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REDACTED – FOR PUBLIC INSPECTION

EX PARTE OR LATE FILED

ORIGINAL

Via Courier

EX PARTE

FILED/ACCEPTED

JUL - 1 2008

Federal Communications Commission
Office of the Secretary

July 1, 2008

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 hereby submits the attached *ex parte* and request for confidential treatment (pursuant to the First Protective Order) of certain confidential information included in the associated *ex parte*, in the above-captioned proceeding.

One original copy of the non-redacted version is being submitted; and two original copies of the redacted version are being submitted. For both the redacted and non-redacted versions, an extra copy is provided to be stamped and returned to the courier. Both the redacted and non-redacted versions of the *ex parte* are being served on Staff of the Commission's Wireline Competition Bureau as indicated below. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please contact me using the information reflected in the above letterhead.

Sincerely,

/s/ Melissa E. Newman

No. of Originals rec'd 051
List Above

Ms. Marlene H. Dortch
July 1, 2008

Page 2 of 2

Attachments

cc: (via e-mail)

Denise Coca (denise.coca@fcc.gov)

Jeremy Miller (Jeremy.miller@fcc.gov)

Tim Stelzig (tim.stelzig@fcc.gov)

Gary Remondino (two hard copies of the non-redacted version & via
gary.remondino@fcc.gov)

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Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303-383-6653
Facsimile 303-896-1107

Daphne E. Butler
Corporate Counsel

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Via Courier

EX PARTE

July 1, 2008

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 requests confidential treatment of certain information included in the associated attachment. The confidential information includes internal confidential Qwest data as to market share and numbers of customers served in the four Metropolitan Statistical areas.

The confidential information is submitted pursuant to the June 1, 2007 First Protective Order (22 FCC Rcd 10129, DA 07-2292) in WC Docket No. 07-97. As required by the First Protective Order, the confidential information (that is, the non-redacted version) is marked **CONFIDENTIAL – SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 07-97 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**. Pursuant to the First Protective Order, Qwest requests that the non-redacted version of the *ex parte* (containing confidential information) be withheld from public inspection.

Qwest considers the confidential information as being competitively-sensitive in nature. This type of information is “not routinely available for public inspection” pursuant to both Federal Communications Commission (“Commission”) rules 47 C.F.R. §§ 0.457(d) and 0.459 (as Qwest explained and for which it provided legal justification in its Request for Confidential Treatment and Confidentiality Justification submitted with its four Petitions for Forbearance on April 27, 2007.

Ms. Marlene H. Dortch
July 1, 2008

Page 2 of 2

Qwest is simultaneously submitting, under separate covers, the non-redacted and redacted versions of this *ex parte*. The redacted version of the *ex parte* is marked "**REDACTED - FOR PUBLIC INSPECTION**". Both the redacted and non-redacted versions of the *ex parte* are the same except that in the non-confidential version the confidential information in the attachment has been omitted. This letter does not contain any confidential information.

If you have any questions concerning this submission, please call me on 303-383-6653.

Sincerely,

/s/ Daphne E. Butler

Attachment

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Phone 303-383-6653
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Daphne E. Butler
Corporate Counsel

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VIA COURIER

EX PARTE

July 1, 2008

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”) responds to several *ex partes* filed with the Federal Communications Commission (“Commission”) by competitive local exchange carriers (“CLECs”) regarding these matters: (1) the May 14, 2008 *ex parte notification* from XO Communications, LLC and Covad Communications Group (“XO/Covad May 14”) regarding competitive market penetration, including CLEC fiber connection to commercial buildings,¹ (2) the May 20, 2008 *ex parte notification* from XO regarding XO’s fiber connection to commercial buildings (“XO May 20”),² (3) the June 3, 2008 *ex parte notification* from XO regarding a number of topics, including fiber connection to commercial buildings (“XO June 3”),³ (4) the

¹ See *ex parte* Letter from Genevieve Morelli, counsel for XO Communications, LLC and Covad Communications Group to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed May 14, 2008.

