

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions of Qwest Corporation)
for Forbearance Pursuant to 47 U.S.C. § 160(c)) WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and)
Seattle Metropolitan Statistical Areas)

COMMENTS OF ADHOC
TELECOMMUNICATIONS USERS COMMITTEE

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SUMMARY

Qwest claims that the forbearance it seeks in the instant petitions is justified by the level of competition which has emerged in the four MSAs it targets. But the data submitted by Qwest to support its claims, analyzed in detail in Attachments A and B of this pleading, demonstrate that those markets are not sufficiently competitive to satisfy Section 10 of the Act, particularly in the enterprise and wholesale market segments. Instead, the competitive evidence Qwest proffers compels the conclusion that Qwest maintains overwhelming market dominance in the target MSAs, for a number of reasons.

First, the vast majority of the competition that Qwest identifies is from providers for whom Qwest services and facilities are essential inputs. Qwest is relying on competition from providers who are dependent upon its services in order to justify deregulating the very services those providers need to compete. When these wholesale services are included in the market, the incumbents' share of retail *and wholesale* wireline services (using the FCC's data for the four jurisdictions in which the Qwest MSAs are located) ranges between 80% and 95%.

Second, Qwest counts as competitive losses those residential second lines that consumers replaced with high-speed Internet access, a large share of which (specifically, ADSL services) *went to Qwest itself*.

Third, as to enterprise services, the data Qwest offers as evidence of competition consists only of unverifiable and unreliable estimates based on white pages listings. Moreover, those data are contradicted by other "evidence" that

Qwest has provided in this same filing regarding the wholesale services Qwest claims to be providing to CLECs serving business customers. Qwest also includes maps of CLEC-owned fiber which supposedly demonstrate CLEC service to business end users. But the maps are so lacking in detail that they have no probative value. In fact, maps of the Denver MSA that Qwest itself filed *publicly* in August 2004 are substantially more detailed. Qwest also offered those maps to demonstrate widespread competition in the enterprise market but the accompanying data showed that CLECs could provide facility-based service to only a tiny fraction of commercial locations. Even if Qwest maps had been more detailed, however, they would not have supported its request for forbearance because they are limited to a tiny portion of the total MSA geographic area (an approach previously rejected by the Commission in the *Omaha Order*); they do not indicate how many commercial locations are served *solely* by Qwest; and they reveal nothing about the type and capacity of services that a CLEC with deployed fiber may be providing, an issue that the Commission has already found significant in the *Triennial Review* proceeding.

Finally, as detailed in Dr. Selwyn's declaration, Qwest's evidence fails to address the importance of "connectivity" and network externalities in telecommunications. These network externalities make Qwest's wholesale services "essential facilities" from a new entrant's standpoint since it must be capable of offering comparable connectivity to enter the market.

As AdHoc has detailed repeatedly, the data regarding limited competitive alternatives for special access type services has been confirmed by the direct market experience of AdHoc's members. The vast majority of businesses – small and large – are being served either directly or indirectly using ILEC facilities

only, because they are the only alternative available. Qwest seeks to portray a far greater level of competition than actually exists by naming a few service providers and describing the services those providers claim to offer. But the actual marketplace experience of enterprise customers confirms the extremely limited nature of such alternatives.

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TELECOMMUNICATIONS USERS COMMITTEE**

The AdHoc Telecommunications Users Committee (“AdHoc” or “the Committee”) submits these Comments pursuant to the Commission’s July 6, 2007 Public Notices¹ in the docket captioned above.

Through its economic consultants, AdHoc analyzed the data upon which Qwest relies to support its claims that the markets for which it seeks forbearance are sufficiently competitive to satisfy Section 10 of the Act. The results of that economic analysis are included in a Declaration by Dr. Lee L. Selwyn of Economics and Technology, Inc. (“ETI”), AdHoc’s expert economic consultants, which appears as Attachment A of this pleading. Forbearance of the type that

¹ *Pleading Cycle Established for Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, Docket No. 07-97, DA 07-2291 (rel. June 1, 2007). *Wireline Bureau Grants Extension of Time to File Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, Docket No. 07-97, DA 07-3042 (rel. July 6, 2007).

