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***Via Courier***

FILED/ACCEPTED
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Federal Communications Commission
Office of the Secretary

October 1, 2007

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Dear Ms. Dortch:

Qwest Corporation ("Qwest") hereby files its Reply Comments to the Comments submitted in WC Docket No. 07-97.[1] Qwest is submitting simultaneously both a confidential version and a redacted public version of its Reply Comments.

Pursuant to the *First Protective Order*[2] in this proceeding, Qwest requests that the confidential version of its Reply Comments be withheld from the public record. As with the non-redacted versions of its previously submitted Petitions (*see* Requests for Confidential Treatment and Confidentiality Justifications attached thereto, filed April 27, 2007) Qwest believes the non-redacted version of its Reply Comments contains confidential information entitled to protection under both Commission rules 47 C.F.R. §§ 0.457 and 0.459. The confidential information included in its Reply Comments is competitively sensitive information and thus should not be available for public inspection pursuant to these rules and the terms of the *First Protective Order*.

[1] *See* Public Notice, *Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 22 FCC Rcd 10126 (2007). *And see* Public Notice, DA 07-3042, rel. July 6, 2007, granting an extension of time to file comments.

[2] *First Protective Order*, 22 FCC Rcd 10129 (2007).

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The confidential information in Qwest's Reply Comments has been rendered unavailable for viewing in the public version of the Reply Comments. The confidential version of Qwest's Reply Comments are marked with the language **CONFIDENTIAL – SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 07-97 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**. Qwest's public version of its Reply Comments are marked **REDACTED – FOR PUBLIC INSPECTION**.

Upon request, Qwest will be providing its confidential Reply Comments to parties who have signed and filed with the Commission, as well as served on Qwest, their executed acknowledgments from the *First Protective Order*.

For its confidential Reply Comments, Qwest is providing one original copy and an extra copy, to be stamped and returned to the courier. For its public Reply Comments, Qwest is providing and original and four copies plus an extra copy to be stamped and returned to the courier. Please contact me at the above contact information or Melissa Newman in Qwest's Federal Relations office (202-429-3120) if you have any questions.

Sincerely,

Daphne E. Butler/jno

Attachments

cc: (via courier, redacted and non-redacted versions):
Denise Coca (Wireline Competition Bureau, Competition Policy Division)
Jeremy Miller (Wireline Competition Bureau, Competition Policy Division)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| Pursuant to 47 U.S.C. § 160(c) in the Denver, | ) | |
| Minneapolis-St. Paul, Phoenix, and Seattle | ) | |
| Metropolitan Statistical Areas | ) | |

**REPLY COMMENTS OF QWEST**

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October 1, 2007

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## REPLY COMMENTS OF QWEST

### I. INTRODUCTION AND SUMMARY

The Federal Communications Commission ("Commission" or "FCC") should grant Qwest Corporation's ("Qwest") forbearance petitions. A wide range of formidable intermodal and intramodal competitors are now present throughout each of the four Metropolitan Statistical Areas ("MSAs") at issue in this proceeding: Denver, Minneapolis-St. Paul, Phoenix and Seattle. In Omaha, Nebraska, the Commission granted Qwest forbearance from dominant carrier regulation for its mass market services on an MSA-wide basis based upon lost market share throughout the MSA.[1] The Commission granted Qwest forbearance from unbundling in nine wire centers based upon Cox's coverage of seventy-five percent of the customer locations served by such wire centers. It is notable that Qwest's competitors typically do not define the boundaries of their telecommunications market on a wire center basis. For example, Comcast, which is the largest cable service provider in the Seattle, Denver and Minneapolis MSAs, and Cox, the largest cable service provider in the Phoenix MSA, utilize their coaxial and fiber

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[1] *In the Matter of 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 Forbearance Order*" or "*OFO*"), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

network to deliver television, Internet access and telephone service to their customers without regard to Qwest wire center boundaries. Similarly, the ever-increasing number of wireless subscribers who have chosen to "cut the cord" (utilize wireless service in lieu of traditional landline telephone service) are served by wireless carriers that provide service based on physical distance from cellular towers rather than Qwest wire center boundaries. Also, carriers that have deployed fiber network facilities to serve retail and wholesale customers deploy such facilities based on locations where customers are concentrated, rather than Qwest wire center boundaries.

The mix of telecommunications competition has evolved in the two years since the Commission issued its *Omaha Forbearance Order*. Cable providers continue to win voice customers at a startling rate, and are transitioning from circuit switched telephony to Voice over Internet Protocol ("VoIP") technology. Comcast has grown to the number five provider of residential local voice in two years, and expects to soon reach the number four spot. More and more consumers and businesses are shifting voice and data minutes from wireline technologies to wireless technologies. In addition, new forms of competition, such as broadband and VoIP continue to enter the market to capitalize on growing demand for alternatives to traditional telecommunications services.

