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Spirit of Service

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REDACTED—FOR PUBLIC INSPECTION

June 21, 2004

RECEIVED

JUN 21 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*

Dear Ms. Dortch:

Enclosed with this cover letter for filing today are an original and four copies of the Petition (redacted) of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c). Portions of the Petition contain confidential (redacted) information. In addition, enclosed are an original and four copies of two exhibits to the Petition that contain confidential (redacted) information: the Affidavit of David L. Teitzel (Exhibit A) and the Affidavit of John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan II (Exhibit B). The non-redacted, confidential versions of the Petition and Affidavits are being filed today under separate cover.

Each page of the confidential versions of the Petition and Affidavits are marked "***NON-REDACTED—NOT AVAILABLE FOR PUBLIC INSPECTION***", since it was not feasible for the confidential information to be physically separated from the Petition or Affidavits (*see* Section 0.459(a) of the Commission's rules, 47 C.F.R. § 0.459(a)). Each page of the non-confidential versions of the Petition and Affidavits are marked "***REDACTED–FOR PUBLIC INSPECTION***". Except for the excised confidential portions of the Petition and Affidavits, the filings are the same. In the redacted versions of the Petition and Affidavits, where confidential information has been removed, the relevant portions of the text are either blacked out or marked "**Data Redacted**".

Notwithstanding the confidential nature of certain information contained in the Petition and Affidavits, Qwest wishes to assist the Commission by enabling interested parties to have proper access to the non-redacted information. Therefore, Qwest also encloses with this letter an original and four copies of a Request for Confidential Treatment, which provides the legal justification as to the claim of confidentiality, along with a proposed protective order. If this

No. of C [redacted]

Request is approved by the Commission, it would provide parties with the means to review, pursuant to the requirements of the adopted protective order, the confidential and competitively sensitive information being filed today.

A fifth copy of the Petition and Request for Confidential Treatment are being provided, for which acknowledgment is requested. Please date-stamp the copies and return them to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead. Thank you for your assistance with this matter.

Sincerely,

Michael B. Adams, Jr.

Michael B. Adams, Jr.

Enclosures

REDACTED–FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) in the	)	
Omaha Metropolitan Statistical Area	)	

PETITION OF QWEST CORPORATION FOR FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c)

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QWEST CORPORATION

June 21, 2004

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SUMMARY

In the preamble to the Telecommunications Act of 1996, Congress set forth its purposes:

> AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.[1]

In other words, Congress passed the act to promote improved, innovative, and cheaper telecommunications services. Congress listed two coequal methods of promoting those ends – competition and deregulation. During the eight years since the 1996 Act was passed, the Commission has spent a considerable amount of effort effectuating the first of those two methods, competition, and has focused less on the second method, deregulation. Only when both competition and deregulation are implemented will the purposes of the 1996 Act be achieved.

Congress gave the Commission a powerful tool to effectuate deregulation – Section 10, which gives the Commission extraordinary power to forbear from its own regulations and even other sections of the 1996 Act.[2] When it granted these powers to the Commission, Congress demonstrated that it was quite serious about deregulation. Congress also indicated that it intended that the forbearance authority be used – the language of the section is proscriptive, stating that "the Commission *shall* forbear."[3]

The focus on competition has borne fruit, and Congress's vision of a competitive marketplace has been achieved – perhaps most completely in the Omaha MSA. In Omaha, an ILEC provider, Qwest, has less than [redacted] of the local access lines. When wireless providers are included in the analysis, Qwest's share of the market is even lower. The competition in the

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[1] *See* the preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[2] 47 U.S.C. § 160.

Omaha MSA is mature and does not rely on resale of Qwest services or unbundled access to its network elements. The competitors in Omaha primarily use their network and facilities to provide their telecommunications services.

Now that competition has fully developed in the Omaha MSA, there can be no remaining reason to delay implementation of the deregulatory purposes of the 1996 Act in that area. In this petition, Qwest asks the Commission to recognize that the telecommunications landscape has been transformed in the Omaha MSA by using the powerful deregulatory tool given to it by Congress – the forbearance power of Section 10. In this petition, Qwest demonstrates that by forbearing from the requirements of Section 251(c), certain requirements of Section 271 and dominant-provider regulations, the Commission will be promoting the goals of the 1996 Act – innovative, improved and cheaper telecommunications services. Qwest demonstrates that those regulations are no longer necessary to protect consumers or competition, and that forbearing from them will eliminate cost-distorting and investment-discouraging unequal regulations.

With the elimination of these unequal regulations, competitors can begin to compete on the basis of which carrier can provide the best, most innovative services at the lowest prices. Investment will flow to the competitors that can most efficiently provide innovative services, and investment will no longer be discouraged by restrictions imposed upon only some competitors. Competition will continue unabated, and deregulation will encourage investment in, and development of, new, innovative services at low prices, thus finally achieving Congress's goals in passing the 1996 Act.