Qwest is seeking, particularly in the enterprise and wholesale market segments, cannot be justified in light of the competitive conditions in those market segments. Absent competition, a provider of essential facilities like Qwest can engage in anti-competitive, anti-consumer practices and impede competitive entry into the market. There is no valid public interest basis for acceding to Qwest's forbearance efforts for these markets when competition has yet to develop. For all of the reasons summarized below and discussed in greater detail in Dr. Selwyn's attached Declaration, the Commission should deny the petitions for forbearance filed by Qwest in this docket.

INTRODUCTION

Qwest justifies the forbearance it seeks in its petitions on the grounds that it "faces competition from a wide range of technologies and a broad array of service providers."² Claiming that "[m]ultiple competitive alternatives are available to mass market and enterprise customers alike" Qwest attempts to piggyback onto the forbearance granted to it for specific wire-centers in Omaha in 2005 by asserting that "intermodal competition, particularly from wireless and Voice over Internet Protocol ("VoIP") providers is more advanced than it was in Omaha, Nebraska in mid-2005, when the Federal Communications Commission ('Commission') voted on the *Omaha Order*."³ But Qwest's Petition suffers from

² See, *e.g.*, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (*Denver Petition*) at 1.

³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415 (2005) ("*Omaha Order*"), *aff'd sub nom. Qwest Corp. v. FCC*, Nos. 05-1450, *et al.* (D.C. Cir. Mar. 23, 2007).

several fatal flaws:

- It misrepresents the nature of and basis for the forbearance the Commission granted in the Omaha Order;
- It fails to provide factual evidence that would support the forbearance it seeks;
- It attempts to “plug the holes” the FCC identified in the *Omaha Order* regarding competition in the enterprise market merely by sprinkling the term “enterprise market” more liberally throughout its pleading.

The evidence of competition that Qwest proffers is not only superficial and anecdotal but in fact compels the conclusion that Qwest maintains overwhelming market dominance in the MSAs for which it seeks forbearance. Indeed, the vast majority of the competition that Qwest identifies is from providers who are dependent upon Qwest services and facilities as essential inputs for the services they provide. Qwest is citing competition from providers who are dependent upon its services as a justification for deregulating the very services those providers need to compete.

As part of its public interest analysis of the instant petition, AdHoc urges the Commission to consider the damaging effects that premature deregulation can have not only on purchasers of telecommunications services, but upon the economy as a whole. AdHoc provides an assessment of those economy-wide effects in Appendix B, a white paper entitled “*Special Access Overpricing and the U.S. Economy – How Unchecked RBOC Market Power Is Costing U.S. Jobs and Impairing U.S. Competitiveness*,” prepared by AdHoc’s economic experts at ETI.

The white paper documents the public interest harm caused by premature deregulation of services that do not face price-constraining competition. In 2006, the regional Bell Operating Companies’ special access revenues topped \$15.6-

billion dollars and represented over half of the RBOCs' interstate revenues. Nearly one-third of those revenues – some \$5-billion – represented excess profits made possible by the absence of any significant competition for these services and by FCC policies that disregard the RBOCs' monopoly status and permit them to price these services outside of a regulatory framework intended to ensure just, reasonable and nondiscriminatory rates.

ETI's white paper demonstrates that, while hardly a household word, special access is integral to the entire US economy. As a result, inflated special access pricing has a ripple effect throughout the economy in the form of lost productivity and efficiency every time the over-priced services are used. The paper explores the broader economic impact of continued application of supracompetitive special access prices in view of the fundamentally noncompetitive character of the special access marketplace.

