SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

FOUNDED 1866

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8224

WRITER'S E-MAIL ADDRESS
checkner@sidley.com

December 8, 2004

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Presentation, *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

In its 11th hour *ex parte* filing in this proceeding, Qwest asks the Commission to adopt a "market share" test as a "backstop" to any unbundling rules it adopts. *See generally* 12/07/04 Qwest Ex Parte (attaching "memorandum"). This request is merely an attempt by Qwest to rehash arguments it advanced in a pending proceeding seeking forbearance from certain unbundling requirements in the Omaha MSA. As AT&T and others have explained, the Commission should deny Qwest's "Omaha" forbearance petition.[1] But whatever the propriety of forbearance, it is plain that Qwest's market share approach has no legitimate place in the impairment analysis in this proceeding.

Qwest advocates that unbundling restrictions be lifted if an incumbent can show that either 40% of homes/buildings in a MSA are "passed" by competitive facilities or if a competitive carrier has captured 30% of the retail market in the MSA. Neither threshold makes economic sense in this context.

Qwest's "homes passed" threshold purports to be a proxy for "potential competition." 12/7/04 Qwest Ex Parte, Mem. at 3. That is wrong. The record in this proceeding clearly establishes that just because a competitive carrier has facilities that "pass" a location does not mean it can build to that location. Only if the potential customer generates the demand necessary

[1] A copy of AT&T's Opposition to Qwest's Forbearance Petition, and accompanying declarations, filed in WC Docket No. 04-223 is attached hereto as Exhibit 1.

to justify the last-mile construction is self-deployment even a theoretically viable possibility. And even then, building access, rights-of-way and other barriers to self-deployment may exist. *See, e.g.*, AT&T Comments at 15-22; 30-80; AT&T Reply Comments at 21-63. Indeed, the Bells' own "fiber maps" generally show that competitive carriers are able to build loops off of their fiber backbones to serve only a small fraction of the buildings that those facilities "pass."

More broadly, the fact that a particular carrier was able to self-deploy facilities does not prove that other competitive carriers may. For example, the Commission has recognized that cable companies have inherent advantages that have enabled them to offer mass-market telephony services but that other competitive carriers have no economic ability to self-deploy mass-market loops. *Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 98 (2004). Similarly, with respect to high-capacity transmission facilities, the ability of a competitive carrier to self-supply facilities to serve the highest-demand customers says nothing about impairment in the provision of lower capacity DS1 and DS3 facilities. AT&T Comments at 18-19.

Equally flawed is Qwest's "retail market share" threshold. 12/7/04 Qwest Ex Parte, Mem. at 3. At bottom, Qwest's argument is that a mere duopoly where the incumbent retains 70% of the market share and a cable company, for example, has the other 30% is sufficient to eliminate core unbundling obligations. Both the Commission and the courts have repeatedly held that duopoly is not a sufficient basis to ensure effective competition, and that a larger number of competitors is necessary to demonstrate that a market is even minimally "competitive." *See generally* 11/30/04 AT&T Ex Parte. Moreover, even if it could be shown that facilities-based competition is possible in a limited urban area of an MSA (that accounts for 30% of customers) no reasonable inference could be drawn that the suburban and rural areas of the MSA – and MSAs can encompass entire states or more – could be competitively served.

Beyond its logical deficiencies, Qwest's proposal is not administratively feasible. Qwest contends that analysis should be based upon "relevant markets." To determine the "market share," the Commission would therefore need to determine both the relevant geographic market and the relevant product markets. Qwest would have the Commission believe that the relevant market for telecommunications services is generally an MSA. *See* 12/7/04 Qwest Ex Parte, Mem. at 2. It is not. The relevant geographic markets for telecommunications services are usually point-to-point routes. AT&T Comments at 15-22. A carrier that has facilities between routes A and B cannot serve a customer at location C. There are also multiple relevant product markets at issue. Accordingly, Qwest's proposal, if truly applied to relevant markets, would have the Commission undertake to determine competitive carriers' market shares for each relevant geographic market-product market combination in the country.

Finally, as the Commission previously recognized, Qwest's argument is "circular." *Triennial Review Order* ¶ 114. Even where carriers self-deploy their own facilities, they often rely on UNEs to "fill out" their network. Thus, "[i]n many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs." *Id.*

Very truly yours,

/s/ C. Frederick Beckner III
Counsel for AT&T Corp.

Exhibit 1

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

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 04-223
Forbearance Pursuant to 47 U.S.C.	)	
§ 160(c) in the Omaha Metropolitan	)	
Statistical Area	)	
	)	

OPPOSITION OF AT&T CORP.

Leonard J. Cali
Lawrence J. Lafaro
AT&T Corp.
One AT&T Way
Room 3A214
Bedminster, NJ 07921

Stephen C. Garavito
James J. R. Talbot
AT&T Corp.
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
202-457-3878

Its Attorneys

August 24, 2004

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

OPPOSITION OF AT&T CORP.

Pursuant to section 1.415 of the Commission's rules, 47 U.S.C. § 1.415, AT&T Corp. ("AT&T") hereby opposes the petition by Qwest Corporation ("Qwest") for forbearance pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area ("Omaha MSA"). As demonstrated herein, Qwest's requested relief is barred by the plain language of the Communications Act (the "Act"). Moreover, Qwest has failed utterly to meet the burden required by the Act for forbearance. Qwest's petition accordingly must be denied.

I. INTRODUCTION AND SUMMARY

Through its petition, Qwest attempts to raise the art of overreaching to a new level. In the *Triennial Review* proceeding and elsewhere, Qwest and its sister Bells were the strongest proponents of "true" facilities-based competition based on unbundled access to the Bells' local loops, and consistently argued that their hot-cut systems and processes

could support such UNE-L competition.[1] Qwest now would have the Commission act to relieve it of any obligation to unbundle its local loops, which are perhaps the ultimate bottleneck facilities, despite the fact that there are no widely available alternatives to such loops and other last-mile access facilities. Indeed, the Commission recently held in its *Triennial Review Order* that the ability of new providers to compete with incumbent LECs would be impaired without access to such loops.[2] This determination was *not* upset in the *USTA II* decision.[3]

However, Qwest does not seek merely to be excused from the Act's loop unbundling obligations. Its petition demands far broader relief. Indeed, although it expresses a desire to negotiate commercial arrangements with carriers, the very first demand on Qwest's list is to be freed of the Act's requirement that it negotiate in good faith (§ 251(c)(1)). Qwest goes on to demand relief from its duties under the Act to interconnect at any technically feasible point (§ 251(c)(2)), to provide access to network elements on an unbundled basis (§ 251(c)(3)), to provide resale of its retail services at a

---

[1] *See, e.g.*, Letter from R. Steve Davis, Qwest, to Michael K, Powell, FCC, in CC 01-338 (dated Feb. 12, 2003) at 2 (arguing that CLECs would not be impaired without access to unbundled switching because ILECs were capable of providing "the hot cuts required to use unbundled loops with competitive switches" in significant volumes); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, in CC 01-338 (dated Feb 12, 2003), attached presentation at 14 (arguing that unbundled switching should be removed from UNE list because "CLECs may order either Resale or Unbundled Loops"); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, in CC 01-338 (dated Oct. 30, 2002), attached presentation at 2, 5-6 (describing proposed transition from UNE-P to UNE-L).

[2] *See, e.g., Review of Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶¶ 248, 253, 288, 325-326 (finding, among other things, that CLECs would be impaired without access to copper loops, copper subloops (including inside wiring), the non-packet capabilities of hybrid loops, and DS1 loops) (2003) ("*Triennial Review Order*").

[3] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

wholesale discount (§ 251(c)(4)), to provide notice of network changes (§ 251(c)(5)), and to permit physical collocation for interconnection and access to network elements (§ 251(c)(6)).

Even this unprecedented relief from the § 251(c) obligations would not be enough for Qwest. It also demands that it be excused from its statutory obligations under the 271 checklist to provide: (i) interconnection; (ii) access to unbundled network elements; (iii) access to its poles, ducts, conduit, and rights-of-way; (iv) unbundled access to its local loops; (v) unbundled access to local transport; (vi) unbundled access to local switching; and (xiv) resale at a wholesale discount.

Even if there were no insurmountable legal barriers to granting such forbearance from statutory duties – which there are – Qwest submits no evidence whatsoever of widespread competition to provide *wholesale alternatives* to Qwest' last mile access (which Qwest identifies as the relevant product market for analyzing its market power[4]) that could justify such unprecedented relief. Instead, Qwest focuses solely on purported *retail* competition, and, in a bootstrapping maneuver of monumental proportions, Qwest attempts to justify its demand to be excused from its statutory unbundling and resale obligations by citing to wireline retail competition that exists *solely* because of Qwest's obligation to provide UNE-P, UNE-L, and resale. For example, at the same time that Qwest argues it should not have to comply with the resale obligations imposed by sections 251(c)(4) and 271(c)(2)(B)(xiv), it contends (pp. 16-17) that the 1996 Act allows "competitive providers to increase their market presence through resale beyond the reach of their own networks." Similarly, Qwest identifies McLeodUSA as one of the

[4] Petition p. 6.

key facilities-based wireline providers in Omaha, while at the same time pointing out that *100%* of McLeod's service offerings rely on inputs from Qwest that would be eliminated if Qwest's petition were granted, *i.e.*, UNE-L (65%), UNE-P (30%), and resale (5%).[5]

Qwest also cites to the presence of providers of voice-over-Internet protocol ("VoIP") services in Omaha while its own petition concedes that two of these alleged providers are *not* offering service in the Omaha MSA. Indeed, the evidence shows that *none* of the purported VoIP providers are offering significant service – if any – in the Omaha MSA. Indeed, most do not offer Nebraska or Iowa telephone numbers to their subscribers.[6] And Qwest's claims regarding *retail* cable telephony competition by Cox in Omaha appear to be vastly overstated. Moreover, Qwest does not cite to, or submit, the source material for its claims, which would presumably show that Qwest has misunderstood – if not misrepresented – Cox's prior statements.

Furthermore, Qwest's claim of overwhelming *retail* competition relies on market share estimates based on E911 counts, which AT&T and others showed in the *Triennial Review* proceeding – and which AT&T shows again here – could not be used to extrapolate the extent of local competition.[7] In fact, Qwest itself, in a related context, has observed that "assigned numbers bear no correlation to actual lines in service." Qwest also argues – again citing an internal survey, which it conspicuously does not produce – that wireless providers are a substitute for Qwest's local exchange offerings in Omaha. Yet, the Commission has determined that wireless services complement – but are not a replacement for – local exchange services, and Qwest's sister Bells (BellSouth and SBC)

---

[5] Teitzel Aff. p. 18.

[6] *See* pp. 12-13, *infra.*

[7] *See* Lancaster/Morgenstern Declaration, attached hereto as Attachment A.

have urged the Commission to find that wireless and local exchange services are *not* in the same product market.

