success was ephemeral: The trend for UNE-P demand has reversed and demand for UNE-P is now declining. Figure 1 shows that after UNE-P demand peaked in September 2004, the demand has been steadily declining. Presently, CLEC demand is less than one million and is likely to decrease further as the March 2006 UNE-P expiration date approaches. Qwest's retail division is likely to win back many of these lines.

Furthermore, 570,000 of the retail lines that Qwest lost between March 2003 and September 2005 were additional residential lines. This is significant for several reasons. The patterns of demand for additional line demonstrate that the market for additional lines differs significantly from that for primary residential lines. Declining demand for Qwest's additional lines explains approximately one-fourth of the total decline in Qwest-served retail lines and therefore, should be examined separately. Demand for additional lines declined by approximately 40 percent during this 30-month period (from 1,518,000 to

[21] / *Id*. *See also*, Teitzel Declaration, which states that "Qwest's retail access line base has declined significantly from 17,091,000 in December 2000 to 13,177,000 in September 2005." Teitzel Declaration at 2, citing Qwest Form 8-K for 2000 and 3Q2005 (filed January 25, 2001 and November 1, 2005).

948,000 lines). In sharp contrast, demand for primary residential lines declined by 13 percent during the same time period (from 9,150,000 to 7,916,000 lines).[22] This contrast in consumers' purchasing decisions provides strong evidence that the market for additional residential lines differs from that from the market for primary residential lines. Second, the reduction in additional lines in no way diminishes the market power that Qwest exerts for its basic primary residential lines. Third, during the same time period, demand for Qwest's DSL increased by 814,000 lines (from 526,000 to 1,340,000). Customers substitute DSL for additional lines to which they had previously subscribed for fax service and dial-up access to the Internet, and, therefore, many Qwest subscribers migrated from Qwest's additional lines to Qwest's DSL. Indeed, Qwest enjoys a unique and formidable advantage in the broadband market by virtue of its long-term and ubiquitous provision of basic local exchange service, and so the purported "loss" in one category frequently represents a gain in the DSL category.

As Table 1 shows, Qwest clearly dominates the local market. Qwest's share of the retail local market is 81 percent, which is strong evidence of its ability to exert market power, thus jeopardizing consumers, competitors, and the public interest. Furthermore, as Table 1 shows, Qwest dominates 92 percent of the market either directly through its retail lines or indirectly through leasing its wholesale facilities to CLECs.

[22] / *Historical Financial Information.*

Intermodal alternatives do not yet constrain Qwest's market power.

In support of Qwest's Petition, Declarant Teitzel relies extensively on the presence of intermodal alternatives as purported evidence of competition in the local market.[23] Qwest's reliance on intermodal alternatives is misplaced, however, and although intermodal alternatives represent a substitute for additional lines,[24] they do not yet represent an economic substitute for basic local exchange service as is demonstrated by consumers' purchasing decisions.[25]

VoIP is at best an alternative for affluent households, and, in any case, does not constrain Qwest's market power.

Although demand for Voice over Internet Protocol ("VoIP") is increasing, it does not yet constrain Qwest's market power. One needs broadband access to use VoIP, yet less than a quarter of households have broadband access.[26] Therefore, for the vast majority of households, VoIP does not represent an alternative. Furthermore, Qwest fails to provide data about the quantity of VoIP customers in its region,

[23] / Teitzel Declaration, at paras. 7 through 16.

[24] / Residential demand for additional lines supplied by Qwest declined by approximately 40 percent over the 30-month period between March 2003 and September 2005 (from 1,518,000 additional lines to 948,000 additional lines). *Historical Financial Information As of September 30, 2005.*

[25] / The most valuable and unbiased evidence about consumers' preferences are consumers' actual purchasing decisions. Consumers, through their purchasing decisions, seek to maximize their utility, and in so doing show their "preferences." See generally, Mas-Colell, Andreu, Michael D. Whinston and Jerry R. Green, Microeconomic Theory (New York: Oxford University Press, 1995).