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[3] 47 U.S.C. § 160(a)(emphasis added).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	)))

PETITION OF QWEST CORPORATION FOR FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c)

Qwest Corporation ("Qwest"), through counsel and pursuant to Section 10 of the Telecommunications Act of 1996,[4] hereby petitions the Federal Communications Commission ("Commission") to forbear from applying the requirements of Section 251(c) and of Section 271(c)(2)(B)(i-vi) and (xiv) of the 1996 Act to Qwest's provision of telecommunications services in the Omaha, Nebraska Metropolitan Statistical Area ("MSA") based on the reality of its non-dominant status in the Omaha MSA. For the same reasons, Qwest asks that the Commission further forbear from regulating Qwest as a dominant carrier and as the incumbent local exchange carrier ("ILEC") in the Omaha MSA.

I. INTRODUCTION

The Commission has recognized that it must continually adjust its regulations to reflect market conditions, particularly when competitive conditions change and the rationales that used to underlay the Commission's regulations no longer serve the public interest.[5] The Commission

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[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") and 47 U.S.C. § 160.

[5] *See, e.g.*, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as

performs such a general analysis of the fit between its regulations and the changing telecommunications market every two years under its *Biennial Review Process*.[6] The Commission has also changed the specific regulatory treatment of individual carriers, such as reclassifying AT&T Corp. as a nondominant carrier.[7] On a third track, the Commission may similarly grant forbearance to carriers from specific regulations under Section 10 of the Communications Act of 1934, as amended ("Communications Act").[8]

Section 10(a) specifies that the Commission may forbear from applying any regulation or provision of the Communications Act if it determines that: (1) enforcement of that regulation or statutory provision is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) their enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[9] In making the public interest determination, Section 10(b) requires that the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition.[10] Lastly, Section 10(d) provides that in the specific case of Sections 251(c) or Section 271 of the 1996 Act, the Commission may not forbear from their requirements until the

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amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets, *Report and Order*, 16 FCC Rcd 7418 (2001) (eliminating as outdated prohibitions against bundling of telecommunications services and customer premises equipment at discounted prices).

6 *See* 47 U.S.C. § 161(a).

7 *See*, *e.g.*, In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) ("*AT&T Reclassification Order*").

8 *See* 47 U.S.C. § 160(a).

9 47 U.S.C. § 160(a)(1)-(3).

10 *See* 47 U.S.C. § 160(b).

Commission has determined that those requirements have been fully implemented.[11]

In this petition, Qwest is seeking forbearance from a group of specific regulatory obligations under Section 251(c) and Section 271, as well as from dominant carrier regulation and from regulation as an ILEC in the Omaha MSA. Qwest is requesting these regulatory changes because it is no longer the dominant carrier in the Omaha MSA due to intense competition both from facilities-based wireline carriers and from intermodal competitors such as cable television ("CATV") providers and commercial mobile radio service ("CMRS") providers, which are using their separate networks and technologies to compete directly with Qwest's services. The manner in which Qwest is regulated no longer matches the reality of the marketplace, and Qwest's asymmetric regulatory burden must be altered if Qwest is going to compete effectively with other companies and bring the full benefit of a competitive market to consumers in the Omaha MSA.

The rapid growth of Qwest's competitors demonstrates that the Omaha MSA has no legal or economic barriers to entry, as well as the fact that Qwest does not enjoy an advantage in terms of its costs, structure, size and resources in these markets. In addition to the fact that there are multiple true facility-based providers of telecommunications services in the Omaha MSA who are not relying on Qwest's Section 251(c) offerings, the fierceness of the competition in the Omaha MSA telecommunications market is further illustrated by market statistics. Over the last several years, Qwest has lost a significant number of the residential and business customers to which it provides local exchange services to competitive local exchange carriers ("CLEC"), CATV and CMRS competitors. As a result of these losses, Qwest currently serves less than [redacted]

11 *See* 47 U.S.C. § 160(d).

of the residential and business lines in the Omaha MSA.[12]

Based on these changed facts and circumstances, Qwest's petition satisfies each of the statutory criteria for forbearance in Section 10(a). Due to the competitiveness of the Omaha MSA telecommunications market, regulating Qwest under the specific provisions of Section 251(c) and Section 271 identified in this petition is no longer necessary to ensure that rates and practices in the Omaha MSA are just, reasonable, and not unreasonably discriminatory. Similarly, it is also no longer necessary to regulate Qwest as an ILEC or to maintain dominant carrier regulation over Qwest's telecommunications services in the Omaha MSA. Qwest has no more market power then any other provider in the Omaha MSA and since Qwest no longer has neither the power to control prices nor the ability to act in a discriminatory manner in the Omaha MSA, it is no longer necessary to regulate Qwest intensively in order to protect consumers. It has also become clear that continuing to subject Qwest's services to asymmetric regulation deprives customers of the benefits of true competition by imposing unnecessary regulatory costs on Qwest, and hampers Qwest's ability to quickly and effectively respond to competitive initiatives. Moreover, because the Commission has previously determined that Qwest has fully implemented the requirements of Section 251(c) and Section 271 in the State of Nebraska, there is no question that the Commission has the authority to grant Qwest forbearance from certain of its requirements under Section 10(d).[13]

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[12] *See* Exhibit A, Affidavit of David L. Teitzel at 7 ("Teitzel Affidavit").

