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December 21, 2007

*Via Electronic Filing*
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Re: *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules,* WC Docket No. 07-21

Dear Secretary Dortch:

BT Americas, Inc. ("BT") respectfully submits the attached Reply Brief, filed today in *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-204 for inclusion as an *ex parte* in the record of the above-captioned proceeding. The Reply Brief addresses many of the same issues raise in this proceeding.

If you have any questions, please feel free to contact me.

Respectfully submitted,

/s/

Aryeh Friedman

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition of Qwest Corporation for | ) | |
| Forbearance From Enforcement | ) | |
| Of the Commission's ARMIS and 492A | ) | WC Docket No. 07-204 |
| Reporting Requirements Pursuant to | ) | |
| To 47 U.S.C. § 160 | ) | |
| | ) | |

**Comments of BT Americas Inc. on Behalf of Itself and other BT Entities**

Pursuant to the Commission's Order,[1] BT Americas Inc., a wholly owned indirect subsidiary of BT Group plc ("BT plc"), submits these Comments on behalf of itself and other BT operating entities in the US (collectively referred to herein as "BT")[2] opposing Qwest's petition for forbearance from enforcing the obligation to file critical Automated Reporting and Management Information System ("ARMIS") reports and to comply with the 492A reporting requirement.[3] The data contained in these reports are essential for the

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[1] Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c), Order, WC Docket No. 07-204, DA 07-4329 (2007).

[2] BT holds section 214 licenses and employs approximately 4000 people in the United States. BT's relationship with BT plc, the incumbent carrier in the UK, and through the Global Services group which serves the global information and communications technology needs of large business ("enterprise") customers worldwide.

[3] This includes ARMIS Report 43-01 (Annual Summary); ARMIS Report 43-02 (Uniform System of Accounts); ARMIS Report 43-03 (Joint Cost Report); ARMIS Report 43-04 (Separations and Access Report); ARMIS 43-05 (Service Quality Report); 43-06 (Customer Satisfaction report); ARMIS Report 43-07 (Infrastructure Report); ARMIS 43-08 (Operating Data Report, except for Table III, columns FC, FD and FE); ARMIS Report 495A (Forecast of Investment Usage); ARMIS Report 495B (Actual Usage of Investment); and 492A Report (Rate-of-Return Monitoring Report).

Commission to make informed decisions about the extent to which it can deregulate critical telecommunications services.

## INTRODUCTION AND SUMMARY

As the U.S. Government Accountability Office noted in its recent report on Special Access, the ARMIS reports on "general rates of return as well as specific revenue figures and line counts for the last mile connections per incumbent" (which are some of the reports as to which Qwest seeks forbearance) are the only "publicly available" "major source of data that FCC uses to gauge competition in the markets for dedicated access services."[4] Indeed, wholesale purchasers of special access in the U.S., who have been the victims of high prices, refusals to provide inputs for new access services such as Ethernet, and "lock-in" "discount" plans, have relied heavily on ARMIS data to develop the record in the special access proceeding[5] showing that the Bell Operating Companies ("BOCs"), including Qwest,[6] have overwhelming market power in the special access market. The Commission has already indicated it will require yet another refresh of the

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[4] U.S. Government Accountability Office, Report to Chairman, House Committee on Government Reform, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO 07-80 (November 2006) at 38 http://www.gao.gov/new.items/d0780.pdf ("*GAO Report on Special Access*").

[5] AT&T Corp, Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services (2002) RM No 10593; In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, Order and Notice of Proposed Rulemaking (31 January 2005) WC Docket No 05-25 ("*Special Access Proceeding*").

[6] For example, the *GAO Report on Special Access* demonstrated that in the Metropolitan Statistical Areas ("MSAs") Qwest, in its recent forbearance petitions in WC Docket No. 07-97, claimed were the most competitive within its region (Qwest's Seattle Forbearance Petition at 5; Phoenix Forbearance Petition at 4-5, Minneapolis-St Paul Forbearance Petition at 5), competitive entry was minimal; in Minneapolis 5.7% of buildings had a competitive , Phoenix and Seattle at 3.7% and 3.8% respectively. *GAO Report on Special Access* Table 2: "Percentage of Buildings with Fiber-Based Competitive Alternative by Demand (July 2006). The data also showed that there has been a decline in two of these three Qwest MSAs in the level of competitive collocation in the wire centers used by the price-cap incumbents to obtain pricing flexibility – in Minneapolis a percentage change of -10%, in Phoenix -5% – while Seattle was unchanged. *Id.,*Table 3: "Change in Competitive Colocation in 'Price-flex" Wire Centers." The record showed little intra- or inter-modal competition. See BT's Comments in WC Docket No. 07-97 (filed Aug. 31, 2007) *passim*which is incorporated herein by reference.