Qwest provided substantial evidence in support of each of its four petitions:

- Qwest's total retail business, residential and public access line losses between 2000 and 2006, which occurred despite increases in the number of households in each MSA. Only a small fraction of those losses are attributable to second lines being converted to Qwest Digital Subscriber Line ("DSL");
- Estimated facilities-based retail business and residential lines served by Qwest's competitors in each MSA;
- Qwest wholesale unbundled loop, enhanced extended link ("EEL"), platform service and resale quantities -- by product and by wire center in each MSA;

- Special access services circuits purchased by competitors -- by voice grade equivalents ("VGEs") and by product (*i.e.*, DS1 and DS3) in each MSA;

- Wireless subscribership increases between 2000 and 2006;

- Growth rates for broadband, which allows increasing numbers of consumers to use "over-the-top" VoIP instead of circuit switched telephony;

- Non-Qwest fiber route miles superimposed on wire center boundary maps by MSA, and number of buildings with non-Qwest fiber by MSA;

- TNS market share data by MSA -- showing Qwest's share of connections for residential customers; and Qwest's share of revenue for business customers; and

- An abundance of data from competitors' own websites and research findings from industry analysts (MSA level to national trends).

The overall body of evidence presented by Qwest shows significant intramodal and intermodal telecommunications competition in each MSA.

As was the case with Verizon's similar petitions, the vast majority of commenters opposing Qwest's petitions are cable operators and competitive local exchange carriers ("CLECs") who are seeking to maintain a competitive advantage by subjecting Qwest to needless regulation. The competitors who have filed comments take issue with Qwest's showing, but submit virtually no data of their own. Only Comcast has even indicated how many customers or lines it serves in the MSAs it serves, and Comcast provides only an order of magnitude for its business customers as an aggregate. Neither the cable companies, nor any of the wireline CLECs provided actual numbers of customers or lines served by MSA, maps of their networks, nor locations where they serve end-user customers. This information is unquestionably and uniquely within the commenters' possession.

Cox attempts to throw the burden of describing such information on Qwest, stating that "[c]onsistent with the *Omaha and Anchorage Orders*, Qwest must submit evidence of which wire centers feature a competitor whose facilities reach seventy-five percent (75%) or more of end user locations."[2] Cox even argues that the Commission should deny Qwest's petitions because Qwest does not provide such information, which is uniquely in Cox's possession.[3] Of course, since it provided the information to the Commission in connection with the *Omaha Forbearance Order*, Cox knows that in the *Omaha Forbearance* and *Anchorage Forbearance Orders*[4] the cable competitor submitted that information, not the petitioning incumbent local exchange carrier ("ILEC"). The failure of Cox and the other commenters to present probative evidence within their possession, moreover, strongly suggests that they know the data would undermine their assertions. Their failure to produce it should be construed against them.[5] The Commission should reject the commenters' attempts to hide relevant information, and should instead require these parties to produce relevant data of their own. Examining the relevant data will be helpful to Qwest's position. In Minnesota, a coalition of seven CLECs provided evidence to the Minnesota Commission in an attempt to convince that Commission to oppose Qwest's petition.[6] Upon reviewing the evidence before it, the Minnesota Commission decided not to oppose Qwest's petition.[7]

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[2] Cox Communications, Inc. ("Cox") at 10.

[3] *Id.* at 11.

[4] *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ("*Anchorage Forbearance Order*"), *appeals dismissed sub nom., Covad v. FCC*, Case No. 07-70898 (9th Cir. June 14, 2007).

[5] *International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (party's failure to produce "relevant evidence within [their] control" gives rise to an inference that the evidence is unfavorable to [them].").

[6] *See generally*, Covad Communications Group, NuVox Communications, and XO Communications, LLC ("Covad") at 51-52.

[7] *See*: http://www.puc.state.mn.us/calendar/decisions_recent/index.htm (visited October 1, 2007) regarding the September 27, 2007 meeting in docket P-421/CI-07-661 (visited October 1, 2007).

Opponents make a number of other procedural objections to Qwest's forbearance petitions. Some opponents suggest that the Commission should impose a "complete when filed" condition on forbearance petitions.[8] For example, Affinity claims that Qwest has filed a half-baked petition with hopes that the Commission will shoulder the burden of assembling wire center information for it.[9] Wire center information regarding network facilities owned by Qwest's intramodal and intermodal competitors, just as an example, is outside of Qwest's control. Imposing a complete when filed requirement would greatly limit the type of relief for which a company could petition. Moreover, it would be arbitrary and capricious for the Commission to impose such a condition on Qwest, without any prior notice.[10] The Section 271 proceedings, where the Commission did have a complete when filed rule, were different because they did not require the Regional Bell Operating Companies ("RBOCs") to acquire and file information about their competitors' networks or market share.

COMPTEL argues that Section 251 is not fully implemented, and makes a related argument that the states must play a role in the Section 251(c) implementation process, and in the decision as to whether Section 251 is fully implemented.[11] COMPTEL argues that the Commission must consult with state commissions with respect to whether Qwest has fully

[8] Affinity Telecom, Inc., Cavalier Telephone, LLC, CP Telecom, Inc., Globalcom, Inc., McLeodUSA Telecommunications Services, Inc., Integra Telecom, Inc., TDS Metrocom, LLC ("Affinity") at 2-3.