In all events, section 271(d)(4) bars the Commission from limiting the terms of the section 271 competitive checklist "by rule" or "otherwise," and the Petition's request for forbearance from compliance with sections (i)-(vi) and (xiv) of the competitive checklist must be denied on this ground alone. In addition, Qwest's petition is fatally premature because section 10(d)(4) prohibits the Commission from forbearing from any requirements of sections 251(c) and 271 before those sections are "fully implemented." As required by the objectives and purposes of the Act, sections 251(c) and 271 cannot be considered fully implemented until there is ubiquitous availability of durable, cost-based wholesale alternatives to Qwest's bottleneck facilities. Qwest has not made, and cannot make, such a showing. For these same reasons, Qwest fails to meet its burden under sections 10(a)(1)-(3) to establish that: (i) compliance with the sections 251(c) and 271 requirements are not necessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the services that would be affected by their removal; (ii) enforcement of these requirements is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest.

II. QWEST HAS NOT MET ITS BURDEN OF SHOWING THAT IT LACKS MARKET POWER IN THE PROVISION OF WHOLESALE SERVICES AND INPUTS.

Assuming Qwest could overcome the legal barriers to its petition, the critical inquiry underlying its request for forbearance – as Qwest itself recognizes – is whether it retains market power in the provision of the *wholesale* services and inputs it is required to provide under §§ 251(c) and 271. Petition p. 6 (relevant product market "is the market for services provided under Section 251(c) and selected services under Section 271");

Selwyn Decl. ¶¶ 14-16. Yet, Qwest has introduced no evidence of any such wholesale competition whatsoever. Instead, Qwest has focused solely on *retail* competition that purportedly exists in the Omaha MSA. The reasons for this focus by Qwest is obvious: the company that Qwest identifies as its principal *retail* competitor – Cox – does not offer wholesale services or inputs to other local exchange or broadband services providers.

This lack of any evidence of wholesale competition should be the end of the Commission's inquiry, and Qwest's petition should be summarily dismissed. This is especially true because much of Qwest's claimed retail competition relies upon the very wholesale inputs Qwest proposes to eliminate. Moreover, even if one focuses solely on retail competition, as Qwest would have the Commission do, it is readily apparent that Qwest's claims of vibrant, sustainable retail competition ring hollow. Indeed, one of Qwest's sister Bells has boasted that telecom is now "evolving to a handful of 'super carriers,'" in which a few dominant carriers, *i.e.*, the Bells, will dominate the telecommunications landscape, while all others will be relegated to "niche" positions that escape the super carriers' interest.[8]

A. Qwest's Retail Market Share Estimates Are Flawed.

As established below, Qwest's petition fails totally to demonstrate the existence of any wholesale alternatives for the inputs competitive carriers need to provide local exchange service. Instead, Qwest focuses solely on the existence of purported retail competition to justify its demand for forbearance. AT&T herein demonstrates that the extent of such competition by wireline, VoIP, cable, and wireless providers is exaggerated, if not non-existent. However, at a more basic level, Qwest's petition errs in

[8] *See* Communications Daily, Vol. 24, Issue 120, "*Whitacre Announces Fiber to Neighborhood Initiative*," June 23, 2004 (quoting SBC Chairman Edward Whitacre).

overstating the competitive significance of such retail offerings – and systematically understating the extent of Qwest's market dominance – in two principal ways: (1) by including in its analysis areas in which Qwest does not even offer local exchange service; and (2) by basing its retail market share analysis on E911 data.

Qwest attempts artificially to limit its retail market share by improperly treating the *entire Omaha MSA* as the relevant geographic market for the assessment of Qwest's local market power when Qwest provides local service only in a small part of this very large area. The Omaha MSA is even larger than Qwest describes and comprises eight counties, five in Nebraska and three in Iowa, and 4,363 square miles.[9] Whether the MSA is defined to include five or eight counties, it is plainly overbroad because Qwest provides local service only in Sarpy County, Nebraska, and *parts* of Douglas County, Nebraska and Pottawattamie, Harrison, and Mills counties, Iowa. Selwyn Decl. ¶ 20. It appears that Qwest provides *no* service in Cass, Saunders and Washington counties, Nebraska. *Id.* Even Qwest admits that the MSA "contains territory served by Qwest (primarily the greater Omaha and Council Bluffs areas) *as well as areas served by Independent Telephone Companies*." Teitzel Aff. p. 14.

A geographic market is "the area of effective competition . . . in which the seller operates and to which the purchaser can effectively turn for supplies."[10] Consistent with this hornbook antitrust approach, Commission precedent makes clear that the relevant

---

[9] Qwest incorrectly contends that the Omaha MSA covers 2,000 square miles and comprises "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 ¶ 7. In fact, as defined by the Office of Management and Budget, the Omaha MSA covers 4,363 square miles and comprises *eight* counties, five in Nebraska, including Saunders, and three in Iowa, including Harrison and Mills. Selwyn Decl. ¶ 20.

[10] *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

geographic market for the assessment of a carrier's market power over local services is confined to the area in which the carrier provides those services. For example, Qwest's cited authority, the *Bell Atlantic/NYNEX Order*, found that a relevant geographic market for the analysis of the Bell Atlantic/NYNEX merger was "LATA 132, which essentially covers the same territory as NYNEX's New York Metropolitan Regional Calling Area" because "*any carrier that offers service in the New York Metropolitan Regional Calling Area offers that service to all customers in that area*."[11] Similarly, the International Bureau has rejected claims that national geographic markets should be used to evaluate the market power of foreign regional local access monopolists and has found that the relevant geographic market is the local franchise area.[12]

By including within its retail market share analysis those portions of the MSA where it does not even offer service, Qwest has artificially minimized its market share. This is especially so here because Qwest has failed to attribute any local retail customers to the other incumbent LECs serving the Omaha MSA. Instead, Qwest has assumed that any lines in the MSA that it does not serve must be served by a competitive carrier. Because any meaningful analysis of Qwest's local market power must be based on

[11] *Applications of NYNEX Corp. & Bell Atlantic Corp*., 12 FCC Rcd. 19,985, ¶ 55 (1997) (emphasis added). *See also*, *id*. ¶ 54 (relevant geographic market is an "area in which all customers in that area will likely face the same competitive alternatives"). Significantly, LATA 132 is part of the much larger New York-Northern New Jersey-Long Island MSA. Selwyn Decl. ¶ 24. Similarly here, the Commission should limit the relevant geographic market to the much smaller area where Qwest provides local services and where customers therefore "face the same competitive alternatives."

[12] *See, e.g*., *Americatel Corp. & Telecom Italia of North America, Inc*., File Nos. ITC-MOD-20020508-00243 & ITC-MOD-20020508-00244, Memorandum Opinion and Order (rel. May 27, 2004), DA 04-1538, ¶ 18; *Americatel Corp. & Telecom Italia of North America, Inc*., File Nos. ITC-MOD-20020502-00212 & ITC-MOD-20020502-00213, Memorandum Opinion and Order (rel. Dec. 30, 2003), DA 03-4115, ¶ 14; *Bell Canada Petition for Declaratory Ruling*, IB Docket No. 98-148, Order, DA 01-1421, 16 FCC Rcd. 12465, ¶¶ 8-9 (2001).

Qwest's market share in the parts of the Omaha MSA in which Qwest in fact offers local services, the Commission should reject the overbroad geographic market claimed by Qwest and deny its petition.

Qwest's retail market share analysis also depends in large measure on E911 data, which is "an inaccurate and unreliable measure of competition in the local market." Lancaster/Morgenstern Decl. ¶ 13. The sole purpose of including telephone numbers in the E911 database is to ensure proper emergency response for 911 users, and "*not* to catalogue correctly the number of telephone lines provided by any one carrier." *Id.* ¶ 6 (emphasis added). Indeed, there are a number of factors that "would cause the E911 database to overstate the number of lines served by CLECs." *Id.* ¶ 13. For example, when a large volume of numbers migrates to AT&T's service from another carrier, AT&T has no easy way to determine which numbers should be included in the E911 database. AT&T therefore takes the conservative approach of including all ported numbers, including DID numbers, in the E911 database. *Id.* ¶ 10. AT&T's listings in the E911 database thus include "a significantly larger number of telephone numbers than the actual facilities needed to provide emergency service." *Id.* Moreover, inactive numbers can remain in the E911 database for extended periods, either because carriers postpone the "cleaning up" of such numbers, or because a number of CLECs have withdrawn from the market and abandoned telephone numbers without cleaning up the E911 database. *Id.* ¶¶ 11-12.

In a related context, the ILECs have recognized the fallacy of using telephone numbers as a gauge for actual end users. In the Commission's proceeding regarding outage reporting, *New Part 4 of the Commission's Rules Concerning Disruptions to*

Communications, ET Docket No. 04-35, the comments filed by the Bells and other ILECs, including Qwest, established that "assigned telephone numbers" should not be used as the threshold for reporting requirements because *assigned numbers do not correlate to actual lines in service*.[13] For example, Verizon noted in its comments (p. 9) that "many customers subscribe to blocks of numbers that they activate only as needed, such as when the number of stations behind a PBX is increased, or that they retain to prevent other customers from using certain telephone numbers." It therefore "has no way of knowing how many numbers the customer is actually using." *Id.*, pp. 9-10. Qwest stated (p. 6) that "'Assigned telephone numbers' bear no correlation with end users."[14] As USTA summarized, "LECs have no way of knowing how many numbers a customer is using. LECs can measure only the number of lines and trunks that they deliver to a customer's premise. More specifically, the number of assigned numbers does not correlate with the number of customers or access lines." USTA Comments, p. 17.

The effect of Qwest's assumptions has been to systematically overstate the existence of retail competitive local services providers and understate Qwest's enduring market power. The Petition should be denied based on these flaws in Qwest's *retail* market share analysis alone.

---

[13] *See* Lancaster/Morgenstern Decl. ¶ 14. The respective Bell and ILEC comments in ET Docket No. 04-35 were filed on May 25, 2004.

[14] *See also* BellSouth Comments, p. 7 ("the quantity of 'assigned' numbers held by a carrier has little correlation to the number of customers or customer lines"); SBC Comments, p. 4 ("The number of 'assigned telephone numbers' has little correlation to the number of customers or customer lines in use . . . ."); Sprint Comments, p. 10 ("Neither the LECs nor the IXCs can determine such impact simply by referring to assigned telephone numbers"); Verizon Comments, p. 9 (Basing outage reports on the number of telephone numbers that are affected by an outage "would be an inherently unreliable measure of the impact of the outage").

B. Qwest Has Failed to Demonstrate the Existence of Wireline Wholesale Competition.

Having defined the "relevant product market" as "the market for services provided under Section 251(c) and selected services under Section 271"[15] – which, by their nature, are in all cases *wholesale* services and inputs – Qwest fails to introduce *any* evidence of wireline wholesale alternatives to the basic inputs the Act requires it to provide under §§ 251(c) and 271. Instead, Qwest cites to retail services provided by Alltel and McLeod. Yet, as Qwest acknowledges, Alltel is primarily an incumbent LEC providing services outside of Qwest's service territory. In fact, as an ILEC, Alltel is the second largest local exchange carrier in Nebraska, with 24.7% (274,416 lines) of the states total access lines as of January 1, 2003. Teitzel Aff. p. 22. Its CLEC operations are much more limited, with only about 22,000 total access lines *statewide*. *Id.* Moreover, Qwest provides no evidence whatsoever that Alltel provides wholesale services to competitive local exchange carriers in the Omaha MSA.

