

Comments of the AdHoc Telecommunications Users Committee
WC Docket 07-97
August 31, 2007

ATTACHMENT A

**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)

DECLARATION OF

LEE L. SELWYN

on behalf of the

AD HOC TELECOMMUNICATIONS USERS COMMITTEE

August 31, 2007

DECLARATION OF LEE L. SELWYN

Introduction

I, Lee L. Selwyn, of lawful age, declare as follows:

1. My name is Lee L. Selwyn; my business address is One Washington Mall, 15th Floor, Boston, Massachusetts 02108. I am President of Economics and Technology, Inc., a research and consulting firm specializing in telecommunications economics, regulation and public policy. My Statement of Qualifications is annexed hereto as Attachment 1 and is made a part hereof. I have previously submitted expert declarations before this Commission in a number of proceedings.

Qwest's "evidence" of competition demonstrates its market dominance and its competitors' dependence upon Qwest wholesale services

2. In this proceeding, Qwest relies upon the Declarations of Robert Brigham and David Teitzel¹ as support for its contention that "Qwest faces competition from a wide range of technologies and a broad array of service providers" in each of the four MSAs for which forbearance is being sought. *Petitions*, at 1. However, while Qwest catalogs the available technologies and recites the names of a host of companies with telecommunications offerings, its evidence is only superficial and anecdotal in nature. Indeed, what little

¹ Declaration of Robert Brigham and David Teitzel Regarding Competition in the Status of Telecommunications Competition the [Denver, Minneapolis-St. Paul, Phoenix, and Seattle] Metropolitan Statistical Area[s], filed April 27, 2007 as an Attachment to Qwest's *Petitions* ("*Brigham/Teitzel Declarations*").

quantitative evidence Qwest does offer actually compels precisely the opposite conclusion from that advocated by Qwest. Qwest's quantitative evidence indicates that, with the limited exception of the nascent mass market residential services being offered by Comcast or other cable MSOs to a small fraction of the residential market, the "competition" that Qwest confronts is confined principally to a small number of *retail-level* competitors who resell Qwest services and thus remain dependent upon access to Qwest's dominant, and largely monopolistic network.

3. The specific quantitative evidence that Qwest offers demonstrates that, in each of the four MSAs for which forbearance is sought, Qwest maintains market dominance. Where Qwest faces competition, the competitive providers are, in the majority of instances and particularly with respect to enterprise services, extremely limited in number and scope and are dependent upon Qwest *wholesale* services as essential inputs for the retail services that they provide. In effect, Qwest is relying upon the emergence of limited resale competition to justify deregulation of the very services upon which that competition depends. As described in greater detail below, Qwest continues to maintain overwhelming and largely unchallenged dominance in both the mass market residential and the enterprise business segments. Qwest has formulated an unduly expansive market definition in a transparent attempt to make its own share of that (expanded) market appear lower than it actually is. Although Qwest has identified putative "competition" from "intermodal" technologies – wireless, high-

speed Internet access, and VoIP – it has not shown that consumers are substituting such services for basic wireline services beyond marginal levels. In fact, Qwest’s evidence actually demonstrates that most consumers view such services as complements to, and not substitutes for, Qwest’s wireline telephone services. In the case of business and enterprise services, Qwest’s evidence demonstrates that the vast majority of the “competition” it confronts actually amounts to little more than resale of wholesale services its competitors obtain from Qwest itself. And the fact that a small number of commercial buildings have a CLEC facilities-based presence cannot diminish Qwest’s de facto monopoly with respect to the vast majority of commercial buildings in all four of the subject MSAs.

Mass Market Services

4. Qwest misrepresents the actual extent of competition it confronts for mass market residential services. Qwest claims to have experienced a substantial decline in its residential access lines since their peak in 2000, which it ascribes to CLEC and intermodal competition. While some of this loss can be attributed to competitive carriers and services, a much larger portion of the line loss is not due to consumers switching to competitors’ services, but rather to consumers replacing their second residential access lines with high-speed Internet access services, a substantial portion of which continues to be provided by Qwest itself as ADSL services.