[26] / In October 2003, approximately 20% of U.S. households subscribed to a broadband service. A Nation Online: Entering the Broadband Age, U.S. Department of Commerce (Sept. 2004), at 1. Furthermore, as the Ratepayer Advocate demonstrates in its initial comments filed in WC Docket 05-271, on January 17, 2006, the likelihood of a household having access to broadband service declines as household income declines. *See* US Dept. of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age*, September 2004, Appendix Table 1. Therefore, low income customers are the least likely to be able to avail themselves of VoIP as an alternative to Qwest's local exchange service. Mr. Teitzel, however, simplistically assumes away the price of broadband and states that "it is likely that the customer has purchased a broadband line for Internet access services." Teitzel Declaration at para. 15.

and, instead, relies on speculation and generalizations.[27]

Qwest has failed to provide evidence that mobile wireless service constrains Qwest's market power.

Despite much hype by ILEC, the nation's huge increase in demand for wireless service has not been paralleled by a comparable decline in demand for wireline service. In other words, simply because a customer purchases wireless service, one cannot conclude that the same customer has disconnected her basic telephone service. Indeed, the FCC stated that "[e]vidence indicates that, overall, approximately 6 percent of households have chosen to rely upon mobile wireless services for all of their communications needs."[28] In the same order, the FCC also stated that it agreed "with commenters who note that the record does not present credible evidence that mobile wireless services have a price constraining effect on all consumers' demand for primary line wireline services."[29] Qwest fails to address the fact that the vast majority of households use wireless to *supplement* their primary basic local exchange service, not to *substitute* for basic landline service.

Speculative demand is meaningless in an assessment of a carrier's market power.

Although in its order approving Verizon's purchase of MCI, the FCC includes intermodal alternatives in its quantitative analysis of market share, its calculations incorporate measures of *actual* demand, and does not include *projected or speculative* demand. The Commission further explains that "[b]ased on record evidence, we define the market for local service to include not only wireline local

[27] / Teitzel Declaration at paras. 13 through 16.

[28] / *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75, Memorandum Opinion and Order, Rel. November 17, 2005 ("Verizon/MCI Merger Order"), at para. 91.

[29] / *Id.*, at footnote 276.

service, but also certain types of VoIP service *to the extent that consumers view them as close substitutes for wireline local service*. In addition, the record evidence suggests that for certain categories of customers, mobile wireless service is viewed as a close substitute to wireline local service."[30] The important aspect of this decision is that, in assessing market share (which is compelling evidence of market power), the FCC indicated that it relies on actual consumer demand rather than speculative demand.

Furthermore, the FCC stated, "[b]ased on the factors discussed in this section, we conclude that mobile wireless services should be included within the product market for local services *to the extent that customers rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service*."[31] In other words, Qwest's data regarding mobile wireless telephone subscribers is meaningless because it does not shed any light on the quantity of customers who "rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service." The Ratepayer Advocate considers the key element in the FCC's analysis of intermodal alternatives to be that the FCC only included those instances in its market concentration calculations where evidence suggests that consumers actually use wireless and VoIP as substitutes. The *Verizon/MCI Merger Order* contains the following explanation of the FCC's methodology:

[30] / *Id.*, at para. 86 (emphasis added).

[31] / *Id.*, at para. 91.

> We estimate total residential local access lines in each relevant geographic market by summing the number of wireline local access lines (i.e., residential resold lines, residential UNE-P lines, non-Verizon residential E-911listings, Verizon's residential access lines) and an estimate of the number of residential wireless-only lines. We estimate residential wireless-only lines in two steps. First, we assume that the total number of all local access lines is the number of landline residential lines in Verizon's franchise areas divided by 94% (100% minus that 6% of residential customers that rely solely on wireless). Second, we estimate the number of wireless-only lines by taking the difference between the estimate of the total number of local access lines and the total number of wireline local access lines. We estimate Verizon's share of the residential wireless-only lines by multiplying the estimate of residential wireless-only lines by an estimate of Verizon Wireless's share of mobile wireless based upon mobile wireless lines in the NRUF database. Facilities-based VoIP lines will be captured in the E-911 listings. We note that, although we do not intend to include over-the-top VoIP subscribers in our market share calculations (because we are unable to determine which services fall within our relevant product market), subscribers to some of these services may be included in the E-911 listings, and thus included in our market share calculations.[32]

Similarly, in this proceeding, the Commission should reject anecdotal evidence and industry projections of future consumer demand. Qwest has failed to provide quantitative data to support its assertion of non-dominance in the local market and therefore has failed to meet its burden of proof.[33]

Qwest's phenomenal success in selling bundled telecommunications services poses the possibility of anticompetitive cross-subsidization.