Qwest's "evidence" regarding McLeod's operations in the Omaha MSA is even less compelling. Qwest candidly concedes that McLeod is entirely dependent on the wholesale inputs that Qwest would be free to cease providing if its petition were granted. Thus, the Teitzel Affidavit states (p. 18) that, as of December 31, 2003, 65% of McLeod's service was provided using unbundled loops, 30% was provided using the unbundled network element platform (unbundled loops and switching), and 5% was provided via resale of Qwest's retail services. In short, *100%* of McLeod's retail services depend on wholesale inputs that would disappear if Qwest's petition were granted.

[15] Petition p. 6.

Qwest's analysis also focuses entirely on the residential market and fails to address at all Qwest's dominance in the provision of local services to business customers. In the *Triennial Review Order*, the Commission expressly determined that CLECs would be impaired without access to unbundled DS1 and DS3 loops (below the three DS3 level)[16] and transport facilities below the optical (OCn) level.[17] Yet, Qwest would have the Commission remove unbundled access to such loops and transport facilities without any evidence of alternative providers. Indeed, its evidence shows that its principal wireline competitor is entirely reliant on Qwest's services and facilities. And, cable companies, such as Cox, provide minimal retail services to business customers[18] and provide no wholesale services at all. Qwest's failure to produce any evidence relating to its market power with respect to large business customers demonstrates conclusively that its petition must be denied.

Because Qwest has failed to demonstrate the existence of any ubiquitous and durable wholesale alternatives provided by wireline carriers, and Qwest itself has shown that wireline *retail* competition relies wholly upon the wholesale inputs Qwest would eliminate, Qwest's petition must be denied.

---

[16] *Triennial Review Order* ¶ 298.

[17] Selwyn ¶ 52.

[18] For example, in 2003, "cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003". Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added). As the Yankee Group recognizes, "*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market." *Id.* p. 4.

C. Qwest Has Failed to Demonstrate the Existence of Any Competition by Voice over Internet Protocol Providers.

As scanty as Qwest's evidence of wholesale and retail wireline competition is, its evidence of VoIP competition is virtually nonexistent. Again, Qwest does not – and cannot – demonstrate the existence of any wholesale competition from VoIP providers in the Omaha MSA. Indeed, Qwest presents no credible evidence of any *retail* VoIP competition. Qwest claims there are seven VoIP providers currently serving the Omaha MSA – AT&T CallVantage[sm], Five Star Telecom, Vonage, Packet8, VoicePulse, BroadVoice, and ZipGlobal. Teitzel Aff. pp. 26-27. Yet, Qwest itself admits that AT&T CallVantage service is "not yet available in Nebraska," and that Voice Pulse "is currently not offering numbers within Nebraska area codes." *Id.* pp. 26, 27 n.59. Qwest's citation to retail competition from companies that it concedes do not even offer service in the Omaha MSA is bad enough, but even a cursory review of the other alleged VoIP competitors reveals that they likewise do not offer any significant retail – much less wholesale – competition to Qwest in Omaha. Thus, a review of the BroadVoice, Vonage, and ZipGlobal websites shows that none of them offers VoIP services in the Omaha MSA.[19] And, Packet8 had only 17,000 subscribers *worldwide* as of June 30, 2004.[20]

---

[19] BroadVoice is not providing service in Nebraska or Iowa, and neither state is on its "Coming Soon" list. http://www.broadvoice.com/company.html It also does not offer Nebraska or Iowa area codes. http://www.broadvoice.com/areacodes.html Vonage also does not currently offer VoIP services in Nebraska or Iowa (http://www.vonage.com/corporate/index.php) and does not offer Nebraska or Iowa area codes. http://www.vonage.com/avail.php ZipGlobal does not offer Nebraska or Iowa numbers. http://zipglobal.com/localnumbers.html

[20] http://www.8x8.com/news_events/releases/2004/pr072804.asp.html It is difficult to tell from a review of Five Star Telecom's website whether it has any subscribers at all, much less a significant number of subscribers in the Omaha MSA. *See* http://www.fivestartel.com

The Bells themselves do not view VoIP as significant local exchange competition. Instead, they view VoIP services as "a 'niche product' that may not live up to the considerable hype surrounding them."[21] According to Verizon CFO Doreen Toben, "[t]he marketing research would suggest, and this is a quote from them, this is for 'the single geeky guys' who are basically OK having one phone in the house they can use this way." *Id.* Moreover, Ms. Toben proclaims that "early feedback from users of other services suggests the technology may still be too complicated for many customers." *Id.*

In short, Qwest has failed to produce any evidence of significant wholesale or retail competition by VoIP providers in the Omaha MSA.

D. Qwest Has Failed to Demonstrate the Existence of Wholesale Cable Telephone Competition and Vastly Overstates the Presence of Retail Cable Telephony.

Although Qwest seeks to be excused from its statutory obligations to provide wholesale services and inputs, it has provided no evidence whatsoever that Cox, the cable company in the Omaha MSA, is an alternative source of such wholesale inputs. Nor can it. It is undisputed that cable companies, including Cox, do not provide wholesale access to their facilities to competitive telecommunications carriers.[22] Instead of focusing on the availability of wholesale inputs from Cox, Qwest attempts to paint Cox as the dominant competitive *retail* provider of local exchange service. Yet, Qwest relies upon undocumented 2-year old statements that appear to have been misunderstood by Qwest

---

[21] Reuters News, "*Interview – Verizon says Internet phones a niche product*" (Jul. 27, 2004) (quoting Verizon CFO Doreen Toben).

[22] In the *Triennial Review Order*, the Commission recognized that "[p]roviders 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" 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." *Triennial Review Order* ¶ 310, n.904.

and which paint a garbled, misleading, and unsubstantiated picture of retail cable telephony competition.

AT&T assumes that Cox will respond directly to the representations Qwest makes regarding Cox's telephone operations in the Omaha MSA. However, serious credibility issues are raised by Qwest's description of those operations. The Teitzel Affidavit refers (p. 11) to a May 9, 2002 investor meeting in which Cox purportedly described its Omaha cable telephony operations. Significantly, Qwest provides no citation to the quotes or statistics from that meeting and has provided no documentation of these alleged disclosures. Moreover, it is apparent that Qwest has added 2 plus 2 and reached its desired result of 10. Even taking the numbers reported by Qwest at face value – which they should not be – it is clear that Qwest has significantly overstated Cox's competitive presence at the retail level.

First, Qwest states that Cox's Omaha system "was comprised of 295,863 serviceable homes" as of April 30, 2002.[23] At the same time, however, Qwest claims that the Omaha MSA contains 241,721 households as of the 2000 Census.[24] Thus, Qwest claims that Cox has 54,000 more serviceable homes in the Omaha MSA than actually exist. The only reasonable explanation is that Cox's Omaha system – and that system's "homes passed" – encompasses homes that lie outside the Omaha MSA. Furthermore, in its most recent annual report, Cox reported that, out of 10,426,093 basic cable homes passed nationwide, only 5,031,401 homes were "telephone ready," *i.e.*, only 48% of its

[23] Teitzel Aff. p. 11.

[24] Petition p. 7. As noted in the Selwyn Affidavit (¶ 20), the Omaha MSA is three counties larger than claimed in the Petition.

total homes passed are telephone ready.[25] This is the source of the statement cited by Qwest that Cox's telephone service was "*available* to 48 percent of our homes passed."[26] With respect to its 5 million telephone-ready homes, Cox has a penetration rate of 19.5%. Thus, even if Cox passed every home in the Qwest-defined Omaha MSA, applying the Cox-reported ratios to its "homes passed" would show that Cox has only 22,625 telephone subscribers in the Omaha MSA (241,721 x .48 x .195 = 22,625), orders of magnitude less than the 148,000 cable telephony subscribers Qwest ascribes to Cox.[27]

Moreover, despite Qwest's contentions, cable companies are also dependent on unbundled access to incumbent LEC facilities in order to provide local exchange services. For example, in late 2000 and early 2001, in Washington State, AT&T's cable unit, AT&T Broadband, could not provide cable telephony to tenants in multiple dwelling units ("MDUs"), because Qwest implemented a policy of placing padlocks on its terminals and denying AT&T Broadband reasonable access to Qwest's subloop inside wiring. As a result of Qwest's padlocking of its terminals, AT&T Broadband could not market its services to hundreds of customers for several months, was forced to delay and reschedule countless installation orders (resulting in loss of revenues), and suffered, not surprisingly, cancelled orders when customers that expected AT&T Broadband service

---

[25] Cox Communications 2003 Financial Results, available at http://media.corporate-ir.net/media_files/IROL/76/76341/reports/AR_2003/assets/pdfs/cox_2003results.pdf

[26] *See* Teitzel Aff. p. 10 (emphasis added). Qwest appears to have confused availability with actual subscribership.

[27] *See* Petition p. 12 n.38. As noted above, Cox is in the best position to describe its operations in the Omaha MSA. AT&T provides this analysis solely to show that Qwest's submission does *not* demonstrate the existence of substantial retail competition, much less available alternatives for the wholesale inputs it wants to remove from the table. Moreover, as noted above, Qwest has submitted no evidence that Cox provides retail services to large business customers.

were denied such service. Ultimately, the Washington Utilities and Transportation Commission ruled against Qwest's policy of denying reasonable access to its inside wiring subloops in MDUs, and held that AT&T Broadband was entitled to "access" to MDUs via Qwest-owned inside wiring.[28] Nevertheless, cable companies, including Cox, still rely on unbundled access to Qwest's subloops to serve a significant number of the customers who reside in MDUs.

Finally, if Qwest's petition were granted, competitive carriers would be denied access to the wholesale inputs they need and only Qwest and Cox would be able to continue providing services to residential consumers. As Dr. Selwyn cautions, the resulting duopoly would stifle innovation and ultimately cause higher prices. Selwyn Decl. ¶¶ 76-82. The Commission has recognized that duopolies do not produce the competition contemplated by the 1996 Act.[29] It should not encourage the creation of such a duopoly through the grant of Qwest's petition.

E. Qwest Has Failed to Demonstrate that Wireless Competition Constrains Its Market Power.

Qwest's claims that wireless services prevent the abuse of Qwest's market power over the local wireline bottleneck in Omaha lack any basis. Even if some substitution

---

[28] *AT&T Communications of the Pacific Northwest, Inc.* v. *Qwest Corp.*, No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination, ¶¶ 44, 48 (Apr. 2001).