[13] *See* In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, *Memorandum Opinion and Order*, 17 FCC Rcd 26303 (2002) ("*Qwest Section 271 Order*").

II. QWEST IS NO LONGER DOMINANT IN THE OMAHA MSA TELECOMMUNICATIONS MARKET

In determining whether a carrier remains dominant in a relevant product and geographic market, the Commission has traditionally evaluated whether the carrier has market power, as determined according to antitrust principles.[14] The Commission has relied on several factors as part of this analysis, including: (i) market participants; (ii) the demand elasticity of customers; (iii) the supply elasticity of the market; (iv) the carrier's costs, structure, size and resources; and (v) market share. An examination of each of these factors clearly demonstrates that due to the aggressive growth of facilities-based CLECs and facilities-based intermodal competitors, Qwest is no longer the dominant carrier in the Omaha MSA telecommunications market, and that Qwest no longer enjoys market power in the Omaha MSA.

A. The Relevant Product and Geographic Markets

The first step in analyzing these changes in Qwest's market power is to determine the relevant product and geographic markets.[15] This approach allows for assessment of the market power of a particular carrier based on unique market situations by recognizing, for example, that "carriers may target particular types of customers, provide specialized services, or control independent facilities in specific geographic areas."[16] In this petition, Qwest has carefully limited the scope of relief to product and geographic markets which are clearly competitive.

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[14] *See* In the Matter of Comsat Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, *Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 14083, 14118-19 ¶ 67 (1998) ("*Comsat Reclassification Order*").

[15] *AT&T Reclassification Order*, 11 FCC Rcd at 3285 ¶ 19.

[16] *Comsat Reclassification Order*, 13 FCC Rcd at 14099-100 ¶ 27.

1. The Relevant Product Market

A relevant product market is a service or group of services for which there are no close demand substitutes.[17] In turn, the task of defining a relevant product market involves identifying and aggregating consumers with similar demand patterns.[18]

In accordance with the Commission's analytical framework, the relevant product market for which Qwest is seeking forbearance is the market for services provided under Section 251(c) and selected services under Section 271 provided within the boundaries of the Omaha MSA due to the mass market residential services and business services, local exchange and exchange access services offered by full facility-based CATV providers (as CLECs) and CMRS providers.[19]

2. The Relevant Geographic Market

As the Commission has explained in past proceedings, a relevant geographic market is defined by demand, and "aggregates into one market those consumers with similar choices regarding a particular good or service in the same geographical area."[20]

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17 *See id.* at 14098-99 ¶ 25 citing the *LEC Classification Order*, 12 FCC Rcd 15756, 15782 ¶ 41, 15787-88 ¶ 54 (1997).

18 *See* Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14088-89 ¶ 102 (2000).

19 Including CMRS providers in this product market is consistent with the Commission's recognition that the product market for local exchange and exchange access services includes both wireline and wireless providers. *See, e.g.,* Application of 360° Communications Company, Transferor, and AllTel Corporation, Transferee, For Consent to Transfer Control of 360° Communications Company and Its Affiliates, *Memorandum Opinion and Order*, 14 FCC Rcd 2005, 2011-12 ¶ 14 (1998).

20 *Comsat Reclassification Order*, 13 FCC Rcd at 14099-100 ¶ 27; *see also* In the Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20016-17 ¶ 54 (1997) (defining relevant geographic area as "an area in which all

Qwest is seeking forbearance from Section 251(c) and Section 271 regulation, as well as from dominant carrier regulation of telecommunications services provided within the Omaha MSA geographic market. The Omaha MSA encompasses approximately 2,000 square miles and is made up of five counties, including Douglas, Sarpy, Washington and Cass counties in the State of Nebraska, as well as Pottawattamie County in the State of Iowa. As of the 2000 United States Census, the Omaha MSA has a population of 629,294 residents and contains 241,721 households.

While Qwest faces competition in local exchanges throughout the State of Nebraska, in Omaha, there is an unusually large and identifiable class of facilities-based competitors, *i.e.*, carriers that provide service using their own facilities and not unbundled elements purchased from an ILEC. Because the competitive characteristics of the Omaha MSA are readily identifiable and are not necessarily similar to the competitive characteristics of other areas in the state, Qwest is asking for forbearance in the Omaha MSA only.[21]

B. Qwest is No Longer a Dominant Carrier in the Omaha MSA Telecommunications Market

In forbearance proceedings, the questions of whether a carrier still enjoys market power and whether it remains dominant in the relevant product and geographic market are determined

customers in that area will likely face the same competitive alternatives" for a relevant service) ("*Bell Atlantic/NYNEX Order*").