5. An additional flaw in Qwest's mass market evidence is that it focuses solely upon retail services. The TNS "connections" data used by Qwest ignores entirely the portion of the CLEC retail customer base that is being served using Qwest wholesale services. Colorado ILECs' share of *retail and wholesale wireline* services, according to FCC data, is a solid 93%.² And, while Qwest has lost some retail share to competitors, 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.

6. The importance of these data to any competitive analysis for purposes of the instant forbearance petitions cannot be overstated. Not only does Qwest enjoy overwhelming dominance in the switched access line market, but the overwhelming majority of competitive services are themselves dependent upon the availability of reasonably-priced Qwest services and facilities. Yet it is precisely with respect to these *wholesale* services that Qwest seeks regulatory forbearance. Thus, even if the Commission were to conclude – which it should not – that the level of retail competition is sufficient to justify the forbearance that Qwest seeks, that conclusion provides no basis, and Qwest has provided no other evidentiary basis, for determining that such retail competition as exists today would survive if the Qwest wholesale services upon which that retail competition depends were unregulated.

² In Arizona, Minnesota, and Washington that percentage is 80%, 91%, and 95% respectively.

Enterprise Services

7. Qwest's share of the market for enterprise services is so overwhelming that forbearance for that market does not merit serious consideration. In order to justify the forbearance it seeks, Qwest has therefore been forced to rely upon meaningless, distorted, and misleading indicia of supposed competition for enterprise services. Indeed, in its effort to portray the market for *retail* enterprise services as highly competitive, Qwest's evidence actually underscores the extreme dependence of those retail competitors serving the enterprise market upon Qwest itself for their underlying services.

8. Bringham/Teitzel attempt to estimate the total number of CLEC-served retail business lines by analyzing CLEC white pages directory listings.³ They have also provided counts of Qwest wholesale services being provided to CLECs for use in serving those business customers in their "highly confidential" Exhibit 2. I have reviewed the Bringham/Teitzel data and have found that the quantities of wholesale facilities Qwest claims to be providing to CLECs serving business customers actually exceeds – and by substantial amounts – the Bringham/Teitzel estimates of the total number of retail CLEC business lines in all four of the MSAs for which forbearance is being sought. *Thus, one must conclude, from a comparison of these two sets of data, either that (a) inasmuch as the number of retail lines being provided by CLECs falls far short of the number of wholesale lines being purchased by CLECs, virtually all CLEC business customers are*

³ See, e.g., the *Bringham/Teitzel Declaration* for the Denver MSA at paragraph 23.

being served via wholesale services being obtained by those CLECs from Qwest and, as such, there is no consequential amount of facilities-based competition for business services in any of the four MSAs, or (b) Qwest's data is so deeply flawed that it cannot support any of Qwest's claims as to the extent of competition it actually confronts.

9. The quantities of wholesale services identified by Bingham and Teitzel in their "highly confidential" Exhibit 2 represent only a portion of CLEC purchases of wholesale services from Qwest, since that data excludes services furnished as special access. Qwest's own data reveals it also furnished extensive amounts of special access service in each of the four MSAs.⁴ Of course, not all of the special access capacity furnished to CLECs is being used to provide the wireline dial tone access services estimated by Qwest on the basis of white pages listings. A significant portion of Qwest special access is provided to wireless carriers that use these services to interconnect cell sites with their switching offices and to interconnect their switching offices with wireline local and long distance carrier networks. Special access services associated with enterprise customer accounts are also used for various data networking and transmission applications. Nevertheless, it is clear that even without inclusion of special access, Qwest's wholesale services overwhelm the total CLEC retail services. If Qwest's figures are even moderately close to accurate, it would seem that there

⁴ See, e.g. the *Bingham/Teitzel Declaration* for the Denver MSA at paragraph 32.

is little or no facilities-based competition for business and enterprise customer retail services in any of the four MSAs.

The “Lit Building” Fallacy.