[9] *Id.* at 3.

[10] *Glaser v. FCC*, 1994 U.S. App. LEXIS 7431 (D.C. Cir. 1994) ("There can be no doubt of the FCC's authority to impose strict procedural rules in order to cope with the flood of applications it receives or expects to receive. As we said in *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), however, "the quid pro quo for stringent acceptability criteria is explicit notice. The less forgiving the FCC's acceptability standard, the more precise its requirements must be.").

[11] COMPTEL at 10-17.

implemented Section 251(c) and analyze Qwest's implementation of that Section in each state, or provide a reasoned explanation why such consultation is not necessary.[12] COMPTEL makes this argument while relying upon Commission decisions that predate *USTA II*, in which the D.C. Circuit previously decided that the Commission had over-delegated its responsibilities under Section 251 to the states.[13] As the D.C. Circuit stated, it is the Commission's responsibility, not the states', to make unbundling decisions. Covad makes a similar argument, relying on use of the word "implement" or forms of that word in paragraph 233 of the *TRRO*.[14] Covad ignores that in the *TRRO* the Commission is discussing implementing rule changes, interconnection agreement changes, and conclusions adopted in the *TRRO*, and is not discussing implementation of Section 251(c).[15] In that paragraph the only mention of implementing Section 251 refers to the Commission's "implementing rules," a use of the term implement that is fully consistent with the Commission's analysis that Section 251(c) is fully implemented. Covad argues that Section 251 cannot be fully implemented until Qwest satisfies its obligations to provide requesting

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[12] COMPTEL also argues that the Commission must revisit the *Omaha Forbearance Order*. *Id.* at 17. That *Order* has been upheld. The Commission does not now have jurisdiction to revisit it. The Commission can open a new rulemaking if it seeks to promulgate new rules that apply to Qwest in Omaha.

[13] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*"), corrected by Triennial Review Order Errata, 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566-67 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, National Ass'n of Regulatory Util. Comm'rs v. U.S. Telecom Ass'n.*, 125 S. Ct. 313 (2004), *on remand*, 20 FCC Rcd 2533 (2004) ("*TRRO*"), *aff'd sub nom., Covad Commc'ns. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[14] *See* Covad at 15.

[15] *TRRO*, 20 FCC Rcd at 2665 ¶ 233.

telecommunications carriers access to unbundled network elements.[16] This nonsensical argument would result in the conundrum that the section is never fully implemented because at any point in time in which there is an outstanding order for an unbundled network element ("UNE"), Qwest cannot be found to have fully implemented Section 251(c).

Other commenters ask that the Commission either delay Qwest's forbearance petitions until the Commission decides other issues, or deny them based upon the grant earlier this year of forbearance from Section 272.[17] These requests find no support in the statute, which provides for a strict timeline and does not limit the number of forbearance petitions that a carrier may file in a given time period. Yet other opponents state that the Commission should deny the petitions because state deregulation orders may have relied upon the availability of UNEs.[18] This should not be a concern because the Commission will grant these petitions only if it finds that consumers will be adequately protected and will continue to enjoy competitive choices even if Section 251 UNEs are not available.

In the absence of specific data regarding penetration, which is only available from the providers, several commenters have criticized Qwest for using more aggregated data in its discussion of cable growth in the four MSAs.[19] The evidence shows that cable voice service is readily available to virtually all mass-market customers throughout each of the four MSAs.

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[16] *See* Covad at 16.

[17] Covad at 6. Covad ignores that the *Qwest Nondominance Order* (22 FCC Rcd 5207 (2007)) provides nondominance relief for in-region, interstate, *inter*LATA services. Qwest Corporation, the entity seeking forbearance here, has until recently been largely limited to providing *intra*LATA services.

[18] *See, e.g.*, Covad at 43-44; Washington Utilities and Transportation Commission ("Washington") at 7.

[19] *See, e.g.*, Cox at 11-12.

making it unnecessary to perform a more granular analysis. There is no evidence to suggest that conditions vary significantly across the MSAs at issue, and particularly not within the areas served by the major cable operators who serve the vast majority of these MSAs.[20] Commenters have made similar criticisms of Qwest's evidence regarding wireless and VoIP.[21] The Commission has held that where competition is fairly uniform across a given geographic area, it is unnecessary to conduct a more granular geographic analysis, even if the identity of particular competitors differs by location. For example, the Commission has held that because competitive choices for interexchange service are fairly uniform nationwide, it should treat the interexchange market as national in scope.[22] Similarly, the Commission has consistently held that in a dynamic market, historic measures of static market share are not especially meaningful in a competitive analysis.[23]

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[20] *See, e.g.*, COMPTEL at 37 (criticizing Qwest for assuming "national" relationships of coverage and penetration in its discussion of cable competition); Covad at 25-27 (criticizing Qwest for using national projections of growth, and saying "nothing regarding the actual telephony share -- if any -- of Comcast in the residential market within any of the Qwest wire centers in the Denver MSA"); Comcast Corporation ("Comcast") at 4 (complaining that "Qwest's language is vague, and it conspicuously refrains from making specific claims of market share loss to Comcast and other competitors").