record in that proceeding.[7] And it is clear that Qwest in this proceeding, and AT&T in the companion proceeding,[8] would like to eliminate this "major source of data" to frustrate any effort to demonstrate that BOC rates of return, already calculated on the basis of ARMIS data as ranging from 52% to 132% in 2006[9] have increased even more.[10]

It is clearly in the public interest to require Qwest and the other incumbent Local Exchange Carriers ("ILECs") to report this data. The most recent European Competitive Telecommunications Association (ECTA) annual benchmark of 19 European countries showed that the countries with the "lowest prices and highest investment" were those where cost accounting and comparative quality data were made available to regulators and the public. New Zealand similarly found itself "slipping behind its OECD peers in broadband services" until it imposed such reporting requirements.

## ARGUMENT

Section 10 of the Act provides that the Commission "shall forbear from applying any regulation or provision" if it determines that:

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[7] Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, Memorandum Opinion and Order, FCC 07-180 (released October 12, 2007) ("*AT&T Broadband Forbearance Order*") Statement of Commissioner McDowell ("many parties allege that competition in the special access market is uneven and is limited to certain urban areas, thus creating supply bottlenecks that favor incumbent local exchange carriers in the business broadband and wireless markets. Despite requests for better data to help us resolve disputes of these material facts, the Commission still has inadequate information to determine whether allegations that competition is scarce in certain segments of the special access market have merit. I will continue to work to ensure that these questions are explored further in the Special Access proceeding after a more granular record has been established through detailed mapping of business broadband facilities").

[8] Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules, WC Docket No. 07-21.

[9] Comments of AdHoc Telecommunications User Committee, CC Docket no. 05-25, (August 8, 2007) at 5-6.

[10] In each refresh of the record in the special access proceeding, the rates of return have increased. For example, the rates of return in 2001 ranged from 21.72%, to 54.6%.

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[11]

In evaluating the public interest, the Commission must ask whether forbearance "will promote competitive market conditions."[12] However, "... the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented."[13]

As shown below, granting Qwest's (and AT&T's) forbearance requests will harm consumers by denying the Commission and the public data they need to evaluate whether there has been a market failure in critical markets. Experience in Europe demonstrates that the availability of such data leads to lower prices and higher investment in innovative technologies and services.

## I. QWEST'S FORBEARANCE PETITION SEEKS TO WITHHOLD CRITICAL INFORMATION NECESSARY TO PROTECT THE PUBLIC

Qwest's Forbearance Petition will effectively deny the Commission and the public the data they need to determine whether the Commission's deregulatory policies in the areas of special access and non-dominance are harming the public. The data in the ARMIS reports as to which Qwest seeks forbearance are not otherwise publicly available.

Data from ARMIS Reports 43-01 (Annual Summary), 43-04 (Separations and Access Report) and 43-08 (Operating Data Report) were heavily relied upon by the

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[11] 47 U.S.C. § 160(a).

[12] *Id*, § 160(b).

[13] *Id*, § 160(d).

parties in the special access proceeding (and the recent BOC merger proceedings) to establish RBOC overcharges in interstate special access services and to demonstrate that they earned excessive realized rates of return.[14] As Sprint has noted in its Comments in this proceeding, the data in these same reports and 43-02 (Uniform System of Accounts) are also essential in calculating the X-factor for price capped services (representing the extent to which the overall LEC productivity growth is expected to exceed the productivity growth of the economy as a whole),[15] including the X-factor being considered in the special access proceeding.

These Reports, and ARMIS Report 43-03 (Joint Cost Report) are also essential to monitor Qwest's and the other BOCs' compliance with the Commission's *Section 272 Sunset Order*[16] where the Commission found that the BOCs possessed "[e]xclusionary market power within its respective regions by reason of its control over these bottleneck access facilities."[17] The Commission nevertheless eliminated the separate subsidiary

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[14] *See e.g.,* Declaration of Stephen Friedlander and the Declaration of M. Joseph Stith submitted with AT&T's Special Access Petition, RM No 10593 (Oct. 15, 2002) (¶¶ 2-7 and Exhibits 1 and 2; rates were calculated from ARMIS 43-01, Table 1, Cost and Revenue Table, Column S, Rows 1910 and 1915); Comments of AdHoc Telecommunications User Committee, CC Docket no. 05-25, (August 8, 2007) at 20, n. 25 (ARMIS 43-08) and Appendix thereto, Selwyn, Gately, Golding and Weir, *Special Access Overpricing and the US Economy; How Unchecked RBOC Market Power is Costing US Jobs and Impairing US Competitiveness*, Tables A1, A4 and A5 (ARMIS 43-01 and 43-04); and Appendix 2, Susan Gately's Declaration on Behalf of AdHoc Telecommunications User Committee at 11, ¶16 (same); Reply Declaration of Lee L. Selwyn on behalf of Comptel/ALTS, *In the Matter of AT&T 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 Dkt. No. 05-65 (filed May 10, 2005) ¶¶ 10, 48-49, Figure 2 and Table 2 (based on the ARMIS 43-04 Report).