10. In an attempt to demonstrate extensive facilities-based competition for enterprise services, Qwest has included in its petitions maps purporting to 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. The maps have no probative value, however, because they contain so little detail regarding the facilities they purport to depict. Significantly, both SBC and Verizon have at various times furnished the Commission with similar but far more detailed maps of alleged CLEC facilities. Qwest’s refusal to do so in this case would support the inference that additional detail would have undermined its arguments.

11. SBC’s maps, which were provided in the public record in both the UNE *Triennial Review* and *Triennial Review Remand* proceedings⁵ as well as in the SBC/AT&T merger proceeding,⁶ identify specific streets where CLEC fiber was

⁵ *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

⁶ *AT&T Corp. and SBC Communications Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of Control of AT&T Corp. to SBC Communications Inc.* WC Docket 05-65.

purportedly deployed, as well as specific buildings where CLECs were serving enterprise customers either by means of their own fiber or by use of special access services obtained from SBC. Verizon's maps, submitted in September, 2006 in connection with its six forbearance petitions, did not identify locations at which CLECs were using special access, but did identify individual CLEC "lit" buildings. What both the SBC and Verizon maps demonstrated is just how limited CLEC facilities-deployment actually is, even in the most densely-populated central business districts where CLEC retail activity is greatest. By contrast, Qwest's maps fail to show any specific locations at which CLECs are providing service. Qwest's failure to provide comparable maps for these four MSAs gives rise to the inference that they would have demonstrated the same low level of CLEC facility deployment, or even less. Even if Qwest had provided more detailed maps, however, the maps would not have supported its request for forbearance, for three primary reasons.

12. First, although Qwest is seeking forbearance for the entire geographic area within each of the four MSAs, its maps are limited to a tiny portion of the total MSA geography. Qwest has provided no evidence of any CLEC facilities or "lit" buildings in the remaining areas of the four MSAs. For example, the Denver MSA covers an area of some 8,414 square miles, spread over ten (10) counties.⁷ The Minneapolis MSA covers thirteen counties in all, eleven in Minnesota and

⁷ The Denver MSA includes the following counties: Adams, Arapahoe, Broomfield, Clear Creek, Denver, Douglas, Elbert, Gilpin, Jefferson, and Park.

two in Wisconsin.⁸ The “urbanized areas” of these MSAs – the portions of the MSAs most likely to have any consequential degree of competitive presence – as defined by the Census Bureau, represent a minuscule fraction of their total geography, as summarized below:

Table 1				
What little CLEC activity may actually exist is limited to an extremely small portion of each MSA’s geography (area in square miles)				
MSA	Total area	Urbanized area	Percent urbanized	
Denver	8,414	498.8	5.9%	
Phoenix	14,573	799.0	5.5%	
Minneapolis	6,364	894.2	14.1%	
Seattle	5,894	953.6	16.2%	
Source: US Census Bureau; Rand McNally Commercial Atlas and Marketing Guide, 2003				

By seeking forbearance for services it provides in the entirety of each of the four MSAs, Qwest is overreaching. Qwest took the same approach in its June 2004 Petition for Forbearance in the Omaha MSA,⁹ specifying the entire 8-county area (which included five Nebraska and three Iowa counties and covered an area in excess of 4,000 square miles). The Commission refused to accept Qwest’s overbroad approach.¹⁰

⁸ Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright Counties, MN, and Pierce and St. Croix Counties, WI.

⁹ 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, filed June 21, 2004.

¹⁰ In its final Order, the Commission authorized forbearance in only nine out of 24 wirecenters in the Omaha MSA. *Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223,