[21] *See, e.g.*, Cox at 13-16.

[22] *See, e.g.*, *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15794 ¶¶ 66-67 (1997).

[23] *See, e.g.*, *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 C.F.R. § 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, Memorandum Opinion and Order, FCC 07-149, rel. Aug. 20, 2007 ¶¶ 79, 98.

With regard to Qwest's forbearance petitions, it follows that the Commission based its decision in Omaha on a unique set of competitive facts. The competitive markets have evolved in the four MSAs since the Omaha facts were presented to the Commission. Since that time cable voice has become pervasively available, and end users are continuing to substitute wireless and VoIP services for wireline. None of these services are defined by Qwest's wire center boundaries. Accordingly, the Commission need not analyze Qwest's petition on a wire center basis, and may grant forbearance throughout each MSA.

## II. THE FIRST TWO PARTS OF THE FORBEARANCE TESTS ARE SATISFIED BECAUSE OF THE EXTENSIVE AND RAPIDLY GROWING COMPETITION IN EACH OF THE FOUR MSAs

There has been continued growth -- and *dramatic* growth in some cases -- in CLEC facilities-based lines in the four MSAs since the end of January 2007. Qwest analyzed white pages listings data in order to estimate the quantity of facilities-based lines in each of its four petitions.[24] Qwest updated this analysis in September 2007, and the following confidential table shows the significant increases in CLEC facilities-based lines that have taken place during that short time.

[24] Qwest's use of white pages listings does not violate Section 222 as Qwest provided only aggregate information.

----------------------Begin Confidential-------------------

Growth in ***CLEC Facilities-Based***[25] Lines
January 2007 to September 2007
As Estimated from White Pages Listings

| MSA | Est. CLEC Fac-Based Bus. Lines 9-12-07 | % Incr. From 1-25-07 | Annualized Rate of Growth in Est. CLEC Fac-Based <u>Bus.</u> Lines | Estimated CLEC Facilities Based Res. Lines 9-12-07 | % Incr. From 1-25-07 | Annualized Rate of Growth in Est. CLEC Fac-Based <u>Res.</u> Lines | Total Estimated CLEC Facilities Based Lines 9-12-07 | % Incr. From 1-25-07 | Annualized Rate of Growth in <u>Total</u> Est. CLEC Fac-Based Lines |
|---|---|---|---|---|---|---|---|---|---|
| Denver | | | | | | | | | |
| Minneapolis | | | | | | | | | |
| Phoenix | | | | | | | | | |
| Seattle | | | | | | | | | |

<u>Note</u>: Estimated CLEC facilities-based lines from January 25, 2007, were provided in ¶ 23 of the Brigham/Teitzel declarations for Denver and Phoenix and ¶ 25 for Minneapolis and Seattle.

---------------------End Confidential------------------

If the growth that has occurred over the past seven and one-half month period continues apace, the annualized growth rates shown above will be realized.

Some commenters appear to be confused about the estimates that Qwest has provided based upon white pages listings. The two broad categories of CLEC lines that were included in this particular analysis are: 1) CLEC lines using CLEC-owned switches and loops (*i.e.*, full facilities-based); and/or 2) CLEC lines utilizing CLEC-owned switches along with *either* an

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[25] CLEC "facilities-based" lines are access lines served by CLECs via: 1) non-Qwest local switching facilities and non-Qwest loop facilities; <u>or</u> 2) non-Qwest local switching facilities and loop facilities purchased from Qwest. Excluded from this analysis are all wireless "access lines" and all CLEC access lines served wholly via facilities purchased from Qwest, such as Qwest platform-based services and Qwest services that are resold by CLECs.

[26] For CLEC facilities-based business lines in Minneapolis, Qwest observed ***begin confidential*** ***end confidential*** lines that, due to rounding, is not reflected in the line count above.

unbundled loop *or* Special Access services purchased from Qwest. Listings for CLEC services that are platform-based or that are resold Qwest services are not included in Qwest's estimate of CLEC facilities-based lines, and Affinity's conclusion that they *were* included is incorrect. Affinity, along with Ad Hoc Telecommunications Users Committee ("Ad Hoc"), also seems to have concluded that Qwest's estimate of CLEC facilities-based lines somehow includes all wholesale Special Access circuits sold by Qwest.[27] That conclusion is equally incorrect. The only role Special Access plays in Qwest's listings-based estimate of CLEC facilities-based lines is that a CLEC with its own switch may, in some cases, provide service using its own switch *and* Special Access facilities purchased from Qwest. Some commenters also seem troubled that Qwest has included lines served by Comcast and Cox in its estimate of CLEC facilities-based lines. In their provision of local telecommunications services, both Cox and Comcast *are*, after all, facilities-based CLECs and it is therefore completely appropriate to include them in any estimate of CLEC facilities-based lines.

