JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS AND
COMMISSIONER JONATHAN S. ADELSTEIN,
CONCURRING

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*, WC Docket No. 05-333

In this Order, the Commission conditionally grants forbearance to allow Qwest to provide long distance services on an integrated basis and subject to non-dominant carrier regulations. We support a conditional grant of relief here because the Commission must take into account the rapidly changing long distance market and the unique competitive position of the petitioner, and because this outcome is clearly superior to allowing this petition to be granted by Commission inaction without the safeguards described below. This Commission repeatedly has recognized that Section 272 provides for structural and accounting safeguards that form the principal guarantees against improper accounting practices and cross-subsidization. We concur because we remain concerned that the Commission has not completed its industry-wide review of these issues and does not have in place a comprehensive mechanism for monitoring changes in the marketplace (*e.g.*, in the long distance, wireless, and access markets) that would enable the Commission to reliably make decisions in this area.[1]

Nearly four years ago the Commission issued the *Section 272 Sunset Further Notice*, which was the second notice seeking comment on changes to the long distance market and the appropriate regulatory framework for carriers like the petitioner. That proceeding – much like this forbearance petition – addresses the important issue of what rules should govern Bell Operating Companies' (BOCs) provision of long distance services after the sunset of the Section 272 separate affiliate and related requirements. While we recognize that Congress specifically contemplated that Section 272's separate affiliate and related requirements sunset after three years, we have repeatedly urged the Commission to engage in a rigorous analysis of the need for alternative safeguards on an industry-wide basis.[2] Yet, rather than complete this rulemaking, the Commission adopts through this Order a combination of conditions – some voluntarily offered, others not – in order to facilitate the grant of a forbearance petition, which would raise serious questions if granted as filed.[3]

[1] *See Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein, Concurring, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Further Notice of Proposed Rulemaking, WC Docket No. 02-112, FCC 03-111 (May 19, 2003) ("*Section 272 Sunset Further Notice*").

[2] Such an approach is also contemplated in the statute, which specifically preserves the Commission's ability to prescribe safeguards consistent with the public interest. *See* 47 U.S.C. § 272(f)(3).

[3] While these conditions help to mitigate the concerns we have regarding petitioner's market power and the impact of integrating their businesses on residential and business consumers, petitioner does not exist in a vacuum and the question of whether these conditions are appropriate on an industry-wide basis is not before us. The fact may well be that they are insufficient as applied to the situation of industry participants not present here.

Although we would have preferred the Commission complete its Section 272 sunset proceeding, we recognize the efforts undertaken here to conduct a rigorous market analysis to provide a picture of petitioner's unique circumstances and the competitive landscape in which it operates. Indeed, there are notable changes to the long distance market in petitioner's territory that the Commission must account for. For many, though not all, consumers, the available options are being reshaped by the rise of wireless, cable, and over-the-top VoIP services. We have also seen an increasing trend toward the availability and desirability of bundled services. We appreciate that this Order acknowledges these developments and takes steps to adjust our regulatory framework accordingly. In particular, we find persuasive the relative market shares of the petitioner in the long distance, and, in particular, the wireless market, which make potential unlawful discrimination less likely and relief more compelling in this case.

At the same time, it is not clear that all customers have benefited as dramatically from these changes, as many customers lack an effective choice of providers due to price or availability. It is imperative that the Commission remain vigilant about the continued evolution of this market. The most notable change in the long distance market, of course, is the entry of the BOCs such as the petitioner, which less than 5 years ago did not even compete in the long distance market. It therefore is important to remember that the market share levels analyzed in this Order have developed from a zero-baseline over a relatively short period of time. We have also seen increasing consolidation in this industry, including the merger of the two largest independent long distance companies into the two largest incumbent LECs. There have also been recent suggestions that the pricing for bundled services is evolving in a duopolistic manner, with higher prices for consumers.[4] We have repeatedly stated that competition must mean more for consumers than a choice between two providers, a cable and telephone company, and such a result would be an unfortunate back-sliding for long distance customers.

We appreciate that the Commission does adopt some notable and necessary safeguards in this Order to address some of these concerns. We were particularly pleased that the petitioner has committed to offering certain calling plans targeted for residential consumers who make relatively few long distance calls and to provide call detail information to enable consumers to make informed decisions about the most cost effective long distance plans. Regrettably, the needs of low volume consumers are often overlooked, although they have a real need for our vigilance.

This Order also makes some important findings with respect to the potential for price and performance discrimination. Notably, the Order acknowledges that incumbent providers like the petitioner retain the ability to raise their rivals' costs, and the Order maintains dominant carrier regulation for critical access services used by alternative long distance providers. The Order correctly concludes that certain requirements of Section 272 will continue to apply and adopts rules for imputation and reporting that should help

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[4] *See* "Battle for the Bundle, 4Q06 Wireline Pricing Trends: Bells Turn the Corner on Price, Voice, & Data Bundles Up Y/Y", Bank of America (Jan. 24, 2007) (noting that "data appear to support our view that the emerging cable/telecom competitive price structure is unfolding in a duopolistic manner").

the Commission and competitors evaluate whether the petitioner is engaging in price discrimination. In addition, we are pleased that petitioner has committed to comply with special access performance metrics to ensure that it does not engage in non-price discrimination in its provision of special access services.

Although these conditions may not be tailored in exactly the manner we would have crafted, their adoption is certainly preferable to the granting of the forbearance petition as filed. It is imperative for the Commission to monitor the effect of these safeguards, and we encourage the Commission to diligently verify whether its predictions about their sufficiency are accurate. In the meantime, we again encourage the Commission to return to its consideration of the Section 272 sunset rulemaking proceeding expeditiously and to evaluate the need for rigorous and more lasting conditions than the voluntary, time-limited conditions offered here.