13. Second, the SBC and Verizon maps indicate that there are, in fact, very few lit buildings in the major urban centers of each MSA. The Qwest maps show only what purport to be competitive fiber routes, but contain no information whatsoever as to the locations of CLEC "lit" buildings or buildings where CLECs serve customers via resale of Qwest special access or other wholesale services. Moreover, Qwest's maps are of such a small scale that it is simply impossible to identify the actual locations of the putative competitive fiber. Indeed, had Qwest proffered maps with a level of detail comparable to those submitted by SBC and Verizon, they would undoubtedly show just how few buildings actually have CLEC facilities deployed to them in the areas at issue. The SBC and Verizon maps confirm that, even in the central business districts, the number of "lit" buildings represents a minuscule fraction of the commercial buildings in those areas, and an even smaller percentage when considered across the entire MSA. For purposes of demonstrating whether the forbearance Qwest seeks is justified, the critical question is not how many buildings are "lit" by competing service providers but rather how many commercial locations are served *solely* by Qwest. Had Qwest provided the same level of detail as was provided in Verizon's and SBC's maps, they would have surely demonstrated that Qwest is the sole provider of service in the vast majority of commercial buildings in each of the four MSAs for which Qwest seeks forbearance.

14. Finally, even the more detailed maps previously submitted by Verizon and SBC revealed 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. Qwest's maps, which do not even identify any individual service locations, clearly suffer from the same deficiency. 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.¹¹ 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 offering services below the OCn level or to buildings that do not already have an "anchor" customer taking a quantity of service sufficient to justify the fiber deployment to that building in the first place. On the other hand, since 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, it is certainly reasonable, in the absence of any evidence from Qwest to the contrary, for the Commission to presume that no commercial building with

¹¹ *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.

demand below the three DS-3 level is currently “lit” or being served directly via CLEC-owned fiber.

15. Qwest’s maps suffer most, in terms of their patent superficiality and lack of probity, by comparison to maps that other ILECs have provided to support the same kinds of claims regarding the extent of CLEC competition. The maps that SBC had submitted in both the *Triennial Review*¹² and *SBC/AT&T Merger* proceedings¹³ were offered for the purpose of demonstrating widespread competition in the enterprise market. Those maps identified CLEC fiber routes and the buildings along those routes that were served by CLEC fiber. But SBC’s maps also identified buildings along the CLEC fiber routes that were being served by special access services obtained by the CLEC from SBC. As a result, the maps confirmed just how dependent most enterprise customers – and the competitive carriers that serve them – were on SBC special access facilities. Because SBC’s maps did not identify locations at which enterprise customers were obtaining service at retail directly from SBC, the CLEC fiber share claimed by SBC was inflated. ETI was nevertheless able to analyze the SBC maps and from them determine the relative use of CLEC fiber and SBC special access by CLECs serving enterprise customers:

¹² *Id.*

¹³ See *SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Docket No. 05-65, SBC/AT&T response to the FCC Staff’s April 18, 2005 Initial Information and Document Request, item 6.

Table 2			
CLEC use of ILEC special access to serve enterprise customers despite deployment of CLEC-owned fiber			
City	All Locations		Buildings served by SBC Spec. Access on streets with CLEC fiber
	Buildings served by SBC Spec. Access	Buildings served by CLEC fiber	
San Francisco (city-wide)	1160	71	658
San Francisco (financial dist)	718	68	436
Oakland	181	18	111
San Diego	95	24	63
Dallas	124	27	109

Source: SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control, WC Docket No. 05-65, SBC/AT&T response to the FCC Staff's April 18, 2005 Initial Information and Document Request, item 6.

16. Qwest has offered no evidence that competitive facilities are or might be available at any “unlit” locations within the MSAs for which it seeks forbearance, or that customers at those “unlit” locations confront viable competitive alternatives that are not themselves utterly dependent upon Qwest for the underlying services and facilities. As a result, there is no basis upon which the Commission can extrapolate from Qwest’s maps to conclude that facilities-based competition exists, or can be expected to arise, throughout the entire area of the MSA or, for that matter, even at nearby “unlit” buildings in those portions of the MSA at which *some* “lit” buildings are to be found.

17. Of course, looking at facilities deployment strictly on a building-by-building basis as Qwest seeks to do in this docket ignores completely the fundamental purpose of telecommunications services – which is to provide

connectivity between and among *all* of the locations at which the customer has business interests.

