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

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

REPLY 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 reply 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 ("Qwest Petition").[1] Five entities submitted initial comments regarding Qwest's Petition. Level 3 Communications, LLC ("Level 3"), Comptel, and the Ratepayer Advocate submitted comments opposing Qwest's Petition; BellSouth Corporation ("BellSouth") submitted comments in support of Qwest's Petition; and AT&T Inc. ("AT&T") submitted comments supporting the merits of Qwest's Petition, but urging the Commission to address the regulation of Bell operating companies' ("BOC") long distance services in a

[1] / Public Notice DA 05-3163, issued December 8, 2005, establishes February 22, 2006 for the reply comment due date. The Ratepayer Advocate filed initial comments on January 23, 2006, opposing Qwest's Petition.

general rulemaking rather than in its review of a specific carrier's petition for forbearance.

The initial comments provide compelling procedural reasons that the Commission should dismiss Qwest's Petition to be exempt from compliance with the Commission's dominant carrier rules regarding the provision of in-region interLATA interexchange services once the Section 272 separate affiliate requirements sunset. Furthermore, even if, contrary to the Ratepayer Advocate's and others' recommendations, the Commission does not dismiss the Petition based on its procedural deficiencies, the Commission should dismiss the Petition because, as the initial comments demonstrate, Qwest fails to substantiate the merit of its request for forbearance.

II. QWEST'S PETITION

Qwest's Petition is flawed procedurally.

Comptel demonstrates unequivocally that Qwest's Petition "is procedurally defective because it requests forbearance from regulations that do not apply to its current operations."[2] The Ratepayer Advocate concurs that Qwest's Petition is premature, inappropriately seeks hypothetical relief, and blatantly ignores the clear explanation set forth by the Commission in the *SBC IP Forbearance* decision rejecting the review of forbearance petitions that seek to "short circuit rulemaking proceedings."[3] The Commission should dismiss Qwest's Petition, which seeks forbearance from regulations

[2] / Comptel at 1.

[3] / *Id.* at 3-7, citing *In the Matter of 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, FCC 05-95, May 5, 2005 ("SBC IP Forbearance"). *See*, especially, excerpt from the *SBC IP Forbearance* decision at pages 4-6 of Comptel's Initial Comments. *See also* Level 3 at 3 opposing Qwest's request for "relief from hypothetical application of regulations" and observing that "the Commission is considering issues identical to those posed by Qwest's petition in a pending rulemaking."

that do not yet apply to Qwest, and, furthermore, should chide Qwest for distracting the Commission with an ill-supported petition for forbearance.

The Commission should address the dominant/nondominant status for Bell operating companies through a general rulemaking proceeding rather than through case-specific forbearance proceedings.

As Comptel thoroughly explains, Qwest's Petition wastes administrative resources and inappropriately seeks to circumvent an existing rulemaking.[4] The Ratepayer Advocate concurs with Comptel that the "matters at issue in this proceeding have industry wide implications for carriers and consumers alike and should not be decided in a single party forbearance proceeding."[5] Comptel observes that Qwest is "asking the Commission to prejudge at least some of the issues in the *BOC Classification Rulemaking* on a piece meal basis for its private advantage."[6] Comptel further argues that the Commission should not be forced to act on Qwest's Petition without the benefit of information submitted in the *BOC Classification Rulemaking* proceeding.[7] The Ratepayer Advocate urges the Commission to refrain from ruling on a case-by-case basis, and urges the Commission instead to pursue and resolve the complex issues pending investigation in the already-open *BOC Classification Rulemaking*.

AT&T also recommends that, instead of expending energies on Qwest's petition, the Commission should work toward an expeditious completion of the *BOC*

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[4] / *Id.* at 2-3.

[5] / *Id.* at 2.

[6] / Comptel at 2, citing *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) ("BOC Classification Rulemaking").

[7] / *Id.* at 2.

Classification Rulemaking.[8] AT&T contends that the resolution of the regulatory paradigm for BOCs "is no less urgent for AT&T than for Qwest" and that that the Commission should not "decide these issues piecemeal when they are already before the Commission in a pending proceeding."[9] Although the Ratepayer Advocate disagrees with AT&T's assessment of the appropriate outcome of the pending proceeding concerning the appropriate classification for BOCs, the Ratepayer Advocate concurs with AT&T that the Commission's resources would be expended more efficiently in a general rulemaking than through the petition procedure.

