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	**WC Docket No. 04-223**

Declaration

of

LEE L. SELWYN

on behalf of

AT&T Corp.

August 24, 2003

REDACTED VERSION

DECLARATION OF LEE L. SELWYN

TABLE OF CONTENTS

Qualifications and Assignment 1

Summary 4

Introduction 6

In the context of the specific relief being sought by its *Petition*, Qwest has correctly defined the relevant product market as consisting only of wholesale services.. 10

The Omaha MSA provides an overly broad geographic market definition, because competing facilities-based infrastructure, to the extent it exists at all, has been deployed in only a small fraction of this expansive geographic area. 13

Qwest offers no evidence of any consequential competition in what Qwest defines as the relevant product market – services provided within the Omaha MSA under Section 251(c) and selected services provided under Section 271 – nor could it, since competition for these wholesale services does not exist. 29

Without a competitive wholesale market for last mile facilities, forbearance of Sections 251(c) and 271 will allow Qwest to restrict the availability of essential bottleneck services to CLECs. 34

The overwhelming majority of retail-level competition for enterprise services that exist within the Omaha MSA is utterly dependent upon last-mile facilities provided by Qwest. 42

Voluntary contractual arrangements are not sufficient safeguards to ensure CLEC access to bottleneck facilities. 48

The "intermodal" retail-level competitors identified by Qwest do not present sufficient alternatives to Qwest wholesale services to alone fulfill the goals of the 1996 Act. 51

Qwest has failed to present evidence that a significant number of Omaha consumers are substituting wireless services for wireline telephone service. 51

Wireless service is not a substitute for wireline service for the overwhelming majority of consumers. 56

VoIP competition cited by Qwest is not a sufficient substitute to Qwest services to justify nondominant regulation of the Qwest network. 61

Without the requirement that Qwest provide Section 251(c) and 271 unbundled access to its network, the telecommunications market in Omaha will, at best, devolve into a duopoly affording both incumbents with the ability and opportunity to exert market power. 63

If granted forbearance, Qwest would be able to increase competitor costs for interconnection. 68

Affording Qwest non-dominant, non-incumbent status in the Omaha MSA could result in higher switched access charges, Subscriber Line Charges, PICCs, and increase high-cost support flowing to Qwest in other parts of Nebraska. 69

Conclusion 71

Attachments

1 Statement of Qualifications

2 Appendix A: Retail Competition in the Omaha MSA

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DECLARATION OF LEE L. SELWYN

Qualifications and Assignment

Lee L. Selwyn, of lawful age, declares and says as follows:

1. My name is Lee L. Selwyn; I am President of Economics and Technology, Inc. ("ETI"), Two Center Plaza, Suite 400, Boston, Massachusetts 02108. ETI is a research and consulting firm specializing in telecommunications and public utility regulation and public policy. My Statement of Qualifications is annexed hereto as Attachment 1 and is made a part hereof.

2. I have been asked by AT&T to review the June 21, 2004 Petition filed by Qwest Corporation ("Qwest") for forbearance of the requirements of Section 251(c) and 271[1] to analyze the issues and questions raised therein, and to provide the Commission with specific recommendations thereon.

3. I have participated in proceedings before the Federal Communications Commission ("FCC" or "Commission") dating back to 1967 and have appeared as an expert witness in hundreds of state proceedings before more than forty state public utility commissions. I have participated in numerous regulatory proceedings involving public utility affiliate relationships and inter-affiliate transactions and transfers. These have included merger proceedings before the California PUC involving Pacific Telesis Group and SBC, and Bell Atlantic and GTE, before the Illinois Commerce Commission involving SBC and Ameritech, before the Connecticut Department of Public Utility Control involving SBC and SNET, and before the Maine PUC involving NYNEX and Bell Atlantic. I also participated in written comments filed with the FCC regarding both the SBC/Ameritech and Bell Atlantic/GTE merger applications. I have participated in a number of Section 271 proceedings, including those in Pennsylvania, New Jersey, California, Minnesota, Delaware and Virginia. I have also submitted testimony before several state commissions addressing proposals for structural separation of ILEC wholesale and retail operations. I participated in proceedings before the California PUC involving Pacific Bell's reorganization of its Information Services (primarily voice mail) business into a separate

1. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket 04-223, Filed by Qwest Corporation, June 21, 2004 ("*Petition*").

subsidiary, and the spin-off of Pacific Telesis Group's wireless services business into a separate company. I have participated in a number of matters involving the treatment of transfers of yellow pages publishing from the ILEC to a separate directory publishing affiliate, including the recent case before the Washington Utilities and Transportation Commission addressing imputation of (then) US WEST yellow pages revenues.

Summary

4. Qwest's *Petition* seeks forbearance from Section 251(c) and of Section 271(c)(2)(B)(i-vi) and (xiv) of the *Telecommunications Act of 1996* ("1996 Act"), as well as forbearance from dominant carrier and incumbent local exchange carrier regulation. While Qwest correctly identifies the relevant product market as the market for *wholesale* services, it offers no evidence whatsoever pertaining to the availability of wholesale services from alternative suppliers, focusing instead upon the alleged presence of competition for *retail* mass market local tele-communications services, services that fall squarely *outside* of the relevant product market that Qwest has itself defined. Moreover, while Qwest's evidence regarding retail-level mass market competition is entirely inapposite to the matters raised in its *Petition*, most of the "competitive" retail services to which Qwest refers are utterly dependent for their very existence upon *wholesale* services obtained from Qwest, services that Qwest *would no longer be obligated to provide at all if its Petition were granted by the Commission*.

5. In a similar leap from its "evidence" to its requested regulatory relief, Qwest has defined, for purposes of its *Petition*, the "relevant geographic market" as consisting of what Qwest

1 portrays as the entirety of the Omaha MSA, which it describes as consisting of four Nebraska
2 counties and one Iowa county (in fact, the Omaha MSA actually consists of five Nebraska
3 counties and three Iowa counties, covering an area nearly as large as the state of Connecticut).
4 However, Qwest offers no evidence whatsoever for the proposition that the "competition" to
5 which Qwest refers is present throughout the entirety of the MSA (or the subset thereof that
6 Qwest has sought to portray as the entirety of the MSA). In fact, Qwest itself serves only a small
7 fraction of the total area embraced within the Omaha MSA, and whatever limited wholesale
8 competition is present is confined to a handful of buildings in downtown Omaha and a few
9 suburban localities. Neither the characteristics of the MSA nor Commission precedent regarding
10 the definition of "relevant geographic markets" support Qwest's contention that the competitive
11 conditions required for the requested regulatory forbearance are satisfied throughout the entirety
12 of the Omaha MSA.
13
14 6. Qwest's forbearance request has far-reaching consequences that have been completely
15 ignored by Qwest and its Affiants. Qwest presents "evidence" purporting to demonstrate the
16 presence of competition in *retail* markets only, focusing primarily upon competing providers
17 ("CLECs") that are offering residential and small business services. It fails to note that, with the
18 exception of Cox cable, it is highly unlikely that any of the *retail* competition to which it refers
19 would continue to exist at all if Qwest, having been granted forbearance from Sections 251(c)
20 and 271 unbundling, interconnection and collocation obligations, either ceases to offer such
21 services and arrangements to its rivals altogether, or prices them at levels that render their use by
22 competitors economically infeasible. Even Cox, the other significant, facilities-based *retail*

1 services provider operating in portions of the Omaha MSA, has given no indication that it
2 intends to provide unbundled (wholesale) access to its network. Without the ability to obtain
3 unbundled access to Qwest's network, to interconnect with Qwest on an economically feasible
4 basis, or to maintain collocations at Qwest wire centers, CLECs that, unlike Cox, have not
5 themselves overbuilt Qwest's network will be unable to compete for retail customers. Moreover,
6 there is no reasonable basis to expect that such overbuilding – which the Commission has
7 previously concluded would be prohibitively expensive and uneconomic – would actually take
8 place. Qwest also points to several "intermodal" sources of retail-level competition – wireless
9 and Voice over Internet Protocol ("VoIP"). As with the other *retail* services to which Qwest
10 refers, these alternatives are not embraced within Qwest's "relevant product market" definition
11 and, moreover, are not even included within the same product market as retail wireline local
12 telephone service, because wireless and VoIP are not yet generally viewed as substitutes for
13 mass market wireline services. In any event, if Qwest's *Petition* were granted, the outcome
14 would be an unregulated Qwest monopoly or, at best, an unregulated duopoly in those portions
15 of the product and geographic market in which Cox also provides facilities-based services.
16
17 7. Qwest currently has a monopoly with respect to wholesale services, the "relevant product
18 market," and if its *Petition* were granted Qwest would then also be afforded monopoly (and in
19 certain areas duopoly) status with respect to most retail local mass market services as well. In
20 addition, however, relieving Qwest of the full suite of statutory and regulatory obligations
21 imposed upon dominant incumbent local exchange carriers would operate to extend Qwest's
22 monopoly into the enterprise and long distance markets as well. Because there would no longer

be an incumbent LEC in Qwest's portion of the Omaha MSA, Qwest has the potential to increase its switched access charges, subscriber line charges and PICCs, as well as to raise costs faced by competitors to interconnect with Qwest's network. Qwest's *Petition* is utterly silent as to these ancillary consequences of the regulatory relied that it is seeking. Qwest's *Petition* is not in the public interest, and should be denied in all respects.

Introduction

8. Qwest's *Petition* asks the Commission to forbear from regulating Qwest as a dominant incumbent local exchange carrier with respect to all product markets and across the entire geography of the Omaha Metropolitan Statistical Area ("MSA"), and to remove requirements that it make its facilities available on an unbundled, wholesale basis to competitors. In so doing, Qwest obscures the many and significant economic distinctions among the various product/ service markets in which it operates, as well as the fact that even in those limited instances where facilities-based competition is actually present, such competition impacts only limited geographic areas and product markets, and does not reduce Qwest's wholesale dominance.

9. Qwest fails to provide evidence supporting the factual claims advanced as the basis for its *Petition*. Although Qwest's *Petition* seeks forbearance from dominant carrier regulation *across all product markets* including wholesale products used by CLEC and interexchange carriers to provide retail enterprise services, Qwest Affiant David Teitzel's discussion of competition is limited entirely to the *retail* mass market, consisting of residential and small

business (four lines or less) segments.[2] Even if there were sufficient competition for mass market services to justify the relief that Qwest is seeking – which is decidedly not the case here – Qwest has provided no support whatsoever that would provide a basis for granting it relief from dominant carrier regulation with respect to wholesale services provided to other carriers in the enterprise and in the (switched and special) access services markets.

10. With respect to mass market services, high fixed costs, a high possibility of stranded investment, and legal delays make CLEC deployment of their own redundant last mile mass market distribution facilities highly unlikely. BOC witnesses and this Commission have both recognized the difficulty of deploying facilities to serve a limited number of CLEC customers. In its *Triennial Review Order* ("*TRO*"), the Commission determined that self-deployment of such facilities simply may not be economic for CLECs.[3] Were the Commission to forbear from enforcement of Sections 251(c) and 271, CLECs would have no assurance as to the continued availability of subscriber loop facilities anywhere in Qwest's Omaha MSA operating areas, and could no longer justify any other (non-loop) capital investment in the Omaha MSA –

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2. Appendix A to this Affidavit addresses and responds to the *retail* competition figures reported by Qwest's Declarant Mr. David Teitzel. Qwest's – and Mr. Teitzel's – claims as to the presence of broad-based competition in the Omaha MSA are based upon a fundamentally flawed accounting of sources of competition.

3. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), 17116-17117, at para. 226.

investments associated with switching facilities and with customer acquisition and market development.

11. Qwest claims that a healthy wholesale services market for UNE-Loops and other underlying network services can nevertheless be expected to develop in the absence of mandatory Section 251(c)/Section 271 unbundling requirements. That contention, however, is belied by empirical evidence. If, as Qwest claims, the Omaha market is already sufficiently "competitive" so as to incent Qwest to provide competitors with negotiated access to its network in order to avoid losing all traffic to competitors, then one would expect that other *existing* facilities-based service providers that are *not subject to Section 251(c)/Section 271 unbundling requirements* – principally cable companies such as Cox – would have already recognized this purported "threat" to their networks from intermodal competition and statutorily-mandated Qwest UNE availability and would themselves be actively and aggressively offering other CLECs wholesale access to their own facilities. However, that has not happened: Cox and other cable companies have made no such moves, and continue to zealously guard access to their network. The *revealed conduct* of Cox and other cable companies in this regard is likely to be a far more accurate indicator of Qwest's likely response to *its* being relieved of its Section 251/271 obligations than the unsupported speculations being offered here by Qwest's paid Affiants.

12. The presence of so-called "intermodal" competition from wireless and VoIP services fails to lessen Qwest's stranglehold on bottleneck wireline facilities. Despite Qwest's claims of increasing wireless substitution, the Company presents no evidence that a significant number of

1 households in the Omaha MSA are willing to "cut the cord" and rely solely upon wireless
2 service for all household calling needs. Indeed, evidence suggests that while there is some
3 shifting of primarily long-distance calling from wireline to wireless services – substitution that is
4 driven primarily by wireless pricing plans that benefit from essentially pecuniary disparities in
5 the application of the Commission's Part 69 access charge rules with respect to a large portion of
6 calls placed from and to wireless phones[4] – consumers generally regard wireless and wireline
7 services as complementary, not substitutes. Similarly, VoIP services for residential customers
8 require a high speed data connection, currently generally available *only* via cable modem or DSL
9 service, making it difficult (and expensive) for a significant number of customers to rely upon
10 VoIP service for their only access to the PSTN. Even major VoIP providers have recently noted
11 that VoIP does not constitute a substitute for wireline phone service for most consumers.
12
13 13. Granting Qwest's request for forbearance would also create a variety of opportunities
14 for Qwest to increase competitor costs and make the competitive landscape in Omaha more
15 difficult for both existing competitors and potential entrants. By eliminating the requirement
16 that Qwest interconnect with competitors at any technically feasible point in the network and by
17 also eliminating collocation requirements, Qwest will be able to significantly increase

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4. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers*, CC Docket 95-185, *First Report and Order*, FCC 96-325, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), 16014, at para. 1036, footnotes omitted.

competitor costs – assuming that it is even willing to negotiate "commercial agreements" whose effect would be to enable competitors to cannibalize Qwest's own retail market.

In the context of the specific relief being sought by its *Petition*, Qwest has correctly defined the relevant product market as consisting only of wholesale services.

14. Qwest's *Petition* asks the 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 ..."[5] To support its contention that Qwest "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 ...,"[6] Qwest has presented evidence purporting to demonstrate the existence of competition *at the retail level*. That evidence, however, is entirely inapposite to the *specific scope of regulatory forbearance that Qwest is seeking with respect to the "relevant product market" that Qwest itself has defined*:

> ... 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.[7]

5. *Petition*, at 1.