18. Telecommunications differs fundamentally from other types of services and commodities because its purpose is to provide connectivity among multiple locations (*i.e.*, a network). With other distribution services such as water, natural gas, or electricity, a customer is only concerned about getting the service at a particular location; the fact that the same utility also serves other nearby or even distant locations is of no real importance from the customer's perspective. But in the case of telecom, the value of the service arises from its ability to connect to other locations. If a customer needs facilities at twenty locations and the CLEC has facilities at only four of them, it will not be able to compete for that customer's business even at those four locations unless it can utilize the ILEC's network to serve the remaining sixteen locations. Thus, the more extensive a carrier's network, the greater the likelihood that the carrier will, in fact, have facilities available at both endpoints of any point-to-point connection that is requested by a prospective customer.

19. Moreover, as shown in the diagrams in Figure 1 below, the number of potential point-to-point connections that can be created on a network increases exponentially with the number of individual "nodes" on the network. For example, only one possible point-to-point connection can be created on a network serving only two nodes (A-B). A network with three nodes can support three different point-to-point connections (A-B, A-C and B-C); one with four nodes can support

six different point-to-point connections (A-B, A-C, A-D, B-C, B-D and C-D), and so on. This relationship between the number of point-to-point connections (C) and the number of locations served by the network (n) can be stated as:

$$C = n(n-1) / 2$$

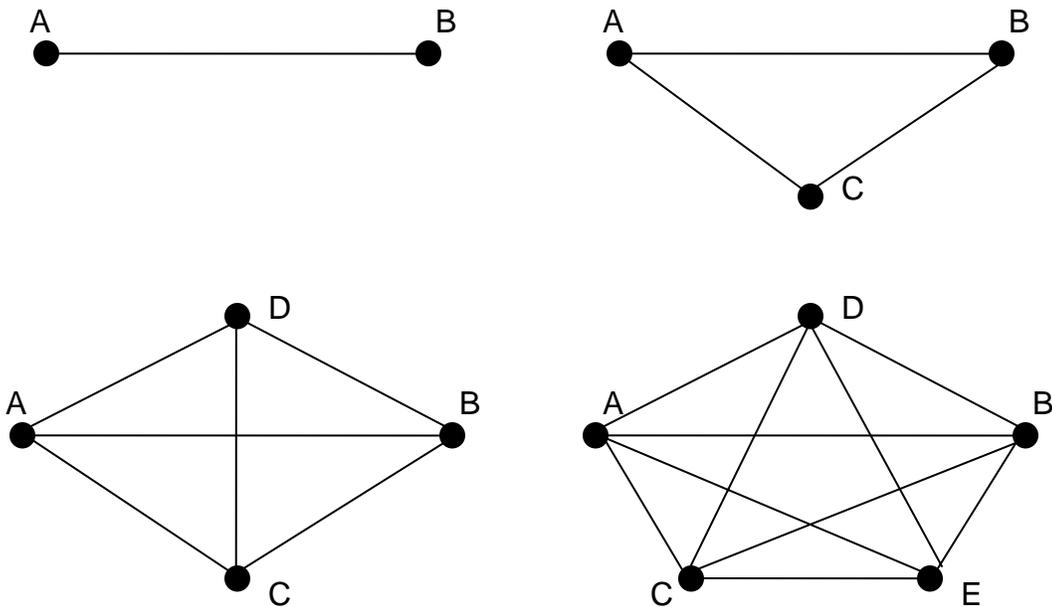


Figure 1. The number of potential point-to-point connections that can be created on a network increases exponentially with the number of individual “nodes” on the network.

20. Thus, the physical presence of a competing carrier in a given building presents a competitive challenge to the incumbent only to the extent that the entrant is able to provide customers in that building with the connectivity they require between that building and other sites. Incumbent carriers with ubiquitous networks can almost always provide the required connectivity precisely because

they serve virtually every building within their overall footprint. Where a carrier owns facilities to only a small fraction of the potential locations at which such connectivity might be required, it can compete with the ubiquitous incumbent only to the extent that it can obtain access to those locations where it does not have its own facilities deployed. The table below illustrates the importance of network extensiveness to competitive viability in the absence of assured access to wholesale facilities of the incumbent:

Table 3	
Network Externalities Grow Exponentially as the Number of On-Net Nodes Increases	
Number of On-net buildings (n)	Possible Point-to- Point Connections (n(n-1)/2)
2	1
3	2
4	6
5	10
10	45
100	4,950
1,000	499,500
10,000	49,995,000

21. This point is frequently overlooked in the analysis of network-based industries. To illustrate the point, suppose that we are analyzing the market for coffee shops, such as Starbucks. Each individual shop serves a limited geographic market defined, for example, by how far a person will walk in order to get a cup of coffee. But as to the specific shop that serves each customer's relevant geographic market, from the customer's perspective the number and locations of other shops is largely unimportant. By contrast, in order for the

presence of a CLEC in a particular building to matter to potential customers in that building, the CLEC must also have a presence in (or be capable of providing connectivity to) the other locations to which that customer requires connectivity.

22. These “network externalities” are a key source of market power and, in fact, are often created by companies with multiple service locations in order to increase their market power. Loyalty programs (e.g., airline mileage programs) are a good example, because they reward customers for staying within the same carrier across a large geographic area, such as the whole country. Pharmacy chains that provide computer networks enabling a customer to refill a prescription at any of their locations are another good example. In each of these cases, the more locations that an airline serves or the more stores the pharmacy chain operates, the more valuable its loyalty marketing program becomes.

23. In the case of telecommunications, these network externalities make the incumbent’s wholesale services “essential facilities” from a new entrant’s standpoint. In order for a new entrant to compete with the incumbent, it must be capable of offering comparable connectivity. Thus, to whatever extent a new entrant’s facilities-based network has less coverage than the incumbent’s ubiquitous network, that portion of the incumbent’s network that is not redundant of the entrant’s network is an essential facility that, by virtue of the incumbent’s control of that facility, would provide the incumbent “with the power to lessen or prevent competition in a relevant downstream market,” *i.e.*, the retail market being served by the entrant.

The wire center and collocation fallacy.

24. Yet another largely meaningless metric proffered by Qwest to support its petition is a head-count of those Qwest wire centers in which CLECs have any collocation presence or are offering service.¹⁴ This metric is meaningless as a measure of Qwest's market power. A wire center collocation arrangement enables a CLEC to offer its customers connectivity that extends beyond the reach of the CLEC's own facilities, but only by leasing the required additional facilities – the “final mile” channel terminations – from the ILEC. Collocation means only that the CLEC is able to utilize ILEC UNEs and special access facilities to serve customers within the wire center serving area. If as a result of Qwest's forbearance petitions those same facilities are no longer regulated, Qwest will be free to exploit its market power and price service beyond the economic reach of its competitors. As was true, *supra*, of data regarding mass market services, competition from competitors that are dependent upon the use of Qwest facilities and services cannot be extrapolated into a post-forbearance world. The Commission has no evidentiary basis for presuming that the present level of competition could survive if Qwest were free to exploit its incumbency and extensive market power over the wholesale services upon which competitors depend for their commercial survival.

¹⁴ See e.g., the *Denver Petition* at p. 26.

Qwest's unique access to CLEC white pages listing data provides additional evidence of its unique position of market dominance.

25. Qwest offers estimates of the number of CLEC-provided retail residential and business access lines through an analysis it conducted of white pages directory listings registered by CLECs (including cable telephony providers) in each of the four MSAs. The very fact that this sensitive information is available to Qwest is, in and of itself, compelling evidence of Qwest's market dominance. Qwest is, in fact, the *only* carrier in each market that is in a position to possess, mine, and utilize competitor data in support of its own business purposes and regulatory strategies – providing additional evidence of its unique and dominant position in each of these markets.

“On-the-ground” experience of large users confirms that Qwest's claims as to the extent of competition for special access services are grossly exaggerated.