Two commenters, Ad Hoc and Affinity, offer several criticisms of Qwest's use of white pages listings data to estimate business and residential lines associated with facilities-based CLECs serving the four MSAs at issue.[28] Affinity faults Qwest for assuming that CLEC customers in each of the four MSAs are requesting listings at the same rate as Qwest's own customers throughout its region.[29] Qwest's data indicates that about 75% of its residential lines

[27] Affinity at Attachment 1, Declaration of Helen E. Golding ("Golding") ¶ 15; Ad Hoc at Attachment A, Declaration of Lee L. Selwyn ("Selwyn") ¶ 9.

[28] Ad Hoc at 6-7 and Selwyn ¶ 8; Affinity at 21-22, 37-38 and Golding ¶¶ 13-15.

[29] *Id.*

and 36% of its business lines are listed in the white pages directories.[30] Lacking precise CLEC customer lines-to-listings relationships from the CLECs themselves, Qwest used the rate of listings by its own customers as a reasonable surrogate for the rate of listings by CLEC customers. Qwest also notes that many former Qwest customers who are now CLEC customers would likely have maintained a similar rate of white pages listings when they chose to leave Qwest and obtain service from a CLEC. Noticeably absent from Affinity's comments on this topic is a suggestion of any kind as to what adjustments Qwest should have made to its methodology to make it more suitable as an estimate of CLEC facilities-based lines, or in the alternative, what other source Qwest should have used to estimate the number of facilities-based lines served by CLECs, keeping in mind that only the facilities-based CLECs know precisely the number of access lines they serve.

Moreover, Qwest believes it may have erred on the conservative side in presenting its estimate for CLEC facilities-based business lines. Because business customers often elect to list only their primary telephone number in the white pages directory, there are significantly more business lines than business white pages listings.[31] For larger businesses serving the larger metropolitan areas such as Denver, Minneapolis-St. Paul, Phoenix and Seattle, one would expect that there are a greater number of business lines per business white pages listing than is true for smaller businesses serving the expansive rural areas of the Qwest region. Because the business

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[30] *See*, Denver forbearance petition at Declaration of Robert H. Brigham and David L. Teitzel ¶ 23 n.64 ("Denver Brigham/Teitzel Declaration"); Minneapolis-St. Paul forbearance petition at Declaration of Robert H. Brigham and David L. Teitzel ¶ 25 n.62 ("Minneapolis Brigham/Teitzel Declaration"); Phoenix forbearance petition at Declaration of Robert H. Brigham and David L. Teitzel ¶ 23 n.40 ("Phoenix Brigham/Teitzel Declaration"); Seattle forbearance petition at Declaration of Robert H. Brigham and David L. Teitzel ¶ 25 n.28 ("Seattle Brigham/Teitzel Declaration").

[31] *See id.*



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lines-to-listings relationship used by Qwest was based on data from both urban and rural areas, Qwest has probably *under*estimated the number of business lines that are associated with business white pages listings for CLEC customers in the four MSAs. For example, when Eschelon announced that it was acquiring Oregon Telecom, a former CLEC competitor, Eschelon described Oregon Telecom as selling local, long distance and Internet access services in Oregon "to approximately 6,000 [small and medium sized business] customers that have approximately 45,000 access lines."[32] Obviously, if each Oregon Telecom customer had listed only its primary telephone number, only 13% of its business lines would have been listed in the white pages directory. Finally, there may be some CLEC customers or certain CLECs that may have chosen not to include their listings in the white pages listings database. Thus, the number of CLEC business lines could potentially be much higher than Qwest has estimated.

Ad Hoc and Affinity are troubled that subtracting the wholesale business and residence line quantities Qwest provided in Highly Confidential Exhibit 2, along with Special Access quantities provided in Section IV of the Brigham/Teitzel declaration, *from* Qwest's estimates of business and residential CLEC facilities-based lines results in a negative number.[33] Based on this calculation, they erroneously conclude that either no facilities-based competition exists, or Qwest's information is flawed.[34]

In essence, Ad Hoc and Affinity subtract DS1, DS3 and Special Access circuit data *calculated at full capacity* from the estimate of *active facilities-based switched access lines.*

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[32] http://www.eschelon.com/about_us/section_detail.aspx?itemID=6995&catID=220&SelectCatID=220&typeID=6 (visited September 29, 2007).

[33] Golding ¶ 15; Selwyn ¶¶ 8-9.