[29] *See EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.*, Statement of Chairmen Powell ("At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."). *Accord FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).

may occur between wireline and wireless outbound long distance calling, wireless does not provide an effective substitute for local dialtone, as shown by the very small percentage of households that have replaced outright their wireline service with wireless service. As the Commission found in the *Triennial Review Order*, wireless is "primarily a complementary technology."[30] According to SBC Chairman and CEO Edward Whitaker, "wireless is not going to displace the wireline network" and is "*never* going to be the substitute. Reliability is one reason."[31]

The *Triennial Review Order* emphasized that "wireless CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity."[32] Also, unlike local wireline services, "CMRS is not yet capable of providing broadband services to the mass market – although a growing number of wireless carriers make available Internet access, such access is generally limited to transmissions of 25 to 66 kbps."[33]

Dr. Selwyn demonstrates that wireless services provide very ineffective and expensive substitutes for many of the calling purposes served by wireline services. Wireless phones are typically used by specific individuals, while wireline phones typically serve an entire "household," rather than a single individual user. As a result, there must be one wireless phone per person in multi-person households in order to replace wireline service. Otherwise, other household members would be stranded when

---

[30] *Triennial Review Order* ¶ 230.

[31] *Business Week Online*, Oct. 20, 2003 (emphasis added). *See also* SBC Communications Analyst Meeting, Nov. 13, 2003, Final Transcript at 12 ("Customers want both" wireless and wireline services).

[32] *Triennial Review Order* ¶ 230.

[33] *Id.*

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.[34] Therefore, as Dr. Selwyn shows, 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, where all calls (including local calls and inbound calls) in excess of the monthly allowance are charged on a per minute basis. Selwyn Decl. ¶ 65-66.

Other unresolved 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, is yet to be demonstrated, and in any event does not exist at the present time.[35]

As Dr. Selwyn describes, for these reasons, wireless bundles are a poor substitute for wireline as a means for satisfying a household's telephone service needs and the

---

[34] The ability to have several extension phones on a single wireline service greatly increases the utility of wireline services – and further differentiates wireline from wireless services – by allowing multiple family members to participate on the same outbound call and is even more important for inbound calls, particularly in the 68 percent of U.S. residences with multiple floors and the 41 percent of American households with three or more persons. Selwyn Decl. ¶¶ 66-67. This limitation may be partially addressed by devices that permit consumers to access their wireless handsets via conventional telephones connected to the inside wiring in their homes. Such devices have been announced in recent months by their manufacturers, but have not yet received any acceptance beyond the earliest of early adopters. The use of such a device would not diminish any of the other limitations on the utility of wireless services as the primary household telephone line, except perhaps in single person households.

[35] Selwyn Decl. ¶ 68. It is not clear that cell phones would 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. *Id.*

availability of wireless services can provide little or no constraint on Qwest's local service pricing. Qwest does not show otherwise. Qwest's claims (pp. 9-10) that wireless services are reducing wireline *long distance* usage – while correct – are certainly beside the point, because, as shown above, households are likely to retain local wireline dialtone service even if they choose to make some long distance calls on their wireless phones.[36]

The *Triennial Review Order* noted that only "about three to five percent of CMRS subscribers are using their service as a replacement for *primary* fixed voice wireline service."[37] Qwest fails to show that Omaha consumers are "cutting the cord" to any significantly greater extent – even after the introduction of wireless number portability. Indeed, Qwest makes no showing that any Omaha customers rely exclusively on wireless services.

Qwest refers (p. 11) to its own internal survey of wireless customers, but has not bothered to provide that survey to the Commission. Yet, even this survey apparently provides no information on *Omaha customers* or the extent to which *any* Qwest customers may have replaced their primary fixed voice wireline service with wireless service.[38] Qwest's only evidence on this central point comprises vaguely described third party survey research by Advantis – which Qwest also has not submitted to the Commission – concerning consumers' purported "willingness" to rely exclusively on

---

[36] 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 November 19, 2003).

[37] *Id.*

[38] Qwest apparently surveyed wireless users in Iowa and Utah. Petition p. 11.

wireless and a press release by a small wireless carrier, Cricket, which claims that 37 percent of its customers use only wireless.[39] Qwest fails to mention, however, that Cricket also states that these customers are largely single and/or aged 18-34 and/or living in one or two person households, and thus predominately are those for whom the advantages of wired service for multi-person household uses are likely to be much less important.[40]

There also is little evidence that number portability is resulting in any significant increase in the use of wireless service as a replacement for primary line voice service. Other BOCs have reported seeing little such effect. Although "[l]ocal phone companies had predicted that hundreds of thousands – possibly even millions – of customers would abandon wired phone service when new federal rules allowing such a switch took effect," SBC reported that "*the number who actually have taken the plunge is very small, numbering in the hundreds.*"[41] Verizon similarly described the number of customers porting wireline numbers to wireless as "very, very small" and "insignificant."[42] As described by Dr. Selwyn, the fact that few consumers take the opportunity to drop wired phone service when they move to a new home also suggests that wireless LNP is "not likely to significantly increase substitutability."[43]

---

[39] *Id.*

[40] http://www.leapwireless.com/press/content/2003/051203.html.

[41] *Demand lacking for home-to-cell phone number moves*, Chicago Tribune (Dec. 10, 2003).

[42] 2003 Verizon Earnings Conference call and Investor Conference, Jan. 29, 2004 Fair Disclosure Wire, Westlaw 65933276

[43] Selwyn Decl. ¶ 72.

Significantly, Cingular, which is controlled by BellSouth and SBC, seeks approval of its proposed merger with AT&T Wireless by contending that wireless and wireline services are *not* sufficiently close substitutes to be treated as part of the same relevant antitrust product market. According to the antitrust economist representing Cingular and AT&T Wireless, who is a former Deputy Assistant Attorney General for Economics in the DOJ Antitrust Division, "[a]t the present time, *wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market*." Declaration of Richard Gilbert, ¶ 44 (emphasis added), Cingular and AT&T Wireless, Application for Assignments of Authorization and Transfer of Control, Mar. 18, 2004.

Qwest's claims also overlook wireless carriers dependence on special access facilities provided by Qwest to connect end users to their points of presence and to carry traffic between their switches and the cell stations where antennas establish connections to users.[44] The ILECs account for more than 90 percent of AT&T Wireless's transport costs and about 96 percent of the special access transport needs of T-Mobile.[45]

Qwest thus has failed to demonstrate that wireless competition constrains its market power. Although wireless service complements wireline service, it does not provide an effective substitute for local dialtone, and according to SBC's Chairman it will "*never*" be a substitute for wireline service.

---

[44] *See, e.g.*, Comments of AT&T Wireless, WC Docket No. 02-112, filed June 30, 2003, at 8.

[45] *Id.* at 9.

III. SECTION 271(d)(4) AND SECTION l0(d) OF COMMUNICATIONS ACT EACH INDEPENDENTLY BAR THE REQUESTED FORBEARANCE RELIEF.

Qwest's request for forbearance from the requirements of sections 251(c) and 271 is barred by sections 271(d)(4) and 10(d) of the Act. Section 271(d)(4) bars the Commission from limiting the terms of the section 271 competitive checklist "by rule" or "otherwise," and Qwest's request for forbearance from compliance with sections (i)-(vi) and (xiv) of the competitive checklist must be denied on this ground alone. In addition, Qwest's petition is fatally premature because section 10(d)(4) prohibits the Commission from forbearing from any requirements of sections 251(c) and 271 before those sections are "fully implemented." As required by the objectives and purposes of the Act, sections 251(c) and 271 cannot be considered fully implemented until there is ubiquitous availability of durable, cost-based wholesale alternatives to Qwest's bottleneck facilities. Qwest has not made, and cannot make, such a showing. For these same reasons, Qwest fails to meet its burden under sections 10(a)(1)-(3) to establish that: (i) compliance with the sections 251(c) and 271 requirements are not necessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the services that would be affected by their removal; (ii) enforcement of these requirements is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest.

A. Section 271(d)(4) Bars the Commission from Limiting the Competitive Checklist.

Section 271(d)(4) is an express "limitation on [the] Commission."[46] The statute provides that the Commission "may not," either by rule "or otherwise," "limit the terms used in the competitive checklist." That, of course, is precisely what Qwest seeks in its

[46] 47 U.S.C. § 271(d)(4).

forbearance petition. But, the plain text of section 271(d)(4) is absolute and unqualified – the Commission is expressly precluded, "by rule or otherwise," from "limit[ing]" the terms of the competitive checklist. Qwest's forbearance petition clearly asks the Commission to "limit" the competitive checklist within the plain meaning of that term;[47] if its petition were granted, Qwest would have no obligation to comply with sections (i)-(vi) and (xiv) of the competitive checklist. Because section 271(d)(4) expressly prohibits the Commission from imposing such limits "by rule or otherwise," Congress could not have more clearly commanded that the Commission may not limit the competitive checklist through *any* means or procedural device, including any attempt at limitation by forbearance.

Qwest's petition ignores completely the strictures of § 271(d)(4). Instead, Qwest argues that once a 271 application has been granted and (in Qwest's view) the checklist requirements have been "fully implemented," the checklist requirements are eligible for forbearance under section 10(a).[48] This argument, though, is foreclosed by the plain text of section 271(d)(4), which contains no language whatsoever limiting its application to the period before a section 271 application is granted.

In all events, Qwest's position is contrary to the very structure of section 271 and the role the competitive checklist plays in ensuring that local markets remain open to competition. Congress recognized that once a BOC obtained long distance authority, there would be a serious risk of "backsliding." Thus, "obtaining section 271 authorization is *not* the end of the road" and Congress made clear that the requirements of section 271,

---

[47] *See* Webster's Revised Unabridged Dictionary (to "limit" is to "*terminate*, circumscribe, or restrict") (emphasis added).

[48] Petition pp. 30-31.

including the section 271 checklist, endure long after the BOC receives section 271 authorization."[49]

Section 271(d)(6) accordingly imposes on the Commission an ongoing obligation to ensure that BOC local markets remain open to competition even after the BOC has satisfied the competitive checklist and obtained section 271 approval. Section 271(d)(6) empowers the Commission to act *sua sponte* to remedy violations of section 271, requires the Commission to act within 90 days on any complaint alleging a violation of section 271, and authorizes the Commission to suspend or revoke a BOC's section 271 authority. All of these post-authorization administrative remedies and enforcement powers could be rendered impotent if, as Qwest contends, the Commission is free through forbearance to limit the terms of the competitive checklist after section 271 authorization has been granted. And, as explained below, the Commission has already rejected Qwest's position that the competitive checklist is fully implemented once a section 271 application is granted.

B. Section 10(d) Prohibits the Commission from Forbearing from Any Requirement of Sections 251(c) and 271 before those Sections Are "Fully Implemented."