6. *Petition*, at 3.

7. *Petition*, at 6, emphasis supplied.

In fact, *none of the "services provided under Section 251(c) and selected services under Section 271" are retail services at all*; they are in all cases *wholesale* services that ILECs are required to furnish *exclusively* to CLECs for incorporation into those CLECs' *own retail offerings*, and are *not even available* on a retail basis to end users.[8] The possibility that competition – even the allegedly intense competition to which Qwest avers – may be present *at the retail end of the market* teaches nothing as to the existence of competition for the specific *wholesale* services being offered within the "relevant product market" as Qwest here defines it and upon which it bases its forbearance petition.

15. As I discuss at length below, there is virtually no competition at all for any of the "services provided under Section 251(c) and selected services under Section 271," *and indeed Qwest has offered no evidence whatsoever to the contrary.*[9] Vertically integrated CATV operators, such as Cox, offer retail local telephone service to end users, but *do not* make components of their networks available to CLECs on an unbundled basis. Similarly, while CMRS carriers will in some cases provide packaged retail-line service on a wholesale basis for

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8. Section 251(c)(3) requires ILECs to provide unbundled access to their networks only for the provision of telecommunications services, defined (at Section 3(a)(51)) as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

9. In its *Triennial Review Order*, the FCC has determined that ILECs are required to provide UNEs only in those cases where the CLECs' ability to compete would be "impaired" if the UNE were not available – i.e., only in those instances where the functionality being provided by the specific UNE is not practically available from an alternative source or from self provisioning. Thus, *by definition*, any services that Qwest is obligated to offer pursuant to Section 251(c) are *necessarily* not subject to competition. *TRO*, 18 FCC Rcd 16985-16993, at para. 7.

resale (as Sprint does for Qwest[10]), they too do not offer CLECs and other service providers unbundled access to their networks.

16. Ironically, much of the *retail* competition upon whose presence Qwest bases its forbearance petition would likely cease to exist if Qwest's request is granted, because without the specific obligation to provide unbundled wholesale services, efficient interconnection arrangements, and collocation to rival local carriers that is provided by Sections 251(c) and 271, there is simply no basis for assuming that Qwest would continue to do so. Except for carriers that own their own last-mile distribution infrastructure – and in the Omaha MSA Cox Cable is the primary such entity – CLECs whose business model is premised upon the availability of Section 251(c) and 271 wholesale services will be forced to exit the market altogether. And that would leave just two incumbent *retail* carriers – Qwest and Cox. As I explain below, since Cox does not offer any wholesale services and, following any grant of forbearance, Qwest would no longer be obligated to do so either, the result will be *no wholesale service providers at all* within the "relevant product market" in the Omaha MSA, and the market would be reduced to a local service duopoly.

10. O'Shea, Dan, *Qwest Taps Sprint PCS for resale*, Telephonyonline.com, August 4, 2003, available at http://wirelessreview.com/ar/telecom_qwest_taps_sprint/ (Accessed August 13, 2004).

The Omaha MSA provides an overly broad geographic market definition, because competing facilities-based infrastructure, to the extent it exists at all, has been deployed in only a small fraction of this expansive geographic area.

17. Qwest's *Petition* seeks to define the "relevant geographic market" as the entire Omaha MSA, which Qwest describes as consisting of four Nebraska counties (Washington, Douglas, Sarpy and Cass) and one Iowa county (Pottawattamie). However, Qwest offers no specific economic rationale or other factual support for its ultimate conclusion that the full Omaha MSA, and not a subset thereof, represents the relevant geographic market within which its forbearance request should be applied. While conceding the importance of accurately determining the relevant product and geographic market ("[t]he first step in analyzing these changes in Qwest's market power is to determine the relevant product and geographic markets"[11]), the *Petition* presents no more than a highly perfunctory analysis that relies solely upon references to two prior FCC orders, offering no hard data or analysis to demonstrate that the geographic market definition standards adopted by the Commission in the referenced decisions – or by anybody else, for that matter – apply to Qwest's "entire MSA" geographic market scope. Incredibly, these prior Commission determinations are either inapposite to the specific facts at issue here, or simply don't support Qwest's position that market power must be evaluated at the MSA level. As such, the ensuing market power analysis being offered by Qwest is inherently flawed because it is based upon an unsupported and inaccurate definition of the relevant geographic market.

11. *Petition*, at 5.

18. Even where there are competitive local distribution facilities (such as cable feeders or small neighborhood build-outs), granting forbearance on an MSA-wide basis ignores the fundamental "localness" of the local network. Even in the most densely populated areas of the MSA, AT&T is still dependent upon Qwest facilities for the vast majority of its enterprise customer locations (see para. 51 below). Qwest has provided no basis for its proposed geographic market definition; indeed, it does not even contend that competitive facilities are in place throughout the entire MSA geography.

19. Even if effective, price-constraining competition were present in limited portions of the MSA – which is in any event not the case – there would be no reasonable basis to forbear from regulating Qwest as an incumbent and dominant LEC in the remainder of the MSA where no such competition is present. CLEC market entry decisions are not made with respect to an entire MSA, and the use of the full MSA for purposes of defining a geographic market is entirely arbitrary.

20. The Omaha MSA is an expansive area – indeed, it is even more expansive than Qwest has portrayed it to the Commission.[12] As presently defined by the US Office of Management and Budget ("OMB"), the Omaha MSA actually comprises *eight* counties, five of which are in

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12. Qwest incorrectly describes the Omaha MSA as follows: "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." *Petition*, at 7.

1 Nebraska and three are in Iowa.[13] The Omaha MSA has a population of approximately 766,000
2 (based upon the 2000 census)[14] and comprises an area of 4,363 square miles[15] – more than four
3 times the area of the state of Rhode Island and nearly as large as the state of Connecticut. The
4 urbanized portion of the Omaha MSA, which includes more than two-thirds of its total
5 population, comprises only 180 square miles, representing only about 4.1% of the total MSA
6 area.[16] The remaining 4,183 square mile (non-urbanized) portion has a population density of
7 approximately 55.5 per square mile. Significantly, while seeking forbearance *with respect to the*
8 *entire MSA* (or, more precisely, what Qwest incorrectly portrays as the entire MSA), Qwest itself
9 serves only a small fraction of the total area embraced by its *Petition*. Qwest's operating areas
10 appear to include most (or perhaps even all) of Sarpy County, Nebraska and a portion of Douglas
11 County, Nebraska, and small portions of Pottawattamie, Harrison and Mills Counties, Iowa. It
12 appears that Qwest provides no local service at all in Cass, Saunders and Washington Counties,
13 Nebraska.

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13. Office of Management and Budget, Executive Office of the President of the United States, OMB Bulletin 04-03, Appendix, December 2003, available at http://www.whitehouse.gov/omb/bulletins/fy04/b04-03.html (Accessed August 17, 2004).

14. Bureau of The Census, United States Department of Commerce, Ranking Tables for Population of Metropolitan Statistical Areas, Micropolitan Statistical Areas, Combined Statistical Areas, New England City and Town Areas, and Combined New England City and Town Areas: 1990 and 2000 (Areas defined by the Office of Management and Budget as of June 6, 2003.) (PHC-T-29) Table1a, Population in Metropolitan and Micropolitan Statistical Areas in Alphabetical Order and Numerical and Percent Change for the United States and Puerto Rico: 1990 and 2000. Available at http://www.census.gov/population/www/cen2000/phc-t29.html (accessed August 10, 2004).

15. Rand McNally, *Commercial Atlas & Marketing Guide 2003*, 134th Edition.

16. *Id.*

21. Qwest relies upon two previous Commission rulings – the *Comsat Reclassification Order*[17] and the *Bell Atlantic/NYNEX Merger Memorandum and Order*[18] – as the sole basis for its proposed definition of the relevant geographic market, characterizing these *Orders* as concluding that the 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 geographic area.'"[19] If the relevant geographic market embraces "consumers with similar choices regarding a particular good or service in the same geographic area," then *all customers* within the specified geographic area must confront substantially equivalent "choices." Despite its reliance upon this standard, Qwest provides no customer choice analysis, but instead merely *asserts* that all consumers throughout the Omaha MSA confront the same set of competitive choices. Inasmuch as Qwest itself serves only a small fraction of the entire MSA, the suggestion that all customers throughout the MSA face the same set of competitive choices fails even to satisfy the "straight face" test.

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17. *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*, CC Docket No. 80-634, *Order and Notice of Proposed Rulemaking*, FCC No. 98-78, 13 FCC Rcd 14083 (1998) ("*Comsat Reclassification Order*").

18. *Applications of NYNEX Corporation, Tranferor, -and- Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries,* File No. NSD-L-96-10, *Memorandum Opinion and Order*, FCC No. 97-286 12 FCC Rcd 19985 (1997) ("*Bell Atlantic/NYNEX Merger*").

19. *Petition*, at 6, citing the *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 27.

22. Qwest's reliance upon the *Comsat Reclassification Order* is particularly curious, inasmuch as the Commission's determination in that matter, when extrapolated to the MSA level, runs directly counter to the relief that Qwest seeks in the instant *Petition*. In its *Petition*, Comsat had defined the relevant geographic market for international satellite services as consisting of the entire world, and had sought to be reclassified as nondominant with respect to the entirety of that geographic area.[20] The Commission rejected Comsat's "whole world" market definition, specifically concluding that there were still many locations (countries, in this case) where Comsat confronted no competition at all:

> 28. Comsat provides switched voice and private line service to a large number of point-to-point routes between the U.S. and foreign countries that can be grouped into two separate and distinct geographic markets. Many of these routes are served by multiple cable and satellite carriers, in addition to Comsat, which provide switched voice and private line service. In addition to being served by multiple carriers, these routes appear to exhibit low barriers to entry for Comsat's competitors. These routes are primarily between the U.S. and the countries of Europe, the Americas, Asia and Australia. *For the purposes of our analysis*, we group these point-to-point routes exhibiting sufficiently similar competitive characteristics into one geographic market referred to as the "thick route market." The record also indicates that a second group of point-to-point routes also share some common competitive characteristics. The 63 countries listed on Appendix A to this Order are not linked to the U.S. by cable and, therefore, are served only by satellite carriers. In addition, generally Comsat is the only satellite carrier that provides switched voice and private line service to these countries from the U.S. These markets are primarily developing nations located in Africa and Eastern Europe as well as low density, remotely located island nations, such as Mauritius and New Caledonia, that might not justify the cost of a cable connection. In many of these countries, legal barriers to entry exist for U.S. cable and satellite carriers. Although the record offers little guidance on this point, *some of these countries, however, may have low barriers to entry but insufficient demand may be the reason*

20. *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 27.

> *Comsat is not encountering competition in these markets from U.S. satellite carriers.* Over time, we expect the number of these thin route countries to decrease as they become linked to the U.S. by fiber-optic cable and lower their barriers to entry. *The record provides an insufficient basis for us to reasonably determine when this will happen.* Because these 63 countries exhibit sufficiently similar competitive characteristics, for the purposes of our analysis, we group them into one geographic market referred to as the "thin route market."[21]

23. By extrapolation, the same reasoning applies to the geographic market definition being advanced here by Qwest and for its *Petition for Forbearance* (nondominant status) *throughout the entirety of the Omaha MSA*. Just as the Commission had determined that Comsat faced competition only in certain "thick market" portions of the world, so too Qwest faces competition only in extremely limited geographic subsets of the Omaha MSA. In the case of Comsat, the Commission applied the point-to-point market approach, where the "points" in that case were entire countries – appropriate for an international carrier, since a physical presence in a country and interconnection with that country's domestic telecommunications network would afford the international carrier access to that country's entire national market. In the case of local telecommunications services, the "points" are individual customer premises, because a physical facilities-based presence at a particular customer premises affords the CLEC access *only to that specific premises* and to no others.[22] For the same reason that the Commission in *Comsat* had excluded from Comsat's relevant geographic market those "thin" markets in which no competitor was as of that date offering service *even where barriers to entry were relatively low*

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21. *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 28, emphasis supplied.

22. *TRO*, at VI.A.4.b.(ii)(d).

and on that basis found Comsat to still be dominant, it must correspondingly exclude from Qwest's full-MSA geographic market definition those product and geographic market segments in which competition has not yet developed, *even if it theoretically might develop in the future.*

24. Indeed, the language used by the Commission in *Comsat* and *Bell Atlantic/NYNEX* goes even further to assert the granularity with which geographic markets are supposed to be determined. In *Bell Atlantic/NYNEX*, the Commission concluded that it would treat a geographic market as "an area in which *all customers in that area will likely face the same competitive alternatives for a product*,"[23] and the Comsat ruling reiterated the *Bell Atlantic/NYNEX* findings, stating that:

> [t]his approach allows for the assessment of the market power of a particular carrier based on unique market situations by recognizing, for example, that certain carriers may target particular types of customers, provide specialized service, *or control independent facilities in specific geographic areas*.[24]

While it may be the case (although it is not the case in the Omaha MSA) that *all* consumers throughout an MSA may face the same set of competitive choices (which was the finding in *Bell Atlantic/NYNEX* with respect specifically to LATA 132, the New York Metro LATA *portion* of the considerably larger New York-Northern New Jersey-Long Island, NY-NJ-PA MSA), the Commission determined that this conclusion can only be supported by grouping "point-to-point routes exhibiting sufficiently similar competitive characteristics into one geographic market,

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23. *Bell Atlantic/NYNEX Merger*, 12 FCC Rcd 20017, at para. 54, emphasis supplied.

24. *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 27, emphasis supplied.

which it referred to as the 'thick route market.'"[25] This was because the Commission found that "any carrier that offers service in the New York Metropolitan Calling Area offers that service to all customers in that area."[26] As noted above, that is not the situation here, where Qwest only offers local services in a very small portion of the MSA

25. The principle adopted by the Commission as to the definition of the relevant geographic market is a reflection of past antitrust determinations and decisions by other federal agencies. Indeed, the Commission states that it "generally has followed the approach of the *Merger Guidelines* for defining the relevant service and geographic markets."[27] This is evident by the fact that the approach adopted by the Commission calls for a point-to-point market analysis with respect, specifically, to demand substitution factors, as suggested by the DoJ.[28] Also, the Commission has included the basic elements of the landmark antitrust case, *Brown Shoe Co. v. United States*, in guiding its approach. In *Brown Shoe*, the Supreme Court determined that "[t]he

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25. *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 28. Indeed, this assessment – that the relevant geographic market definition is determined by combining a contiguous point-to-point locations which exhibit "sufficiently similar characteristics" – has been reiterated in the recent *Dom/NonDom NPRM*. *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, *Further Notice of Proposed Rulemaking*, FCC 03-111, 18 FCC Rcd 10914 (2003) ("*Dom/NonDom NPRM*"), 10925-10926, at para. 17.