26. The trend toward a shrinking supply of competitive alternatives for special access type services is confirmed by the direct market experience of AdHoc's members. While it is often suggested that the 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. AdHoc and many other commenters have informed the Commission on a number of occasions as to the highly limited

availability of non-ILEC special access type facilities.¹⁵ While 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, the actual marketplace experience of enterprise customers confirms the extremely limited nature of such alternatives. For example, Qwest suggests that major cable multi-system operators (MSOs) such as Comcast are offering high speed

¹⁵ 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 *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 Ad Hoc 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 Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Mar. 16, 2006).

data services (similar special access type services) to enterprise customers.¹⁶ 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.

27. Indeed, in recent comments to the FCC, Comcast specifically rejected claims by ILECs as to the extent of Comcast's involvement in the enterprise market, stating that

despite [the ILEC's] citation to aspirational statements by certain Comcast entities on their web sites, Comcast's actual number of business customers is relatively small. Indeed, Comcast has not, to date, made any significant or sustained entry into the business and enterprise markets.¹⁷

28. Qwest has identified and described a small number of carriers that claim to provide services to enterprise customers, but offers no evidence that the actual extent of such competition as may exist in this segment is sufficient to constrain Qwest's own conduct and market power. As an economic matter, a business with a 90%+ market share cannot be expected to reduce its prices market-wide merely to respond to the small amount of competition it might confront in specific area, because to do so would involve sacrificing profits across the portion of the market that its nascent competitors have been unable to penetrate. If, however, the firm is able to discriminate in its pricing as between

¹⁶ See, e.g., *Phoenix Petition* at p.21

¹⁷ *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-72, Comments of Comcast Corporation, March 5, 2007, at 4-5.

the competitive and noncompetitive segments, it could respond aggressively to its niche market rivals while maintaining monopolistic price levels in the noncompetitive remainder of its market. Qwest is already able to engage in such price discrimination by virtue of the special access pricing flexibility and other service-specific deregulatory measures that the Commission has adopted, but full regulatory forbearance would surely exacerbate this situation. For example, Qwest could offer customers in buildings served by CLEC fiber ("lit" buildings) lower prices than in nearby Qwest-only buildings. Moreover, Qwest's ability to do this in currently "unlit" buildings as soon as the CLEC builds out its own facilities would itself operate to deter such entry.

29. That Qwest confronts little or no actual competition in the special access market, and that as a result it is already exploiting its monopoly in this segment, is readily demonstrated by Qwest's earnings level with respect to these services. ARMIS data submitted by Qwest confirms that no competition for special access services currently exists. The data reveal Qwest's persistent – and escalating – supracompetitive earnings on its interstate special access services. As Table 4 demonstrates, by virtue of a succession of price increases in markets subject to the special access pricing flexibility rules,¹⁸ the Company has been able to bring

¹⁸ The Commission is presently investigating the impact of the pricing flexibility rules upon special access pricing levels 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, FCC 05-18 (rel. Jan. 31, 2005).

its earnings levels for this service category well into the triple-digit range, a feat that would be impossible in a competitive market.

Table 4								
Qwest Realized Rate of Return On Interstate Special Access								
	1999	2000	2001	2002	2003	2004	2005	2006
Qwest total	32.18%	38.35%	45.96%	56.96%	68.08%	76.84%	109.42%	132.21%
CO	28.58%	37.81%	46.48%	59.71%	73.83%	91.45%	123.89%	154.37%
AZ	42.13%	43.97%	46.02%	64.56%	74.66%	66.87%	100.76%	59.71%
MN	32.22%	37.90%	42.25%	51.26%	61.91%	65.68%	101.06%	112.17%
WA	20.17%	41.09%	48.40%	59.53%	69.17%	80.04%	101.93%	137.72%
Source: FCC, ARMIS, Report 43-04, Access Report: Table I Separations and Access Data, YE 1999–2006.								

