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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services; Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services; WC Docket No. 06-125

Dear Ms. Dortch:

Time Warner Telecom Inc. ("TWTC") hereby supplements its recent *ex parte* notice in the above-referenced proceeding[1] with further information demonstrating Qwest's dominance in the provision of OCn and Ethernet services throughout its region. As demonstrated below, Qwest's high prices inflict deadweight losses on consumer welfare in the form of monopoly rents imposed on customers in locations where only Qwest has deployed or could deploy loop facilities. Perhaps more importantly, Qwest's pricing and conduct effectively limit TWTC, the most aggressive and successful non-ILEC provider of Ethernet, from offering these services to the vast majority of locations in the Qwest territory. Qwest, meanwhile, has little incentive to offer Ethernet to such locations since it can earn equal revenues without incurring new Ethernet deployment costs by simply offering legacy services.[2] Businesses, and the economy more generally, in the Qwest territory therefore suffer a direct

[1] *Letter from Thomas Jones to Marlene H. Dortch*, WC Docket No. 06-125 at Att. p.2 (filed Aug. 10, 2007).

[2] *See* Rosemary M. Cochran, *Business Ethernet Services--If You Build It, Will They Come?*, BUSINESS COMMUNICATIONS REVIEW, Oct. 2006 at 20 ("The number of retail business Ethernet customer

and substantial price for Qwest's largely unregulated exercise of pricing power in the provision of OCn and Ethernet services. Accordingly, there is no basis for granting Qwest's petition for forbearance from dominant carrier regulation of its OCn or Ethernet services.

As TWTC has previously explained, it is unable to deploy its own loops to the vast majority of locations it serves.[3] Moreover, in locations in which TWTC cannot deploy its own facilities, it has no choice but to rely on the ILEC's loop facilities. For example **[Proprietary begin] [Proprietary end]** Similarly, TWTC has been able to serve less than **[Proprietary begin] [Proprietary end]** of its locations demanding Ethernet service with facilities provided by competitive carriers. Such alternatives are no more available in the Qwest region than is the case elsewhere in the country.

The available evidence indicates that Qwest is exercising its market power with respect to OCn and Ethernet services. Qwest is able to sustain wholesale prices for these services at levels that far exceed those charged by competitive wholesalers like TWTC because in most locations Qwest has a monopoly over loop access to the commercial building. Indeed, Qwest's Ethernet pricing, provides clear evidence of its dominance. Most importantly, Qwest's practice of selling Ethernet cross-connects only in one Gbps increments while TWTC sells the same facilities **[Proprietary begin] [Proprietary end]** is a targeted ploy to raise rival Ethernet service providers' costs. For example, if a wholesale customer purchases two 50 Mbps loops and a cross-connect, it would pay **[Proprietary begin] [Proprietary end]** This differential is due largely to the fact that TWTC offers a smaller capacity, less expensive cross-connect that is better suited to support two 50 Mbps loops. Moreover, where a purchaser seeks a higher capacity Ethernet loop facility that would offer a higher fill rate for the one Gbps cross-connect, Qwest charges loop prices that **[Proprietary begin] [Proprietary end]**.

The attached Ethernet pricing charts compare the prices at which Qwest offers Metro Optical Ethernet service in Qwest's ILEC region with the wholesale prices that TWTC charges for its comparable Ethernet service provided over its own network in the same region. As the charts demonstrate, Qwest's Ethernet prices are **[Proprietary begin] [Proprietary end]** than TWTC's prices for the same services in the same region.

Qwest OCn prices are similarly well in excess of competitive rates. The attached OCn pricing charts compare the prices that TWTC pays Qwest for OC3 and OC12 service in Qwest's ILEC region with wholesale prices that TWTC charges for those services provided over its own network in that same region. As the charts show, Qwest's OC3 and OC12 prices are **[Proprietary begin] [Proprietary end]** than TWTC's prices for the same service. There is simply no clearer evidence of Qwest dominance in these markets.

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installations in the U.S. is just over 40,000 ports. AT&T, Verizon Business (the former MCI) and the RBOCs face cannibalization of more than 1 million frame relay ports."). The market for frame relay as of last October was $9 billion. *See id.*

[3] *Letter from Thomas Jones to Marlene H. Dortch*, WC Docket No. 06-125 at Att. p.2 (filed Aug. 10, 2007).

High OCn and Ethernet prices have made it impossible for TWTC to purchase such facilities from Qwest as inputs into TWTC's retail service offerings. For example, **[Proprietary begin] [Proprietary end]**. TWTC's inability to rely on Qwest Ethernet facilities effectively restricts TWTC's addressable market for Ethernet services to customer locations that TWTC can serve on-net, which is approximately 25 percent of its current locations for all service offerings.