[34] *Id.*

Thus, it is not surprising that they derive a negative -- and meaningless -- result. First, Qwest's estimate of CLEC facilities-based lines represents *only active voice-grade circuits, based on white pages listings.* Ad Hoc and Affinity ignore "Note 1" at the bottom of Highly Confidential Exhibit 2, which explains that the DS1s and DS3s reflected in the "UNE-L" and "EEL" columns are counted as VGEs. These facilities are counted at their full capacity of 24 DS0s and 672 DS0s, respectively, even though in some cases the facilities may not be fully utilized for voice-grade services that would have a listing (*e.g.*, a DS1 might be used to provide only 16 switched voice channels).[25] Thus, Ad Hoc and Affinity have subtracted DS1 and DS3 VGEs from facilities-based lines that reflect only the actual channels that are used for switched local service. Second, many Special Access circuits purchased by other carriers from Qwest are not used to provide switched voice-grade local services, and these Special Access circuits would not be included in Qwest's count of active facilities-based switched access lines, since they have no listings. Thus, Ad Hoc and Affinity subtract Special Access VGEs from facilities-based lines that do not include many of the Special Access VGEs to begin with. This is a meaningless calculation.

It is not the least bit surprising that Ad Hoc and Affinity could not get the numbers to "add up," since they are subtracting apples and oranges. Affinity and Ad Hoc have simply failed to demonstrate that Qwest's white pages-based estimation of facilities-based switched lines is unreasonable. In fact, the Qwest method for estimating CLEC facilities-based switched access lines is entirely reasonable, especially given that Qwest does not possess the confidential line

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[25] In fact, the Commission ordered in its *TRRO* that RBOCs should count DS0s in each DS1 and DS3 at full capacity in developing business line counts to determine which wire centers qualify for non-impairment classification. *TRRO*, 20 FCC Rcd at 2628-29 ¶ 172.

count data for each of the CLECs. Even Affinity recognizes that Qwest should not be faulted for not knowing the precise numbers of its competitors' lines.[36]

Despite tremendous growth by Qwest's competitors, the opposing parties would have the Commission believe that Qwest's competitors, collectively, are few and becoming fewer, and weak and becoming weaker. Ad Hoc, for example, proclaims with absolutely no supporting evidence that "today's competitors hang by a very slender thread."[37] Similarly, BT Americas Inc. ("BT Americas") asserts that "recent financial results show such national CLECs faltering" and bases that conclusion solely on its misinterpretation of a *Reuters News* article that expressed disappointment in the second quarter 2007 results of a single CLEC – Level 3.[38] In fact, all that happened was Level 3 missed its second quarter core communications services revenue forecast by two percent. Meanwhile, its second quarter reported core communications services revenue actually represented a 2% *increase* when compared to similar first quarter 2007 results, and -- largely due to its acquisition of Broadwing in October 2006 -- was more than double such revenue one year earlier.[39]

Covad employs a slightly different tactic in attempting to demonstrate that "wireline competitive carriers are exiting the mass market."[40] Covad relies on nationwide statistics from the Commission's *Local Telephone Competition* report for June 2006 to try to prop up its claims about diminished competition in the mass market. Covad cites Table 2 of that report to

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[36] Golding ¶ 11.

[37] Ad Hoc at 5.

[38] BT Americas at 7.

[39] *See*: http://www.level3.com/newsroom/pressreleases/2007/20070726.html and http://www.level3.com/newsroom/pressreleases/2006/20060725.html (visited September 28, 2007).

[40] Covad at 46.

emphasize the "precipitous" drop of 7.4 million in the number of residential lines served by CLECs between December 2004 and June 2006, completely overlooking the footnote in Table 2 advising readers that the December 2004 'residential' quantities also include small business lines, whereas the June 2006 quantities include residential lines only.[41] Moreover, as explained below, lines reported for the *Local Telephone Competition* report may not include the increasingly substantial number of lines served by Comcast and other carriers via VoIP-based architecture and therefore likely understates competitive presence. Nonetheless, Table 9 of that report shows that between December 2004 and June 2006, total reported CLEC lines grew by 22.5% in Arizona, 11.7% in Colorado, 10.8% in Minnesota and 9.7% in Washington. And, of course, the growth rate for competitors' lines in the Phoenix, Denver, Minneapolis-St. Paul and Seattle MSAs has no doubt been higher.

Thus, there is certainly every indication that, on the whole, the competitors Qwest faces in its region (including Level 3) remain viable. Following are a few examples of selected highlights offered by Qwest's competitors during their reporting of second quarter 2007 results:

- ***Comcast Corporation***: "Surpassed 3 million Comcast Digital Voice customers as the Triple Play powers record quarterly additions"; "Year to date through June 30, 2007, phone revenue increased 94% to $773 million reflecting a 2.2 million increase in CDV customers since June 2006 and partially offset by a $106 million decline in circuit-switched phone revenue."[42]

- ***Cox Communications, Inc.***: "More than 60% of Cox customers take a bundle, increasing their satisfaction and decreasing susceptibility to competitive offers";

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[41] *Id.*

[42] *See*: http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1031371&highlight= (visited September 28, 2007). Comcast Digital Voice ("CDV") is Comcast's VoIP-based local telephone service. Comcast notes that ". . . the number of circuit-switched phone customers continues to decline as Comcast focuses on marketing CDV service in most markets."