26. *Bell Atlantic/NYNEX Merger*, 12 FCC Rcd 20017, at para. 55.

27. *Dom/NonDom NPRM*, 18 FCC Rcd 10920-10921, at para. 9.

28. United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, http://www.usdoj.gov/atr/public/ guidelines/horiz_book/12.html, accessed August 4, 2004 ("*Horizontal Merger Guidelines*").

geographic market selected must [] 'correspond to the commercial realities' of the industry."[29] In *Comsat*, the Commission applied the *Brown Shoe* principle and determined that telecommunications services, uniquely, require access to the customer premises if services are to be purchased.[30] This unique characteristic of telecom services requires that the relevant market be measured "point-to-point," as the Commission has correctly determined.

26. Here, however, Qwest has not even advanced a single argument defending its proposed MSA-wide geographic market definition. As such, there is no factual support in this record for Qwest's contention that the Omaha MSA constitutes a zone of "customers with similar choices" regarding competitive telephone service. If Qwest is relying upon the Commission's finding in *Bell Atlantic/NYNEX* to support its own assertion that the Omaha MSA constitutes a relevant geographic market, it has no basis to make this assertion. In *Bell Atlantic/NYNEX*, the Commission determined that:

> A geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area. In the *LEC In-Region Interexchange Order*, we found that each point-to-point market constituted a separate geographic market. We further concluded, however, that we could consider groups of point-to-point markets where customers faced the same competitive conditions. *We will therefore treat as a geographic market, an area in which all customers in that area will likely face the same competitive alternatives for a product.* This approach allows assessment of the market power of a particular carrier or group of carriers based on unique market situations by recognizing, for

29. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

30. *Comsat Reclassification Order*, 13 FCC Rcd 14100, at para. 28.

> example, that certain carriers may target particular types of customers, provide specialized services or *control independent facilities in specific geographic areas*.[31]

Qwest has not provided any analysis demonstrating that the Omaha MSA represents a geographic area "in which all customers in that area will likely face the same competitive alternatives for a product" nor has it recognized that, within the Omaha MSA, "certain carriers may target particular types of customers, provide specialized services or *control independent facilities in specific geographic areas*" so as to limit the ubiquity of competitive choices to areas far smaller than the entire MSA. As noted above, customers clearly do not face the same competitive alternatives throughout the Omaha MSA because Qwest only provides local services in a small portion of that very large area.

27. The very suggestion that MSAs – as defined by OMB and as used by, among other agencies, the US Census Bureau – should be used by the Commission as the basis for defining the relevant geographic market is directly at odds with the stated purpose of the "MSA" concept. MSAs are established and maintained by the Office of Management and Budget and are intended to be used *solely for statistical purposes*, i.e., to "provide nationally consistent definitions for collecting, tabulating, and publishing Federal statistics for a set of geographic areas."[32] The OMB is clear and specific, admonishing that MSAs "should not be used to develop and

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31. *Bell Atlantic/NYNEX Merger*, 12 FCC Rcd 20017, at para. 54, emphasis supplied, footnotes omitted.

32. Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228, December 27, 2000.

1 implement Federal, state, and local nonstatistical programs without consideration of the full
2 effects of using these definitions for such purposes."[33]
3
4 28. MSAs are by their very nature arbitrary measures of cohesion surrounding an urban
5 center. While there are criteria to determine the area encompassed by an MSA – including
6 certain population requirements and commuting patterns[34] – MSAs can still have vastly different
7 make-ups state-to-state and ultimately lack uniformity because (outside of New England) they
8 are defined in terms of entire counties, which are often (as in the case of the Omaha MSA)
9 expansive areas that in no sense can be said to 'correspond to the commercial realities' of the
10 industry.
11
12 29. Indeed, the Commission has never made a specific or definitive finding as to the
13 validity of basing the relevant geographic market definition *for wireline services* on MSA
14 boundaries. The Commission has used the MSA geography as a basis for *establishing* market
15 areas for 800 MHz cellular licenses, but there it used the MSA to *create* the geographic market
16 scope by conditioning its license grant upon specific coverage requirements with respect to the

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33. *Id.*

34. These requirements include that an MSA have "at least one urbanized area of 50,000 or more inhabitants...Additional 'outlying communities are included in the [MSA] if they meet specified requirements of commuting to or from the central counties." Available at http://www.census.gov/ populations/www/estimates/aboutmetro.html, accessed August 10, 2004.

area embraced within MSA boundaries.[35] Even there, however, the Commission has never required CMRS licensees to provide "wall-to-wall" coverage of the entire MSA, and even today, wireless carriers frequently do not provide wall-to-wall coverage of the entire MSA geography. In its 1994 *Personal Communications Service* ("PCS") order the Commission abandoned the MSA definition in favor of larger areas – including the so-called "Basic Trading Areas" ("BTAs") and Major Trading Areas ("MTAs').[36]

30. The Commission has used the MSA concept to *prioritize* implementation of wireline and wireless local number portability ("LNP"),[37] which hardly constitutes the adoption of a "relevant geographic market" definition.

31. The Commission came closest to adopting the MSA as the basis for relevant geographic market definition in the *Special Access Pricing Flexibility Order.*[38] There, the Commission

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35. *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, CC Docket No. 79-318, *Memorandum Opinion and Order On Reconsideration*, FCC 82-99, 89 F.C.C.2d 58 (1982), 86-87, at para. 62.

36. *Amendment of the Commission's Rules To Establish New Personal Communications Services*, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994)("*PCS Order*"), 4988, at para. 78.

37. *Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-286, 11 FCC Rcd 8352 (1996).

38. *Access Charge Reform,* CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63;

(continued...)

1 established minimum threshold criteria for granting price cap carriers pricing flexibility for
2 specific special access services based upon the instances of collocation and the share of special
3 access revenues on an MSA basis. However, the Commission did not base its decision to adopt
4 the MSA as a relevant geographic market upon recognized economic or antitrust standards. At
5 best, the MSA-level scope applicable to special access pricing flexibility represented a middle-
6 ground between alternative market definitions involving either larger or smaller geographic
7 reach. For example, the Commission declined to define the market on a full-state, ILEC study-
8 area, or LATA basis, concluding that "competitive LECs generally do not enter new markets on
9 a state-wide basis."[39] But the Commission also rejected CLEC proposals to grant pricing
10 flexibility at the wire center or central office level; while conceding that such an approach
11 "might produce a more finely-tuned picture of competitive conditions,"[40] it nevertheless
12 concluded that this level of granularity would impose additional expenses and administrative
13 burdens on ILECs in filing pricing flexibility petitions.[41] In response to commenters who argued
14 that competition may only exist in a small part of an MSA, the FCC contended that the threshold

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38. (...continued)
Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157; *Fifth Report and Order and Further Notice of Proposed Rulemaking,* FCC No. 99-206, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), 14234-14235, para. 24-25.

39. *Pricing Flexibility Order*, 14 FCC Rcd 14260, paras. 72-73.

40. *Pricing Flexibility Order*, 14 FCC Rcd 14260, para. 74.

41. The Commission's emphasis upon administrative simplicity also extended to its decision to assess the presence of competitive entry in the RSAs for the purpose of granting ILECs pricing flexibility, by allowing ILEC's to file a single pricing flexibility petition for all the RSAs in a study area. *See, Pricing Flexibility Order*, at 14261, para. 76.

1 triggers established for pricing flexibility were "sufficient to ensure that competitors have made
2 sufficient sunk investment within an MSA."[42] Subsequent events have shown that expectation to
3 have been seriously in error.[43]
4
5 32. The use of the MSA as the basis for geographic market definition cannot be reconciled
6 with the specific requirements of the *Horizontal Merger Guidelines*, which explicitly state that
7 "[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer
8 responses." In defining the geographic market in terms of demand, *Brown Shoe* requires that
9 "[t]he geographic market selected must [] 'correspond to the commercial realities' of the
10 industry."[44] In the case of local telephone service, the "commercial reality" is that customers
11 will *not* relocate their homes or businesses so as to obtain a competitive telephone service.[45] In
12 the *LEC Interexchange NPRM*, the Commission expressed its belief "that most telephone
13 consumers do not view interexchange calls *originating in different locations* to be close
14 substitutes for each other."[46] Accordingly, a *demand-based* geographic market definition for the

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42. *Pricing Flexibility Order*, 14 FCC Rcd 14260, para. 74.

43. *See* fn. 48, *infra*.

44. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

45. While there might be a few instances where a business whose primary cost is the cost of phone service (like a large calling center) might change locations to access cheaper phone rates, this represents a rare exception.

46. *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, *Notice of Proposed Rulemaking*, FCC 96-123, 11 FCC Rcd 7141, 7168 (1996), at para. 49.

local telephone service market would necessarily define the "relevant geographic market" as consisting, in each case, of one individual customer premises.

33. An alternative to a *demand-based* market definition is a *supply-based* approach: If the customer is unlikely to relocate in order to gain access to a competitor's offering, then *competitors must bring their offerings to the prospective customers*. A competitor's ability to do so will depend fundamentally upon the *elasticity of supply* that the competing firm confronts. If competitors confront relatively high supply elasticities, they will be able to rapidly respond to market opportunities by extending their service to meet potential customer demand. On the other hand, if such responses are impeded by high up-front investment requirements, protracted construction requirements, physical impediments (e.g., difficulties in obtaining rights-of-way and building access), unavailability of capital, and/or other barriers to entry, then the Commission's conclusion in *Special Access Pricing Flexibility* – i.e., that the threshold triggers established for granting price cap carriers pricing flexibility were "sufficient to ensure that competitors have made sufficient sunk investment within an MSA"[47] – could not be supportable.[48] Yet that is undeniably the situation in the Omaha MSA. Even Qwest, the

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47. *Pricing Flexibility Order*, 14 FCC Rcd 14260, para. 74.

48. *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, Reply Declaration of Lee L. Selwyn on Behalf of AT&T, January 23, 2003, at Tables 1-4; AT&T Corp. v. FCC, US Court of Appeals for the District of Columbia, No. 03-1397, Petition for Writ of Mandamus (D.C. Cir. filed Jan. 23, 2004); AT&T Corp. v. FCC, The FCC recently stated that it will be issuing a special access NPRM, See, US Court of Appeals for the District of Columbia, No. 03-1397, Brief for Federal Communications Commission, July 4, 2004.

dominant incumbent LEC, serves only a small fraction – probably well below 10% – of the total MSA geography.

34. The RBOCs have often advanced a supply-based argument to assess the relevant market and market power, premised upon the notion that a high elasticity of supply will induce entry if prices are increased. It is claimed that this threat of competitive entry will discipline would-be monopolists from raising prices even if no apparent competitive alternatives currently exist. But there is no "threat of entry" if such entry is not realistic. In the *Comsat Reclassification Order*, for example, the Commission concluded that, although certain developing country routes where Comsat is not facing competition "have low barriers to entry[,] insufficient demand may be the reason Comsat is not encountering competition in these markets."[49] The mere presence of one or more CLECs in a small portion of an MSA in no way supports a finding that the CLEC is capable of serving the entire MSA or that such a potential would be sufficient to discipline the incumbent LEC *throughout the MSA*.

35. Access line facilities are not fungible from one location to another: The fact that a CLEC might own facilities supporting a limited array of service offerings and serving a handful of individual buildings on a particular street in a particular zip code does not make such CLEC-owned facilities available ubiquitously throughout the entire Omaha MSA. ILECs clearly possess "the ability to raise and maintain price above the competitive level without driving away

49. *Comsat Reclassification Order*, 13 FCC Rcd 14101, at para. 28.

so many customers as to make the increase unprofitable"[50] precisely because the *supply elasticity* confronting CLECs is extremely low. If CLECs cannot rapidly respond (or in most cases cannot respond at all) to an ILEC price increase by rapidly expanding their own facilities, which is the only condition (short of regulation) that would be capable of constraining an ILEC price increase, Qwest must continue to be classified as a *dominant* incumbent carrier subject to unbundling requirements with respect bottleneck facilities exhibiting low supply elasticity.

Qwest offers no evidence of any consequential competition in what Qwest defines as the relevant product market – services provided within the Omaha MSA under Section 251(c) and selected services provided under Section 271 – nor could it, since competition for these wholesale services does not exist.

36. Qwest's *Petition* asks the 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 ..."[51] Qwest bases its forbearance request upon the contention that Qwest "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 ..."[52] These claims, and the evidence being advanced

50. Landes & Posner, "Market Power in Antitrust Cases," 94 Harv. L Rev. 937 (1981).

51. *Petition*, at 1.

52. *Petition*, at 3.

by Qwest to support them, all refer specifically to competition that is present *solely at the retail level*.

37. Qwest cites three "facilities based" wireline CLECs as providing service in the Omaha MSA, but fails to note that, with limited exceptions, only *one* of these existing rival providers is not itself utterly dependent upon Qwest for the wholesale essential bottleneck services that constitute critical inputs to the local and long distance services being offered. The presence of CLEC switches in the Omaha MSA, far from proving the existence of "facilities based" CLECs, underscores the significant hurdles that CLECs, investing on the promise of fair access to bottleneck facilities, will face without access to Qwest unbundled loops.

38. Although Qwest identifies three competing *retail* wireline service providers – Cox, Alltel, and McLeod USA – in the Omaha MSA, it identifies no other *wholesale* provider beyond Qwest itself. Based upon Qwest's own definition, *none of these three retail providers are currently offering services in the "relevant product market."* Cox is a CATV operator that provides retail local telephone service using its own distribution and switching facilities at discounts where the customer also takes cable TV and/or high-speed Internet from Cox.[53] McLeod USA's services *are entirely dependent upon at least some Qwest resold or unbundled network facilities* – facilities that Qwest is *obligated to provide* precisely because it is subject to Sections 251(c) and 271(c)(2)(B)(i-vi) and (xiv). If Qwest's *Petition* is granted, Qwest will no

53. *Teitzel Affidavit*, at 13. See Appendix A for an analysis of Mr. Teitzel's competitive claims with respect to these companies retail operations.

longer be obligated to provide UNEs or resale services to CLECs such as McLeod USA, a situation that would likely leave McLeod USA no longer able to offer retail local dial tone service to end user customers. Qwest also cites Alltel's CLEC division (Alltel-Midwest) as a retail competitor in the Omaha MSA, and provides an estimated line count of Alltel CLEC lines in Nebraska. The highly limited information presented in the Qwest Petition, however, is not sufficient to determine either the number of Alltel lines in the Omaha MSA, or Alltel's use of its own or UNE facilities for providing these retail lines, or any indication that Alltel is itself offering wholesale facilities-based services. In fact, even if Alltel has overbuilt last-mile facilities to serve *some* of its CLEC customers, Qwest has offered no evidence that would support a conclusion that Alltel's overbuild represents anything more than a minuscule fraction of the geography being served by Qwest or by Cox, or that any of these providers would make their networks available on an unbundled basis to competitors, absent unbundling requirements.