The paper quantifies the negative public interest impacts that prematurely reduced regulation of the special access market has had. While each individual impact, viewed in isolation, may be small, in aggregate the economy-wide impact is many multiples of the excessive monopoly profit levels that the incumbent carriers can generate, and are generating, through their monopoly control of the special access market. In 2007 alone, the \$5-billion that the RBOCs are able to extract from their customers in overcharges deprives the US economy of 95,000 jobs and \$17.2-billion in GDP. For the period 2007 through 2009, inclusive, excessive special access rates would deprive the US economy of some 234,000 new jobs and GDP growth in the range of \$66-billion.

DISCUSSION

I. MASS MARKET SERVICES

Qwest's petitions exaggerate and overstate the extent of actual competition Qwest faces for mass market services, particularly in residential markets. As detailed in the Selwyn Declaration (Attachment A hereto), Qwest's claims regarding its alleged competitive losses are based on misleading omissions of critical data:

- A substantial portion of the supposed "loss" in residential lines that Qwest alleges it has experienced in recent years due to competition is in fact the result of consumers replacing second lines dedicated to computers with high-speed Internet access, a large share of which (specifically, ADSL services) *went to Qwest itself*. (Selwyn Declaration paragraph 4)
- Qwest's evidence focuses solely upon retail services, ignoring entirely the portion of the CLEC retail customer base that is served using Qwest wholesale services. When that portion is added to the picture, the incumbents' share of retail *and wholesale* wireline services (using the FCC's data for the four jurisdictions in which the Qwest MSAs are located) ranges between 80% and 95%.⁴ (Selwyn Declaration paragraph 5)
- The overwhelming majority of competitive services are themselves dependent upon the availability of reasonably-priced Qwest *wholesale* services and facilities – the very services for which Qwest seeks regulatory forbearance. (Selwyn Declaration at paragraph 6)

Thus, even if the Commission were to conclude – which it should not – that significant retail competition exists in the markets Qwest targets in its petitions, the Commission could conclude only that today's competitors hang by a very slender thread. Nothing in the record would support a conclusion that such retail competition would survive if the Commission were to forbear from regulating the very wholesale services upon which that retail competition

⁴ Moreover, even the majority of competitively supplied switched access services still require competitors to purchase Qwest facilities either as UNEs (or the "commercial agreement" replacement "Qwest Platform Plus ("QPP") service) or as resale lines.

depends.

II. ENTERPRISE SERVICES

Qwest's attempts to "plug the holes" identified by the Commission in the *Omaha Order* regarding the enterprise market necessarily fail because Qwest's share of that market is so overwhelming that forbearance does not merit serious consideration. In order to craft some justification for the forbearance it seeks, Qwest has been forced to create new and meaningless, distorted, or misleading indicia of the competition it claims for enterprise services. As Dr. Selwyn explains at paras. 7-34 of Attachment A, even a cursory analysis of Qwest's evidence confirms the dependence of competitors serving the enterprise market upon Qwest itself for the underlying service.

a. Qwest's Flawed "Evidence"

Qwest offers no meaningful evidence of competition in the provision of the services ultimately utilized by enterprise customers in the four MSA's in which it seeks forbearance. Though Qwest attempts to demonstrate extensive facilities-based competition for enterprise services, the data provided by Qwest would not support that finding in any of the four MSAs.

Qwest Declarants Bingham and Teitzel offer unverifiable and unreliable estimates of CLEC enterprise line counts developed through an analysis of white pages listings. The unverifiable data was developed based upon interpretations of databases that are available only to Qwest (data that has not been proffered by Qwest as part of its evidentiary showing).⁵ Moreover, the results of the white

⁵ See, e.g., *Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of*

pages analysis are contradicted by other “evidence” that Qwest has provided in this same filing. As Dr. Selwyn describes in greater detail at paragraph 8 of his Declaration, the quantities of wholesale facilities Qwest claims to be providing to CLECs serving business customers actually exceeds Qwest’s estimate of the total number of retail CLEC business lines in each of the four of the MSAs. (Selwyn Declaration paragraph 8.)