² See *ex parte* Letter from Genevieve Morelli, counsel for XO Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed May 20, 2008.

³ See *ex parte* Letter from Denise N. Smith, counsel for XO Communications LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed June 3, 2008.

Ms. Marlene H. Dortch
July 1, 2008

Page 2 of 17

June 10, 2008 *ex parte notification* from XO and Covad (“XO/Covad June 10”) regarding competitive market penetration, including CLEC fiber connection to commercial buildings,⁴ and (5) the June 16, 2008 *ex parte* letter from Covad, NuVox and XO (“Joint CLECs June 16”)⁵ regarding the GeoResults data they provided in an April 23, 2008 *ex parte* filing (“Joint CLECs April 24”).⁶

Qwest urges the Commission to give no weight to the GeoResults “lit buildings” data that have been presented for the following reasons (explained in more detail below): 1) the CLECs used over one hundred wire centers that are not part of the geographic area for which Qwest seeks relief; 2) there are inconsistencies between the GeoResults data provided for Minneapolis-St. Paul and the data the CLECs provided to the Minnesota Department of Commerce (or “MNDOC”) that was filed by the Minnesota Public Utilities Commission (“MNPUC”) in this docket;⁷ 3) the GeoResults data do not capture the full range of last-mile alternatives available to CLECs; and 4) examining commercial activities outside the context of this proceeding demonstrates the importance of last-mile alternatives that the GeoResults data do capture.

I. THE SUMMARY OF GEORESULTS DATA PRESENTED BY XO/COVAD AND XO IS BASED ON A TOTAL OF 141 MORE WIRE CENTERS THAN THE TOTAL NUMBER OF WIRE CENTERS FOR WHICH QWEST SEEKS RELIEF

CLECs have tainted the GeoResults data by including 141 wire centers for which Qwest is not seeking relief, in addition to the 191 wire centers where Qwest is seeking relief. In the numerous presentations between April and June 2008 of GeoResults summary data by Covad, XO, *et al.*, the following information categories have each been repeatedly referenced:

⁴ See *ex parte* Letter from Genevieve Morelli, counsel for XO Communications, LLC and Covad Communications Group to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed June 10, 2008.

⁵ See *ex parte* Letter from Genevieve Morelli, counsel for XO Communications, LLC, Covad Communications Group and NuVox to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed June 16, 2008.

⁶ See *ex parte* Letter from Brad E. Mutschelknaus and Genevieve Morelli, counsel for XO Communications, LLC and Covad Communications Group and NuVox Communications, Thomas Jones and Nirali Patel, counsel for Cbeyond Inc., *et al.*, John T. Nakahata and Stephanie Weiner, counsel for Earthlink, Inc. and New Edge Networks, Inc. and Andrew D. Lipman, Russell M. Blau, Patrick J. Donovan and Philip J. Macres, Counsel for Cavalier Telephone Corporation, PAETEC, and U.S. Link, Inc. d/b/a TDS Metrocom to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed April 23, 2008 and its attached GeoSummary Wire Center Analysis.

⁷ See *ex parte* Letter from Burl W. Haar, Minnesota Public Utilities Commission, WC Docket No. 07-97, filed Feb. 8, 2008 (“MNPUC Feb. 8”).

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- “total number of wire centers in MSA [Metropolitan Statistical Area]”
- “total number of commercial buildings in MSA”
- “% of commercial buildings served by facilities-based CLECs”
- “total number of wire centers with no buildings served by facilities-based CLEC”
- “percentage of wire centers with no buildings served by facilities-based CLECs”
- “number of wire centers in MSA with facilities-based CLEC addressable demand market share between 0%-5%, 5%-10%, 10%-15%, above 15%”⁸

It is important to note that the “total number of wire centers in MSA” forms the basis for the calculation of the result associated with each of the other five items, including total number of commercial buildings in the MSA, because that is calculated by wire center. Each time the data representing “total number of wire centers in MSA” have been presented, it has been incorrect. The “total number of wire centers in MSA”, as relied upon by the CLECs, grossly overstates the total number of wire centers for which Qwest is seeking relief and likely includes many wire centers in areas not served by Qwest.