39. As noted above, Qwest has defined the relevant product market for the *Petition* as the *wholesale* service market.[54] In fact, none of the "services provided under Section 251(c) and selected services under Section 271" are retail services. The specific Section 251(c) and Section 271 services to which Qwest refers involve in all cases *wholesale* services that ILECs provide to CLECs for incorporation into those CLECs' *own retail offerings*. None of these offerings are available on a retail basis to end users.[55] The allegedly intense competition to which Qwest

54. *Petition*, at 6, emphasis supplied.

55. See fn. 8, *supra*.

avers *at the retail end of the market* teaches nothing as to the existence of competition for the specific *wholesale* services within the Qwest-defined "relevant product market."

40. Qwest's presentation of figures pertaining exclusively to *retail* competition is hardly surprising, given the complete lack of competition within the relevant, wholesale, market.[56] The demonstrated unwillingness of competing facilities-based retail carriers to make unbundled wholesale access to their networks available to others has been previously recognized by the Commission. In the *TRO*, the Commission observed that:

> ... Providers of viable intermodal alternatives to mass market customers have shown no inclination to provide access to competing carriers to serve their customers, nor would we expect them to.[57]

because

> A provider that has privileged access to a single mass market customer potentially will lose the customer if it provides wholesale access to a potential competitor.[58]

Qwest has nowhere even addressed – let alone refuted – the utter soundness of these prior Commission observations.

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56. See fn. 9, *supra*.

57. *TRO*, 18 FCC Rcd 17164, at para. 310.

58. *Id.*, 18 FCC Rcd 17164, at para. 310, fn. 904.

41. The presence of Cox as a potential mass market facilities-based competitor to Qwest provides no basis for an inference that additional facilities-based entry is likely; indeed, if anything, the inference would be precisely the contrary. As the Commission has noted in the *TRO*:

> ... one of the mass market's major alternative loop technologies, cable telephony, is only available to cable TV companies that, because of their unique economic circumstances of first-mover advantages[905] and scope economies,[906] have access to the customer that other competitive carriers lack. ...
>
> 905. These companies had the advantage of beginning with exclusive franchises and a captive market. These advantages are not available to other entrants.
>
> 906. Scope economies exist when the cost of providing a service is lower when combined with other services. The cost of providing cable telephony to customers is lower for cable TV companies because they also provide video services to those customers.[59]

In the Omaha MSA, Cox confronts an advantageous cost structure, first-mover advantages, and a host of other incumbency benefits that are simply unavailable to non-CATV rivals. At the same time, the presence of Cox in the Omaha market makes further facilities-based entry even less likely than it would be absent an incumbent cable telephony provider.

42. Given these realities of the wholesale market, here is no assurance that any non-cable CLEC lines will persist in the Omaha MSA once Qwest is no longer obligated to provide

59. *TRO*, 18 FCC Rcd 17164, at para. 310, fn. 905, 906.

wholesale services, and as such Qwest's attempt to build a case for UNE forbearance based in part upon the existence of these CLEC retail competitors can be afforded no weight.

Without a competitive wholesale market for last mile facilities, forbearance of Sections 251(c) and 271 will allow Qwest to restrict the availability of essential bottleneck services to CLECs.

43. Economists and antitrust courts have long understood that market power in one industry segment can be extended into an adjacent – and otherwise competitive – segments, thereby reducing competition in the adjacent markets.[60] The 1982 Consent Decree separating the former Bell System's monopoly local exchange carrier operating companies from, and prohibiting them from re-entering, the long distance, manufacturing and enhanced services lines of business was specifically aimed at preventing the Bell monopolies from leveraging their local exchange market power into these adjacent – and potentially competitive – markets.[61] In enacting the 1996 legislation, Congress undertook to create an alternative to the structural remedy that underlay the

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60. See, *e.g.*, *United States of America v. Microsoft Corporation*, Civil Action No. 98-1232 in US District Court for the District of Columbia, Direct Testimony of Franklin M. Fisher, January 5, 1999, at para. 55, noting, "[a monopoly firm] may choose to exercise its power to gain an advantage or even a monopoly in a second market."

61. *U.S. v. Western Electric Co. et al.*, 552 F. Supp. 131 (D. D.C., 1982), Section VII, *aff'd sub nom. Maryland vs. U.S.*, 460 U.S. 1001 (1983). The Consent Degree noted that, "These [line of business] restrictions are justified, according to the Department, because the Operating Companies will have 'both the ability and the incentive' to thwart competition in these market by leveraging their monopoly power in the intraexchange telecommunications market. In the absence of the restrictions, it is reasoned, the Operating Companies will be able (1) to subsidize their prices in competitive markets with supracompetitive profits earned in the monopoly market, and (2) to hinder competitors by restriction their access to the intraexchange network."

MFJ. Rather than simply prohibit the BOCs from offering long distance services on the basis that they monopolized the local services market, the 1996 Act sought to open the local service market to competition: If the BOCs no longer had market power in the local exchange service market, they could no longer leverage that market power to monopolize the adjacent long distance market. The combined effects of the ILECs' legacy incumbent status, geographic ubiquity, and pervasive economies of scale and scope afforded the incumbent local exchange carriers formidable competitive advantages protected by massive economic barriers to competitive entry. Sections 251/252 and 271/272 were intended to isolate the provision of underlying wholesale network services from the end-user retail market by requiring ILECs to afford competing retail service providers unbundled and nondiscriminatory access to their networks, thus enabling entrants to overcome the largest economic barrier – the acquisition and construction of their own duplicative local network infrastructures.

44. Qwest Affiants Drs. Haring, Rohlfs and Shooshan (hereafter HRS) attempt to downplay the importance of the Qwest local bottleneck by portraying access facilities as elastic. HRS cite the depressed state of the telecommunication equipment supply industry,[62] and imply that CLECs can cheaply deploy their own facilities and thus eliminate reliance upon Qwest bottleneck facilities. In so doing, however, HRS obscure the fact that the relevant costs of deploying last-mile facilities are often prohibitive. HRS suggest that CLECs can achieve the "*same degree*" of economies of scale that ILECs enjoy by exploiting "potentially offsetting economies of *scope* that may facilitate competitive entry." HRS claim that last mile facilities are

62. *HRS*, at 9.

1 feasible given that a CLEC could "provid[e] a *variety* of services (*e.g.*, multi-channel video
2 program delivery or electrical power distribution in addition to telephony services – whether
3 POTS or high-speed Internet access) so that more applications can 'ride' on any necessary
4 dedicated or shared facilities including rights of way."[63] Such speculations do not a competitive
5 market make, nor do they assure the availability of wholesale distribution facilities to CLECs
6 whose business models do not happen to comport precisely with HRS's vision.
7
8 45. In order for a CLEC to build a business relying upon such economies of scope, it must
9 first consider its scale and the competition for the additional services that would be provided.
10 Adapting an existing (for example, power or cable) distribution network to accommodate voice
11 telephony is in no sense "free," and the entrant would need to evaluate the investment required in
12 the context of the share of the total market it is likely to capture from the incumbent LEC or
13 incumbent cable provider. For an entrant with no existing distribution facilities, construction of
14 a ubiquitous distribution infrastructure from the ground up would require massive amounts of
15 capital as well as protracted lengths of time. Additionally, the glut of capacity in the telecom
16 equipment market to which HRS refer – or for that matter the glut of long-haul backbone
17 capacity that exists nationwide – is of no consequence to the construction of a *local* distribution
18 infrastructure. A new competitor wishing to offer a variety of products, including telecom-
19 munications services, over its own last-mile facilities would be required to deploy its own local
20 distribution network, in direct competition with the existing networks of Qwest and incumbent

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63. *HRS*, at 9, emphasis in original, footnote omitted. HRS's reference to power lines in this situation is misleading. No Qwest witness has provided any evidence that broadband over power lines is currently provided or, indeed, even contemplated for the Omaha MSA.

cable providers. The Commission must not underestimate the capital investment involved in such an undertaking.

46. The Commission has recently recognized the huge entry barrier posed by forcing CLECs to deploy their own loop facilities:

> The costs of local loops serving the mass market are largely fixed and sunk. By fixed we mean that these costs are largely insensitive to the number of customers being served. Much of the cost applies to whether a carrier serves a single residential customer or ten thousand residential customers: that carrier must secure rights-of-way, dig trenches or place poles, and run wire underground or along poles. Such deployment costs are also sunk. That is, local loop facilities are not fungible because they cannot be used for any purpose if the investment fails. If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both. A carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment. ... Incumbent LECs also enjoy first-mover advantages that work with the steep costs noted above to compound the entry barriers associated with local loop deployment. When the incumbent LECs installed most of their loop plant, they had exclusive franchises and, as such, the record shows that they secured rights-of-way at preferential terms and at minimal costs. By contrast, our record shows that new entrants have no such advantage. Even if a competitive LEC obtains speedy resolution of right-of-way issues, it may still experience delays involved with constructing new loop plant.[64]

64. *TRO*, 18 FCC Rcd 17123-17124, at paras. 237-238.

1 Despite the *retail* mass market environment extant in the Omaha MSA is as competitive as
2 Qwest undertakes to portray it, Qwest has provided no evidence that CLECs have determined
3 they can provide a sufficient volume of narrowband *or broadband* facilities-based services to
4 justify significant sunk facilities investments. The fact that no CLEC has deployed such
5 facilities in the Omaha MSA indicates that CLECs do not anticipate the availability of sufficient
6 revenues to justify the undertaking. The fact that several CLECs have invested in switches to
7 serve their customers in the Omaha MSA demonstrates the willingness of CLECs to commit
8 capital dollars to their business plans, and not simply (as Qwest and other BOCs have often
9 claimed) to get a "free ride" on Qwest's network through their use of UNEs. These investments
10 in switching were, of course, necessarily premised upon the *continued availability* of UNE-
11 Loops at TELRIC-based rates. To the extent that a favorable ruling by the Commission on
12 Qwest's *Petition* would be seen by the investment community as a harbinger of similar actions in
13 other markets, rather than *encouraging* additional CLEC investment, forbearing from requiring
14 Qwest to provide wholesale Section 251/271 services will almost certainly cast a dark shadow
15 over investor interest in further switch purchases; rather than encouraging additional facilities-
16 based competition, forbearance would serve only to *discourage* the efficient facilities-based
17 investment that would otherwise take place.
18
19 47. The expense of deploying a competitive local distribution network was explained
20 recently by SBC affiant Randall C. White in a recent Illinois Commerce Commission case.
21 There, Mr. White confirmed that CLECs' apparent failure to deploy facilities of their own is not
22 *caused* by what SBC sought to portray as "subsidized" UNE prices, but rather is due to the

enormous cost that a CLEC would be forced to incur to deploy its own distribution network, when expressed on a per-customer basis. Mr. White explained that "[o]utside plant represents the largest capital and expense category in SBC Illinois' operating budget."[65] Were a CLEC to engage in its own outside plant facilities construction, that same condition would surely apply to the CLEC as well. Mr. White explained that:

> ... distribution plant is sized to meet the long-term ultimate demand of residence and business customers within a specific geographic area. Unlike feeder cables, distribution cables are not as readily accessible. ... Therefore, distribution facilities in urban/suburban areas are sized to meet the expected long-term ('ultimate') demand for telecommunications facilities in that neighborhood.[66]

While this "meet ultimate demand" engineering requirement means that SBC (and presumably other ILECs) will typically deploy more loops along a given street or in a given subdivision than there are (current) lines in service, an ILEC can nonetheless generally count on providing *at least one line* to the overwhelming majority of the existing and future households along the distribution cable route, either as a retail ILEC service or as a wholesale (resale or UNE) service to a CLEC. At most, a facilities-based entrant can only count on serving a fraction of the total demand, which means that the large and mostly fixed-cost capital investment in distribution infrastructure will necessarily have to be recovered across a smaller customer population than that being served by the ILEC. Even if such a CLEC were twice as efficient as Qwest – i.e., that

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65. *Filing to Increase Unbundled Loop and Nonrecurring Rates*, Before the Illinois Commerce Commission, ICC Docket No. 02-0864, Direct Testimony of Randall S. White on Behalf of SBC Corporation, filed December 23, 2002, at para. 14 ("*White Direct*").

66. *Id.,* at para. 19.

its total infrastructure investment were only half that of Qwest – it would likely confront average *unit* investment cost *per in-service access line* well above the level confronting Qwest simply because the CLEC would necessarily have to spread its fixed costs across a far smaller customer base.

48. For example, Qwest currently serves some BEGIN QWEST PROPRIETARY << >>END QWEST PROPRIETARY retail access lines in the Omaha MSA.[67] According to Qwest, there are currently several (non-cable) CLECs offering service in the Omaha MSA, providing a total of BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY lines using UNE-L, UNE-P and resale.[68] Even assuming that *one* CLEC builds distribution facilities used by it and every other non-facility-bypass CLEC in the MSA, taking into account Mr. White's statement that "[s]izing distribution facilities ... to accommodate long-term [ultimate] demand is a standard practice in the telecommunications industry,"[69] any CLEC undertaking to construct its own distribution facilities would necessarily have to size its cables on the same basis – i.e., to satisfy ultimate demand in the area being served.[70] Assuming that the

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67. *Teitzel Affidavit*, at 3.

68. *Teitzel Affidavit*, at 4.

69. *White Direct*, at para. 22.

70. One might argue that for a CLEC the correct engineering standard is "ultimate *expected* demand" rather than "ultimate [total] demand." Even in that case, however, the CLEC's cost would not be proportionately lower. As SBC's Mr. White expressly notes, "[t]he most costly element in installing outside plant facilities is the labor, not the plant itself, and labor costs increase over time. For example, for any given job, installation labor costs represent more than

(continued...)