[21] This petition should not in any way be construed to imply that MSAs are the only proper geographical areas for consideration in petitions for forbearance or non-dominance. Depending on the particular factual circumstances, future forbearance and non-dominance petitions could be brought based upon the competitive characteristics of smaller areas, entire states, or multi-state regions. In addition, this petition should not be in any way construed to imply that MSAs are or are not the proper geographical scope for unbundling analyses, such as the necessary and impair analysis.

according to antitrust principles.[22] As discussed above, the Commission has relied on several factors as part of this analysis, including: (i) market participants; (ii) the demand elasticity of customers; (iii) the supply elasticity of the market; (iv) the carrier's costs, structure, size and resources; and (v) market share. An examination of each of these factors demonstrates that Qwest is clearly not dominant in the Omaha MSA telecommunications market, and cannot exercise market power.

1. The Omaha MSA Telecommunications Market is Extremely Competitive

The Omaha MSA telecommunications market is extremely competitive. Qwest competes against facilities-based wireline competitors, and also faces intense intermodal competition from CATV-based CLECs and CMRS providers. All of these competitors are firmly established in the Omaha MSA geographic market, and they enjoy substantial customer bases and brand recognition. Although Qwest believes that forbearance can be justified based upon the Omaha MSA level of wireline competition alone, each of these factors shows that the Commission can and should also consider competition from CMRS providers as well, since their services have become directly competitive with Qwest's local exchange service offerings.

As demonstrated in the Teitzel Affidavit, the CLECs are rapidly increasing their market share in the Omaha MSA. Of these CLECs, Qwest's most significant local exchange competitor is Cox Communications, which now offers CATV-based telephony service throughout all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network.[23] Qwest's

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22 *See Comsat Reclassification Order*, 13 FCC Rcd at 14118-19 ¶ 67.

23 *See* Exhibit A, Teitzel Affidavit at Attachment 2. Cox has stated that as of April 30, 2002, its Omaha CATV system was comprised of 295,863 serviceable homes, 360,000 total residential "revenue generating units" – a term used by Cox to describe households that are potential or current Cox customers within the defined market – as well as 7,587 commercial customers. At that time two years ago, Cox estimated its residential telephony market share to be

CLEC competitors also include McLeod and AllTel, which are also facilities-based CLECs that serve the Omaha MSA using their own networks, and which have overbuilt Qwest's legacy facilities.[24]

In addition to wireline-based CLECs, Qwest also faces additional intermodal competition, principally from CMRS providers but also from companies that provide VoIP services over broadband facilities, such as CATV coaxial networks.[25] It is both appropriate and necessary to consider these additional intermodal competitors when analyzing the competitiveness of the Omaha MSA telecommunications market since the lines between these service providers are blurring and because these providers are directly competing for Qwest's customers. Clearly, end users are increasingly viewing their wireless options as more than sufficient to meet their telecommunications needs. As the Nebraska Public Service Commission ("Nebraska PSC") recently noted in its annual report on the state's telecommunications market, wireline and wireless services are increasingly in direct competition with each other for the same consumers. Specifically:

> Wireless carriers continue to command a greater share of the consumer market in telecommunication. In the four years since wireless carriers reached one-third of the total access lines in Nebraska, the gap between wireless and wireline users continues to shrink. This year, wireless access lines total 774,185, a growth of seven percent over the end of 2002. Correspondingly, wireline usage has shrunk to 1,112,182 lines, a drop of 31,929, nearly four times the reduction from the previous fiscal year.[26]

26.5 percent of the Omaha market. More recently, Cox reported that residential telephony penetration was approaching 50 pecent of its basic cable customer base in Omaha. *See* Exhibit A, Teitzel Affidavit at 11.

[24] *Id.* at 18, 21.

[25] *Id.* at 26.

[26] *See* Nebraska Public Service Commission, *Annual Report to the Legislature on the Status of the Nebraska Telecommunications Industry* (Sept. 30, 2003).

Wireless subscribership well exceeds traditional ILEC lines in service in the State of Nebraska. According to the Commission's Local Competition Report, there were 900,744 wireless subscribers in Nebraska, compared to 775,829 ILEC access lines in service.[27] What is more, wireless service options are available from at least one CMRS provider in every Qwest wire center in the Omaha MSA. The CMRS providers serving the Omaha MSA include Verizon, Sprint, AllTel, Cricket, Nextel, U.S. Cellular and MCI.[28]

There are other clear indicia that wireless services are directly competing with wireline services – such as the CTIA's recent data showing that wireless minutes of use grew over 1600 percent between 1995 and 2002,[29] at the same time that wireline long distance usage has fallen from an average of 143 minutes per month in 1995 to just 90 minutes in 2002.[30] According to other estimates, wireless has now displaced about 30 percent of total wireline minutes.[31] These facts and figures demonstrate the ability and willingness of customers to substitute among technologies and this nationwide pattern is repeated in the Omaha MSA. Wireless number portability will increase the proportion of wireless subscribers willing to substitute wireless for wireline service.