Qwest's integration of its long distance and local services raises the possibility of the cross-subsidization of its long distance services with revenues from its local services. Figure 2 shows Qwest's

[32] / *Id.*, at footnote 307.

[33] / For example, the wireless data provided in paragraph 8 of Mr. Teitzel's declaration does not show how many customers in Qwest's territory have abandoned Qwest's wireline local exchange service. Much of the information and data in Mr. Teitzel's declaration is anecdotal or relies on speculations about future consumer purchasing decisions.

significant success rapidly gaining market share in the long distance market. In a press release issued in November 2005, Qwest stated that "[l]ong-distance penetration of total retail lines increased to 36 percent in the third quarter, compared to 32 percent a year ago." In the same press release, Qwest announced:

> Aggressive marketing efforts are paying off for Qwest. Following the launch of new bundles in May and targeted incentives and promotional initiatives kicked off in July, Qwest earned more than 90,000 bundle sales since launch. The company was able to increase average sales per week of its high-speed Internet service 65 percent over pre-July initiative results.
>
> Qwest's full-featured bundled offering includes high-speed Internet access, a national wireless offering, local and long-distance service and integrated satellite TV services through a marketing alliance with DIRECTV, Inc. The company's bundle penetration increased to 50 percent in the quarter, compared to 43 percent a year ago.[34]

Figure 3 illustrates the significant growth in the average revenue per "unit" that Qwest has generated. Qwest's bundled offerings raise serious concerns about the potential for anticompetitive bundling and tying of local and long distance telecommunications services.

Qwest's bundling of telecommunications services, and its success selling DSL underscores the fact that the Commission's Part 36 separations process is outdated and needs to be revised. The classification of DSL as an interstate service combined with ILECs' aggressive entry into advanced and video services has made the 75%/25% cost allocation between intrastate and interstate jurisdictions obsolete.[35] The existing jurisdictional split of costs is based on a network of the past. If a fair share of the common network were allocated to the interstate jurisdiction, based on decisions such as the treatment of DSL and broadband

[34] / "Qwest Reports Third Quarter Results: Revenue Trends Steady; Margin Expansion Continues," November 1, 2005. http://www.qwest.com/about/media/pressroom/1,1281,1785_archive,00.html?printVersion=1&xmlFilename=2005Nov011785&storyId=1785

[35] / With the numerous and major changes in the market (such as the granting of Section 271 authority, the classification of digital subscriber line ("DSL") and cable modem as informational services, the classification of VoIP as an interstate service, pending proposals to revise intercarrier compensation, and proposed universal service reform), Qwest's rates and rate caps need to be re-initialized at both the state and federal levels.

services, state costs would decline and rates in Qwest's territory similarly should decline.

The Commission should impose separate affiliate safeguards when Section 272 sunsets for Qwest.

Concerns that the Ratepayer Advocate identified and discussed in its filing in WC Docket No. 02-112 and CC Docket No. 00-175 (concerning the sunsetting of BOC separate affiliate requirements) apply also in this proceeding.[36] Specifically, local exchange carriers should continue to be subject to the requirements of the *Competitive Fifth Report and Order,* and, furthermore, these requirements should be imposed after the Section 272 requirements sunset to prevent anticompetitive and discriminatory behavior. Structural safeguards are critical because incumbent carriers, despite their assertions to the contrary, continue to possess market power in the relevant markets.

Mass market consumers are the most vulnerable to anticompetitive pricing practices.

Qwest serves approximately 10.7 million mass market lines, consisting of 8.9 million residential lines and 1.8 million small business lines.[37] The consumers who are most vulnerable to Qwest's anticompetitive behavior are those with low telecommunications usage, who cannot afford alternatives such as broadband-based VoIP, and those in rural areas. Qwest has failed to demonstrate that its petition is in the public interest, and has failed to demonstrate that rates would be just and reasonable if it were granted the forbearance it seeks from the Commission's dominant carrier rules.

[36] / See Comments of the New Jersey Division of the Ratepayer Advocate, WC Docket No. 02-112, CC Docket No. 00-175, June 30, 2003.

[37] / *Historical Financial Information As of September 30, 2005.*

III. CONCLUSION

For the foregoing reasons, the Ratepayer Advocate urges the Commission to deny Qwest's unsupported petition for forbearance from enforcement of the Commission's dominant carrier rules.

Respectfully submitted,
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