[15] Sprint-Nextel Comments at 12.

[16] Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 22 FCC Rcd 16440 (2007).

[17] Id, ¶ 64.

requirement for in-region long distance service relying on non-structural safeguards such as the ARMIS data reporting requirements.[18]

The other ARMIS Reports as to which Qwest seek forbearance are also critical. ARMIS Report 43-05 captures data on the quality of service an ILEC provides to its retail and wholesale customers such as BT. ARMIS Report 43-06 is an annual report on customer satisfaction and reports the percentage of customers who are dissatisfied with various features of the reporting carrier's services.

## II. GRANTING FORBEARANCE IS NOT IN THE PUBLIC INTEREST: THE EUROPEAN EXPERIENCE HAS BEEN THAT THE PUBLIC REPORTING OF THE TYPE OF INFORMATION AS TO WHICH QWEST SEEKS FORBEARANCE LEADS TO LOWER PRICES AND HIGHER INVESTMENT

### A. The ECTA Regulatory Scorecard and the UK Experience Provide Benchmarks Demonstrating that Such Reports Are in the Public Interest

The European Competitive Telecommunications Association (ECTA) does an annual benchmark of 19 European countries. The most recent (2007) ECTA Regulatory Scorecard found that the "[t]he United Kingdom remains the highest scoring country overall for effective regulation of the telecoms sector. The Netherlands has improved its position from 4th place in 2006 to 2nd place this year just four points behind the UK."[19] The authors further concluded, based on their 19 country survey, that "the lowest prices and highest investment occurs where regulators have strong tools to enforce EU pro-competition rules."[20] And it is clear from that study that one of those "key tools" for realizing lower prices and higher investment is the public availability of audited

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[18] Id, ¶ 84-85 and 90.

[19] European Competitive Telecommunications Association, Regulatory Scorecard, November 2007, p.3 ("Regulatory Scorecard"). Available from http://www.ectaportal.com/en/

[20] http://www.ectaportal.com/en/upload/File/Regulatory%20Scorecards/2007/2007_Regulatory_Scorecard_press_release_final.pdf

accounting separations data, which includes data on volumes, cost and prices of key and data on the quality of the services provided.

Specifically, the 2007 Regulatory Scorecard found that: "accounting separation, a vital measure to ensure consistent pricing to promote competition and investment – has been mandated in all countries but has yet to be fully implemented except in the UK, Netherlands and Ireland."[21] The Scorecard's recommendation to the regulators in the other countries was that they "[e]nsure that separated accounts are published in a timely manner following best practice identified by ERG and Commission."[22] For business services, ECTA further recommended that National Regulatory Authorities "[a]pply and publish KPIs [Key Performance Indicators] that allow industry to compare whether services provided by dominant operators to competitors match expressed demand and the standard of services supplied internally."[23]

As reported in the Regulatory Scorecard, BT in the UK is required to prepare cost accounting and/or accounting separation statements on 18 wholesale and 7 retail markets. BT's regulated Financial Statements[24] include statements specifically designed to show sales of products from wholesale Significant Market Power ("SMP") markets and into relevant retail SMP markets. The published regulatory accounts of BT detail cost components and show how these are allocated consistently to regulated services. BT also

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[21] Regulatory Scorecard at 9.

[22] *Id* at 8. ERG is the European Regulators Group set up by the Commission and composed of the heads of each relevant national regulatory authority in each Member State or their representative. Commission decision, 2002/627/EC of 29 July 2002. The "best practice" can be found in *ERG Common Position: Guidelines for implementing the Commission Recommendation C (2005) 3480 on Accounting Separation & Cost Accounting Systems under the Regulatory Framework for Electronic Communications*, at http://www.erg.eu.int/doc/publications/consult_accounting_sep/erg_05_29_erg_cp_rec_as_and_cas_final.pdf

[23] Regulatory Scorecard at 9.