Qwest includes maps which it claims identify the location of CLEC-owned fiber and, by implication, the presence of CLEC-served “lit” buildings, *i.e.*, buildings at which CLECs are alleged to have deployed fiber optic facilities that connect the building to the CLEC’s network. But the maps are so lacking in detail that they have no probative value. Significantly, Qwest itself, SBC and Verizon have at various times furnished the Commission with similar but far more detailed maps of alleged CLEC facilities. Qwest’s failure to do so in this case would support the inference that the additional detail would have undermined its claims. (Selwyn Declaration at paragraphs 10 – 16.)

Qwest’s “confidential” maps in this proceeding suffer most in terms of their patent superficiality and lack of probity. In fact, the maps of the Denver MSA that Qwest itself filed *publicly* in August 2004 are substantially more detailed.⁶ Those maps, submitted in the *Triennial Review* proceeding,⁷ were similarly offered for

Competition in the Denver, Colorado Metropolitan Statistical Area (“Brigham/Teitzel Denver Declaration”) at para. 23. Although it is not our battle to fight, AdHoc notes that it seems unlikely that Qwest is even authorized to use for these purposes any white pages listings provided to it by CLECs for inclusion in white pages directories.

⁶ See Letter from Cronan O’Connell to Marlene H. Dortch, Secretary of the FCC in Docket Nos. 01-338, 96-98 and 98-147 (August 20, 2004).

⁷ *Id.*

the purpose of demonstrating widespread competition in the enterprise market. The maps identified CLEC fiber routes as well as the buildings along those routes that were served by CLEC fiber. Although Qwest's maps did not identify buildings where CLECs were purchasing special access, the filing did note that 18,563 special access circuits were being provided to other carriers by Qwest (18,267 DS1s and 296 DS3s) at 6,350 locations in the Denver MSA. Qwest's failure to submit similarly detailed data in this proceeding is not surprising since it previously revealed that the Denver MSA contained only 979 "lit" buildings, *i.e.*, buildings where a CLEC could connect to customers using its own facilities rather than being dependent upon Qwest's wholesale special access services. The CLECs' continuing dependence upon Qwest special access services to reach customers is hardly an argument that such services face sufficient competition to justify forbearance.

Even if Qwest maps had been more detailed, however, they would not have supported its request for forbearance, for three primary reasons. First, the maps are limited to a tiny portion of the total MSA geographic area even though Qwest is seeking forbearance for the entire geographic area of each MSA. By seeking forbearance for services it provides in the entirety of each of the four MSAs, rather than limiting its request to the far smaller areas for which it purports to make a competitive showing, Qwest is taking the same approach that it took in its June 2004 Petition for Forbearance in the Omaha MSA,⁸ which the

⁸ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha MSA, WC Docket No. 04-223, filed June 21, 2004.

Commission did not accept.⁹

Second, even if Qwest had filed sufficiently detailed maps to indicate the handful of CLEC “lit buildings” in the urban centers of each MSA, the critical question would still be not how many buildings are “lit” by competitors but rather how many commercial locations are served *solely* by Qwest.

Third, even the most detailed maps indicating the presence of CLEC facilities would reveal nothing about the types of services that a CLEC with deployed fiber to a particular building may actually be providing to customers in that building. Yet the Commission has already found that, for buildings at which the service level demanded by customers is less than three DS-3s, there is insufficient revenue to support the deployment of fiber to that location.¹⁰ By failing to provide information regarding the type and capacity of service provided by the CLEC, Qwest has deprived the FCC of any basis for determining whether a CLEC is only offering services at that threshold or to buildings with sufficient demand to justify the fiber deployment in the first place. (Selwyn Declaration at paragraphs 11 – 14.)

Finally, as detailed in Dr. Selwyn’s declaration, Qwest’s building-specific evidence fails to address the importance of “connectivity” and network

⁹ In the *Omaha Order*, the Commission authorized forbearance in only 9 out of 24 wire centers.