"2.2 million telephone subscribers: 20.2% growth" (versus the same quarter in 2006).[43]

- ***Time Warner Telecom***: "Grew core enterprise revenue 19% year over year"; "Grew enterprise revenue 57% year over year and 5% sequentially"; "Enterprise revenue represents 68% of total revenue for the quarter."[44]

- ***Eschelon Telecom*** (recently acquired by Integra): "Eschelon Telecom announces record network services line sales in second quarter"; "Results show sixth consecutive quarter of record line sales"; "The competitive landscape has stabilized over the last few years with each competitor settling into their own niche."[45]

- ***Cbeyond, Inc.*** (a significant competitor in the Denver MSA): "Revenues grew by 28.9% and adjusted EBITDA increased 24.3% over prior year."[46]

In sum, the simple fact that there are fewer individual CLECs now than there were at some point in the past does not suggest that competition is waning. In fact, CLEC consolidation, such as the Integra and Eschelon transaction, the XO and Allegiance transaction and the recently announced PAETEC purchase of McLeod, result in a lower absolute number of CLECs but allow the consolidated entities to leverage their combined resources to create even more powerful competitors.

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[43] *See*: http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-newsArticle&t=Regular&id=1032065& (visited September 28, 2007).

[44] *See*: http://www.twtelecom.com/Documents/Announcements/News/2007/TWTC_Q2_07PR_.pdf (visited September 28, 2007). "Core" results exclude results from acquired operations.

[45] *See*: http://www.eschelon.com/about_us/section_detail.aspx?itemID=9182&catID=220&SelectCatID=220&typeID=6 (visited September 28, 2007).

[46] *See*: http://ir.cbeyond.net/ReleaseDetail.cfm?ReleaseID=258244 (visited September 28, 2007). Cbeyond's reporting shows that revenues and adjusted EBITDA for its Denver market increased over the prior year by 8.5% and 12.4%, respectively.

### A. There Is Extensive Mass-Market Competition In Each Of The Four MSAs

Qwest's petitions demonstrated that mass-market consumers throughout each of the four MSAs have access to affordable local telephone service from cable providers, wireless carriers, "over the top" VoIP providers and traditional CLECs. These competitive alternatives are widely available and widely used by consumers in each of the MSAs.

#### 1. Cable

Qwest's forbearance petitions demonstrated that in each of the four MSAs, one or more of the incumbent cable operators serves residential customers in wire centers that account for an overwhelming majority of Qwest's residential access lines in the four MSAs.[47] Moreover, each of the cable operators already offers voice service throughout the majority of its service territory and each will continue to extend service to any areas not currently served.[48] Competition from cable companies is increasing rapidly in the Denver, Minneapolis, Phoenix and Seattle MSAs.

Comcast, the major cable provider in Denver, Minneapolis and Seattle, now serves over three million CDV customers nationally, and admits that it would not be directly affected by a grant of Qwest's forbearance petitions.[49] Comcast added 571,000 new CDV customers in the first quarter of 2007,[50] and 670,000 new CDV customers in the second quarter.[51] Thus, the

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[47] Denver forbearance petition at 7 and Denver Brigham/Teitzel Declaration ¶ 13 and Exhibit 1, pages 1 and 2; Seattle forbearance petition at 10 and Seattle Brigham/Teitzel Declaration n.48; Minneapolis forbearance petition at 10-11 and Minneapolis Brigham/Teitzel Declaration ¶ 13; Phoenix forbearance petition at 10 and Phoenix Brigham/Teitzel Declaration n.40.

[48] Denver forbearance petition at 6-7 and Denver Brigham/Teitzel Declaration ¶¶ 14-15; Seattle forbearance petition at 6-9 and Seattle Brigham/Teitzel Declaration ¶ 16; Minneapolis forbearance petition at 6-9 and Minneapolis Brigham/Teitzel Declaration ¶ 16; Phoenix forbearance petition at 6-9 and Phoenix Brigham/Teitzel Declaration ¶ 14.

[49] Comcast at 2.

[50] Comcast First Quarter Earnings Report, Press Release, April 26, 2007.

[51] Comcast Second Quarter Earnings Report, Press Release, July 26, 2007.

number of CDV customers Comcast has added increased each and every quarter in 2006 and 2007.[52] Without relying on UNEs, Comcast has blossomed into the fifth largest provider of residential voice services in the United States in just two years by building its own network.[53] Comcast expects to be the fourth largest provider of residential voice service by the end of this year.[54] Comcast has continued its aggressive marketing. For example, it recently offered its CDV service for just $24.99 (for six months) to customers in Denver.

Comcast disavows having a market share comparable to the share that Cox achieved in Omaha.[55] Comcast does not, however, provide its penetration rate, which suggests that the information is not favorable to Comcast's position. In any event, even crediting its disavowal of a high market share, given Comcast's explosive growth rate, Comcast likely will meet Cox's penetration rate soon. Similarly, Comcast argues against granting forbearance stating that it does not serve as many residences as the ILEC.[56] Comcast does not, however, dispute that its facilities pass the great majority of the homes in its service territory within each MSA.