1 CLECs' construction costs are in all other respects comparable to those of Qwest,[71] the CLEC
2 serving *all current UNE-based CLEC customers* would incur a capital construction cost per
3 *revenue-producing* loop that is some *eight times* the per-line cost that Qwest would confront for
4 each revenue-producing loop that it deploys, and CLECs serving a smaller number of lines
5 would confront even higher multiples of Qwest's costs were they to undertake facilities
6 construction of their own.
7
8 49. In any event, it is obvious that Qwest's market power with respect to *wholesale* services
9 – the "relevant product market" at issue in this *Petition* – is currently, and shall remain for the
10 foreseeable future, intact and unchallenged. CLECs are not investing in their own subscriber
11 loops because the cost of doing so is prohibitively expensive. Indeed, this evidence provides
12 compelling support of the inescapable *fact* that with limited exceptions of incumbent cable

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70. (...continued)
70% of the total cost." *White Direct*, at para. 39. Since installation labor is not materially impacted by the physical size (capacity) of the cable being installed, a CLEC constructing distribution facilities based upon *its* ultimate expected demand (assuming, say, an ultimate 20% market share) would *at the very most* save 80% of the 30% of *non-labor* costs, i.e., that job would still cost about 76% of what the BOC would spend. However, many of those costs — such as supporting structures, rights-of-way, and construction equipment — are also fixed relative to cable size. Hence, even if the CLEC were to build capacity only to serve its own ultimate expected demand, its total costs would not be materially different from the BOCs' *but its per-loop cost would be many multiples thereof.*

71. The costs of facilities construction confronted by any individual CLEC are likely to be considerably higher for an otherwise comparable project than those that Qwest would incur, due to the CLEC's considerably smaller size and purchasing power. In addition, because any individual CLEC will necessarily confront far greater competitive risk than the market dominating Qwest (or cable company), its risk-adjusted cost of capital will be a good deal higher, assuming of course that the capital is available to the CLEC in the first place.

1 companies or high concentrations of CLEC customers in densely-populated central business
2 districts of major cities, subscriber loops are a "natural monopoly" by any traditional standard.
3
4 **The overwhelming majority of retail-level competition for enterprise services that exists**
5 **within the Omaha MSA is utterly dependent upon last-mile facilities provided by Qwest.**
6
7 50. While seeking to portray the market for mass market retail residential/small business
8 services as being highly competitive, Qwest Affiants are curiously silent as to the overwhelming
9 dominance that Qwest currently enjoys with respect to enterprise customers. Enterprise
10 customers were defined in the *TRO* as those requiring five or more individual voice-grade access
11 lines or their equivalent.[72] In general, for customers with roughly twelve or more voice-grade
12 access lines, CLECs will typically find it more economical to utilize a digital loop facility, such
13 as a DS-1 or DS-3 circuit. Because these facilities typically carry both local (intrastate) and
14 interstate traffic, the Commission's rules require that, where a CLEC requires the use of ILEC
15 facilities to serve the CLEC's end user customers, those facilities be obtained as Special Access
16 lines rather than as UNEs.[73] While CLECs are able to utilize owned facilities to serve a small
17 number of their enterprise customers, in the overwhelming majority of cases the last-mile
18 facilities must be obtained from an ILEC. In the Omaha MSA, Qwest provides the vast majority

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72. *TRO*, 18 FCC Rcd 17294, at para. 497.

73. *Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, FCC 00-183, 15 FCC Rcd 9587, 9598 (2000) .

of Special Access facilities required by CLECs and IXCs in order to provide service to most enterprise customers.

51. The Nebraska PSC reported that AT&T (for example) provided 31,753 business access lines throughout the state as of January 1, 2003. AT&T data, however, indicate that of the BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY business customer locations being served by AT&T in the Qwest-defined Omaha MSA with service at the DS-1 level and above, BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY are currently being provisioned using Special Access facilities obtained from the ILEC. AT&T's overwhelming dependence upon Qwest for last-mile connectivity to enterprise customers in the Omaha MSA is demonstrated by the fact that only BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY AT&T out of the total of BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY enterprise customer locations in the Omaha MSA are being served by AT&T-owned facilities; the remaining BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY are served via Special Access. Limiting the analysis to approximately the portion of the MSA that is served by Qwest in eastern Douglas and Sarpy Counties (Nebraska) and in western Pottawattamie County (Iowa), only BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY AT&T out of the total of BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY enterprise customer locations are being served by AT&T-owned facilities; the remaining BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY are served via Special Access. Even in the portion of the Omaha MSA with the highest concentration –

downtown Omaha itself – the vast majority of enterprise customers must still be served via Special Access. Only BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY AT&T out of the total of BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY enterprise customer locations in downtown Omaha are being served by AT&T-owned facilities; the remaining BEGIN AT&T PROPRIETARY << >> END AT&T PROPRIETARY are served via Special Access.

52. In the *TRO*, the Commission expressly determined that CLECs would be "impaired" without access to unbundled DS-1 and DS-3 loops and transport facilities in those cases where the capacity requirement was too small to make deployment of CLEC-owned facilities economically viable:

> ... When competitive LECs self-deploy fiber they predominantly do so at the OCn-level. ... In contrast, the record contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops. As for DS3 loops, evidence of self-deployment and wholesale availability is somewhat greater than for DS1s and is directly related to location-specific criteria. Indeed, competitive LECs agree that at a three DS3 loop capacity level of demand, it is economically feasible to self-deploy, and record evidence reveals that both AT&T and WorldCom have self-provisioned DS3 circuits to many customer locations.[74]

The Commission went on to identify several *specific barriers* to CLEC facilities deployment, and on that basis found that, at a national level, CLECs would be impaired without access to UNEs for dark fiber, DS-1 loops, and for less than three DS-3 loops provided to the same customer location:

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74. *TRO*, 18 FCC Rcd 17156-17157, at para. 298.

> In conducting our impairment analysis, we give substantial weight to the cost of constructing a loop facility in relation to the ability of the competitive carrier to recover those costs over time, *i.e.*, where the traffic volume and associated revenue potential from the loop facility allow a carrier to earn a return necessary to sustain its operations at that location. We do, however, consider other factors affecting competitive LEC loop deployment, including access to public and private rights-of-way and multiunit premises access, that incumbent LECs have not or do not similarly face as a result of their first-mover advantage. Altogether, these factors directly influence the ability of competitive carriers to raise capital to deploy service to customers using their own loop facilities in a timely manner. ...[75]

These and related findings and conclusions reached by the Commission in the *TRO* specifically recognize the economic distinctions that must be made not only among the different product markets (i.e., mass market vs. enterprise market vs. wholesale market) but also among customers with different capacity requirements and at different locations. With respect to customer location, the Commission specifically found that:

> ... the extent of competitive deployment of high-capacity loop facilities can vary tremendously by geographic area. More specifically, the barriers to entry requesting carriers face are most precisely identified on each geographic route serving a particular customer location. ...[76]

Clearly, Qwest's attempt to lump all of its different services, customer types, and geographic locations into the same "soup" whose only commonality is that it all occurs within the Omaha MSA cannot square with this Commission's detailed analyses and determinations to the contrary.

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75. *TRO*, 18 FCC Rcd 17162, at para. 306.

76. *Id.*

53. Although the obligation to provide Special Access services is not embraced within the requirements of Section 251(c) or Section 271,[77] competitive carriers overwhelmingly must rely on these bottleneck services today and would be even more reliant if Qwest's *Petition* were granted. Prices for Special Access services furnished by Qwest in the Omaha MSA are currently subject to Phase II Pricing Flexibility as set forth in the Commission's *Special Access Pricing Flexibility Order*.[78] and are thus not currently subject to price regulation. However, the *Pricing Flexibility Order* does require that Qwest establish generally available tariffs applicable to all customers for its Special Access services, even though the specific prices themselves are not regulated.

54. In addition to seeking regulatory forbearance from its Section 251(c) and 271 obligations, Qwest is also asking the Commission to "further forbear from regulating Qwest as a dominant carrier and as the incumbent local exchange carrier ('ILEC') in the Omaha MSA."[79] If this request is granted, Qwest's Special Access services in the Omaha MSA would (presumably) no longer be subject to the *Pricing Flexibility Order*, and would thus no longer be covered by the *Order*'s requirement that carriers subject to Phase I or Phase II pricing flexibility still file "generally available tariffs."[80] Qwest would presumably then be free to engage in surgically-

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77. 47 CFR 51.607

78. *Pricing Flexibility Order*, 14 FCC Rcd 14301.

79. *Petition*, at 1.

80. *Pricing Flexibility Order*, 14 FCC Rcd 14300, at para. 151. The Commission noted that (continued...)

1 targeted competitive pricing initiatives, offering lower prices to customers facing actual
2 competitive choices while potentially raising rates above the generally available tariffs for
3 services furnished to the vast majority of Special Access locations where no competitor presently
4 offers service. The existence of Qwest's *de facto* monopoly with respect to most special access
5 services is amply demonstrated by the fact that, according to data that Qwest is required to file
6 with the FCC, its realized rate of return on special access services for 2003 was a jaw-dropping
7 68%.[81] And apparently not satisfied with that 68% rate of return, on August 16, 2004, via
8 Transmittal No. 206, Qwest proposed dramatic rate increases to many of its Interstate Private
9 Line services in Phase II Pricing Flexibility wire centers as defined at Section 23 of Qwest's
10 Tariff F.C.C. No. 1. For the third time in less than two years (and the second time in six
11 months), Qwest has proposed to increase rates for Special Access services in MSAs where it has
12 received Phase II pricing flexibility[82] – which includes the Omaha MSA – this time ranging from
13 9% to 94%. Clearly, if Qwest actually faced any consequential competition for special access

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80. (...continued)
"[u]pon a Phase II showing, we will not grant incumbent LECs all the regulatory relief we afford to non-dominant carriers. Specifically, incumbent LECs in Phase II are still required to file generally available tariffs, while non-dominant LECs and CAPs are permitted, but not required, to file tariffs."

81. Qwest 2003 ARMIS Report 43-01, filed April 1, 2004. The rate of return was computed by dividing the Special Access net return (column S, row 1915 = $705,315,000), by the Special Access Average Net Investment (column S, row 1910 = $1,036,068,000) for all fourteen states in Qwest's ILEC operating territory.

82 Qwest also filed for rate increases for its special access services in MSAs with Phase II pricing flexibility in Transmittal No. 145, effective November 1, 2002, and in Transmittal No. 186, effective February 28, 2004.

services in these "Phase II" MSAs, it could not sustain profit levels of 68% or higher, nor could it unilaterally increase its rates at the magnitudes that it has just proposed.

55. The Commission has recognized that, in the case of "high-capacity" (i.e., DS-1 and higher) loops used to serve enterprise customers, the presence of competitive alternatives to ILEC services is location-specific:

> We find that the extent of competitive deployment of high-capacity loop facilities can vary tremendously by geographic area. More specifically, the barriers to entry requesting carriers face are most precisely identified on each geographic route serving a particular customer location.[83]

Designations and forbearances aside, for enterprise customer *locations* at which Qwest faces no facilities-based CLEC competition, it remains the monopoly provider. If it is permitted to raise (or, more accurately, not prohibited from raising) rates at these locations while reducing them wherever a competitor is present, the economic effect is to use monopoly profits to cross-subsidize competitive services.

Voluntary contractual arrangements are not sufficient safeguards to ensure CLEC access to bottleneck facilities.

56. In an attempt to assuage concerns regarding CLEC access to and investment in bottleneck facilities, HRS speculate that even without the specific obligation to do so, Qwest would likely continue to make its network available on an unbundled basis:

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83. *TRO*, 18 FCC Rcd 17162, at para. 307.

> ... it is important to note ... that *voluntary contractual* sharing of network facilities is an entirely feasible alternative, implying ample opportunities to share in economies from resource-sharing. Indeed, there are, as we shall presently describe, powerful economic and strategic incentives pushing toward effective exploitation of opportunities for realizing cost economies through network-resource sharing. The great debates about the economically appropriate extent of network element unbundling and whether a second "resale window" is appropriate are primarily debates about appropriate contractual terms and conditions and appropriate means for determining them. These debates and the commentary associated with commercial bargaining negotiations (especially that disclosed/advertised in public) should not be allowed to obscure the fundamental economic realities working in favor of "deals" being struck—in particular, the economic cost savings that potentially inhere [sic] is network sharing arrangements.[84]

Importantly, and notwithstanding HRS's musings, nowhere in its *Petition* does Qwest itself actually *commit to*, or even suggest that it might consider, entering into such "deals" to provide CLECs with unbundled access to its network on terms and conditions that would enable a competitor to cannibalize Qwest's own retail customer base. In fact, there is compelling basis to expect that it would not.[85] If there were any validity to HRS's theory, then Cox and other CATV companies would *already* be offering CLECs unbundled access to their distribution networks.

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84. *HRS*, at 10.

85. Qwest has recently entered into a "commercial agreement" with MCI under which MCI would be provided with the technical equivalent of UNE-Ps but not at TELRIC-based prices throughout Qwest's 14-state footprint. While this "commercial agreement" may be thought of as "voluntary" on Qwest's part, it has been entered into at a time when Qwest is still being regulated as a dominant incumbent LEC fully subject to the unbundling, interconnection and collocation requirements of Sections 251(c) and 271. There is no basis upon which to infer that, by virtue of its "willingness" to enter into such an agreement under prevailing regulatory conditions, Qwest would continue to "voluntarily" enter into "commercial agreements" with CLECs under the forbearance scenario contemplated in its *Petition*.

1 Not only are they not doing this, Cox and other cable companies have actively and aggressively
2 *resisted* efforts aimed at imposing similar unbundling requirements on their networks.[86]
3 Ironically, while Qwest and its Affiants premise their claims as to the presence of retail
4 competition in part upon the existence of CLECs pursuing business models that are *based upon*
5 *the continued availability of UNEs*, if Qwest's *Petition* is granted that competition can no longer
6 be relied upon as providing any ongoing challenge to Qwest's then-expanding market power at
7 the retail level.
8
9 57. As Qwest has correctly observed, "Section 10(b) requires that the Commission shall
10 consider whether forbearance will promote competitive market conditions, including the extent
11 to which forbearance will enhance competition."[87] If, as a result of a Commission decision to
12 forbear from requiring Qwest to offer Section 251(c) and 271 wholesale services, such services
13 were no longer available to CLECs in the Omaha MSA, such forbearance will decidedly *not*
14 "promote competitive market conditions" and will certainly operate to diminish competition for
15 retail telecommunications services.
16

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86. See, e.g. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185, Comments of Cablevision Systems Corporation and Comments of Cox Communications, Inc., filed December 1, 2000.

87. *Petition*, at 2.

The "intermodal" retail-level competitors identified by Qwest do not present sufficient alternatives to Qwest wholesale services to alone fulfill the goals of the 1996 Act.