Qwest's petition is also fatally premature in seeking forbearance from the obligations contained in sections 251(c) and 271. Section 10(d) places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines

---

[49] *See* Memorandum Opinion and Order, *Application By Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service In the State of New York*, 15 FCC Rcd. 3953, ¶¶ 448, 453 (1999) (stating that "obtaining section 271 authorization is not the end of the road" and that the "critically important power" in section 27l(d)(6) "underscores Congress's concern that BOCs continue to comply with the statute") (emphasis added).

that those requirements have been fully implemented."[50] The Commission considers section 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits.[51]

Qwest's submission does not begin to demonstrate that *all* – or even *any* – of the requirements of sections 251(c) and section 271 have been "fully implemented." Nor could it. The objectives and purposes of the Act suggest that the requirements of section 251(c) and 271 will be "fully implemented" when, at a minimum, there is ubiquitous availability of cost-based *wholesale* alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets.[52] The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities.[53] The requirements of sections 251(c) and 271 are not fully implemented,

---

[50] 47 U.S.C. § 160(d).

[51] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶ 5, 9 (2003) ("*Verizon Forbearance Order*").

[52] As demonstrated above, Qwest has failed to establish the existence of any alternative source for the wholesale inputs competitive local exchange carriers require.

[53] *Cf. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

according to the plain meaning of those terms, where Qwest has failed to demonstrate any wholesale alternatives to the inputs it is required to provide under those sections.

Section 10(d) thus precludes the Commission from even considering the regulatory forbearance Qwest seeks until all of the market-opening requirements of sections 251(c) and 271 have been fully implemented. Because there is no sustainable construction of section 10(d) under which the "fully implemented" requirement could be found satisfied, the Commission has no authority to grant Qwest's request that it forbear from applying the requirements of sections 251(c) and 271 to Qwest in the Omaha MSA.

Qwest contends, however, that its receipt of section 271 authority to provide interLATA services in Nebraska establishes that it has fully implemented sections 251(c) and 271. Qwest is wrong. The Commission's section 271 precedents confirm that the Commission was not making any comprehensive determination in its section 271 authorization decisions that the requirements of section 25 l(c) and 271 were themselves "fully implemented" or, indeed, even that the BOC applicant had "fully implemented" the requirements of section 251(c) and section 271. Early on in evaluating section 271 applications, the Commission held that its review would be quite limited in important respects. First, the Commission held that it would not evaluate whether a BOC had complied with rules that were promulgated, but not effective at the time of the application.[54] Thus, for example, the Commission did not evaluate whether SBC in Texas complied fully with all of the Commission's rules implementing Rule 319 because those rules went into effect shortly after SBC filed its application, and the Commission

[54] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354, ¶ 30 (2000).

undertook no assessment of whether SBC implemented operational support systems to accommodate line sharing.[55] Likewise, Verizon in New York was not required to show compliance with any aspect of the Commission's Rule 319 regulations.[56] In this regard, the Commission stressed that its rules "vary with time" and that the section 271 process would only work if the BOC's application were judged soley against those rules that were "fix[ed]" at the time of the application.[57]

Second, the Commission observed that its existing rules do not address many local competition issues or are ambiguous in key respects, and thus held that it would only evaluate section 271 applications with respect to a BOC's compliance with "clear" rules or "self-executing" requirements of the Act.[58] In so holding, the Commission observed that the "fast track" 90-day section 271 process was not an appropriate forum for addressing "fact-intensive" disputes about an individual BOC' s compliance with the Act or resolving "industry-wide local competition questions."[59]

In all events, the Commission *rejected* Qwest's position in the *Verizon Forbearance Order*. Specifically, the Commission expressly rejected the notion that the

---

[55] *Id.* ¶¶ 32, 33.

[56] *Id.* ¶ 32.

[57] *Id.* ¶ 27.

[58] *Id.* ¶ 23.

[59] *Id.* ¶ 25. *See also* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, inc. D/B/A Southwestern Bell Long Distance for Provision of In Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237, ¶ 19 (2001) ("Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability").

grant of section 271 authority in a state means that all of the requirements of section 271, including the incorporated requirements of section 272, have been "fully implemented."[60] Instead, the Commission held that "full implementation'' must be determined on the basis of whether the "goals" of the underlying statutory provisions have been fulfilled.[61] Qwest cannot possibly make that showing, and does not even attempt it.

Ultimately, the "fully implemented'' requirement of section 10(d) must be interpreted in light of the purposes of section 271. Section 271 is intended to open local markets to competition *and* ensure no backsliding by the BOCs after section 271 relief is granted. That will be accomplished only when the Bells' incentives to backslide are eliminated, which will occur only when, at a minimum, there is ubiquitous availability of durable, cost-based, wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. Qwest has produced no such evidence. Accordingly, the "fully implemented" requirement is not satisfied, and the Commission is therefore barred from granting Qwest's forbearance requests.

IV. QWEST FAILS TO SATISFY THE THREE SECTION l0(a) CONDITIONS FOR FORBEARANCE OF "BROADBAND'' OBLIGATIONS.

In all events, Qwest cannot meet the specific requirements for forbearance contained in section 10(a). Under section l0(a), the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[62] First, the proponent of

---

[60] *Verizon Forbearance Order* ¶ 7.

[61] *Id.*

[62] *Cellular Telecommunications & Internet Assn. v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

forbearance must show that enforcement of the specific regulations that apply to the "telecommunications service" at issue "is not necessary to ensure that the charges, practices, classifications, or regulations . . . in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory."[63] Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."[64] And, third, it must show that non-enforcement of those regulations "is consistent with the public interest,"[65] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[66]

Here, Qwest is seeking forbearance from regulations that apply to the "telecommunications services" of providing to competitive carriers, *inter alia*, unbundled network elements (including loops and transport), physical collocation, resale at a wholesale discount, and access to poles, ducts, conduits, and rights-of-way. Thus, under section l0(a)(l), Qwest must demonstrate that the regulations from which it is seeking forbearance – *i.e.*, the 251(c) and 271 requirements – are unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for those services.

With respect to access to unbundled local loops and other wholesale inputs, this showing is foreclosed by the *Triennial Review Order* and the *USTA II* decision. In the *Triennial Review Order*, the Commission held that the ability of new providers to

---

[63] 47 U.S.C. § 160(a)(l).

[64] *Id.* § 160(a)(2).

[65] *Id.* § 160(a)(3).

[66] *Id.* § 160(b).

compete with incumbent LECs would be impaired without access to such loops.[67] This determination was *not* upset in the *USTA II* decision. Moreover, under the Commission's impairment test, impairment exists when natura1 monopoly and sunk cost entry barriers make it uneconomic for competitive carriers to deploy their own loops.[68] In light of these findings, the loop access regulations from which Qwest seeks forbearance are clearly necessary to prevent the exercise of market power over the services at issue. Qwest has the ability to charge supracompetitive prices for wholesale access to its loops – or deny access altogether – because it is economically infeasible for competitive carriers to self-deploy their own loops. And, for the same reasons, competitive carriers must continue to have unbundled access to Qwest's transport and other wholesale inputs.

Nor could competitive carriers turn to alternative providers for such wholesale inputs. In the first place, Qwest has failed to demonstrate the availability of such wholesale inputs from wireline carriers, and, indeed, has shown that the largest *retail* wireline competitor is *100% reliant* on Qwest's provision of such inputs. In addition, cable facilities cannot be used by competitive carriers to offer voice and data services and, in all events, Cox does not offer such wholesale access. To the extent that forbearance would allow Qwest to exercise any market power over the leasing of access to its local networks, the Commission's precedent makes clear that it must be denied.[69]

---

[67] *See, e.g., Triennial Review Order* ¶¶ 248, 253, 288, 325-26.

[68] *Triennial Review Order* ¶¶ 75-78.

[69] *See, e.g.*, First Report and Order, *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414 ¶ 13 (2000) ("In determining whether to forbear from applying specific statutory or regulatory provisions, our goal, consistent with sound public policy and Congressional intent, is to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary. At the same time, . . . the decision to forbear from enforcing

Moreover, Qwest has produced no evidence whatsoever that access to its retail services at wholesale discounts, access to its poles, ducts, conduits, and rights-of-way, or access to physical collocation in Qwest's serving offices and remote terminals is unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the provision of competitive local services. Indeed, Qwest's petition establishes that resale is a necessary tool for competitive carriers to "increase their market presence beyond the reach of their existing networks" and "more quickly than would be possible solely through expansion of their own networks." Petition pp. 16-17. Furthermore, Qwest has provided no explanation whatsoever regarding how facilities-based competitive carriers – who in all events would rely upon unbundled access to Qwest's local loops – could provide service without physical collocation in Qwest's serving offices and/or remote terminals and without access to Qwest's poles, ducts, conduits, and rights-of-way. Indeed, even cable companies are reliant on access to unbundled access to Qwest's facilities. As shown above, cable companies must have access to ILEC inside-wiring subloops in order to provide cable telephony to subscribers residing in MDUs. Without such access, cable companies would be walled off from a significant number of the consumers who reside in MDUs. Qwest accordingly has not meet its burden under section 10(a)(1).

For these same reasons, Qwest's petition does not satisfy section 10(a)(3). That provision requires the Commission to examine whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." Granting Qwest an unregulated monopoly clearly does

---

statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met").

not "promote competitive market conditions" or "enhance competition among providers of telecommunications services." As Dr. Selwyn points out, denying CLECs access to the wholesale inputs they need "will decidedly *not* 'promote competitive market conditions' and will certainly operate to diminish competition for retail telecommunications services." Selwyn Decl. ¶ 57 (emphasis in original). Indeed, granting Qwest's petition could have competition limiting implications far beyond the Omaha MSA. Thus, to the extent that a grant of the petition were seen by the investment community as a harbinger of similar actions in other areas, it would "cast a dark shadow over investor interest" and "serve only to *discourage* the efficient facilities-based investment that would otherwise take place."[70]

Qwest also fails to satisfy section 10(a)(2). Here, Qwest falls back to the Bells' shop-worn arguments regarding "regulatory parity" and the need to be "freed" of regulation in order to promote investment. However, as the Commission has stated, regulatory parity demands no more than "an analytical approach that is, to the extent possible, consistent across multiple platforms."[71] That is far different from Qwest's view, in which regulatory parity necessarily requires identical *outcomes* across different platforms, regardless of the real world circumstances and consequences. As the Commission has stressed, "legal, market, or technological distinctions may *require* different regulatory requirements between platforms" notwithstanding the application of

[70] Selwyn Decl. ¶ 46 (emphasis in original).

[71] Declaratory Ruling, *Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 6 (2002) ("*Cable Modem Declaratory Ruling*").

a consistent analytical framework.[72] And, Qwest simply ignores the Supreme Court's decision validating TELRIC as the pricing methodology for unbundled network elements and holding that TELRIC-based rates had not deterred investment.[73] Qwest thus presents no compelling counter to the fact that it is the sole source for the wholesale inputs competitive carriers need to provide local telephone service.