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27 *See Local Telephone Competition: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, December 2003, at Table 13 and Table 6, respectively.

28 *See* Exhibit A, Teitzel Affidavit at 28.

29 *See* CTIA State of the Wireless Union Presentation (available at http://www.ctia.org/conventions_events/ctia_events/index.cfm/AID/10085).

30 *See Trends in Telephone Service*, Wireline Competition Bureau, May 2004 at Table 14.2.

31 *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eighth Report,* 18 FCC Rcd 14783, 14832 ¶ 102 (2003), *citing* Cannon Carr and Gregor Dannacher, *Can Wireline Cannibalization Save Wireless ARPU in 2003*, CIBC World Markets, Dec. 11, 2002, at 8.

As discussed in the Teitzel Affidavit, research that was released by Advantis in January of 2004 showed that, absent wireless number portability, 6.4 percent of respondents report a willingness to "cut the cord." With number portability, the percentage willing to "cut the cord" increases to 11.5 percent.[32] This data corresponds with statements by Cricket that 37 percent of its customers had discontinued their landline service and have begun relying solely on wireless services.[33] Cricket's survey is borne out by a recent survey that Qwest performed of wireless users in adjacent states, which demonstrated the following:

- Approximately 25 percent of the personal and business wireless phone users in Iowa reported not having a traditional landline phone in their home or in their place of business;
- If wireless service did not exist, 70 percent of the personal wireless phone users and 45 percent of the business users indicated that they would install traditional landline service;
- In the absence of wireless services in Iowa, at least 75 percent of the personal wireless calls and 60 percent of the business calls would have been made on traditional landline telephones;
- In Utah, approximately 27 percent of the wireless phone users are substituting wireless service for home residential service;
- Twelve percent of these Utah wireless customers had previously had wireline telecommunications service, but had discontinued it;
- An additional 9 percent had never subscribed to wireline service, but say that they would do so if wireless services were not available; and
- 5.5 percent of the surveyed wireless customers in Utah stated that they had terminated service on a second home line "exclusively" because of the ability to substitute wireless service for the second line.

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32 *See* Exhibit A, Teitzel Affidavit at 24.

33 *See* http://www.leapwireless.com/dindex.html.

As shown in the economic analysis performed by Strategic Policy Research, which is attached as Exhibit B to this petition, the presence of intermodal competition from CMRS providers plays a significant role in reducing any market power and precluding market "dominance" by any single carrier in related market sectors.[34] As their analysis states, "regardless of whether one regards wireless service as a sufficiently close substitute for wireline service to constitute the *same* economic good (*i.e.*, trading in the *same* market), the existence of good wireless service lowers the elasticity of demand for wireline service and, consequently, the scope for any exercise of market power."[35] As a result, even if the Omaha MSA's telecommunications market is construed narrowly, and CMRS services are "excluded," they still have an effect on demand elasticity that must be factored.[36]

In addition to the increasing number of consumers that are substituting their wireline services for CMRS services, VoIP is also becoming a competitive factor in the Omaha MSA and promises to further erode the wireline market. Currently, at least seven VoIP providers – including AT&T, 5 Star Telecom, Packet 8, VoicePulse, BroadVoice and Zipglobal – are providing telephony services in the Omaha MSA. These services can be accessed by any customer that has a broadband internet connection.[37] Since the vast majority of Qwest customers in the Omaha MSA have access to a broadband internet connection via cable modem from Cox or via DSL, VoIP is readily available to customers throughout its geographic area.[38]

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[34] *See* Exhibit B, Strategic Policy Research Study at 5-6 [internal citation omitted].

[35] *Id.*

[36] *Id.*

[37] *See* Exhibit A, Teitzel Affidavit, Attachment 2.

[38] *See id.* at 11. Cox reported 295,863 serviceable homes in its Omaha MSA cable system as of April 30, 2002, and that their residential telephony penetration of its basic customer base

2. Qwest is No Longer the Sole Facilities-Based LEC in the Omaha MSA

Due to overbuilding by competitors, Qwest is no longer the sole facilities-based LEC in the Omaha MSA telecommunications market. As discussed above, Cox Communications now offers CATV-based telephony service throughout virtually all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network.[39] CLEC competitors also include McLeod and AllTel, which are facilities-based CLECs and which serve the Omaha MSA using their own networks.[40]