58. While Qwest correctly identifies the relevant product market as the market for wholesale services similar to UNEs and resale, the evidence of competition presented by Qwest witnesses is entirely unrelated to this product market. Qwest presents evidence pertaining solely to *retail* competition in the Omaha MSA or marginal substitutes to wireline competition. With respect to this *retail* competition, Qwest's claims are grossly exaggerated, because Qwest seeks to include intermodal alternatives to traditional wireline telephone service that customers do not currently view as substitutes. Wireless is not considered a substitute for basic wireline access by the vast majority of consumers and by virtually every business that operates out of a fixed location. VoIP – a service that is currently being used by well below one percent of all consumers nationwide *and* which requires a broadband connection at the customer's premises – has not yet demonstrated general consumer acceptance as a substitute for the *primary* residential access line. However, even if Qwest's contentions as to the substitutability of such services for primary residential wireline access were valid – which is decidedly not the case – the presence of such intermodal alternatives *at the retail level* does not evidence competition specifically within *the relevant product market*.

Qwest has failed to present evidence that a significant number of Omaha consumers are substituting wireless services for wireline telephone service.

59. Although various Qwest witnesses speculate and cite "studies" of wireless substitution, Qwest fails to present any kind of cross-elasticity study indicating, on a market-wide basis, the

extent of consumer willingness to entirely discontinue their primary wireline local telephone service in favor of wireless service. Qwest's Mr. Teitzel cites a market research report based upon a survey of certain consumers by the market research firm Advantis as indicating that:

> 6.4% of the respondents reported a willingness to completely substitute wireless for wireline service without number portability. When the respondent was informed of the availability of wireless number portability, the percentage of respondents willing to 'cut the cord' increased to 11.5%.[88]

Significantly, Mr. Teitzel neglects to mention that according to a press release describing this study, Advantis also found that:

> ... the majority of households remain unwilling to even consider displacing their wireline service, despite widespread awareness of LNP. They cite numerous reasons for keeping their regular phone service, such as concerns about call quality and reliability, and a reliance on wirelines for dial-up Internet and other services. Age, income, and prior wireless experience are also factors – older households with no wireless phone service are the least likely to consider giving up their wirelines.[89]

Mr. Teitzel apparently made no attempt to apply Advantis' nationwide findings to conditions in the Omaha MSA, specifically if the Omaha MSA has higher than average call quality or

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88. *Teitzel Affidavit*, at 24.

89. *New Wireline Number Portability Rules Will Double The Number Of Households Dropping Traditional Phone Service for Wireless*, available at: http://www.numberportability.com/pages.php?id=5&articleID=30 (accessed August 20, 2004.) The Adventis study itself appears to only be available through an extensive "subscription" requirement, as such, AT&T has been unable to review the entire study.

1 reliability, or age, income or prior wireless experience that would make the Advantis finding
2 specifically applicable Omaha customers.
3
4 60. Importantly, however, the Advantis figures would seem to be in direct conflict with any
5 reasonable estimate of actual substitution in Nebraska, as well as with FCC statistics regarding
6 wireless substitution nationwide. For Nebraska specifically, it is highly unlikely that the substi-
7 tution rate is significantly higher than the national rate. According to research performed by
8 TNS Telecoms, nationwide wireless penetration is 58%.[90] As of 2003, there were 677,000
9 households in Nebraska,[91] 650,000 of which had some form of telephone service.[92] Applying the
10 58% wireless penetration rate to the total number of households in Nebraska suggests that
11 393,000 households in Nebraska have wireless service. According to the Nebraska Public
12 Service Commission, there are 685,000 residential access lines in Nebraska,[93] 615,000 of which
13 are primary lines.[94] Attributing these 615,000 primary lines to the 650,000 households in

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90. Press Release, "Despite Overall Economic Conditions Americans Increased Telecom Service Expenditures," TNS, May 6, 2002.

91. The U.S. Census Bureau, United States Department of Commerce, 2002 American Community Survey. Available at http://factfinder.census.gov/ (accessed July 22, 2004).

92. Industry Analysis and Technology Division, Federal Communications Commission, *Telephone Subscribership Report (Data through November 2003)*, May 2004, at Table 2.

93. Nebraska Public Service Commission, *2003 Annual Report on Telecommunications*, September 30, 2003.

94. Federal Communications Commission, ARMIS Report 43-08, Operating Data Report: Table III, YE 2003. Available at http://www.fcc.gov/wcb/eafs/ (Accessed July 27, 2004). Dividing the sum of lifelines and primary lines by the sum of lifelines, primary lines, and

(continued...)

1 Nebraska with telephone service yields a 94.6% wireline penetration rate for households with
2 telephone service. Even assuming that all of the 35,000 remaining households with telephone
3 service have substituted wireless for wireline service, the vast majority of households – 350,000
4 – view the two services as complementary, and subscribe to both services. As an extremely
5 conservative estimate, at the very most, only 5.4% of Nebraska households have substituted
6 wireless for wireline service. The Commission has repeatedly noted the scarcity of information
7 on wireless/wireline substitution. As a benchmark, the FCC in its annual telephone
8 subscribership report noted that between 4.9% and 6.0% of households have substituted wireless
9 service for wireline.[95] The Commission's CMRS report notes that wireless substitution is
10 estimated at between 3-5% nationwide.[96]
11
12 61. Qwest's *Petition* cites "a recent survey that Qwest performed of Cricket wireless users
13 in adjacent [sic] states"[97]which, according to Qwest, found (in part) that:
14

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94. (...continued)
secondary lines for Qwest yields the percentage of lines that are considered primary lines. This is then applied to all lines in Nebraska to estimate the number of primary lines statewide.

95. Industry Analysis and Technology Division, Federal Communications Commission, *Telephone Subscribership Report (Data through March 2004)*, August 2004, at fn. 2.

96. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 02-379, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services: Eighth Report*, Released July 14, 2003, at fn. 349, citing previous report at fn. 208.

97. The Qwest Petition cites a survey apparently conducted in Iowa and Utah. *Petition*, at 11.

- 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.

62. The fact that Cricket customers may not be representative of most wireless customers is indicated by the surprising statistic that only 70% of personal and 45% of business users would install traditional landline phones without wireless availability. Given the telephone penetration rates in this country, one would expect those numbers to be closer to 99%.

63. In addition, as with the Advantis study, Qwest makes no attempt to compare the Omaha MSA with Iowa or Utah to consider possible differences between wireless substitution in each state, or the to compare customers of Cricket to customers of other wireless providers. Cricket itself, to the extent that it offers service more comparable to wireline service than other wireless carriers, offers service in only part of the Omaha MSA, and is itself currently operating under chapter 11 bankruptcy protection.

Wireless service is not a substitute for wireline service for the overwhelming majority of consumers.

64. In addressing the question of wireline/wireless substitution, it is useful to think of these services as each satisfying two distinctly different functions – (1) the ability to *originate* outbound calls, and (2) the ability to *receive* incoming calls.

65. With respect to both inbound and outbound calling, because wireless phones are typically used by specific individuals, while wireline phones (and local and long distance wireline bundles) typically serve an entire "household" rather than a single individual user, there must be one wireless phone per person in multi-person households in order to replace wireline service. Otherwise a household member is stranded when the possessor of the phone takes the phone with him or her in order to obtain the benefits of mobility, which is the primary benefit of the wireless phone.

66. Thus, to compare (roughly) equivalent wireless and wireline packages, one would need to compare the total price of a wireline bundle with the total price of a "family" multi-phone wireless package. So-called "family" wireless packages provide multiple phones, each with its own phone number, and a "pool" of daytime minutes that are "shared" among all of the phones in the group. Unlike "all distance" wireline bundles that offer *unlimited* local and long distance calling 24/7, most "family" wireless plans provide a finite allowance of daytime minutes that can be used for local or long distance. Calls placed in excess of the monthly allowance are charged on a per-minute basis; in this example, the charge for each additional daytime minute is 45 cents.

Typically, the "marginal" additional airtime charge is many multiples of the wireline long distance per-minute rate of 5 to 10 cents (in measured-use calling plans) and similarly well in excess of the *effective* per-minute price under unlimited "all distance" plans.

Outbound calling. The principal considerations relating to outbound calling are price and quality. In addition to the need to have one cellphone per family member in order not to leave the others stranded, there is a need in multi-room and multi-floor dwellings to have several extension phones on a single wireline service, and/or the ability to have several family members participate on the same call (via extension phones) increases the utility of wireline service vis-à-vis wireless. Except for the "unlimited night/weekend calling" that applies in some wireless pricing plans, all usage is either counted within the monthly calling allowance or is subject to a per-minute charge. Thus, even toll-free 800-type calls would be "chargeable" in typical wireless pricing plans.

Inbound calling. The ability to have multiple extensions on a single wireline service may be far more important for inbound calls than for outbound calls. Census Bureau data indicate that 68% of all US residences involve multiple floors. If the single wireless phone is not convenient to the user at the time than an inbound call arrives, the ringing signal may not be heard, and the call may not be answered in time even if it is heard. Customers who select premium-priced "all distance" bundles exhibit a particularly high level of concern about incoming calls, since BOC "all distance" bundles typically include call waiting, caller ID, call waiting with caller ID, voice mail, call return ("*69") and call forwarding, *features that relate solely to inbound calling*.

While these features are also offered in most wireless service plans, their utility is limited to the specific user of the wireless phone, rather than the entire household. Additionally, most wireless pricing plans in the US charge for incoming calls (either as part of the monthly calling allowance or on a per-minute basis if the allowance is exceeded), which confronts the user with a usage-sensitive price for most incoming calls. Wireline services generally do not charge the customer for incoming calls.

67. Wireless service is not a close substitute for wireline service in multi-person households. Forty one percent of American households contain three or more persons. If a "family" wireless plan (involving multiple phones each with its own phone number) were to be substituted for wireline service, the household would then have no single phone number – *i.e.*, no single point of contact. If the household subscribed to only a single wireless phone, there would be times when the phone is not at the residence at all, impairing the ability of other household members to place or to receive phone calls.

68. Yet-to-be-resolved technical issues also limit a household's ability to substitute wireless for wireline. Cellular phones are powered by rechargeable batteries, many of which have a maximum talk time of only an hour or two, as well as a standby battery life that degenerates significantly over time. Additionally, the reliability of cell phone E911 technology, which depends, in part, upon Global Positioning System ("GPS") satellites that may not even be able to "see" GPS satellites when used indoors, which is exactly where they would be used if substituted

for a consumer's primary wireline service, is yet to be demonstrated, and in any event does not exist at the present time.

69. For all of these reasons, wireless bundles are a poor substitute for wireline as a means for satisfying a household's telephone service needs. Households are therefore likely to retain wireline local service for incoming and local calling purposes, even if they choose to make some long distance calls on their wireless phones.[98] And if the "shared" monthly usage allowance for the "family" wireless plan has been exceeded, additional airtime charges will apply, thereby making the wireless long distance call more expensive than the corresponding call if placed from the customer's wireline phone.

70. While there has been much coverage in popular media regarding customers who discontinue their wireline service altogether and substitute wireless, in reality this represents an extremely small percentage of households and is in no sense a mainstream phenomenon. Customers who are most likely to purchase *wireline* "all distance" plans are probably the *least likely* to substitute wireless services for their wireline bundle. Moreover, to the extent that such customers would ordinarily purchase the various calling features that are typically included in

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98. This conclusion is supported by the Census Bureau's September 2001 Computer and Internet Use survey (containing questions regarding wireline phone service). The data indicated that only .11% of survey respondents reported replacing home phone lines with wireless phones. Bureau of Labor Statistics, United States Department of Labor; Bureau of the Census, United States Department of Commerce, Current Population Survey, Computer and Internet Use Supplement, September 2001. Available at http://www.bls.census.gov/cps/ (accessed August 20, 2004).

the wireline bundles, the *incremental price* of unlimited long distance calling is relatively low. Consequently, there is no basis to assume that there is any consequential elasticity of substitution between wireline bundles and wireless services. BOCs can thus increase the overall price of the "all distance" bundles by increasing the price of the calling feature elements, while holding the unlimited long distance price differential constant. Wireless services will not work to constrain the BOCs' prices for "all distance" bundles.

71. The availability of wireline-to-wireless number portability might conceivably make it somewhat easier for a customer to discontinue wireline service and utilize wireless as the primary telephone. However, for the reasons discussed above, there are numerous reasons why wireless is not a satisfactory substitute for wireline service, and the availability of LNP would not materially change that situation. For example, in a multi-person household that has several wireless phones, to which of those wireless phones would the wireline number be ported? Obviously, if calls to that number were directed to any member of the household, porting the wireline number to one of the household's wireless phones would not be satisfactory.

72. That LNP is not likely to significantly increase substitutability can be inferred from the behavior of those persons who have no vested interest in their wireline number. Roughly 17% of US households move each year, typically requiring a new telephone number. LNP would not be an issue if, at the time of the move, the customer were simply not to order wireline service and utilize only his/her wireless phone. Nevertheless, the vast majority of customers in such instances do install a wireline phone in addition to their wireless service.

VoIP competition cited by Qwest is not a sufficient substitute to Qwest services to justify nondominant regulation of the Qwest network.

73. VoIP services, cited by Qwest Affiants as "quickly evolving," is not yet an acceptable substitute for traditional circuit-switched wireline telephone service. Verizon, in announcing its own VoIP service, noted that:

> Ingalls said Verizon is not worried about VoIP service cannibalizing traditional wireline offerings, but instead sees the technology as an alternative for users such as college students, as well as a "win-back" for customers who have switched carriers.[99]

Verizon noted several distinct limitations of VoIP:

> [Verizon's Mr.] Ingalls also stopped short of guaranteeing Bell System-level service for VoiceWing, which does not support calls to 911 and which stops working if subscribers have a power outage at their home. "There is no VOIP system out there that's going to offer the same quality and reliability of the traditional network," Ingalls said...[100]

Even where some VoIP services include some form of E911 access, the functionality provided is not comparable to wireline or even wireless E911. VoIP customers dialing '911' are connected to the 911 call center through different routing that provides far less reliable emergency service,

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99. Teal, Kelly M., "Verizon Enters VoIP Market," Xchange, July 22, 2004, available at: http://www.x-changemag.com/hotnews/47h22124954.html, accessed August 17, 2004.

100. Howe, Peter J., "Verizon rolls out Net-based phone service," *Boston Globe*, July 23, 2004, Available at: http://www.boston.com/business/articles/2004/07/23/verizon_rolls_out_net_based_phone_service/ (accessed August 17, 2004).

and imposes the responsibility entirely on the VoIP customer for assuring that the correct PSAP has been associated with the customer's VoIP service. Given the importance that this Commission has placed upon E911 access for wireline and wireless services, the inability of VoIP to provide VoIP E911 at a level of service quality comparable to that available through conventional wireline telephony limits the substitutability of VoIP as a competitive alternative for primary residential telephone service. [101]

74. VoIP may well be a substitute for additional residential and small business mass market access lines but, given its various technical and other limitations, its acceptance as an out-and-out substitute for primary access line service is yet to be demonstrated.