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[52] As noted in the Denver and Minneapolis Brigham/Teitzel Declarations, Comcast added 232,000 CDV customers in 1Q06, 326,000 in 2Q06, 483,000 in 3Q06 and 508,000 in 4Q06. *See* Denver Brigham/Teitzel Declaration ¶ 16 n.38; Minneapolis Brigham/Teitzel Declaration ¶ 16 n.34.

[53] Comcast at 1-2. Comcast does argue that it relies upon Qwest to transit local traffic, which it claims is an ILEC duty under Section 251. Suffice it to say that Qwest does not agree with Comcast that transiting is required by Section 251. *See, e.g.*, Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed May 23, 2005, at 38-40; Comments of Qwest Communications International Inc., CC Docket No. 01-92, filed Oct. 25, 2006, at 29-30; Reply Comments of Qwest Communications International Inc., CC Docket No. 01-92, filed Feb. 1, 2007, at 8-10. Despite this disagreement on the law, both Comcast and Qwest agree that granting Qwest's petition would not have any effect on whether Qwest performs transiting or the rates at which it does so.

[54] Merrill Lynch U.S. Media Conference, June 7, 2007 at slide 12.

[55] Comcast at 5.

[56] *Id.*

Moreover, Comcast does not disclose how many homes it does pass, which again requires an inference that the information is not favorable to its position.

Cox, the major cable provider in Phoenix, reported that its national phone subscribership increased by 372,000 customers in the second quarter of 2007 -- an increase of 21% year over year.[57] Cox continues to aggressively pursue Phoenix residential customers. It recently offered phone service for an additional $20 per month to its existing Phoenix Internet customers. Cox does not dispute Qwest's estimates regarding its market share, nor does Cox provide a coverage map for its voice-based cable plant.

Cox claims to rely upon "inside wire subloop unbundling" in Multiple Tenant Environment ("MTE") locations to deliver its competitive telephone services in the Phoenix MSA.[58] Cox also argues that Qwest made "unsubstantiated charges" regarding Cox's access procedures.[59] However, Qwest's Arizona complaint resulted in Cox undertaking an unprecedented review and repair project in Arizona of over 30,000 terminals located at over 5,000 complexes, costing Cox millions of dollars. That is quite a reaction to an "unsubstantiated" complaint. Cox is embarking upon a similar initiative in Omaha, without Qwest even needing to file a complaint.[60] As part of resolving the "unsubstantiated" Arizona complaint proceeding, Qwest has offered an agreement whereby Cox makes an upfront payment of $500,000 for five years of subloop use. As part of this agreement, Qwest has offered to allow

[57] Cox press release, July 26, 2007.

[58] Cox at 21.

[59] *Id.* at 24.

[60] *See* Qwest's *ex parte* letter from Melissa Newman to Marlene Dortch, dated May 24, 2007 in WC Docket No. 01-338 and Qwest's *ex parte* letter from Melissa Newman to Marlene Dortch, dated May 29, 2007 in WC Docket No. 01-338.

this payment to cover subloop use in all Qwest wire centers, including any wire centers in which Qwest might receive forbearance in the future.[61] In any event, Cox's eventual migration of circuit switched customers to an IP platform will ultimately eliminate its need for access to the incumbents' network altogether, since Cox IP telephony is provided entirely via its coaxial cable network (as is Comcast's IP telephony service in the Denver, Minneapolis-St. Paul, and Seattle MSAs).

Cable providers are moving from circuit-switched telephony to VoIP-based telephony. Some commenters appear not to understand how this impacts data collection by this Commission and other organizations. For example, some parties focus on the market share data provided in the Commission's *Local Telephone Competition* Report, and claim that cable's share of the telecommunications market is still very small.[62] The regulatory classification of VoIP is the subject of an open Commission docket, and thus VoIP is likely underreported in the *Local Competition* Report. The Commission does not presently require information about local telephone service provided by entities exclusively utilizing VoIP, although it is possible that some entities may include information about VoIP service in their filings.[63] Thus, as cable

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[61] In the nine Omaha wire centers in which Qwest was granted forbearance, Qwest has offered Cox a commercial agreement for subloops that substantially tracks the terms and conditions set forth in Qwest's current standard interconnection agreement language, including the rates. Qwest has even offered Cox the ability to avoid having to place individual orders for subloops in return for an upfront payment of $50,000 for five years of use of subloop. Qwest's offer, $50,000 for five years, is hardly an amount that would shock one's conscience.

[62] *See, e.g.*, Comcast at 5 (arguing that CLECs hold only 14% and 19% of the market in Washington and Colorado respectively, based on June 2006 data from the Commission's *Local Competition* Report); *see also* Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc., ("Time Warner") at 45.

[63] The Commission states that: "The regulatory status of local telephone service provided by VOIP is the subject of an open proceeding, IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004). When the Commission adopted