Qwest position is even more lacking with respect to those unbundled elements it must make available under section 271. In the *Triennial Review Order*, the Commission expressly declined to require the Bells to provide section 271 checklist items at TELRIC-based rates, and instead mandated only that those elements, to the extent they are used to offer interstate service, be governed by the "just and reasonable" requirements of section 201 and the "nondiscrimination" requirement of section 202.[74] Qwest, however, seeks to be freed of its obligation to provide unbundling under section 271 at the section 201/202-prescribed nondiscriminatory, just and reasonable rates. The rates, terms and conditions of the voluntary access that Qwest claims it is more than willing to provide and of the section 271 access that it here seeks to evade would be subject to the very same section 201/202 safeguards. Thus, the purpose of Qwest's forbearance petition must be to enable Qwest to deny access to its wholesale services and inputs altogether, even at the "just and

---

[72] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, ¶ 7 (2002) ("*Wireline Broadband NPRM*") (emphasis added).

[73] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 517 n.33 (2002) (the evidence does not "support [the] assertion that TELRIC will stifle incumbents' 'incentive ... either to innovate or to invest' in new elements," because it is "commonsense" that "so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and to improve their services to hold onto their existing customer base"); *id.* at 517-19 (TELRIC includes forward-looking cost of capital and depreciation lives that are sufficient to compensate carriers for the risks they incur when investing in new facilities).

[74] *Triennial Review Order* ¶ 663.

reasonable" rates mandated by section 201. The very fact that Qwest is fighting so hard to deny altogether any obligation to provide CLECs access to these facilities – access that would be provided upon the same terms as "voluntary" access – gives the lie to Qwest's claim that it would actively seek out wholesale relationships with CLECs.

Finally, Qwest falls back to arguments that unbundling is "time consuming" and "expensive." Again, this argument fails because so long as Qwest retains substantial market power over the wholesale inputs required by competitive carriers, complaints that it is "costly" for it to comply with the section 251(c) and 271 rules are patently insufficient under section 10 to justify the wholesale repeal of core nondiscrimination and unbundling requirements that Qwest seeks.

V. QWEST'S REQUEST THAT IT BE TREATED AS A NONDOMINANT, NON-ILEC SHOULD BE DENIED.

In addition to its requests that it be relieved of its statutory duties under sections 251(c) and 271, Qwest asks the Commission to forbear from treating Qwest as a dominant carrier and as an ILEC. For the reasons set forth above with respect to forbearance from sections 251(c) and 271, the Commission should deny this request. Moreover, granting Qwest's demand for nondominant, non-ILEC treatment would raise the specter of additional abuse by Qwest of its bottleneck control over special access and could result in significant increases in Qwest's already above-cost switched access charges. Qwest's petition should be denied for these reasons as well.

As Dr. Selwyn documents (¶ 51), AT&T still must rely upon Qwest's special access services for the overwhelming preponderance of its high-capacity loops in the Omaha MSA, even in the portion of the Omaha MSA with the highest concentration of enterprise customer locations – downtown Omaha itself. As AT&T has demonstrated

elsewhere, the Commission's premature granting of pricing flexibility to ILECs that retain market power with respect to last-mile high-capacity facilities, *i.e.*, special access, has resulted in a significant increase in the price of special access services where such flexibility has been granted.[75] Indeed, less than ten days ago, Qwest filed a tariff transmittal proposing to increase its special access rates in MSAs where it has received Phase II Pricing Flexibility by 9% to 94%, with an average increase of 27%.[76] Moreover, based on 2003 calendar year data, Qwest's special access rate of return before these substantial rate increases "is a whopping 68%."[77] The ability to impose such significant rate increases and to realize such considerable rates of return demonstrates the enduring market power Qwest enjoys over necessary last mile inputs.

Declaring Qwest nondominant would exacerbate this situation and permit Qwest to squeeze its competitors even further in their ability to provide services to business customers. Even where it has received pricing flexibility with respect to special access, Qwest is required to establish generally available tariffs applicable to all special access customers. Selwyn Decl. ¶ 53. If, however, Qwest were to be treated as a nondominant, non-ILEC, it presumably would not be covered by the *Pricing Flexibility Order*'s requirement that carriers subject to Phase I or Phase II pricing flexibility still file such tariffs. *Id.* ¶ 54. If that were the case, Qwest would be free to engage in "surgically-targeted" competitive pricing initiatives, offering lower prices to customers facing actual

---

[75] *See, e.g.*, *Petition of AT&T Corp. for Rulemaking to Reform Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, filed October 15, 2002.

[76] *See* Petition of AT&T Corp., *Qwest Corporation*, Transmittal No. 206, filed August 23, 2004, pp.1-2.

[77] *Id.*

competitive choices while potentially raising rates above those in its generally available tariffs for special access services furnished to the vast majority of locations where no competitor offers service. *Id.* This would increase Qwest's market power in the Omaha MSA, and such a result should not be countenanced by the Commission.

Granting Qwest's petition could also cause a significant increase in interstate switched access rates. In its 2001 *CLEC Access Charge Order*,[78] the Commission established limits on the level of interstate switched access charges that CLECs may impose, which were based on the incumbent LECs access charge rate levels within the same geographic footprint. Selwyn Decl. ¶ 86. Thus, CLECs may set their charges no higher than those charged by the ILEC. *Id.* If, however, Qwest were no longer to be deemed an ILEC, there would be no limiting ILEC rates in those portions of the Omaha MSA served by Qwest, and Qwest arguably would be free to increase its interstate switched access charges for call originating or terminating in the Omaha MSA at will. *Id.* This is an example of a potential consequence that could be caused by granting Qwest's petition, and one which has not been addressed by Qwest.[79]

---

[78] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, FCC 01-146 (2001).

[79] In addition, the grant of Qwest's petition arguably could negate Qwest's duty to comply with the Part 32 accounting rules, file ARMIS reports, and comply with the Part 36 separations requirements with respect to the Omaha MSA. Qwest could also have to revise its Cost Allocation Manuals to reflect the separation between ILEC and non-ILEC operations. *See* Selwyn Decl. ¶ 84.

CONCLUSION

For all of the reasons set forth herein, Qwest's petition for forbearance should be denied.

Respectfully submitted,

/s/ Stephen C. Garavito

Leonard J. Cali
Lawrence J. Lafaro
AT&T Corp.
One AT&T Way
Room 3A214
Bedminster, NJ 07921
908-532-1850

Stephen C. Garavito
James J. R. Talbot
AT&T Corp.
1120 20th Street, N.W.
Suite 1000
Washington, DC 20036
202-457-3878

August 24, 2004

ATTACHMENT A

ATTACHMENT B

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opposition of AT&T Corp. was served on the following by placement in the United States mail, postage prepaid, on the 24th day of August, 2004:

/s/ Sabrina Carter
Sabrina Carter

Andrew D. Crain
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005

Attorneys for Qwest Corporation

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

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 04-223
Forbearance Pursuant to 47 U.S.C.	)	
§ 160(c) in the Omaha Metropolitan	)	
Statistical Area	)	
	)	

DECLARATION OF MARK J. LANCASTER
AND DALE C. MORGENSTERN
ON BEHALF OF AT&T CORP.

I. QUALIFICATIONS

1. **Mark J. Lancaster.** My name is Mark J. Lancaster. My business address is 1111 Main Street, Kansas City, Missouri 64105. I am employed by AT&T as a Technical Specialist in the AT&T Labs organization. My primary responsibilities are to provide strategic network planning expertise to internal AT&T clients on numbering issues, and to work with state and federal regulatory commissions and industry representatives to encourage competitive opportunities for AT&T in the provision of telecommunications service.

2. My career with AT&T began in 1979, when I was hired by Southwestern Bell Telephone Company as a Service Consultant in the Marketing organization. I worked extensively with plant, engineering, accounting, and the business office in support of sales to customers in the utilities and data processing industry. In 1982, I accepted a position in AT&T's Long Lines Engineering organization. I

held various positions in AT&T, including Engineering Systems Design, Switch Planning, and Material Management. In 1990, I accepted a position in State Government Affairs developing Network and Access costs in support of AT&T's intrastate service filings. My duties also included analysis, intervention, and negotiations related to local exchange company service filings. In 1993, I joined the Access Management organization and worked in all phases of access rate design and intervention, primarily in Arkansas, Kansas, and Missouri. I accepted my current position in 1996.

3. **Dale C. Morgenstern**. My name is Dale C. Morgenstern. My business address is 1 AT&T Way, Bedminster, New Jersey 07921. I am employed by AT&T as Group Manager – Numbering, Routing & 911 Planning. Since January 1999, I have been responsible for numbering and 911 planning and implementation for various AT&T network services and for AT&T's internal test network. My 911 responsibilities focus on ensuring that AT&T's internal network is in compliance with state and local regulatory requirements.

4. I began my career with AT&T in 1976 in the company's Network Service Distribution organization. From 1976 to 1981, I was employed in the Circuit Administration and Transmission Engineering departments of that organization and was involved in designing and implementing performance measurement plans for transmission and trunk administration. In 1981, I began a rotational assignment in AT&T's New York Telephone unit. From 1984 to 1988, I was employed in the Network Service Field Support and Technical Regulatory Planning departments of AT&T's Network Operations organization, where my

responsibilities included the development of dialing and routing plans for "National Security-Emergency Preparedness" government networks. In 1988, I moved to AT&T's Consumer Communications Services unit, where I held a succession of jobs in the New Business Development, Consumer Information Management, and Consumer Video Services departments. From 1994 until I accepted my current job in January 1999, I was employed in AT&T's Customer Connectivity organization, where my responsibilities included operations planning and implementation for AT&T Customer Network Service Centers as well as number administration and local number portability implementation.

II. INTRODUCTION AND SUMMARY

5. The purpose of this declaration is to rebut the contention in this proceeding by Qwest Corporation ("Qwest") that the listings of telephone numbers in Enhanced 911 ("E911") databases are a reliable source from which to determine the number of business lines currently served by CLECs using their own facilities. Although the volume of numbers in use by any one carrier's customers may suggest competitive entry, its relationship to the service provided and the facilities used to provide such service is, at best, tenuous.

III. ANALYSIS

6. The sole purpose of including telephone numbers in the E911 database is to ensure proper emergency response for 911 users. The methods and procedures used by each carrier and the industry guidelines for database population both are designed strictly for the limited (albeit important) purpose of facilitating accurate identification of a caller. Therefore, to the extent these databases are maintained

with scrupulous care, it is to promote effective emergency response, not to catalogue correctly the number of telephone lines provided by any one carrier or the facilities they use in providing such service.

7. E911 databases serve as the foundation for the provision of emergency services. When a customer dials 911, the call is directly routed to the Public Safety Answering Point ("PSAP") charged with responding to emergency calls within the area where the customer is located. When the PSAP receives a call, the call is accompanied by Automatic Location Identification ("ALI") that provides the caller's telephone number, the address or location of the telephone the caller is using, and supplemental emergency services information. This information is maintained by the ALI Database Management Systems Provider, and it is accessed by PSAPs in order to enable them to link the caller's telephone number with the information maintained in the database. Although the ILECs originally served as ALI Database providers and therefore had control of the databases, more recently this function has been provided by third-party vendors, who allow individual carriers to make their own judgments on database population.

