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July 2, 2008

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

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

Dear Ms. Dortch:

On July 1, 2008, Bill Haas of PAETEC, Paul Kennefick of Earthlink, Lisa Youngers of XO Communications, Tony Hansel of Covad, Russ Merbeth of Integra Telecom, Gavin McCarty of Globalcom, Jennifer Duane of Sprint, Julia Strow of Cbeyond, Andy Lipman of Bingham McCutcheon, Brad Mutschelknaus of Kelley Drye and Warren and Matt Salmon and the undersigned of COMPTEL met with Commissioner Robert McDowell and his special counsel John Hunter regarding the Qwest Petitions for forbearance from unbundling and dominant carrier regulation in the Denver, Phoenix, Seattle and Minneapolis-St. Paul MSAs. The parties reiterated their objections to the grant of the Qwest Petitions as reflected in their written filings in this docket and as summarized in Attachment 1 hereto.

Should you have any questions relating to this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Mary C. Albert

cc: Commissioner Robert McDowell
John Hunter

ATTACHMENT 1

Qwest Forbearance Petitions – WC Docket No. 07-97

<u>Loop and Transport Unbundling</u>

The Qwest petitions should be denied because Qwest has failed to satisfy the statutory forbearance criteria. Qwest has not demonstrated that it meets the network coverage and market share tests in any of the 4 MSAs.

I. Public Interest Standard Has Not Been Satisfied

- The third prong of the Section 10 forbearance criteria that must be met is that forbearance will serve the public interest.

- The record in this docket contains overwhelming evidence that forbearance will not serve the public interest. State and local regulators, legislators and consumer organizations that are most familiar with the Phoenix, Denver, Minneapolis-St. Paul and Seattle MSAs actually filed in opposition to the Qwest petitions and have been very vocal and consistent in their opposition. The Commission should give particular weight to this evidence under the public interest criterion.

  - Oppositions were filed by the following:

    Arizona Corporation Commission
    Arizona Office of the Attorney General
    Bill Konpnicki, Arizona House of Representatives
    Washington Utilities and Transportation Commission
    Washington State Attorney General's Office
    Colorado Public Utility Commission
    Colorado Office of Consumer Counsel
    Minnesota Public Utilities Commission
    Minnesota Association of Telecommunications Administrators
    City of St. Paul, Minnesota
    The Greater Metro Telecommunications Consortium (Denver)
    The New Jersey Division of Rate Counsel
    Independent Business Association (Washington state)
    National Association of State Utility Consumer Advocates
    Consumer Federation of America
    Consumers Union
    Educause
    Free Press
    Media Access Project
    New America Foundation
    Public Knowledge
    U.S. Public Interest Research Group

II. Qwest Has Not Shown That Forbearance Is Warranted Under The Commission's Existing Framework

- Under the current Omaha methodology, Qwest has not come close to demonstrating that it is entitled to forbearance in any of the MSAs.

  - Qwest has not shown that one or more facilities-based competitors are capable of serving at least 75% of the customer locations and that facilities-based competitors have at least a 50% market share in Denver, Minneapolis-St. Paul, Phoenix or Seattle. These Petitions should be denied under the tests applied by the Commission in the Verizon 6 MSA Order.

- While Qwest's own numbers and market share estimates approach, they still do not reach, the required threshholds. Qwest's estimates, however, must be substantially discounted for a number of reasons.

- **Lines served by competitors that use Qwest wholesale products should not be attributed to the competitive side of the equation.**

  - Qwest improperly includes non facilities-based lines – i.e., QPP/QLSP and resale lines -- in its estimates of the number of lines served by competitors. Qwest's retail prices or terms of service cannot be disciplined by the resale of its own products. The Commission cannot attribute these lines to competitors or rely on them to ensure that Qwest's rates, terms and conditions of service will remain just and reasonable in the absence of unbundled loops.

  - Competitors providing service using resale and QPP/QLSP are limited in their retail offerings to the underlying wholesale products created by Qwest. As a result, resale and QPP/QLSP are not alternatives to the incumbent's products or services.

  - In the Qwest Omaha and Verizon 6 MSA Orders, the Commission determined, and properly so, that it could not grant forbearance from unbundling obligations based on the existence of competition that uses UNEs because to do so would eliminate the very competition that the ILECs allege justifies forbearance. Qwest has stated that its QPP/QLSP product includes a UNE loop. Therefore, the Commission should reach the same result here and ignore Qwest's allegations of the competition it faces from competitors that rely on its QPP/QLSP or other UNE loop products.

- **Wireless Lines Should Not Be Included in the Calculation of Competitive Market Share**

  - Wireless lines should be eliminated from the market share analysis because Qwest has not demonstrated that wireless and wireline service are in the same product market.

  - Qwest attributes wireless customers to the competitive side of the equation without a showing that consumers in any of the MSAs view wireless service as a substitute for wireline. In the Omaha decision, the Commission declined to rely on competition from wireless to rationalize forbearance from unbundling requirements because Qwest failed to submit sufficient data concerning the full substitutability of wireless service for wireline within its service territory in the Omaha MSA. Qwest has submitted no data in this case that consumers in its service area in any of the 4 MSAs view wireless as a substitute for wireline so wireless lines should not be factored into the market share calculation.

