Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6649
Facsimile 303 896-1107

Craig J. Brown
Associate General Counsel

Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6650
Facsimile 303 896-1107

Robert B. McKenna
Associate General Counsel

VIA ELECTRONIC MAIL

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The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554
kevin.martin@fcc.gov

RE: *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers* -- WC Docket No. 07-135

Dear Chairman Martin:

On July 30, 2007, Gary L. Phillips of AT&T Inc. ("AT&T") wrote to you recommending that the Federal Communications Commission ("Commission") be sure to include competitive local exchange carriers ("CLECs") in its upcoming rulemaking proceeding looking towards reducing the incentives of local exchange carriers to engage in what is called "traffic pumping." AT&T pointed out that the traffic pumping issue is an extremely serious one, and that no solution that does not include CLECs within its parameters can have lasting vitality.

Qwest completely agrees with AT&T's observation. If the traffic pumping issue is dealt with only from the perspective of incumbent local exchange carriers ("ILECs"), it will simply shift the problem from small ILECs (where it currently resides for the most part) to CLECs whose rates are pegged to the same small ILECs. This solution would simply shift the traffic pumping incentive to CLECs, and Qwest agrees with AT&T that CLECs must be included in the planned rulemaking on traffic pumping.

In the traditional traffic pumping scheme, a small ILEC leaves the NECA pool and charges high rates predicated on traditional low traffic volumes, but enters into a partnership with a provider of what are known as "free calling services" to pump massive amounts of traffic through the ILEC switch. The contract generally calls for a sharing in the access revenues generated from the scheme. To the extent that the pumped traffic is actually subject to the small ILEC's tariffs, the rates are unreasonable and unlawful because the tariff was filed based on at least an implicit representation that the small ILEC's traffic would not dramatically increase, certainly not via a scheme in which the ILEC was sharing its access revenues with a purported "customer." Because small ILECs are generally subject to rate-of-return regulation for their interstate access rates, the Commission has ready authority to require adjustment of rates that are designed to earn in excess of the prescribed rate-of-return.

CLECs, on the other hand, do not have their rates directly regulated. Instead, a CLEC's tariffed access rates are limited by the rates of the adjacent "competing ILEC" (or in some cases by the NECA rate). Thus, if a CLEC pegged its interstate access rates to the very high rates of an adjacent ILEC, the CLEC could pump traffic through its switch without the ILEC's rates or traffic being affected at all. And the CLEC could argue that its rates were lawful because, no matter what the traffic volume or profit level, they would still be in line with the rates charged by the adjacent ILEC.

Quite simply, if the Commission were to resolve the traffic pumping issue only from the perspective of the small ILECs, it would incent the traffic pumping problem to simply move to CLECs, and the problem would not be resolved at all.

What is more, as AT&T points out, CLEC traffic pumping has already begun. In fact, CLEC involvement in traffic pumping schemes goes beyond the examples cited by AT&T. Qwest has detected traffic pumping by the following additional CLECs (several of which, it can be seen, have recently cut back on their traffic pumping activities):

- Tekstar Communications, Inc. (Minnesota)—January, 2005, <u>124,755</u> terminating minutes of use ("mou"); May, 2007, <u>5,652,115</u> terminating mou.

- Great Lakes Communication Corp. (Iowa)—August, 2005, <u>16,588</u> terminating mou; June, 2007, <u>1,943,465</u> terminating mou.

- Aventure Communications Technology LLC (Iowa)—June, 2006, <u>11</u> terminating mou; January, 2007, <u>2,759,950</u> terminating mou; June, 2007, <u>718,992</u> terminating mou.

- Mitchell Telecom (South Dakota)—January, 2005, <u>29</u> terminating mou; June, 2007, <u>2,487,701</u> terminating mou.

- Reasoner Telephone Co. (Iowa)—February, 2005, <u>13,577</u> terminating mou; February, 2007, <u>4,632,225</u> terminating mou; June, 2007, <u>35,839</u> terminating mou.

We have reason to believe that there are many more CLECs preparing to embark on traffic pumping schemes, especially if the Commission is successful in reducing incentives of small ILECs to engage in such schemes. Accordingly, Qwest agrees that AT&T is correct -- the traffic pumping proceeding that the Commission has announced it is initiating must include both ILECs and CLECs. Otherwise the problem will not be resolved with any degree of finality.

AT&T proposes that the Commission take a variety of approaches to resolving the traffic pumping problem as it involves CLECs. Additional possible approaches include:

- Declaring that traffic to "free calling services" in which the CLEC has a financial interest (*e.g.*, by sharing access revenues) is not terminating traffic and may not lawfully be covered by a CLEC's interstate access tariff.

- Requiring that CLECs provide a formal certification to the Commission (as a prerequisite to their tariffs being lawful) to the effect that it is aware of no reason why its access traffic will grow by more than a specified percentage over any three months following the effective date of the tariff, and that it will update its certification (and its tariff rates) should this certification no longer be accurate. Traffic in excess of the certified amount would be beyond the scope of the tariff. If a CLEC expected more rapid traffic growth (for example, if it had just entered the market), it would be required to explain why its rates were reasonable. This approach is similar to the approach suggested by Qwest in its petition to suspend the tariffs of various small ILECs hopping out of the NECA Pool on July 1, 2007.

- Adopting a rule that all traffic above a certain number of minutes per-month per-line is beyond the scope of the tariff.

There are undoubtedly additional approaches that might have vitality.

In all events, traffic pumping represents a serious problem today, and it is incumbent on the Commission to address it holistically -- in a manner that includes both ILECs and CLECs.

Very truly yours,

/s/ Craig J. Brown
/s/ Robert B. McKenna

cc:

Jonathan Adelstein (jonathan.adelstein@fcc.gov)
Michael Copps (michael.copps@fcc.gov)
Robert McDowell (robert.mcdowell@fcc.gov)
Deborah Taylor Tate (deborah.tate@fcc.gov)
Thomas Navin (thomas.navin@fcc.gov)
Donald Stockdale (donald.stockdale@fcc.gov)
Albert Lewis (albert.lewis@fcc.gov)
Deena Shetler (deena.shetler@fcc.gov)
Marlene H. Dortch (via ECFS)