[24] BT's 2007 regulatory Financial Statements can be found at http://www.btplc.com/Thegroup/Regulatoryinformation/Financialstatements/index.htm.

has an obligation to publish some KPIs on quality of service. For example on Partial Private Circuits ("PPCs") (what is called special access in the U.S.) BT is required to publish KPIs on a quarterly basis.[25]

An example of the extent of financial disclosure comparing charges to affiliated (internal) and non-affiliated ("external") charges can be found in BT's 2007 Report.[26] Extensive data is provided on costs of special access (PPC) services and Ethernet access.[27] Both BT's Wholesale group and Openreach publish KPIs.[28]

As to the Netherlands, the ECTA Regulatory Scorecard describes the accounting separation imposed on KPN in the new (2005) regulatory framework. The description of the cost system and costing methodologies is published annually as part of the accounting separation report. The accounting separation report must (a) cover the wholesale and retail cost system as approved by the National Regulatory Authority, OPTA, (b) be audited and (c) be published.[29] With respect to wholesale markets, the internal and external wholesale revenues have to be specified. With respect to the retail markets, the

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[25] Available from BT Wholesale website. http://www.btwholesale.com/application?pageid=editorial_one_column&nodeId=navigation/node/data/Pricing_and_Contracts/Reference_Offers/Partial_Private_Circuits_PPC_Reference_Offer/PPC_Quality_of_Service_Performance/navNode_PPC_Quality_of_Service_Performance.

[26] The "Current Cost Financial Statements for 2007 including Openreach Undertakings" report can be found at http://www.btplc.com/Thegroup/Regulatoryinformation/Financialstatements/2007/CurrentCostFinancialStatements.pdf

[27] See Section 3 of the Report ("Review of Access Markets") pp. 22-43, especially Sections 3.8 and 3.9 (PPCs) and 3.10 (Ethernet).

[28] For BT Wholesale, *see* http://www.btwholesale.com/application?origin=child_link_index.jsp&event=bea.portal.framework.internal.refresh&pageid=editorial_two_column&nodeId=navigation/node/data/Footer/About_BTW/Key_Performance_Indicators/navNode_Key_Performance_Indicators. For Openreach *see e.g.,* for LLUs (Local Loop Unbundling) http://www.openreach.co.uk/orpg/products/llu/kpi/kpi.do.

[29] The KPN reports for 2005 and 2006 can be found on KPN's wholesale website www.kpn-wholesale.com, search for "accounting separation". For 2007, the public version of the accounting separation report was published on OPTA's website on 17 October 2007.

transfer charges of internal wholesale purchases must be specified. The fixed incumbent has to use one single, consistent cost system for all different services and markets. This is also explicitly stated in the obligation and subject of the audit of the separated accounts. Costs of assets which are used by different services and markets are allocated to these services and markets on the basis of a single, consistent, methodology and allocation mechanism. The report includes an audit statement.

### B. The New Zealand Experience Similarly Confirm the Importance of Such Reports in Promoting Competition and Innovation

The ECTA analysis is confirmed by the experience in New Zealand. New Zealand initially adopted a deregulatory process similar to that being implemented in the United States only to find that it began slipping behind its OECD peers in broadband services.[30] In response, the Government, in December 2005, commenced a "stocktake" of the telecommunications sector.[31] That analysis showed that the governing Telecommunications Act 2001 "at present does not provide the Commission with specific powers to: provide for public information disclosure of relevant undue discrimination performance measures including applicable accounting information."[32] It concluded that: [a] transparency requirement that enables the regulator to specify the precise information to be made available can render undue discrimination actions less likely to succeed by making the behaviour observable and enabling initiation of enforcement action."[33] It was

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[30] See the Statement of Communications and Information Technology Minister, Hon David Cunliffe, (March 5, 2006) ("Cunliffe Statement" )at http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25636.

[31] *Id.*

[32] Regulatory Measures to Address Wholesale Supply Discrimination Issues and Information Needs (Published 28 April 2006) at 12. This report can be found at http://www.med.govt.nz/templates/MultipageDocumentTOC____20558.aspx.

[33] *Id* at 13.

accordingly recommended that New Zealand require the incumbent provider to make available the following "publicly available" information:

- "information including in respect of similar services the access provider supplies to itself, including technical specifications, network characteristics, service order provision characteristics,"
- "accounting records … pricing and revenue related data, cost related data, including in relation to equivalent services and related services supplied by the access provider to its own affiliates,"
- "business unit accounting information that is required in respect of the resolution of terms and conditions of a regulated service or the monitoring or enforcement of a determination,"
- "from access providers, which is required by the parties to efficiently monitor compliance with the relevant access principles.[34]

One of the key elements in the resulting legislation was a provision requiring the incumbent telecommunications provider to publicly provide a set of regulatory accounts (accounting separation) based around its wholesale businesses.[35]

## CONCLUSION

For the foregoing reasons, Qwest's Petition for Forbearance should be denied in its entirety.

Respectfully submitted.

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Dated: December 21, 2007

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[34] *Id* at 14-15.

[35] *See* Cunliffe Statement *supra*.