Table 1 below provides a comparison of the number of wire centers upon which most of the GeoResults data are based⁹ as compared to the number of wire centers for which Qwest is actually seeking relief.¹⁰

Table 1

Comparison of Wire Center Counts
Qwest Petitions vs. CLEC-Submitted GeoResults Data

<u>MSA</u>	<u>Total Number of Qwest Wire Centers in MSA for</u>	<u>Total Number of Wire Centers in MSA Per The GeoResults</u>	<u>Number of Wire Centers That Were Erroneously Included in the</u>
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⁸ See Joint CLECs April 23 at 20-22; XO/Covad May 14, Slides 11, 13 and 14; XO June 3, Slides 12, 14 and 15; and XO/Covad June 10, Slides 11, 13 and 15.

⁹ *Id.*

¹⁰ See *Highly Confidential Exhibit 2* attached to the Brigham/Teitzel declaration filed with each of Qwest’s petitions for Denver, Minneapolis-St.Paul, Phoenix and Seattle. While Qwest acknowledges that the data contained therein was redacted in the public versions of its filings, the list of Qwest wire centers and associated eight-character Common Language Location Identification (“CLLI8”) code for each MSA was available for public review by all interested parties, including the CLECs. Yet, the parties chose to present extraneous information for numerous wire centers not relevant to Qwest’s petitions.

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	<u>Which Relief is Sought</u>	<u>Data Relied Upon by the CLECs¹¹</u>	<u>GeoResults Data</u>
Denver	43	47	4
Minneapolis/St. Paul	58	140	82
Phoenix	64	76	12
Seattle	26	69	43
Total	191	332	141

As explained below, this discrepancy in wire center counts is but one of many highly questionable uses of the GeoResults data by the CLECs, and this distortion alone invalidates the vast majority of the CLEC-served commercial building statistics that have been repeatedly presented to the Commission by the CLECs.

II. THE GEORESULTS-BASED DATA FOR THE MINNEAPOLIS-ST.PAUL MSA DO NOT NOT SQUARE WITH THE DATA THE CLECS PROVIDED TO THE MINNESOTA DEPARTMENT OF COMMERCE

The GeoResults data that purport to cover all carriers in Minneapolis-St. Paul (including 82 extra wire centers) does not square with the data that was filed by the MNPUC in this docket.¹² In its February 8, 2008 *ex parte*, the MNPUC filed the aggregated residence and business line counts of ten CLECs serving the 58 Minneapolis-St. Paul MSA wire centers,¹³ as had been provided by these ten CLECs pursuant to a survey undertaken by the MNDOC subsequent to Qwest's filing of its petition for forbearance in the Minneapolis-St.Paul MSA.¹⁴ The results of this survey are by no means complete because they only reflect data provided by

¹¹ See XO/Covad May 14 at Table 3.

¹² See MNPUC Feb. 8 at 6-7.

¹³ According to the MNPUC Feb. *ex parte*, the ten CLECs that submitted data were ATT/TCG, Covad, Eschelon, Integra, MCImetro, McLeodUSA, Onvoy, Popp, TDS Metrocom and XO. *Id.* at Attachment A, n.1. Qwest notes that, at the time of this survey, the participating CLECs were quite aware that Qwest's Minneapolis-St. Paul petition involved the 58 specific wire centers listed in the MNDOC-reported results, and not the 140 wire centers that were included in the GeoResults data.

¹⁴ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-97, filed Apr. 27, 2007.

ten CLECs and do not include data from Comcast or certain other facilities-based CLECs competing in the Minneapolis-St. Paul MSA. However, they are nonetheless enlightening in at least two respects.