As the Teitzel Affidavit also makes clear, the CLECs serving the Omaha MSA have been shifting away from using resale, and are increasingly providing local exchange service using their own facilities.[41] As part of this shift, the CLECs now serving the Omaha MSA have deployed voice switches with capacity to serve a significantly greater number of end-user lines than they are currently serving. The Local Exchange Routing Guide ("LERG") shows that there is now at least one DMS 500 switch, one DMS 100/200 switch and one 5ESS switch deployed to serve the Omaha MSA.[42] The three switches can alone accommodate approximately 400,000 end-user

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was "approaching 50%" at that time. On this basis, it can be estimated that Cox is now providing telephone service to approximately 148,000 households in the Omaha MSA, and each of these households has direct access to Cox broadband internet service. In contrast, Qwest's DSL subscriber base in the Omaha area was approximately [redacted] in May 2004. Clearly, a disproportionate number of customers in the Omaha MSA interested in utilizing VoIP for their telephony needs may do so via Cox broadband connections.

39 *See* Exhibit A, Teitzel Affidavit at Attachment C (Cox service area map).

40 *Id.* at 3-6.

41 *Id.* at 1-2 and 3-7.

42 *Id.* at 9.

lines.[43] Other CLECs have deployed switches to serve the Omaha MSA as well, but the switch types are not specified in the LERG.

As stated in the Teitzel Affidavit, at least seven wireless carriers offer service in Qwest's Nebraska service territory, including the Omaha MSA, and provide voice services that can be used as a substitute for Qwest wireline services.[44] In fact, one of these carriers, Cricket, actively markets its flat-rated wireless service as a complete substitute for traditional wireline service and urges its potential customers to "cut the cord." With the advent of number portability for wireless, customers of traditional landline service are now able to retain their preexisting telephone numbers when they elect to use wireless service as the primary telephone service. It is now more convenient than ever for existing Qwest landline customers to migrate to the separate networks of the various wireless carriers serving the Omaha MSA.

It should also be noted that like Cox and AllTel, the CMRS providers that compete with Qwest in the Omaha MSA use switches and networks that are entirely separate from Qwest's network, yet which overlay Qwest's service territory.

As a result, it is clear that Qwest is no longer the exclusive source of switching and local loop facilities in the Omaha MSA, and that Qwest faces intense competition from established

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[43] *Id.* As the Teitzel Affidavit explains, the LERG shows a total of eight CLECs with prefixes assigned to switches serving rate centers in the Omaha MSA. In several instances, the reporting CLEC declined to specify the type of switch used, and notes simply a switch type of "digital switching system." However, the LERG shows that one DMS 500, one DMS 100/200 and one 5ESS switch are located in Omaha to serve this market. A DMS 500 switch and DMS 100/200 switch can each serve a maximum of 100,000 access lines, while a 5ESS switch can serve 200,000 access lines. In other words, these three Omaha CLEC switches alone can accommodate approximately 400,000 end-user lines, which is nearly double the number of facilities-based CLEC lines that are currently in service in the Omaha MSA.

[44] *See* Exhibit A at 23. The Teitzel Affidavit notes that a wide range of CMRS providers serve the Omaha MSA, including Verizon, Sprint, AllTel, Nextel, U.S. Cellular and MCI. *Id.*

facilities-based providers in the provisioning of local exchange services in the Omaha MSA.

3. There is Elastic Demand for Residential and Business Telecommunications Services in the Omaha MSA

"Demand elasticity" refers to the willingness and ability of a carrier's customers to switch to a competitive provider, or to otherwise change the amount of services they purchase from the carrier in response to a change in the price of the service. High demand elasticity indicates that customers are willing and able to switch to another service provider in order to obtain price reductions or desired features. It also indicates that the particular service market is subject to competition.[45]

As shown in the economic analysis performed by Strategic Policy Research (Exhibit B), there is a high degree of demand elasticity for telecommunications services in the Omaha MSA, particularly when intermodal competition is factored directly.[46] As it notes:

> In the Omaha market, the service demand elasticities perceived by Qwest are quite *high* – *i.e.,* demand is very *elastic*, indeed. Consider that with several firms offering virtually indistinguishable service offerings to Qwest's telecommunications offerings at comparable, competitive prices, any attempt by Qwest to raise the prices of its offerings would prompt wholesale substitution of its competitor's offerings by consumers.[47]

The Strategic Policy Research analysis further states that the fact that the demand for Qwest's services has declined by more than [redacted] within three years in response to "*far less* than an effective halving of prices" shows the high demand elasticity for Qwest's services among customers.[48] The study concludes that such demand elasticity precludes any opportunities for a

45 *See Comsat Reclassification Order*, 13 FCC Rcd at 14120 ¶ 71.

46 *See* Exhibit B at 6-7 and 11-14.

47 *Id.* at 15 (emphasis in original).