The Ratepayer Advocate also concurs with Level 3's claim that other BOCs would likely seek forbearance if the Commission grants forbearance in this case.[10] Level 3 argues that Qwest's "unilateral relief would preclude the Commission from developing transparent standards understood by the industry and applicable to all BOCs."[11] The Commission should dismiss Qwest's Petition because the changes that Qwest seeks are more appropriately addressed in the pending Commission investigation.

Regulatory oversight of BOCs' long distance services continues to be essential to protect consumers and to prevent anticompetitive behavior.

As is discussed above, the initial comments demonstrate that the procedural infirmities of Qwest's filing are sufficiently significant to justify the Commission's denial of the Petition. Furthermore, Qwest and those carriers supporting the Petition fail to justify the *merits* of Qwest's request for forbearance. Accordingly, even if the

8 / AT&T at 1-2.

9 / *Id.* at 5-6.

10 / Level 3 at 7.

11 / *Id.*

Commission does not deny the Petition on procedural grounds, the Commission should deny it for substantive reasons.

AT&T and BellSouth contend that dominant carrier regulations are no longer necessary. AT&T contends that the modern telecommunications marketplace differs substantially from that which existed when the dominant carrier requirements were enacted. In particular, AT&T asserts that competition provided by new technologies have pushed stand-alone long distance service to the fringe of the marketplace and states that "[c]ompetition from those new technologies constrains any carrier's ability to exercise market power in the provision of interexchange services."[12]

BellSouth similarly claims that dominant carrier regulation was intended to address conditions that no longer exist. BellSouth states, "[f]or almost a decade, all long distance providers have been classified as nondominant, including the section 272 long distance affiliates through which BOCs offer long distance services."[13] BellSouth adds that because no carrier is subject to dominant carrier regulation today, the regulation is unnecessary to protect consumers.[14]

Although there are accounting safeguards and a process for Section 201 or 202 complaints that are designed to alert regulators to anticompetitive activities, Level 3 argues that these are insufficient protection against anticompetitive activity: "Competitors can only use accounting safeguards to detect and prevent anticompetitive activity, and detect violations of such safeguards themselves, when it is too late to address the issue."[15]

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[12] / AT&T at 2.

[13] / BellSouth at 2.

[14] / *Id.* at 2.

[15] / Level 3 at 12.

Level 3 explains that competitors could be forced out of the market by the time an accounting-type investigation can be resolved.[16] The Commission should reject the BOCs' assertions of effective competition and maintain safeguards to prevent BOCs from re-monopolizing telecommunications markets through anticompetitive practices.

Alternative technologies are augmenting, but not replacing, traditional telephony.

AT&T and BellSouth allege that alternative technology, such as wireless service, VoIP, and cable telephony, provide adequate market discipline for long distance carriers. AT&T points to expanding wireless networks as giving consumers more choice in voice and data services. AT&T also refers to an alleged "widespread adoption of broadband" leading to adoption of VoIP, and entry of cable companies into voice telephony.[17] BellSouth claims that wireless is becoming "the method of choice when it comes to long-distance calling from home."[18] BellSouth also cites growth in VoIP subscribership as a check on BOC dominance in the long distance market. The Commission should afford little weight to BellSouth's reliance on *predictions* of demand for cable telephony and VoIP in support of its assertion of competition.[19] The *present* demand that BellSouth describes for these intermodal services is paltry (three percent for cable telephony and 1.1 million VoIP subscribers).[20] Furthermore, as the Ratepayer Advocate demonstrated in its initial comments, VoIP is an option for the affluent: the probability of a household

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[16] / *Id.* at 12-13.

[17] / AT&T at 3.

[18] / BellSouth at 3, cite omitted.

[19] / *Id.*

[20] / BellSouth at 3.

subscribing to broadband service declines as income declines.[21] Because VoIP relies on a broadband connection, VoIP is not a substitute for traditional telephony, but rather is at best an emerging option for the well-to-do. Wireless service is far more widely adopted than is VoIP, but even this technology is viewed by a majority of consumers as a supplement to rather than substitute for a wireline connection to the public switched telephone network. The Ratepayer Advocate urges the Commission to dismiss BOCs' reliance on intermodal technologies, much of which is based on *future and speculative* predictions about consumer demand, as evidence of effective competition.