8. The National Emergency Number Association ("NENA"), an organization that includes industry experts from both the public and private sectors, defines standard practices to ensure the compatibility of 911 technologies and increase the effectiveness of 911 systems. NENA's standards reflect industry consensus and provide the basis for agreements among 911 jurisdictions, local exchange carriers, and the ALI Database Management System Provider. However, because NENA has no authority to enforce compliance, the standards it promulgates are merely

recommendations. In fact, there are many factors that suggest that the number of lines identified by a direct count of telephone numbers in the ALI Database is likely to be significantly different from the number of voice grade equivalent lines provided by each local exchange carrier.

9. When a carrier provisions local service, the carrier is responsible for electronically populating the ALI Database with the Master Street Address Guide ("MSAG") valid address of the customer. Although NENA guidelines set forth the criteria for telephone numbers to be included in the ALI Database, each carrier populates the database using its own protocol for record creation, maintenance, and deletion.

10. For example, NENA guidelines recommend that carriers not include telephone numbers for classes of service that do not generate dial tone, such as direct inward dial ("DID") numbers. However, when a customer with a large volume of numbers migrates to AT&T's services from another carrier, AT&T has no easy way to determine the details of the customer's PBX configuration. Because it is not clear which numbers should be included, in order to implement the purposes of the E911 system (to assure prompt and accurate access to emergency assistance), AT&T takes the conservative approach of including *all* ported numbers, including DID numbers. As a result, AT&T's listings in the ALI

Database include a significantly larger number of telephone numbers than the actual facilities needed to provide emergency service.[1]

11. Telephone numbers can also remain in the ALI Database even though the number is no longer active. NENA guidelines provide mechanisms for the removal of inactive telephone numbers, but inactive numbers can remain in the ALI database without interfering with the accurate operation of the service. Therefore, it is not uncommon for a carrier not to delete a particular number concurrently with its termination, instead completing the function on a regular interval of up to several months, or even yearly. Further, because database reconciliations and audits are not required, it is possible for deactivated numbers to remain undetected for extended periods.

12. Another factor that undermines the accuracy of an ALI database count for the purposes Qwest identifies is that a number of CLECs have withdrawn from the market and abandoned telephone numbers. Not surprisingly, these carriers have few resources, and even less motivation, to do the work necessary to ”clean up” the ALI database, and consequently blocks of inactive numbers remain in the database.

13. All of the above factors would cause the E911 database to overstate the number of lines served by CLECs. In addition, because of the critical link between carriers’

[1] AT&T network engineering standards allow for up to 500 DID numbers for each DS-1 facility purchased by a customer. AT&T does not include DID numbers when a customer uses telephone numbers from a block of numbers assigned to AT&T that was originally provisioned by AT&T, because in those cases, AT&T has specific information regarding the status of each

(. . . continued)

ALI database population and the delivery of emergency services to their customers, carriers, such as AT&T, will lean toward over-inclusion rather than under-inclusion of numbers in the E911 database. For all of these reasons, the E911 database is an inaccurate and unreliable measure of competition in the local market.

14. In a related context, the ILECs have recognized the fallacy of using telephone numbers as a gauge for actual end users. In the Commission's proceeding regarding outage reporting, *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, the comments filed on May 25, 2004 by the Bells and other ILECs, including Qwest, established that "assigned telephone numbers" should not be used as the threshold for reporting requirements because assigned numbers do not correlate to actual lines in service. For example, Verizon noted in its comments (p. 9) that "many customers subscribe to blocks of numbers that they activate only as needed, such as when the number of stations behind a PBX is increased, or that they retain to prevent other customers from using certain telephone numbers." It therefore "has no way of knowing how many numbers the customer is actually using." *Id.*, pp. 9-10.

(. . . continued)
number.

Qwest stated (p. 6) that "'Assigned telephone numbers' bear no correlation with end users."[2] As USTA summarized, "LECs have no way of knowing how many numbers a customer is using. LECs can measure only the number of lines and trunks that they deliver to a customer's premise. More specifically, the number of assigned numbers does not correlate with the number of customers or access lines." USTA Comments, p. 17.

[2] *See also* BellSouth Comments, p. 7 ("the quantity of 'assigned' numbers held by a carrier has little correlation to the number of customers or customer lines"); SBC Comments, p. 4 ("The number of 'assigned telephone numbers' has little correlation to the number of customers or customer lines in use . . . ."); Sprint Comments, p. 10 ("Neither the LECs nor the IXCs can determine such impact simply by referring to assigned telephone numbers"); Verizon Comments, p. 9 (Basing outage reports on the number of telephone numbers that are affected by an outage "would be an inherently unreliable measure of the impact of the outage").

VERIFICATION

I, Mark J. Lancaster, declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2004.

/s/ Mark J. Lancaster

Mark J. Lancaster

VERIFICATION

I, Dale C. Morgenstern, declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2004.

/s/ Dale C. Morgenstern

Dale C. Morgenstern

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

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

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 telecommunications 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

portrays as the entirety of the Omaha MSA, which it describes as consisting of four Nebraska counties and one Iowa county (in fact, the Omaha MSA actually consists of five Nebraska counties and three Iowa counties, covering an area nearly as large as the state of Connecticut). However, Qwest offers no evidence whatsoever for the proposition that the "competition" to which Qwest refers is present throughout the entirety of the MSA (or the subset thereof that Qwest has sought to portray as the entirety of the MSA). In fact, Qwest itself serves only a small fraction of the total area embraced within the Omaha MSA, and whatever limited wholesale competition is present is confined to a handful of buildings in downtown Omaha and a few suburban localities. Neither the characteristics of the MSA nor Commission precedent regarding the definition of "relevant geographic markets" support Qwest's contention that the competitive conditions required for the requested regulatory forbearance are satisfied throughout the entirety of the Omaha MSA.

6. Qwest's forbearance request has far-reaching consequences that have been completely ignored by Qwest and its Affiants. Qwest presents "evidence" purporting to demonstrate the presence of competition in *retail* markets only, focusing primarily upon competing providers ("CLECs") that are offering residential and small business services. It fails to note that, with the exception of Cox cable, it is highly unlikely that any of the *retail* competition to which it refers would continue to exist at all if Qwest, having been granted forbearance from Sections 251(c) and 271 unbundling, interconnection and collocation obligations, either ceases to offer such services and arrangements to its rivals altogether, or prices them at levels that render their use by competitors economically infeasible. Even Cox, the other significant, facilities-based *retail*

services provider operating in portions of the Omaha MSA, has given no indication that it intends to provide unbundled (wholesale) access to its network. Without the ability to obtain unbundled access to Qwest's network, to interconnect with Qwest on an economically feasible basis, or to maintain collocations at Qwest wire centers, CLECs that, unlike Cox, have not themselves overbuilt Qwest's network will be unable to compete for retail customers. Moreover, there is no reasonable basis to expect that such overbuilding – which the Commission has previously concluded would be prohibitively expensive and uneconomic – would actually take place. Qwest also points to several "intermodal" sources of retail-level competition – wireless and Voice over Internet Protocol ("VoIP"). As with the other *retail* services to which Qwest refers, these alternatives are not embraced within Qwest's "relevant product market" definition and, moreover, are not even included within the same product market as retail wireline local telephone service, because wireless and VoIP are not yet generally viewed as substitutes for mass market wireline services. In any event, if Qwest's *Petition* were granted, the outcome would be an unregulated Qwest monopoly or, at best, an unregulated duopoly in those portions of the product and geographic market in which Cox also provides facilities-based services.

7. Qwest currently has a monopoly with respect to wholesale services, the "relevant product market," and if its *Petition* were granted Qwest would then also be afforded monopoly (and in certain areas duopoly) status with respect to most retail local mass market services as well. In addition, however, relieving Qwest of the full suite of statutory and regulatory obligations imposed upon dominant incumbent local exchange carriers would operate to extend Qwest's 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 –

---

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

households in the Omaha MSA are willing to "cut the cord" and rely solely upon wireless service for all household calling needs. Indeed, evidence suggests that while there is some shifting of primarily long-distance calling from wireline to wireless services – substitution that is driven primarily by wireless pricing plans that benefit from essentially pecuniary disparities in the application of the Commission's Part 69 access charge rules with respect to a large portion of calls placed from and to wireless phones[4] – consumers generally regard wireless and wireline services as complementary, not substitutes. Similarly, VoIP services for residential customers require a high speed data connection, currently generally available *only* via cable modem or DSL service, making it difficult (and expensive) for a significant number of customers to rely upon VoIP service for their only access to the PSTN. Even major VoIP providers have recently noted that VoIP does not constitute a substitute for wireline phone service for most consumers.

13. Granting Qwest's request for forbearance would also create a variety of opportunities for Qwest to increase competitor costs and make the competitive landscape in Omaha more difficult for both existing competitors and potential entrants. By eliminating the requirement that Qwest interconnect with competitors at any technically feasible point in the network and by also eliminating collocation requirements, Qwest will be able to significantly increase

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

---

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

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.

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

---

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.

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*

---

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,

---

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

---

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

---

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.

implement Federal, state, and local nonstatistical programs without consideration of the full effects of using these definitions for such purposes."[33]

28. MSAs are by their very nature arbitrary measures of cohesion surrounding an urban center. While there are criteria to determine the area encompassed by an MSA – including certain population requirements and commuting patterns[34] – MSAs can still have vastly different make-ups state-to-state and ultimately lack uniformity because (outside of New England) they are defined in terms of entire counties, which are often (as in the case of the Omaha MSA) expansive areas that in no sense can be said to 'correspond to the commercial realities' of the industry.

29. Indeed, the Commission has never made a specific or definitive finding as to the validity of basing the relevant geographic market definition *for wireline services* on MSA boundaries. The Commission has used the MSA geography as a basis for *establishing* market areas for 800 MHz cellular licenses, but there it used the MSA to *create* the geographic market scope by conditioning its license grant upon specific coverage requirements with respect to the

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

---

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...)

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

---

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.

triggers established for pricing flexibility were "sufficient to ensure that competitors have made sufficient sunk investment within an MSA."[42] Subsequent events have shown that expectation to have been seriously in error.[43]

32. The use of the MSA as the basis for geographic market definition cannot be reconciled with the specific requirements of the *Horizontal Merger Guidelines*, which explicitly state that "[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer responses." In defining the geographic market in terms of demand, *Brown Shoe* requires that "[t]he geographic market selected must [] 'correspond to the commercial realities' of the industry."[44] In the case of local telephone service, the "commercial reality" is that customers will *not* relocate their homes or businesses so as to obtain a competitive telephone service.[45] In the *LEC Interexchange NPRM*, the Commission expressed its belief "that most telephone consumers do not view interexchange calls *originating in different locations* to be close substitutes for each other."[46] Accordingly, a *demand-based* geographic market definition for the

---

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

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.