75. In any event, VoIP requires a high speed internet connection, currently generally available to residential customers via DSL or cable modem. The only customers with the ability to employ VoIP at an incremental price that is comparable to that for similar wireline services are those *already* purchasing high speed internet access, currently estimated at approximately 22% of households nationwide.[102] In addition, since both DSL and cable modem service require access to bottleneck end user facilities, VoIP is ultimately subject to the same bottleneck

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101. There is also growing concern that VoIP service – at least as it presently exists – may be far less secure than traditional wireline circuit-switched services. Ken Belson, "Hackers Are Discovering a New Frontier: Internet Telephone Service," *The New York Times*, August 2, 2004.

102. *IP-Enabled Services*, WC Docket No. 04-36, Report on Competition in the Provision of Voice Over IP and Other IP-Enabled Services by Peter W. Huber and Evan T. Leo, Prepared for and Submitted by BellSouth, Qwest, SBC and Verizon, May 28, 2004, at 11.

restrictions as traditional wireline telephone services. It is estimated that as of the end of the year there will be between 0.4-million and 1-million VoIP users nationwide.[103] Extrapolating from that universe to the Omaha MSA, which represents roughly 0.5% of the total US population, suggests that the total number of mass market VoIP customers in the Omaha area is in the range of 2,000-5,000. And it is likely that far fewer than all of these have adopted VoIP as an outright substitute for wireline circuit-switched dial tone service. The idea that this provides a basis for forbearing from regulating Qwest as the dominant ILEC, or for relieving Qwest of its Section 251/271 duties, is so absurd as to be almost laughable, if the consequences of such an outcome were not so serious.

Without the requirement that Qwest provide Section 251(c) and 271 unbundled access to its network, the telecommunications market in Omaha will, at best, devolve into a duopoly affording both incumbents with the ability and opportunity to exert market power.

76. As discussed above, Qwest and Cox maintain the only relatively ubiquitous last-mile access networks available to the vast majority of mass market residential and small business customers in the Omaha MSA, and there is no indication that either Cox or Qwest will allow unbundled access to their last mile networks without being required to do so by Section 251(c) and 271 or by any unbundling requirements that may become applicable to cable.[104] In addition, as explained above, competitor costs for deploying their own last mile facilities are generally prohibitive. Lastly, as also explained above, wireless and VOIP services do not provide

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103. *Id.*, at Table 2.

104. *See* fn. 86, *supra*.

substitutes for local wireline telephone services for most consumers. As a result, were the Commission to grant Qwest's petition for forbearance, it could expect few if any significant local service providers to emerge in the *retail market* without access to the Cox or Qwest bottlenecks. The ultimate result would be a cable/ILEC duopoly in the retail market. Duopoly markets, where two large firms carve up all of the demand, tend to behave like monopolies, not like competitive markets.

77. As opposed to the case of a perfectly competitive market, in a duopoly each seller is "sufficiently large in relation to the market so that his actions will have noticeable effects upon his rivals." In the case of a duopoly, a change in output by one seller will have an effect upon the price both sellers receive for the good. Profit maximization on the part of an individual firm is not possible, because that firm must take into account the reaction of the (one) competitor to any price or output change.

78. This Commission has previously determined that a cable/ILEC duopoly was not sufficient to realize the intention of the *Act*. As the Commission noted:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers. A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are "impaired" under section 251(d)(2), would be inconsistent with the Act's goal

> of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.[105]

79. "Stagnant duopolies" are a result of the strong incentive of firms in a duopoly to engage in some form of collusive conduct, even if only implicit (rather than explicit) in nature. Although direct, explicit collusion is illegal under existing antitrust laws, price leadership by one firm – particularly where the two firms are dissimilar in size – is a common form of implicit collusion in a market characterized by duopoly that skirts legal requirements. Where price leadership is present, one firm takes the role of leader and one (or more in the case of an oligopoly) becomes the "price-taker." The leader will set the price based upon whether the second firm is expected to match price and restrain production (such that market shares will stay the same) or instead, produce more at the higher price. If, as here, the price leader is a dominant firm, it will set a price that maximizes its profits and other firms will follow by producing what they want at the given price. In the end, if demand is relatively inelastic and there is little threat of entry (or successful entry) by competitors, the existing firms in the market can earn monopoly profits if prices are set "cooperatively."

105. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 15 FCC Rcd 3696 (1999), 3726, at para. 55.

80. Many empirical studies seeking to understand duopoly behavior recognize the general tendency towards some amount of collusive conduct:

> If all firms in an industry [or market] act in concert to determine pricing policies, they can maximize their combined profits. Traditional oligopoly theory argues that oligopolists generally appreciate this fact and therefor they desire to collude to maximize their joint long-run profits.[106]

The structural characteristics of a given market affect the likelihood of collusive behavior. Fraas and Greer (1977) conclude that the existence of few firms in the market makes it easier to coordinate all parties, and thus lead to a more stable collusive arrangement.[107] Brander and Spencer (1985) similarly conclude that, to keep numbers small, duoplies have an incentive to engage in short-term pricing policies designed to exclude new firms from the market.[108] Given initial entry barriers, Brander and Spenser demonstrate a clear relationship between entry and collusion.[109]

81. The early history of the wireless industry in the United States provides examples of market stagnation in a duopoly with high barriers to entry. The FCC initially divided the 800 MHz cellular band into two segments, earmarking one for so-called "non-wireline" applicants

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106. Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, The Journal of Industrial Economics, Vol. 26, No. 1, September 1977, at 21

107. *Id*., at 42.

108. James A. Brander & Barbara J. Spencer, *Tacit Collusion, Free Entry, and Welfare*, The Journal of Industrial Economics, Vol. 33, No. 3, March 1985, at 277.

109. *Id*., at 292.

and the other for wireline local telephone companies whose geographic footprint overlapped with the designated cellular geographic service area ("CGSA"). The specific rationale offered by the Commission for dividing up the cellular spectrum into two equal-size bands was to foster competition.[110] But after nearly a decade of operation as a duopoly, the 800 MHz licensees rarely competed with respect to price, and maintained through the mid-1990s essentially the same price points for home and roaming services that had been initially established when the CMRS carriers first went "on the air" around 1983-84. Ultimately, the Commission concluded that a market limited to two incumbent carriers was simply not sufficient to become competitive,[111] and on that basis divided up the newly created 1.9 GHz "PCS" band into six segments specifically to attract as many separate viable entrants as possible.[112]

82. Sections 251(c) and 271 make it possible for multiple firms to compete aggressively at the retail level of the local wireline service market even if the underlying wholesale services are controlled by only one or, where cable is present, two incumbents. The purpose and effect of

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110. *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, CC Docket No. 79-318, *Report and Order*, FCC 81-161, May 4, 1981, 86 F.C.C.2d 469.

111. *Interconnection And Resale Obligations Pertaining To Commercial Mobile Radio Services*, 17 Communications Reg. (P&F) 518, para 69 (1999), noting that "competition continues to be a 'work in progress,' as the marketplace evolves from the tight duopoly that prevailed only a few years ago to a state of full competition, which we anticipate will prevail in a few years."

112. *PCS Order,* 9 FCC Rcd 4978, at para. 52. The FCC initiated PCS license auctions on December 5, 1994. *See* Broadband PCS Fact Sheet, available at http://wireless.fcc.gov/pcs/bbfctsh.html (accessed April 19, 2002).

Sections 251/252 and 271/272 is specifically to limit the ability of facilities-based monopolies to leverage their market power into the adjacent and potentially competitive retail segment. Granting Qwest's *Petition* would fundamentally undermine that goal, and would afford Qwest the ability to monopolize the retail market is precisely the manner that the 1996 Act sought to preclude.

If granted forbearance, Qwest would be able to increase competitor costs for interconnection.

83. If Qwest's *Petition for Forbearance* is granted, Qwest would acquire the ability to increase its competitors' costs of interconnection with Qwest's network. Section 251(c)(2) requires that ILECs interconnect with CLECs at any technically feasible point on the ILEC's network.[113] The Commission has interpreted this provision as permitting the CLEC to specify the location of such Points of Interconnection ("POIs") in each ILEC LATA,[114] which locations would typically be selected by the CLEC so as to minimize its costs. Generally, such Points of Interconnections ("POIs") are selected by the CLEC and are usually at or near the point of maximum concentration of the CLEC's own network, such as the location of its switch in a given LATA. As a non-incumbent, non-dominant LEC, Qwest would have no such obligation, and would thus be free to require CLECs to interconnect at, for example, remote locations involving substantial amounts of CLEC backhauling and transport costs. Coupled with the elimination of Qwest's duty to provide for CLEC collocation in its wire centers, Qwest would be

113. 47 U.S.C. § 251(c)(2)(B)

114. *Local Competition Order*, 11 FCC Rcd 15608, at para. 209; 47 CFR § 51.321.

in a position to impose potentially large increases in CLEC operating costs, further undermining what little facilities-based competition may actually survive in a post-forbearance environment.

Affording Qwest non-dominant, non-incumbent status in the Omaha MSA could result in higher switched access charges, Subscriber Line Charges, PICCs, and increase high-cost support flowing to Qwest in other parts of Nebraska.

84. There are other potentially adverse implications of the forbearance that Qwest is seeking with respect to its dominant and incumbent carrier status. Only ILECs are subject to Part 32 accounting rules, ARMIS reporting requirements, and to the Part 36 jurisdictional separations requirements that such reporting supports; if Qwest is no longer regulated as an ILEC in the Omaha MSA, it arguably would no longer be required to provide ARMIS reports that include data pertaining to the Omaha MSA. If so, Qwest, among other things, would then need to *allocate* costs (and revenues) between its ILEC operations outside of the Omaha MSA and its non-ILEC operations in the Omaha MSA. To the best of my knowledge, there is at present no specific methodology or process governing such allocations and, at the very least, the requirement would impose additional regulatory burdens on the Commission – and possibly on the Nebraska PSC and Iowa Utilities Board as well. Part 64 Cost Allocation rules and the ILEC Cost Allocation Manuals ("CAMs") filed in compliance therewith, contemplate separation between regulated and non-regulated services within the same geographic area.

85. Omaha is the principal metropolitan center in Nebraska, and as such the four Nebraska counties that comprise the Nebraska portion of the Omaha MSA (as Qwest has defined it) likely

exhibit lower average costs than the overall Qwest Nebraska statewide average – and possibly the lowest average costs of any of Qwest's Nebraska service areas. Removal of these four counties from the statewide reporting could thus result in an *increase* in the residual average cost of providing local service in the remaining portions of Qwest's Nebraska service area. The higher average cost could, in turn, potentially work to trigger an increase in Qwest's interstate Subscriber Line Charge ("SLC") and/or its Presubscribed Interexchange Carrier Charge ("PICC") applicable to its non-Omaha MSA Nebraska exchanges.[115] At the same time, as a non-ILEC in the Omaha MSA, Qwest would not be subject to any specific SLC or PICC cap, and could increase those rates (or by whatever name it would then elect to call them) as it sees fit.

86. Qwest arguably may also be able to use its non-ILEC status to effect a potentially significant increase in interstate switched access charges applicable to calls originated and/or terminated within the Omaha MSA. The Commission's 2001 *CLEC Access Charge Order*[116] established limits on the level of interstate switched access charges that CLECs may impose. However, those limits are denominated specifically *with respect to the incumbent LEC's access*

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115. Similarly, it is possible that the removal of the relatively low unit costs associated with Qwest's urban and suburban Omaha MSA lines would increase the average per-line cost for the balance of Qwest's Nebraska operating areas for USF purposes. If that operates to push the (non-Omaha MSA) average Qwest residual Nebraska study area costs above the applicable high-cost support threshold, the result could be an additional windfall for Qwest, in the form of increased draw from the national high-cost funding mechanism.

116. *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146, 16 FCC Rcd 9923 (2001).

charge rate levels within the same geographic footprint.[117] Currently, CLECs are required to set their own access charges no higher than those being charged by the ILEC. If Qwest, through Commission forbearance, is no longer regulated as an ILEC in the Omaha MSA, then *there will no longer be an ILEC in the Omaha MSA*. Without an ILEC benchmark rate, Qwest could arguably increase Omaha MSA switched access charges at will.

Conclusion

87. Qwest has failed to demonstrate the presence of any measurable competition for wholesale Section 251(c)/271 services in the Omaha MSA – the precise services for which it is seeking regulatory forbearance. And although Qwest's various allusions to *retail* competition are off-point with respect to the specifics of its *Petition*, much of that retail competition is itself utterly dependent upon the very wholesale services for which Qwest seeks forbearance. A grant of Qwest's *Petition* would eliminate its legal obligations to furnish wholesale services to competing LECs, the then-unavailability of which could force those CLECs to exit the Omaha MSA market altogether. Moreover, although Qwest's request is made with respect to the entirety of the Omaha MSA, it has offered no evidence that the competition to which it refers is even present throughout the entire MSA which, of course, it is not. Forbearing from regulation of Qwest as a dominant incumbent LEC would permit Qwest to operate in the Omaha as an *unregulated* dominant incumbent LEC, one with even greater market power than it possesses at the present time. That outcome, together with the reduced competition and potentially large

117. *Id.*, 16 FCC Rcd 9941, at para. 45.

1 increases in prices that would ensue, is clearly not in the public interest, and for this and the
2 various other reasons discussed herein, Qwest's *Petition* should be denied in all respects.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Lee L. Selwyn

Statement of Qualifications

LEE L. SELWYN

Dr. Lee L. Selwyn has been actively involved in the telecommunications field for more than twenty-five years, and is an internationally recognized authority on telecommunications regulation, economics and public policy. Dr. Selwyn founded the firm of Economics and Technology, Inc. in 1972, and has served as its President since that date. He received his Ph.D. degree from the Alfred P. Sloan School of Management at the Massachusetts Institute of Technology. He also holds a Master of Science degree in Industrial Management from MIT and a Bachelor of Arts degree with honors in Economics from Queens College of the City University of New York.

Dr. Selwyn has testified as an expert on rate design, service cost analysis, form of regulation, and other telecommunications policy issues in telecommunications regulatory proceedings before some forty state commissions, the Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission, among others. He has appeared as a witness on behalf of commercial organizations, non-profit institutions, as well as local, state and federal government authorities responsible for telecommunications regulation and consumer advocacy.