BOCs' success in the long distance market combined with its dominance of the local market underscores the importance of regulatory oversight.

AT&T asserts that "competition is rampant throughout all long distance markets."[22] AT&T further claims that it, "as all other BOCs, is struggling to retain access and long distance lines in the face of growingly [sic] intense intermodal competition, much of which does not even use ILEC local network facilities."[23] AT&T cites an article that claims that BOCs' efforts to stop the losses have failed, even through the use of bundling.[24] A footnote in AT&T's comments adds, "[a]lthough this article focuses on local phone lines, it is equally apt to consumer long distance services, because consumers who substitute VoIP or wireless service for their landline connection will obviously not be obtaining long distance service from their BOC."[25]

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[21] / Ratepayer Advocate at 9.

[22] / AT&T at 2.

[23] / *Id.* at 3.

[24] / *Id.* at 3, citing Todd Rosenbluth, TECH KNOWLEDGE, *Business Week Online*, October 17, 2005.

[25] / *AT&T Comments*, at footnote 6.

Contrary to AT&T's claims of rampant competition, BOCs are experiencing phenomenal success in their re-entry into the long-distance market. As Table 1 below shows, from 2003 to 2005, the four BOCs (AT&T, Qwest, BellSouth, and Verizon) increased their long distance customer base by 51% in aggregate.[26] AT&T's long distance subscribership grew from 14.4 million at the end of 2003 to 23.5 million at the end of 2005.[27] Qwest's long distance subscribership grew from 2.2 million at the end of 2003 to 4.8 million at the end of 2005, an increase of 118% in only two years.[28] This is hardly evidence of "intense intermodal competition" eroding BOCs' business.

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[26] / SBC 2004 Annual Report, page 5; [AT&T] *Access Line Information as of 12/31/2005*, available at http://www.sbc.com/gen/investor-relations?pid=1129; [Verizon] *Historical Financial Information, As of September 30, 2005* (at http://investor.verizon.com/financial/overview.aspx; Verizon *Investor Quarterly*, Q4 2005, January 26, 2006, page 13; Qwest 2004 Form 10-K page 33; Quarterly Earnings Press Release, "Qwest Reports Solid Fourth Quarter Results; EPS Break-even Before Special Items; Margin Expansion; Improved Year-over-Year Revenue," Feb 14, 2006; BellSouth 2004 Form 10-K, pages 18 and 26. 4Q05 BellSouth Financials, available at http://www.bellsouth.com/investor/xls/4q05x.xls

[27] / *Id.*

[28] / *Id.*

Table 1: BOCs Are Rapidly Adding Long Distance Customers

	Retail Long Distance Customers (in Thousands)			Percentage Increase
	2003	2004	2005	2003-2005
AT&T	14,416	20,868	23,507	63%
Verizon	15,042	17,367	18,359	22%
Qwest	2,200	4,600	4,800	118%
BellSouth	3,960	6,130	7,179	81%
BOC Totals	35,618	48,965	53,845	51%

Sources: [AT&T] SBC 2004 Annual Report, page 5; *Access Line Information as of 12/31/2005*, available at http://www.sbc.com/gen/investor-relations?pid=1129; [Verizon] *Historical Financial Information, As of September 30, 2005*, tab "Telecom -YTD" (at http://investor.verizon.com/financial/overview.aspx; *Verizon Investor Quarterly*, Q4 2005, January 26, 2006, page 13; Qwest 2004 Form 10-K page 33; Quarterly Earnings Press Release, "Qwest Reports Solid Fourth Quarter Results; EPS Break-even Before Special Items; Margin Expansion; Improved Year-over-Year Revenue," Feb 14, 2006; BellSouth 2004 Form 10-K, pages 18 and 26. *4Q05 BellSouth Financials*, tab "Communications Group," available at http://www.bellsouth.com/investor/xls/4q05x.xls

Furthermore, BOCs' entry into the long distance market is occurring largely through their sale of bundled services. One of the issues presently under investigation by the Commission in the *BOC Classification* proceedings is the effect of bundled service offerings on BOC market power.[29] Qwest's Petition seeks to circumvent precisely the type of in-depth analysis necessary to evaluate BOCs' ability to engage in anticompetitive pricing of bundled services. The Ratepayer Advocate urges the Commission, in assessing BOC market power, to examine actual data rather than

[29] / Level 3 at 6, citing, *BOC Classification Rulemaking* at para. 25.

anecdotal evidence, and, furthermore, to continue to address issues such as the implications of BOCs' bundled offerings for its ability to engage in anticompetitive pricing and/or tying.