48 *Id.* (emphasis in original).

profitable restriction of output, due to the availability of alternative service providers to consumers.[49]

4. There is an Elastic Supply of Local Exchange Services in the Omaha MSA

"Supply elasticity" refers to the ability of suppliers in a given market to increase the quantity of services supplied in response to an increase in price. There are two factors that determine supply elasticities in the market. The first is the supply capacity of existing competitors, because supply elasticities tend to be high if existing competitors have or can easily acquire additional capacity in a relatively short time period.[50] The second factor is the existence of low barriers to entry, because supply elasticities tend to be high if new suppliers can enter the market relatively easily and add to existing capacity.

As shown in the economic analysis performed by Strategic Policy Research, there is a highly elastic supply of both local exchange services and facilities in the Omaha MSA. Citing the data contained in the Teitzel Affidavit, the study concludes that:

> This data indicates that there is ample "excess" switching capacity *currently deployed*, and that competitors are well-positioned to expand the number of access lines they serve. [citation omitted] These data are completely inconsistent with "weak" competitors incapable of inflicting significant competitive losses on Qwest. To the contrary, competitors are in a position to take virtually *the whole market* (more than [redacted] of which they have already taken) . . .[51]

Similarly, the impressive growth of Qwest's competitors' market share in the Omaha MSA market for local exchange services demonstrates that the cost of entry is not prohibitive.[52]

49 *Id.* at 15-16.

50 *See Comsat Reclassification Order*, 13 FCC Rcd at 14123-24 ¶ 78.

51 Exhibit B, Strategic Policy Research Study at 14.

52 *See, e.g., id.* at 8-10 and 13-14.

Lastly, there are no legal barriers to entry in the Omaha MSA.[53] Competitive providers have other market entry options in those areas where they choose not to deploy facilities. With the adoption of the 1996 Act, Congress implemented a comprehensive system of market-opening provisions that benefit both facilities-based carriers and pure resellers. This flexibility allows competitive providers to increase their market presence through resale beyond the reach of their existing networks. It also allows them to increase their market share more quickly than would be possible solely through expansion of their own networks. On this basis, the Strategic Policy Research study concludes that there are "no legal barriers preventing expansion of output by competitors" in the Omaha MSA.[54]

5. Qwest's Costs, Structure, Size and Resources No Longer Give it an Advantage Over Competitors

In the *AT&T Reclassification Order*, the Commission addressed the question of whether AT&T's size relative to other carriers might give it a significant advantage in terms of scale economies and access to capital.[55] Qwest does not currently enjoy any such advantage in the Omaha MSA market for local exchange services. While the Commission considered the fact that AT&T faced at least two "full-fledged facilities-based competitors" in the long distance market,[56] Qwest faces established facilities-based competitors, including cable providers, CDMA providers and competitors using IP-based technology, in the Omaha MSA that increasingly compete for

53 *Compare Comsat Reclassification Order*, 13 FCC Rcd at 14125 ¶ 82.

54 *See* Exhibit B, Strategic Policy Research Study at 8.

55 *AT&T Reclassification Order*, 11 FCC Rcd at 3309 ¶ 73. The Commission recently held that Comsat does not have market power, notwithstanding its finding that Comsat has competitive advantages in size and access to resources. *Comsat Reclassification Order*, 13 FCC Rcd at 14131-32 ¶ 93.

56 *AT&T Reclassification Order*, 11 FCC Rcd at 3308 ¶ 70.

both business and residential customers as their primary telecommunications services provider.

The continued feasibility and vitality of competitive entry in the Omaha MSA market for local exchange services is shown by the fact that the rapid expansion of competitive entry has occurred at the same time as incumbent charges for local services have substantially declined. The fact that competitive activity in the market is accelerating while prices for services are dropping is a strong indication that investors do not believe incumbents have an insurmountable cost advantage in the market.[57]

6. Qwest no Longer has a Dominant Market Share in the Omaha MSA

Due to this gradual and ongoing erosion of its customer base, Qwest no longer has a dominant share of the Omaha MSA market for local exchange services. This is a consequence of fierce competition in terms of price, service and bundled packages (such as Cox Communications' combination of cable television, broadband Internet access and telecommunications services).[58]

As discussed in the Teitzel Affidavit, it is difficult to identify the total CLEC market share in the Omaha MSA local services market with precision, absent proprietary customer access line data from the CLECs. However, Qwest believes that an accurate estimate can be made using the CLECs' E911 records, the number of resold lines, and the number of UNE-platform lines that currently are in service.

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[57] Exhibit B, Strategic Policy Research Study at 17-18.

[58] The market share data in Omaha undeniably support Qwest's petition for forbearance. However, nothing in this petition should be construed to imply that any particular market share loss is necessary for forbearance or non-dominance. Furthermore, nothing in this petition should be construed to imply that any particular market share loss is required in unbundling analyses, such as the necessary and impair analysis, or that market share data is appropriate for consideration in such analyses.