¹⁰ *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, FCC No. 03-36, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”) at paras. 320, 325. The US Department of Justice has reached a similar conclusion. See Complaint filed by the U.S. Dep’t of Justice in *United States v. SBC and AT&T*, No. 1:05CV02102 (D.D.C. filed October 27, 2005), at para. 28; and in *United States v. Qwest and MCI*, No. 1:05CV02103 (D.D.C. filed October 27, 2005) at para. 28.

externalities. The fundamental purpose of telecommunications services is to provide connectivity between and among *all* of the locations at which the customer has business interests. These network externalities make Qwest's wholesale services "essential facilities" from a new entrant's standpoint. In order for a new entrant to compete with Qwest, it must be capable of offering comparable connectivity, meaning that the portion of the Qwest's network that is not redundant of the entrant's network is an essential facility. Qwest's control of that facility would provide Qwest "with the power to lessen or prevent competition in a relevant downstream market," *i.e.*, the retail market being served by the entrant. (Selwyn Declaration at paragraphs 17 – 23.)

Qwest's head-count of those Qwest wire centers in which CLECs have any collocation presence or are offering service is yet another largely meaningless metric when service from those locations depends upon the connection between the collocation and the customer. Dr. Selwyn details (at paragraph 24) why this metric fails to measure Qwest's market power.

b. The Conflicting Marketplace Experience of Large Users

As AdHoc has indicated repeatedly, the data regarding limited competitive alternatives for special access type services has been confirmed by the direct market experience of AdHoc's members.¹¹ While it is often suggested that the

¹¹ See, *e.g.*, Comments of AdHoc Telecommunications Users Committee (Jan. 22, 2002) at 2-3, filed in *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001); Comments of AdHoc Telecommunications Users Committee (Mar. 1, 2002) at 14-17, filed in *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001); Reply Comments of AdHoc Telecommunications Users Committee (Jul. 1, 2002) at i, filed in

level of competition in the enterprise market is greater than that for mass market services, the reality is that the vast majority of businesses – small and large – are being served either directly or indirectly using ILEC facilities only, because they are the only alternative available. Qwest seeks to portray a far greater level of competition than actually exists by naming a few service providers and describing the services those providers claim to offer. But the actual marketplace experience of enterprise customers confirms the extremely limited nature of such alternatives.¹² (Selwyn Declaration paragraphs 26 - 34)

Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); Comments of AdHoc Telecommunications Users Committee (Dec. 2, 2002) at 5, *filed in AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593; Comments of AdHoc Telecommunications Users Committee (Jun. 30, 2003) at 6, *filed in Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, and *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, 18 FCC Rcd 10914 (2003); Reply Comments of AdHoc Telecommunications Users Committee (September 23, 2004) at 3-14, *filed in 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, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005); Reply Comments of AdHoc Telecommunications Users Committee (May 10, 2005), *filed in SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65; Reply Comments of AdHoc Telecommunications Users Committee (May 24, 2005) at pp. 8-23, *filed in Qwest Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75; Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005), *filed in Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); Comments of AdHoc Telecommunications Users Committee (February 22, 2006), *filed in Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset Pursuant To 47 U.S.C. § 160*, WC Docket No. 05-333, Letter from Colleen Boothby, Counsel for AdHoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Mar. 16, 2006).

¹² Qwest's suggestion that major cable multi-system operators (MSOs) such as Comcast are offering high speed data services (special access type services) to enterprise customers is simply wrong. *See, e.g.*, claims made in the Phoenix Petition at 21. In fact, cable facilities are deployed primarily in residential neighborhoods, and are not available in major downtown business centers. Qwest has not (and could not) offer evidence that would contradict this inescapable fact.

CONCLUSION

For the reasons discussed above, the Commission should deny the petitions for forbearance filed by Qwest in this docket.

Respectfully submitted,

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Certificate of Service

I, Dorothy Nederman, hereby certify that true and correct copies of the preceding Comments of AdHoc Telecommunications Users Committee was served this 31st day of August, 2007 via the FCC's ECFS system, and via email upon the following:

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Legal Assistant

August 31, 2007