BOCs remain dominant in many product markets.

Qwest dominates the local market.[30] As Level 3 states, "allowing Qwest to combine its local and long distance operations while enjoying this market power could exacerbate this market distortion by providing a greater incentive and ability for Qwest to discriminate against its competitors, subsidize its long distance services and make detection of such activity more difficult."[31] Despite AT&T's reference to recent Commission decisions to demonstrate that BOCs do not dominate the business segment,[32] Level 3 demonstrates that Qwest *does* have significant market power in the special access market. Level 3 explains that:

> Level 3 and other buyers find it largely impossible to find viable alternatives to ILEC special access services. Few intramodal or intermodal alternatives exist, and most customers rely on BOC special access for all or nearly all of their special access needs.[33]

The absence of competitive alternatives enables Qwest to exert its market power and "gives it the incentive and ability to discriminate against unaffiliated service providers and to cross-subsidize its provision of end-to-end services."[34] This market power is

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[30] / Ratepayer Advocate at 8.

[31] / Level 3 at 4.

[32] / AT&T at 2-4, citing *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 Non-Dominance Order*"); *MCI-WorldCom Merger Order*, 13 FCC Rcd 18025, ¶¶ 34, 40-42, 65; 73 & n.230 (1998); *see also Bell Atlantic-GTE Merger Order*, 15 FCC Rcd 14032, ¶¶ 120-21 (2000); *SBCAmeritech Merger Order*, 14 FCC Rcd 14712, ¶¶ 89-90 (1999).

[33] / Level 3 at 10.

[34] / *Id.* at 9.

precisely the issue under analysis in considering first of the three requirements for forbearance – namely, that forbearance will not lead to rates and practices that are unjust, unreasonable, or discriminatory. The Ratepayer Advocate agrees with Level 3 that Qwest should undergo an investigation of its market power before being considered for forbearance from dominant carrier obligations.[35]

BellSouth claims that streamlining regulation of long distance service has led to greater competition and lower prices.[36] BellSouth anticipates little danger that prices would rise if nondominant status were given to BOCs.[37] However, neither BellSouth nor Qwest provides any evidence that prices will not rise if non-dominant status if granted to Qwest, nor do they provide any evidence that Qwest will not engage in anticompetitive practices.[38]

BellSouth references the *LEC Classification Order* in support of its assertion that dominant carrier regulation stifles competition. BellSouth, quoting from the Commission decision, states that "[f]or example, advance notice periods for tariff filings can stifle price competition and marketing innovation when applied to a competitive industry."[39] However, any purported loss in competitive activity and innovation is more

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[35] / *Id.* at 8.

[36] / BellSouth at 2.

[37] / *Id.* at 2.

[38] / Furthermore, reductions in long distance rates, although seemingly beneficial to consumers, could be evidence of BOCs' cross-subsidization of long distance services with revenues derived from exorbitant special access rates.

[39] / *Id.* at 4, citing *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket Nos. 96-149 & 96-61, *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 (1997) ("LEC Classification Order"), 15806, para. 88.

than offset by the critical consumer protection that dominant carrier regulation provides. Eliminating such safeguards would not be in the public interest.

BellSouth contends that regulation would lead to collusion, stating, "[t]he Commission concluded that if it 'were to require BOC InterLATA affiliates to file tariffs for interstate, domestic, interexchange services, the ready availability of that information might facilitate tacit coordination of prices.'"[40] However, it could be argued equally that availability of pricing information would lead to lower prices by all long distance providers as they strive to remain competitive. Transparency in pricing also benefits the consumer, as she is better able to choose the carrier that best suits her needs.

Dominant carrier regulation does not force a debilitating corporate structure on BOCs.