He has served or is now serving as a consultant to numerous state utilities commissions including those in Arizona, Minnesota, Kansas, Kentucky, the District of Columbia, Connecticut, California, Delaware, Maine, Massachusetts, New Hampshire, Vermont, New Mexico, Wisconsin and Washington State, the Office of Telecommunications Policy (Executive Office of the President), the National Telecommunications and Information Administration, the Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission, the United Kingdom Office of Telecommunications, and the Secretaria de Comunicaciones y Transportes of the Republic of Mexico. He has also served as an advisor on telecommunications regulatory matters to the International Communications Association and the Ad Hoc Telecommunications Users Committee, as well as to a number of major corporate telecommunications users, information services providers, paging and cellular carriers, and specialized access services carriers.

Dr. Selwyn has presented testimony as an invited witness before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance and before the U.S. Senate Judiciary Committee, on subjects dealing with restructuring and deregulation of portions of the telecommunications industry.

In 1970, he was awarded a Post-Doctoral Research Grant in Public Utility Economics under a program sponsored by the American Telephone and Telegraph Company, to conduct research on the economic effects of telephone rate structures upon the computer time sharing industry. This work was conducted at Harvard University's Program on Technology and Society, where he was appointed as a Research Associate. Dr. Selwyn was also a member of the faculty at the College of Business Administration at Boston University from 1968 until 1973, where he taught courses in economics, finance and management information systems.

Dr. Selwyn has published numerous papers and articles in professional and trade journals on the subject of telecommunications service regulation, cost methodology, rate design and pricing policy. These have included:

"Taxes, Corporate Financial Policy and Return to Investors"
National Tax Journal, Vol. XX, No.4, December 1967.

"Pricing Telephone Terminal Equipment Under Competition"
Public Utilities Fortnightly, December 8, 1977.

"Deregulation, Competition, and Regulatory Responsibility in the Telecommunications Industry"
Presented at the 1979 Rate Symposium on Problems of Regulated Industries - Sponsored by: The American University, Foster Associates, Inc., Missouri Public Service Commission, University of Missouri-Columbia, Kansas City, MO, February 11 - 14, 1979.

"Sifting Out the Economic Costs of Terminal Equipment Services"
Telephone Engineer and Management, October 15, 1979.

"Usage-Sensitive Pricing" (with G. F. Borton)
(a three part series)
Telephony, January 7, 28, February 11, 1980.

"Perspectives on Usage-Sensitive Pricing"
Public Utilities Fortnightly, May 7, 1981.

"Diversification, Deregulation, and Increased Uncertainty in the Public Utility Industries"
Comments Presented at the Thirteenth Annual Conference of the Institute of Public Utilities, Williamsburg, VA - December 14 - 16, 1981.

"Local Telephone Pricing: Is There a Better Way?; The Costs of LMS Exceed its Benefits: a Report on Recent U.S. Experience."

Proceedings of a conference held at Montreal, Quebec - Sponsored by Canadian Radio-Television and Telecommunications Commission and The Centre for the Study of Regulated Industries, McGill University, May 2 - 4, 1984.

"Long-Run Regulation of AT&T: A Key Element of A Competitive Telecommunications Policy"
Telematics, August 1984.

"Is Equal Access an Adequate Justification for Removing Restrictions on BOC Diversification?"
Presented at the Institute of Public Utilities Eighteenth Annual Conference, Williamsburg, VA - December 8 - 10, 1986.

"Market Power and Competition Under an Equal Access Environment"
Presented at the Sixteenth Annual Conference, "Impact of Deregulation and Market Forces on Public Utilities: The Future Role of Regulation"
Institute of Public Utilities, Michigan State University, Williamsburg, VA - December 3 - 5, 1987.

"Contestable Markets: Theory vs. Fact"
Presented at the Conference on Current Issues in Telephone Regulations: Dominance and Cost Allocation in Interexchange Markets - Center for Legal and Regulatory Studies Department of Management Science and Information Systems - Graduate School of Business, University of Texas at Austin, October 5, 1987.

"The Sources and Exercise of Market Power in the Market for Interexchange Telecommunications Services"
Presented at the Nineteenth Annual Conference - "Alternatives to Traditional Regulation: Options for Reform" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1987.

"Assessing Market Power and Competition in The Telecommunications Industry: Toward an Empirical Foundation for Regulatory Reform"
Federal Communications Law Journal, Vol. 40 Num. 2, April 1988.

"A Perspective on Price Caps as a Substitute for Traditional Revenue Requirements Regulation"
Presented at the Twentieth Annual Conference - "New Regulatory Concepts, Issues and Controversies" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1988.

"The Sustainability of Competition in Light of New Technologies" (with D. N. Townsend and P. D. Kravtin)
Presented at the Twentieth Annual Conference - Institute of Public Utilities Michigan State University, Williamsburg, VA, December, 1988.

"Adapting Telecom Regulation to Industry Change: Promoting Development Without Compromising Ratepayer Protection" (with S. C. Lundquist)
IEEE Communications Magazine, January, 1989.

"The Role of Cost Based Pricing of Telecommunications Services in the Age of Technology and Competition"
Presented at National Regulatory Research Institute Conference, Seattle, July 20, 1990.

"A Public Good/Private Good Framework for Identifying POTS Objectives for the Public Switched Network" (with Patricia D. Kravtin and Paul S. Keller)
Columbus, Ohio: *National Regulatory Research Institute*, September 1991.

"Telecommunications Regulation and Infrastructure Development: Alternative Models for the Public/Private Partnership"
Prepared for the Economic Symposium of the International Telecommunications Union Europe Telecom '92 Conference, Budapest, Hungary, October 15, 1992.

"Efficient Infrastructure Development and the Local Telephone Company's Role in Competitive Industry Environment" *Presented at the Twenty-Fourth Annual Conference, Institute of Public Utilities, Graduate School of Business, Michigan State University, "Shifting Boundaries between Regulation and Competition in Telecommunications and Energy"*, Williamsburg, VA, December 1992.

"Measurement of Telecommunications Productivity: Methods, Applications and Limitations" (with Françoise M. Clottes)
Presented at Organisation for Economic Cooperation and Development, Working Party on Telecommunication and Information Services Policies, `93 Conference "Defining Performance Indicators for Competitive Telecommunications Markets", Paris, France, February 8-9, 1993.

"Telecommunications Investment and Economic Development: Achieving efficiency and balance among competing public policy and stakeholder interests"
Presented at the 105th Annual Convention and Regulatory Symposium, National Association of Regulatory Utility Commissioners, New York, November 18, 1993.

"The Potential for Competition in the Market for Local Telephone Services" (with David N. Townsend and Paul S. Keller)
Presented at the Organization for Economic Cooperation and Development Workshop on Telecommunication Infrastructure Competition, December 6-7, 1993.

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The Effect of Internet Use On The Nation's Telephone Network, Lee L. Selwyn and Joseph W. Laszlo, a report prepared for the Internet Access Coalition, July 22, 1997.

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Where Have All The Numbers Gone?: Long-term Area Code Relief Policies and the Need for Short-term Reform, prepared by Economics and Technology, Inc. for the Ad Hoc Telecommunications Users Committee, International Communications Association, March 1998, second edition, June 2000.

Broken Promises: A Review of Bell Atlantic-Pennsylvania's Performance Under Chapter 30, Lee L. Selwyn, Sonia N. Jorge and Patricia D. Kravtin, Economics and Technology, Inc., June 1998.

Building A Broadband America: The Competitive Keys to the Future of the Internet, Lee L. Selwyn, Patricia D. Kravtin and Scott A. Coleman, a report prepared for the Competitive Broadband Coalition, May 1999.

Bringing Broadband to Rural America: Investment and Innovation In the Wake of the Telecom Act, Lee L. Selwyn, Scott C. Lundquist and Scott A. Coleman, a report prepared for the Competitive Broadband Coalition, September 1999.

Bringing Local Telephone Competition to Massachusetts, Lee L. Selwyn and Helen E. Golding, prepared for The Massachusetts Coalition for Competitive Phone Service, January 2000.

Subsidizing the Bell Monopolies: How Government Welfare Programs are Undermining Telecommunications Competition, Lee L. Selwyn, April 2002.

Dr. Selwyn has been an invited speaker at numerous seminars and conferences on telecommunications regulation and policy, including meetings and workshops sponsored by the National Telecommunications and Information Administration, the National Association of Regulatory Utility Commissioners, the U.S. General Services Administration, the Institute of Public Utilities at Michigan State University, the National Regulatory Research Institute at Ohio State University, the Harvard University Program on Information Resources Policy, the Columbia University Institute for Tele-Information, the International Communications Association, the Tele-Communications Association, the Western Conference of Public Service Commissioners, at the New England, Mid-America, Southern and Western regional PUC/PSC conferences, as well as at numerous conferences and workshops sponsored by individual regulatory agencies.

APPENDIX A

RETAIL COMPETITION IN THE OMAHA MSA

Qwest estimates of retail CLEC competition in the Omaha MSA are belied by the FCC's own competition figures.

Qwest Affiant David Teitzel presents data purporting to show CLEC share of retail access lines in the Omaha MSA. The figures presented in this table are exaggerated to the point where the Commission can draw no conclusions from them. Mr. Teitzel claims that CLECs serve BEGIN QWEST PROPRIETARY << >> END QWEST PROPRIETARY access lines in the Omaha MSA, and from this figure computes a CLEC market share of BEGIN QWEST PROPRIETARY << >> END QWEST PROPRIETARY.[1] Comparing these figures to Table 6 of the FCC's *Local Telephone Competition Report* for June 2003, which was released on December 22, 2003, Mr. Teitzel calculates an overall statewide CLEC market share in Nebraska at 20% as of June 30, 2003.[2] He concludes that the FCC's Nebraska cumulative CLEC figures include Independent Telephone Company operating territory (which is less competitive than Qwest's service area in the Omaha MSA) are out of date, and notes that the FCC *Local Telephone Competition Report* excludes carriers with 10,000 or fewer access lines. Considering these factors, Mr. Teitzel concludes that "the FCC's own data shows that the CLEC share estimate shown [in his table] is realistic and likely understated."[3]

In fact, data available in the very same FCC report upon which Mr. Teitzel relies actually leads to precisely the opposite conclusion, i.e., that under no possible scenario is Mr. Teitzel's estimate either "realistic" or "understated." According to that same June 30, 2003 *Local Telephone Competition Report*, CLECs reported a total of 190,754 CLEC lines in Nebraska *statewide*.[4] Mr. Teitzel's estimate for the Omaha MSA *alone* of BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY CLEC lines is thus BEGIN PROPRIETARY<< >>END QWEST PROPRIETARY *more* than the FCC's figure

1. *Teitzel Affidavit*, at 8.

2. *Id.*

3. *Id.*

4. Industry Analysis and Technology Division, Federal Communications Commission, *Local Telephone Competition: Status as of June 30, 2003*, December 2003, at Table 6.

for the entire state of Nebraska.[5] Mr. Teitzel's statement that his estimate was "understated" must have assumed (a) that most, if not all, of the CLEC lines in Nebraska were in the Omaha MSA, (b) that there were a significant number of non-reporting CLECs with lines in the Omaha MSA but whose line counts fell below the 10,000 line reporting threshold, *and* (c) that CLEC shares had grown significantly in the eight months between the June 2003 date of the FCC report and the February or April date of the Qwest data. Mr. Teitzel's evaluation of his data based upon all three of these assumptions is in no way "realistic."

Mr. Teitzel's overstatement is further detailed in the FCC's latest *Local Competition Report*.[6] This new information, far from confirming the kind of enormous growth posited by Mr. Teitzel in the previous six months, indicated that CLEC growth in Nebraska remained at a relatively stable rate. Mr. Teitzel's estimate continued to exceed this new, updated FCC CLEC line count number by more than BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY.

Mr. Teitzel's gross overstatement of CLEC line counts likely results from a misuse of the E911 database. The IATD reports that, as of December 31, 2003, there were 129,778 facilities-based (defined for the purposes of the *Local Telephone Competition Report* as full facilities-bypass serving arrangements) access lines in Nebraska,[7] while Mr. Teitzel's estimate is a full BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY for Omaha

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5. It should be noted that approximately 12% of the Omaha MSA population (as defined by Mr. Teitzel) is in Iowa (88,000 people). Inclusion of Iowa competitive lines, however, cannot possibly account for the discrepancy between Mr. Teitzel's MSA total and those of the IATD. The population of Iowa is approximately 2,922,000, and Pottawattamie County represents only 3% of that population. In order for Pottawattamie County to contribute the BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY competitive lines remaining after all Nebraska lines are attributed to Omaha, Pottawattamie County would have to account for BEGIN QWEST PROPRIETARY<< >>END QWEST PROPRIETARY of all competitive line in Iowa, an unreasonable assumption given the county's *3%* share of the state's population.

6. Industry Analysis and Technology Division, Federal Communications Commission, *Local Telephone Competition*: *Status as of December, 2003*, June 21, 2004.

7. *Id.,* at Table 6.

alone.[8] Mr. Teitzel's error doubtless arises from the fact that E911 database records are keyed to *telephone numbers*, not telephone *lines*, which leads to several possible sources of error. First, there is no process in place for systematically *removing* disconnected numbers from the E911 database. In the case of multiline business customers, the quantity of individual telephone numbers may be a multiple of the number of individual lines. In addition, Mr. Teitzel appears to have included in his E911 "number counts" numbers associated with *non-UNE* BOC facilities being leased to CLECs as Special Access lines. In fact, since CLECs are frequently unable to utilize UNE-loops to serve multiline business customers, the quantity of BOC Special Access facilities being leased by CLECs likely represents a substantial fraction – possibly even the *majority* – of CLEC-provided business retail lines.

Mr. Teitzel also provides a table purporting to show the "significant change in Qwest's residential and business retail access line base in the Omaha MSA from December 2000 to February 2004."[9] Mr. Teitzel notes that:

> [w]hile various factors have contributed to these trends, including the general economic malaise and some displacement of non-primary lines by DSL service, it is indisputable that Qwest's access line base has declined dramatically and that the bulk of this decline is driven by the increase in the number of competitive alternatives to Qwest service.[10]

In fact, Mr. Teitzel has made no attempt to distinguish between "competitive losses" ostensibly suffered by Qwest and the effect of DSL on the market for additional residential access lines, or to differentiate between retail customers lost to Qwest who still receive service via the Qwest network (i.e. Qwest "line losses" to UNE-P, UNE-L, or resale CLECs) vs. customers lost to full-facilities based providers or to "intermodal" competitors.

In addition to providing no evidence regarding competition for wholesale services, the evidence that Qwest does provide regarding retail-level competition is flawed and unreliable, and presents a false view of the actual extent of retail competition in the Omaha market. The Commission should afford Qwest's wholly unsupportable retail competition assertions no weight when evaluating Qwest's *Petition*.

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8. Total E911 records(from p. 8) - UNE-P records(from p. 4) - UNE-L(from p. 4)

9. *Teitzel Affidavit*, at 2-3.

10. *Id.*