  - The Verizon 6 MSA decision cannot be read to mean that the Commission has affirmatively found that wireline and wireless should be viewed as substitutes for one another. Although the Commission included an estimate of wireless cut the cord lines in its calculation of competitive market share, it very clearly stated that the market share thresholds were not met *even if* cut the cord lines were counted. In contrast, in the Universal Service High Cost Support order adopted 5 months after the Verizon 6 MSA order, the Commission affirmatively found that a majority of consumers do not view wireless service as a substitute for wireline.[1]

  - Even if the Commission were to disavow its very recent finding that the majority of consumers do not view wireless as a substitute for wireline service, it should not rely on any national or regional "cut the cord" estimates, including those generated by the CDC study. The Commission cannot use national or regional data to determine whether the competitors' share of the local telephone market is large enough to warrant forbearance from unbundling obligations in any of the 4 MSAs.

  - If the Commission were to rely on the CDC estimates of cut the cord wireless customers to calculate competitors' market share, wireless lines can only be used to determine market share in the residential market because the CDC study surveyed only households, not businesses. Moreover, the Commission must make the adjustments proposed in the

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[1] *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 08-122 (rel. May 1, 2008); *In the Matter of High-Cosst Universal Service Support*, WC Docket No. 05-337, Notice of Proposed Rulemaking, (rel. Jan. 29, 2008).

Gillan & Associates analysis. The Gillan analysis persuasively showed that the Commission should at most rely on the estimates represented by the lower bound of the 95% confidence interval, rather than the point estimates produced by the study to avoid overstating the extent of competition. The CDC study was not conducted for the purpose of determining market share and for this reason, the Commission should rely on only the most conservative numbers. In addition, the Commission should subtract out numbers for identifiable groups that are not representative of the population as a whole, such as college age respondents.

- Under no circumstances can cut the cord wireless be considered a broadband substitute. Wireless data speeds and prices are not competitive with wireline.

- **Facilities-based competition in commercial buildings is extremely limited in each of the 4 MSAs**

  - CLECs have provided company-specific lit building and near network data that show minimal actual competitive penetration in all 4 MSAs. GeoResults data submitted by XO and Covad show that competitors connect with their own facilities to significantly less than 1% of the commercial buildings in each of the MSAs and that a significant percentage of the wire centers in each of the MSAs have no buildings served by competitors with their own facilities.

- **The data recently produced by Cox at the Bureau's request demonstrate that the market share test is not met in Phoenix.**

- **Qwest's data is not reliable**

  - Qwest's estimate of competitive wireline market share data is pretty much limited to the residential market. This data cannot possibly justify eliminating unbundling obligations in the small, medium or enterprise business market or broadband market.

  - Qwest has not produced actual line count data for any facilities-based carrier (competitors not using QPP, Qwest resale, UNEs or special access). In the Verizon 6 City MSA Order, the Commission properly included only actual competitor line counts in determining Verizon's market share and should do the same when calculating Qwest's market share.

III. The Omaha experiment has proven unsuccessful and the Commission should avoid making the same mistake again

- The Commission should not make the Omaha mistake again by using the same flawed methodology to evaluate whether the Section 10 criteria are met in these 4 MSAs. There are at least 3 fundamental flaws in the Commission's analysis (1) its failure to perform a separate analysis of the existence and viability of competition in each separate product market; (2) its failure to give any weight to the availability of wholesale alternatives in determining whether the enforcement of the unbundling requirements remained necessary to ensure that Qwest's rates are just, reasonable and nondiscriminatory and to protect consumers; and (3) its reliance on its "predictive judgment" that if granted forbearance, Qwest would not curtail wholesale access to unbundled loops and transport and that market incentives would prompt Qwest to make network elements available to other carriers at competitive rates and terms.

- The reality is that the Commission's "prediction" has failed to materialize. Qwest has not made its network elements available to other carriers at competitive rates and terms and as a result, competition has eroded.

- The Commission must evaluate the existence of competition in the wholesale market before eliminating access to wholesale inputs at cost-based rates.

  - If the Commission were to grant Qwest forbearance from its statutory obligation to make unbundled loops and transport available to competitors in any of the 4 MSAs based on the existence of competition in the retail market alone, there is no reason to believe that competition in the retail market will not be curtailed, as it has been in Omaha, once competitors are denied access at reasonable rates to the essential inputs they need to provide service to their customers. There will be nothing to discipline Qwest's wholesale pricing where there are no alternatives to Qwest for the purchase of wholesale inputs. Noncompetitive rates will drive competitors from the market, producing a duopoly of Qwest and the cable company.