BellSouth states that those companies required to separate local and long distance operations are at a competitive disadvantage to wireless operators, cable companies, VoIP providers, and CLECs.[41] According to BellSouth, the regulated companies are constrained in their corporate structure, while the less regulated companies are allowed to choose the corporate structure best suited to their needs.[42] An examination of recent operational data from BOCs shows that BOCs are faring extremely well in the telecommunications marketplace despite the purported yoke of regulation. The evidence shows that, contrary to BellSouth's assertion that dominant carrier rules hamper BOCs, they are successfully expanding their long distance customer base through their 272-

[40] / BellSouth at 5, citing *LEC Classification Order* at 15808, para. 90.

[41] / BellSouth at 5.

[42] / *Id.*

affiliates.[43] Level 3 also points out that Qwest provides no evidence to support its claim that it is harmed by dominant carrier regulation.[44]

Qwest's petition should be dismissed because Qwest is not specific about the regulations from which it seeks forbearance.

Comptel asserts that Qwest does not specify the rules from which it seeks forbearance.[45] Comptel explains that even if Qwest's petition is not rejected on procedural grounds, it should still be rejected on substantive grounds. Aside from asking for forbearance from Part 61 tariffing and price cap regulations, Qwest asks the Commission to forbear in applying "any other dominant carrier rules as they might be applied."[46] The Ratepayer Advocate concurs with Comptel that this "catch-all" phraseology justifies the Commission's dismissal of Qwest's Petition. In further support of its position, Comptel cites the Commission's analysis of an earlier Qwest petition for forbearance,[47] in which the Commission determined that it is not required "to comb though its rules to infer which other regulations are encompassed by Qwest's general request [and] this lack of specificity alone warrants dismissal."[48]

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[43] / See Table 1 above.

[44] / Level 3 at 14-15.

[45] / Comptel at 1.

[46] / *Id.* at 8.

[47] / *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160 in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 at ¶16 and n. 51 (released December 2, 2005)(" Qwest Omaha Forbearance Petition")

[48] / Comptel at 8, citing *Qwest Omaha Forbearance Petition*.

Qwest's petition should be dismissed because Qwest has significant market power in the special access market, which it can use to unfair advantage.

Contrary to Qwest's claim, Level 3 shows that Qwest does have market power, and the potential to use that market power to thwart competition. Level 3 contends that Qwest remains a monopolist in many areas, particularly with reference to special access. According to Level 3, with Qwest's market power in the special access market, it "is able to charge significantly above-cost special access rates to companies seeking to provide end-to-end services to enterprise customers in Qwest's region, giving Qwest an unfair advantage in that market."[49] Level 3 argues that allowing Qwest to combine local and long distance services while it maintains market power will allow Qwest to discriminate against competitors.[50] The Ratepayer Advocate urges the Commission to heed these concerns, and to find that Qwest's Petition is not in the public interest.

Qwest fails to show that dominant carrier regulation is unnecessary to protect consumers.

The Ratepayer Advocate concurs with Level 3 that Qwest fails to show that dominant carrier regulation is unnecessary to protect the consumer. In particular, Level 3 claims that without regulation, Qwest will "eliminate long distance competition and raise prices for business services, resulting in higher prices for consumers."[51] BellSouth contends that forbearance is in the public interest because "[h]andicapping one set of providers simply reduces effective competition and harms consumers, which is hardly in

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[49] / Level 3 at 4.

[50] / *Id.*

[51] / *Id.* at 13.

the public interest."[52] However, the BOCs have failed to demonstrate that the purported gains in Qwest's ability to market and sell services would offset the offset the significant loss in consumer protection afforded by dominant carrier regulation of BOCs' long distance services. The Ratepayer Advocate urges the Commission to find that Qwest's Petition is not in the public interest and to deny the Petition.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Qwest's petition for forbearance. As the initial comments thoroughly demonstrate, Qwest fails to satisfy Section 10's three requirements. Also, the Commission should caution other BOCs from submitting frivolous petitions for forbearance, which divert administrative resources away from critical proceedings in which industry-wide modifications are under investigation.

Notwithstanding the fact that the petition is without merit and should be denied by the Commission based on the reasons discussed above, the Ratepayer Advocate renews the arguments and incorporates those arguments attached hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th amendment, and 11th amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

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[52] / BellSouth at 5.

Respectfully submitted,

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