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

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 economics 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.

feasible given that a CLEC could "provid[e] a *variety* of services (*e.g.*, multi-channel video program delivery or electrical power distribution in addition to telephony services – whether POTS or high-speed Internet access) so that more applications can 'ride' on any necessary dedicated or shared facilities including rights of way."[63] Such speculations do not a competitive market make, nor do they assure the availability of wholesale distribution facilities to CLECs whose business models do not happen to comport precisely with HRS's vision.

45. In order for a CLEC to build a business relying upon such economies of scope, it must first consider its scale and the competition for the additional services that would be provided. Adapting an existing (for example, power or cable) distribution network to accommodate voice telephony is in no sense "free," and the entrant would need to evaluate the investment required in the context of the share of the total market it is likely to capture from the incumbent LEC or incumbent cable provider. For an entrant with no existing distribution facilities, construction of a ubiquitous distribution infrastructure from the ground up would require massive amounts of capital as well as protracted lengths of time. Additionally, the glut of capacity in the telecom equipment market to which HRS refer – or for that matter the glut of long-haul backbone capacity that exists nationwide – is of no consequence to the construction of a *local* distribution infrastructure. A new competitor wishing to offer a variety of products, including telecommunications services, over its own last-mile facilities would be required to deploy its own local distribution network, in direct competition with the existing networks of Qwest and incumbent

63. *IIRS*, 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.

Despite the *retail* mass market environment extant in the Omaha MSA is as competitive as Qwest undertakes to portray it, Qwest has provided no evidence that CLECs have determined they can provide a sufficient volume of narrowband *or broadband* facilities-based services to justify significant sunk facilities investments. The fact that no CLEC has deployed such facilities in the Omaha MSA indicates that CLECs do not anticipate the availability of sufficient revenues to justify the undertaking. The fact that several CLECs have invested in switches to serve their customers in the Omaha MSA demonstrates the willingness of CLECs to commit capital dollars to their business plans, and not simply (as Qwest and other BOCs have often claimed) to get a "free ride" on Qwest's network through their use of UNEs. These investments in switching were, of course, necessarily premised upon the *continued availability* of UNE-Loops at TELRIC-based rates. To the extent that a favorable ruling by the Commission on Qwest's *Petition* would be seen by the investment community as a harbinger of similar actions in other markets, rather than *encouraging* additional CLEC investment, forbearing from requiring Qwest to provide wholesale Section 251/271 services will almost certainly cast a dark shadow over investor interest in further switch purchases; rather than encouraging additional facilities-based competition, forbearance would serve only to *discourage* the efficient facilities-based investment that would otherwise take place.

47. The expense of deploying a competitive local distribution network was explained recently by SBC affiant Randall C. White in a recent Illinois Commerce Commission case. There, Mr. White confirmed that CLECs' apparent failure to deploy facilities of their own is not *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

---

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 << [redacted] >>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<< [redacted] >>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

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...)

CLECs' construction costs are in all other respects comparable to those of Qwest,[71] the CLEC serving *all current UNE-based CLEC customers* would incur a capital construction cost per *revenue-producing* loop that is some *eight times* the per-line cost that Qwest would confront for each revenue-producing loop that it deploys, and CLECs serving a smaller number of lines would confront even higher multiples of Qwest's costs were they to undertake facilities construction of their own.

49. In any event, it is obvious that Qwest's market power with respect to *wholesale* services – the "relevant product market" at issue in this *Petition* – is currently, and shall remain for the foreseeable future, intact and unchallenged. CLECs are not investing in their own subscriber loops because the cost of doing so is prohibitively expensive. Indeed, this evidence provides compelling support of the inescapable *fact* that with limited exceptions of incumbent cable

---

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.

companies or high concentrations of CLEC customers in densely-populated central business districts of major cities, subscriber loops are a "natural monopoly" by any traditional standard.

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

50. While seeking to portray the market for mass market retail residential/small business services as being highly competitive, Qwest Affiants are curiously silent as to the overwhelming dominance that Qwest currently enjoys with respect to enterprise customers. Enterprise customers were defined in the *TRO* as those requiring five or more individual voice-grade access lines or their equivalent.[72] In general, for customers with roughly twelve or more voice-grade access lines, CLECs will typically find it more economical to utilize a digital loop facility, such as a DS-1 or DS-3 circuit. Because these facilities typically carry both local (intrastate) and interstate traffic, the Commission's rules require that, where a CLEC requires the use of ILEC facilities to serve the CLEC's end user customers, those facilities be obtained as Special Access lines rather than as UNEs.[73] While CLECs are able to utilize owned facilities to serve a small number of their enterprise customers, in the overwhelming majority of cases the last-mile facilities must be obtained from an ILEC. In the Omaha MSA, Qwest provides the vast majority

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:

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.

---

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-

---

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...)

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

---

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:

---

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.

---

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*.

Not only are they not doing this, Cox and other cable companies have actively and aggressively *resisted* efforts aimed at imposing similar unbundling requirements on their networks.[86] Ironically, while Qwest and its Affiants premise their claims as to the presence of retail competition in part upon the existence of CLECs pursuing business models that are *based upon the continued availability of UNEs*, if Qwest's *Petition* is granted that competition can no longer be relied upon as providing any ongoing challenge to Qwest's then-expanding market power at the retail level.

57. As Qwest has correctly observed, "Section 10(b) requires that the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition."[87] If, as a result of a Commission decision to forbear from requiring Qwest to offer Section 251(c) and 271 wholesale services, such services were no longer available to CLECs in the Omaha MSA, such forbearance will decidedly *not* "promote competitive market conditions" and will certainly operate to diminish competition for retail telecommunications services.

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

---

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.

reliability, or age, income or prior wireless experience that would make the Advantis finding specifically applicable Omaha customers.

60. Importantly, however, the Advantis figures would seem to be in direct conflict with any reasonable estimate of actual substitution in Nebraska, as well as with FCC statistics regarding wireless substitution nationwide. For Nebraska specifically, it is highly unlikely that the substitution rate is significantly higher than the national rate. According to research performed by TNS Telecoms, nationwide wireless penetration is 58%.[90] As of 2003, there were 677,000 households in Nebraska,[91] 650,000 of which had some form of telephone service.[92] Applying the 58% wireless penetration rate to the total number of households in Nebraska suggests that 393,000 households in Nebraska have wireless service. According to the Nebraska Public Service Commission, there are 685,000 residential access lines in Nebraska,[93] 615,000 of which are primary lines.[94] Attributing these 615,000 primary lines to the 650,000 households in

---

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...)

Nebraska with telephone service yields a 94.6% wireline penetration rate for households with telephone service. Even assuming that all of the 35,000 remaining households with telephone service have substituted wireless for wireline service, the vast majority of households – 350,000 – view the two services as complementary, and subscribe to both services. As an extremely conservative estimate, at the very most, only 5.4% of Nebraska households have substituted wireless for wireline service. The Commission has repeatedly noted the scarcity of information on wireless/wireline substitution. As a benchmark, the FCC in its annual telephone subscribership report noted that between 4.9% and 6.0% of households have substituted wireless service for wireline.[95] The Commission's CMRS report notes that wireless substitution is estimated at between 3-5% nationwide.[96]

61. Qwest's *Petition* cites "a recent survey that Qwest performed of Cricket wireless users in adjacent [sic] states"[97] which, according to Qwest, found (in part) that:

---

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

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,

---

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

---

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

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

---

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

---

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*

---

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.

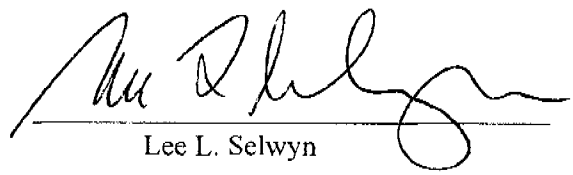
Conclusion

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.

increases in prices that would ensue, is clearly not in the public interest, and for this and the 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.

"Market Failure in Open Telecommunications Networks: Defining the new natural monopoly," *Utilities Policy*, Vol. 4, No. 1, January 1994.

The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers, (with Susan M. Gately, et al) a report prepared by ETI and Hatfield Associates, Inc. for AT&T, MCI and CompTel, February 1994.

Commercially Feasible Resale of Local Telecommunications Services: An Essential Step in the Transition to Effective Local Competition, (Susan M. Gately, et al) a report prepared by ETI for AT&T, July 1995.

"Efficient Public Investment in Telecommunications Infrastructure"
Land Economics, Vol 71, No.3, August 1995.

Funding Universal Service: Maximizing Penetration and Efficiency in a Competitive Local Service Environment, Lee L. Selwyn with Susan M. Baldwin, under the direction of Donald Shepheard, A Time Warner Communications Policy White Paper, September 1995.

Stranded Investment and the New Regulatory Bargain, Lee L. Selwyn with Susan M. Baldwin, under the direction of Donald Shepheard, A Time Warner Communications Policy White Paper, September 1995

"Market Failure in Open Telecommunications Networks: Defining the new natural monopoly," in *Networks, Infrastructure, and the New Task for Regulation*, by Werner Sichel and Donal L. Alexander, eds., University of Michigan Press, 1996.

Establishing Effective Local Exchange Competition: A Recommended Approach Based Upon an Analysis of the United States Experience, Lee L. Selwyn, paper prepared for the Canadian Cable Television Association and filed as evidence in Telecom Public Notice CRTC 95-96, Local Interconnection and Network Component, January 26, 1996.

The Cost of Universal Service, A Critical Assessment of the Benchmark Cost Model, Susan M. Baldwin with Lee L. Selwyn, a report prepared by Economics and Technology, Inc. on behalf of the National Cable Television Association and submitted with Comments in FCC Docket No. CC-96-45, April 1996.

Economic Considerations in the Evaluation of Alternative Digital Television Proposals, Lee L. Selwyn (as Economic Consultant), paper prepared for the Computer Industry Coalition on Advanced Television Service, filed with comments in FCC MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, July 11, 1996.

Assessing Incumbent LEC Claims to Special Revenue Recovery Mechanisms: Revenue opportunities, market assessments, and further empirical analysis of the "Gap" between embedded and forward-looking costs, Patricia D. Kravtin and Lee L. Selwyn, In the Matter of Access Charge Reform, in CC Docket No. 96-262, January 29, 1997.

The Use of Forward-Looking Economic Cost Proxy Models, Susan M. Baldwin and Lee L. Selwyn, Economics and Technology, Inc., February 1997.

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.

Regulatory Treatment of ILEC Operations Support Systems Costs, Lee L. Selwyn, Economics and Technology, Inc., September 1997.

The "Connecticut Experience" with Telecommunications Competition: A Case in Getting it Wrong, Lee L. Selwyn, Helen E. Golding and Susan M. Gately, Economics and Technology, Inc., February 1998.

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 << [redacted] >> END QWEST PROPRIETARY access lines in the Omaha MSA, and from this figure computes a CLEC market share of BEGIN QWEST PROPRIETARY << [redacted] >> 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<< [redacted] >>END QWEST PROPRIETARY CLEC lines is thus BEGIN PROPRIETARY<< [redacted] >>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

---

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*.

---

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.*