SUMMARY OF WHITE PAPERS AND STUDIES FILED IN QWEST 4-MSA FORBEARANCE PROCEEDING, WC DOCKET NO. 07-97

"An Analysis of Qwest's Petition for Forbearance: A Quantification of the Impact of Forbearance" (QSI Consulting Impact Study)

- "[I]f the FCC grants Qwest its requested forbearance in the four MSAs at issue, the annual impact in terms of increased telecommunications expenses incurred by customers for retail mass market and enterprise voice and broadband services in the four MSAs would range between $0.87 and $1.41 billion, which translates into *an average of $1.14 billion*." (emphasis added)

- As the GAO's 2006 Report on special access services makes clear, "Qwest's requested relief from TELRIC pricing requirements would generally translate into upward pressure on wholesale prices for network elements used by competing CLECs. If there is not sufficient competitive pressure to keep Qwest from increasing its special access prices when it has the regulatory [pricing] flexibility to do so, there is no reason to believe that there is sufficient competitive pressure to prevent Qwest from increasing the prices for its loop and transport facilities to, at a minimum, its special access prices with a grant of forbearance."

- "On average across the four MSAs, current special access rates for DS1 loops are *almost three times higher* than UNE rates." (emphasis in original)

- Intermodal competition is not necessarily price-constrained competition. That is, "given the highly concentrated and increasingly duopolistic nature of telecommunications markets, it is highly unlikely that the cable companies will have an interest in meaningfully curtailing Qwest's ability to raise retail rates in the four MSAs at issue."

"GeoSummary Wire Center Analysis" by GeoResults

- The percentage of commercial buildings served by facilities-based competitors is *no more than 0.26%* in any of the four Qwest markets.

- The highest percentage of commercial buildings served by facilities-based competitors in any wire center in any of the four MSAs at issue is 3.62%.

- The number of wire centers in which *no* buildings are served by competitors ranges from 43% in Denver and Seattle, to 51% in Phoenix, and 60% in Minneapolis.

"Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of Wireline Competition" by Dr. Kent Mikkelsen

- Wireless service does not belong in the wireline voice service product market because the demand for primary and secondary fixed lines is inelastic. That is, "in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, *one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service*." (emphasis added)

- The presence of *some* amount of substitution does not demonstrate that wireline and wireless service are part of the same market. The percentage of households that have "cut the cord," "by itself, does not give much, if any insight into the demand elasticity for wireline service."

- Even if the Commission gathers sufficient evidence to conclude that mobile wireless service is part of the same product market as wireline voice service, the "Commission must still be careful not to use such a finding to infer that mobile wireless service belongs in the same relevant product market with wireline services for *services other than voice* such as ADSL, DS1, and DS3 services." (emphasis added)

"Properly Estimating the Size of the Wireless-Only Market," by Gillan Associates

- If the Commission includes "wireless-only" (or "cut-the-cord") subscribers in its forbearance analysis, the estimate of such subscribers should come from a neutral source, such as the semi-annual survey conducted by the Centers for Disease Control ("CDC Survey").

- However, the FCC "should not rely on the CDC Survey's [national] point-estimate of wireless-only households but should instead use the lower bound of the 95% confidence interval" in order to "better protect against the risk that it is adopting an inflated estimate of the actual number of wireless-only subscribers."

- In addition, the estimate must reflect *regional* differences in wireless acceptance. (The CDC Survey provides wireless-only estimates for the North South, East, and West regions.)

- The estimate should also exclude identifiable groups, such as college-age CDC Survey respondents, that "can be expected to exhibit wireless preferences that are not representative of the population as a whole."

"The Irrelevance of Resale and RBOC Commercial Offers To Competitive Activity in Local Markets" by Gillan Associates

- Neither resale nor Commercial Offers (such as Qwest's QPP/QLSP product) should be included in any analysis of retail competition because "the lines served by these options impose no price constraint on the incumbent." In addition, resale lines do not limit the market power of the incumbent because the purchasing carrier (i.e., reseller) has no meaningful ability "to differentiate its product from that offered by the incumbent through innovation."

- "[T]he effect of the Omaha forbearance decision has been a collapse in wholesale volume, as Qwest increased rates between 30% (individual DS0s) and 178% (DS3s). These price increases caused a significant decline in competitive activity, with UNE loop volumes declining by 25% for the entire State of Nebraska." The Omaha market post-forbearance supports the conclusion that "when the RBOC is permitted to set the price of its wholesale offerings without [regulatory] oversight, those wholesale offerings do not support retail competition and cannot constrain the retail pricing of the incumbent."

"The Importance of Wholesale Competition to Market Performance" by COMPTEL

- The failure of wholesale competition to develop in the Omaha market post-forbearance is the result of several factors, including that with only two providers, Qwest and Cox, "there is little reason to expect an interest in wholesale offerings (which would support additional retail level competition)." In addition, Cox's cable plant is generally deployed to residential areas, whereas most UNE-based competition occurs in the business market.

- "Where competition at the wholesale level assures [reasonable] pricing and terms, reducing regulatory obligations makes sound policy sense. The [grant of forbearance in Omaha], however, demonstrates that the reverse is not true – that is, merely observing retail-level competition does not imply that wholesale inputs will be priced reasonably in the absence of regulatory oversight."