To be sure, there are some circumstances in which TWTC has been able to rely on DS1 or DS3 TDM inputs to provide Ethernet service to off-net locations, but TWTC's ability to do so is *extremely limited* today *and will become less and less so in the future*. In fact, today, TWTC provides approximately **[Proprietary begin] [Proprietary end]**. Based on its extensive experience in this area, TWTC believes that it cannot efficiently support a higher percentage of off-net TDM facilities as inputs for Ethernet. The current percentage is likely now as high as it can be. In contrast, as indicated above, legacy TWTC serves approximately 75 percent of its customer locations for all products combined via off-net facilities, virtually all of which are DS1 and DS3 circuits purchased from ILECs. As this comparison shows, while *theoretically* TWTC could use such DS1 and DS3 transmission inputs to serve any location, the pricing and technology realities mean that *in practice* TWTC *cannot* rely on these inputs in the vast majority of cases to provide Ethernet. This is so for the following fundamental reasons.

- When TWTC purchases TDM transmission facilities to provide Ethernet, it must pay for two sets of electronics: TDM electronics (as part of the TDM circuit) and Ethernet electronics. In addition, TWTC must send an installation engineer to install CPE needed to support Ethernet over TDM. In contrast, where TWTC purchases Ethernet transmission facilities, it only pays for one set of electronics (Ethernet electronics) and it need not send an installation engineer to the customer premises. In addition, reliance on TDM transmission facilities imposes extra, and otherwise unnecessary, integration costs on TWTC.

- TDM transmission facilities *are not available* in the transmission increments needed to provide Ethernet. For example, if TWTC wishes to provide a 50 Mbps Ethernet connection via TDM, it must buy at least two DS3s, each of which delivers 45 Mbps of capacity. This is because TDM circuits cannot be provisioned in 50 Mbps increments. As of a result of purchasing two DS3s, therefore, TWTC receives 90 Mbps of capacity, 40 Mbps of which it must pay for but cannot use. In contrast, if TWTC relies on Ethernet transmission facilities purchased at wholesale, Ethernet electronics enable the wholesaler to offer the Ethernet facilities at precisely the capacity levels needed by the retail customer.[4]

[4] The FCC's assertion in the *ACS Order* that "it could well be necessary to purchase excess capacity of a wholesale Ethernet service" is misleading and inapposite. A consistent mismatch between wholesale and retail Ethernet capacity offerings would only exist if the wholesaler has an incentive to raise its rivals' costs by refusing to provide wholesale Ethernet at capacities that suit wholesale customers' needs. *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in*

- Reliance on TDM transmission facilities creates serious service quality problems. The use of an extra set of electronics introduces extra potential points of technical failure. Moreover, where a circuit experiences technical problems, TWTC must incur the extra delay and expense of determining whether the source of the problem is the extra set of TDM electronics before even addressing a problem that may have been caused by its Ethernet electronics. In contrast, reliance on ILEC Ethernet local transmission facilities reduces the number potential points of failure and reduces the time and expense of resolving such problems. For services such as Ethernet that businesses rely upon to deliver critical functionalities, this service quality differential is extremely important.[5]

Moreover, in the longer term, as Ethernet services evolve, and they are doing so very quickly, it will become more and more difficult to ensure compatibility between TDM transmission inputs and Ethernet finished services. It is inevitable that the service characteristics of Ethernet offered over TDM will become less and less robust than Ethernet provided using Ethernet transmission facilities.

Finally, the Commission's recent classification of ACS's Ethernet and OCn as non-dominant in no way justifies treating Qwest as non-dominant in the provision of these services. In the *ACS Order*, the FCC made its decision "in light of the unique nature of the access market in Anchorage."[6] Moreover, Commissioner Robert McDowell emphasized that "the special characteristics of that market that are not duplicated in any other market in the country," thus making comparisons with other markets all but impossible.[7] Furthermore, in the *ACS Order*, the Commission found no evidence of unreasonable wholesale pricing in the Anchorage market. In fact, the Commission stated that "[o]ne critical factor, as discussed below, is the evidence that ACS faces extraordinary facilities-based competition in the Anchorage market."[8] The Commission later stated that "ACS faces sufficient competitive pressure, either from actual or potential competitors, in its provision of the existing ACS-specified services because competing carriers are able to economically deploy OCn-level facilities to

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the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Memorandum Opinion & Order, n.287 (rel. Aug 20, 2007). (quotation omitted) ("*ACS Order*").

[5] The FCC's assertion in the *ACS Order* that "obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits" is simply incorrect. *See id.* Where TWTC attaches Ethernet electronics to a TDM circuit, TWTC has no visibility into the status of the underlying TDM circuit from TWTC's network operations center ("NOC"). Only the ILEC has visibility into and control over the facility from its NOC.

[6] *ACS Order* ¶ 28.

[7] *Id.*, Separate Statement of Commissioner Robert McDowell.

[8] *Id.* ¶ 3.

compete with ACS's offerings to the extent that there is demand for such services within the Anchorage study area."[9] This is clearly not the case in the Qwest region.

For all of these reasons, regulation is necessary to ensure that, in accordance with 47 U.S.C. § 160(a), Qwest's charges and practices are just and reasonable and consumers are adequately protected.

Please let us know if you have any questions with respect to this submission.

Respectfully submitted,

/s/

Thomas Jones
Jonathan Lechter
Karen Henein

WILLKIE FARR & GALLAGHER LLP
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cc: Scott Bergmann
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Enclosures

[9] *Id.* ¶ 48.

The Following Seven Pages of Charts are Redacted from the Public Version