On this basis, it is apparent that CLECs have together captured over [redacted] percent of the residential market, over [redacted] percent of its business market, and over [redacted] percent of the combined retail local exchange market in the Omaha MSA. These totals are broken down in the following chart:

CLEC Market Share Estimate			
	Residence	*Business*	*Total*
Resold lines	[redacted]	[redacted]	[redacted]
UNE-P listings	[redacted]	[redacted]	[redacted]
E911 records	[redacted]	[redacted]	[redacted]
Total CLEC lines	[redacted]	[redacted]	[redacted]
Qwest retail lines	[redacted]	[redacted]	[redacted]
Total Omaha MSA market lines	[redacted]	[redacted]	[redacted]
% CLEC lines in Omaha MSA	[redacted]	[redacted]	[redacted]

It is also important to note that these "share" estimates do not contemplate intermodal telephone service substitutes, such as wireless and VoIP services, which are now available to customers within Qwest's service territory in the Omaha MSA.[59]

While CLEC lines and the number of wireless subscribers have increased very significantly over the last four years, the CLECs' competitive gains have come at a price to Qwest's local exchange access line base, which has declined by over [redacted] percent. The following table summarizes the significant change in Qwest's residential and business retail access line base in the Omaha MSA[60] from December 2000 to February 2004:

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[59] *See* Exhibit A, Teitzel Affidavit at 9.

[60] As stated in the Teitzel Affidavit, Qwest's service territory in the Omaha MSA includes the following Qwest wire centers in Nebraska: Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th St., Omaha 84th St., Omaha 90th St., Omaha Bellevue, Omaha 135th St., Omaha Fort St.,

Qwest Retail Lines in Service[61]				
	December 2000	February 2004	Difference	% Change
Residence	[redacted]	[redacted]	[redacted]	[redacted]
Business				
Total				

Put another way, Qwest's residential customer base in the Omaha MSA declined by [redacted] lines – a total decrease of [redacted] percent – over the last four years. Over this same period, Qwest's business retail access line base in the Omaha MSA declined by [redacted] lines – a decrease of [redacted] percent.[62]

Given these facts, the economic analysis performed by Strategic Policy Research concludes that, "[T]he time has come in Omaha, where it is difficult to see how any disinterested analyst could conclude that Qwest is the economically dominant operator."[63]

C. Qwest No Longer Possesses Market Power In the Omaha MSA

The Commission has consistently held that a carrier is to be declared dominant only if it possesses market power in the relevant product and geographic market.[64] Conversely, a carrier

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Omaha Fowler St., Omaha 156th St., Omaha Izard St., Omaha Douglas, Omaha O St., Springfield and Valley. The following Qwest wire centers in Iowa are within the Omaha MSA: Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood. All Qwest retail and wholesale data presented in this document relate only to these specific Qwest wire centers. *Id.* at 2 n. 3.

[61] This figure excludes public coin and Qwest Official Company Service ("OCS") access lines. *Id.* at 3 n. 4.

[62] As the Teitzel Affidavit notes, this percentage does not account for new customers who subscribe immediately to the service of a CLEC without becoming a Qwest customer in the first instance. *See id.* at 2 n. 2.

[63] *See* Exhibit B, Strategic Policy Research Study at 4.

[64] *AT&T Reclassification Order*, 11 FCC Rcd at 3346 ¶ 138.

qualifies as non-dominant if it lacks market power in the relevant market.[65] In making a determination about whether a carrier has market power, the Commission analyzes whether the carrier has the ability to "raise prices above competitive levels and maintain that price for a significant period, reduce the quality of the relevant product or service, reduce innovation or restrict output profitably."[66]

When this standard is applied to the evidence discussed above, it is clear that Qwest does not have the ability to exercise market power in the Omaha MSA market for local exchange services. Following the approach the Commission has previously used to assess market power for other services, this market fully exhibits each of the necessary indicia of competition. As Qwest has shown above: (1) customers (*e.g.*, residential and business end users) are highly sensitive to price and other service characteristics; (2) Qwest's competitors have the ability to expand their services and capture Qwest's existing customers, and there are minimal barriers to entry; (3) Qwest's size does not provide it an insurmountable advantage and (4) Qwest has a diminishing market share.

III. THE COMMISSION SHOULD FORBEAR FROM APPLYING SPECIFIC SECTION 251(c) AND 271 REGULATORY REQUIREMENTS TO QWEST

Consistent with the high level of competition, Qwest's corresponding lack of market power, the presence of facilities-based and intermodal competitors in the Omaha MSA telecommunications market, and the decline in Qwest's market share, Qwest asks that the Commission forbear from applying certain of the interconnection, unbundling and resale

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65 Exhibit B, Strategic Policy Research Study at 4.

66 *See Comsat Reclassification Order*, 13 FCC Rcd at 14118-19 ¶ 67; *see also* In the Matter of The Merger of MCI Communications Corporation and British Telecommunications plc, *Memorandum Opinion and Order*, 12 FCC Rcd 15351, 15398 ¶ 124 (1997); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20038 ¶ 101.