30. Sustained and increasing earnings at such levels could not exist if Qwest confronted actual competition for these services because competition forces market prices down toward cost which, in turn, produces earnings at competitive levels, approaching the Commission’s last-authorized rate of return at 11.25%. Qwest’s supracompetitive profits for the past several years are an unequivocal indicator that Qwest’s would-be rivals in this market segment are confronting formidable barriers to entry, effectively foreclosing them from creating a serious challenge to Qwest’s *de facto* monopoly. Qwest’s supporting “evidence” for its petition – its anecdotes, website citations, and other purported “statistics” regarding the presence of competition – cannot undermine the

inescapable fact that Qwest's nose-bleed earnings levels simply would not be possible if competition were present or imminent in Qwest's markets.¹⁹

31. The difficulties confronting CLECs in presenting ILECs such as Qwest with a serious competitive challenge is demonstrated by a recent statement by Level3 regarding its plans for building out fiber in commercial buildings. According to Level3, there are 100,000 "enterprise buildings" within 500 feet of its metro fiber in the US, and the company states that it is "targeting 750 to 1,000 building additions in 2007"²⁰ At that rate of deployment, it would take between 100 and 140 years for Level3 to "light" all of those 100,000 buildings, underscoring just how formidable the entry barriers confronting even the largest CLECs actually are. Clearly, Qwest's persistent triple-digit earnings on special access services trump all of its anecdotes about the existence of competition, and require that such superfluous and misleading "evidence" be summarily discarded.

32. Persistent overpricing of special access enables Qwest to leverage its monopoly over these essential services to exert market power and ultimately to monopolize potentially competitive downstream markets. High special access

¹⁹ Qwest and other RBOCs have attempted to distance themselves from this compelling evidence of overearning by arguing that the accounting data being reported in ARMIS – their own data – is erroneous and unreliable. The Ad Hoc Committee has just commissioned a study by Economics and Technology, Inc. (ETI) that, among other things, specifically addresses and responds to these claims. The study, "*Special Access Overpricing and the US Economy: How Unchecked RBOC Market Power is Costing US Jobs and Impairing US Competitiveness*," is annexed as Attachment B to Adhoc's Comments in the instant proceeding.

²⁰ Level3 Communications Analyst and Investor Conference 2007, "From VoIP to Video: Making Sense of the Content (R)evolution," at slide 36.

rates raise rivals' costs and facilitate the implementation of a classic price squeeze between the wholesale special access price and the retail price of the end-user service. In its Order issued August 20, 2007, the Commission denied ACS' request for forbearance with respect to special access, noting that these services are used by competitors as inputs to their end-user services in downstream retail markets:

... We deny ACS's requested relief from dominant carrier regulation of its special access services generally, ensuring that they remain subject to the full range of dominant carrier tariffing, pricing, and other regulatory obligations. In particular, our forbearance excludes TDM-based, DS1 and DS3 special access services. This will ensure that ACS's competitors will continue to be able to obtain these services for use as inputs to their own retail broadband services.²¹

In his separate statement, Commission McDowell observed that "The Anchorage, Alaska study area is a unique market," and noted in particular that ACS is "a rate-of-return carrier."²² Qwest, on the other hand, is not subject to rate-of-return or, for that matter, any price regulation for its special access services within the four MSAs for which forbearance is being sought. Thus, whereas downstream competitors in Anchorage who require the use of ACS special access as inputs to their own competitive services will continue to be afforded the protection of *regulated* special access prices, downstream competitors in Denver, Phoenix,

²¹ 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 the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109, 2007 FCC Lexis 6046 at para. 110.

²² *Id.*, Statement of Commissioner Robert M. McDowell.

Minneapolis and Seattle are being subjected to special access price levels that, by any standard, are grossly excessive. Competition that relies upon Qwest special access as an essential input will not survive as long as special access prices remain at current levels and, as such, forbearance both with respect to special access and to downstream services that require equivalent facilities should not be pursued until these excessive special access price and earnings levels are eliminated.

33. Forbearance of the type that Qwest is seeking will serve only to enhance and facilitate Qwest's ability to engage in anticompetitive practices, forcing additional competitors out of the market and ultimately resulting in an entirely unregulated monopoly for Qwest. There is no valid public interest basis for acceding to Qwest's deregulatory efforts.

Conclusion

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

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 thirty-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.

Statement of Qualifications – Lee L. Selwyn

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 Telecommunications 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.

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