First, the MNDOC's non-confidential data show that these ten CLECs alone report serving a total of 334,150 business lines in the MSA.¹⁵ Although the vintage of the data collected and reported by the MNDOC in September 2007 is not apparent in the MNPUC's Feb. 8 *ex parte*, Qwest notes that the total business lines served by just these ten CLECs **[begin confidential]** **[end confidential]** Qwest's December 2006 total MSA business lines by **[begin confidential]** **[end confidential]** lines and **[begin confidential]** **[end confidential]** Qwest's December 2007 total MSA business lines by nearly **[begin confidential]** **[end confidential]** lines.

Secondly, the ten CLECs served 101,318 business lines completely over their own facilities. This number is about **[begin confidential]** **[end confidential]** Qwest's total business line count, even though it excludes Comcast and other facilities-based carriers. Looking at the data in more detail, these ten CLECs reported to the MNDOC that 36 percent of their total "enterprise market" lines are served exclusively over their own facilities.¹⁶ However, for the "large business" market, which the report defines as "over 200" lines, the ten CLECs indicate they provide 62 percent of these lines using only their own facilities. And for the "other enterprise" market, which is characterized as "mostly large business," 75 percent of the lines are served entirely over CLEC-owned facilities. Not insignificantly, these "other enterprise" lines comprise 32 percent of the ten CLECs' total enterprise lines, and together, the "large business" and "other enterprise" lines represent 42 percent of the total enterprise market lines served by the ten CLECs.¹⁷

This data stands in stark contrast to the miniscule **[begin confidential]** **[end confidential]** percent of commercial buildings the CLECs claim are served by facilities-based CLECs in the Minneapolis-St. Paul MSA,¹⁸ based on the GeoResults data. Clearly, the purportedly all-inclusive GeoResults-based "percent of commercial buildings served" data are not at all indicative of the level of business market competition that actually exists in Minneapolis-St. Paul, per the data that just ten CLECs reported to the MNDOC. Nor is it a

¹⁵ See MNPUC Feb. 8, Exhibit A, summary entitled "Reported line counts for Ten CLECs Serving the Twin Cities MSA": 20,020 "small business" lines + 314,130 "enterprise market" lines = 334,150 total business lines.

¹⁶ See *id.* Exhibit A, summary entitled "Reported line counts for Ten CLECs Serving the Twin Cities MSA."

¹⁷ *Id.*

¹⁸ See Joint CLECs Apr. 24, 2008 at 20; XO/Covad May 14, Slide 11; XO June 3, Slide 12; and XO/Covad June 10, Slide 11.

reliable indicator of the level of full facilities-based competition that exists in the enterprise market in the Minneapolis-St. Paul metropolitan area.

Simply put, the data that ten CLECs provided to the MNDOC casts serious doubt on the GeoResults-based data the CLECs have provided to the Commission. The percentage of commercial buildings served by facilities-based CLECs' lit fiber -- as based on GeoResults data - is obviously not a meaningful or accurate measure of the CLECs' ability to compete independently, without relying upon Qwest's facilities. The disconnect may be explained by the fact that GeoResults data do not capture all of the last mile alternatives available to CLECs, as described below.

III. GEORESULTS DOES NOT CAPTURE THE "LAST MILE" ALTERNATIVES AVAILABLE TO CLECS AND IS THEREFORE NOT INDICATIVE OF THE BREADTH OF COMPETITION IN THE FOUR MSAs

Covad Communications, NuVox and XO Communications ("Joint CLECs") take issue with Qwest's contention that the GeoResults "lit building" data filed on April 24, 2008 reflects only a subset of the number of commercial buildings served by "facilities-based" CLECs.¹⁹ The Joint CLECs are now clearly attempting to mask problems they have created for themselves through their misuse and misapplication of a data set they purchased from GeoResults. The Joint CLECs have placed great stock in the manner in which they have characterized the GeoResults data as being "proof" of the miniscule "percentage of commercial buildings with facilities-based CLECs."²⁰ While the table offered by the Joint CLECs may represent the results of a data extract from the GeoResults databases that was a result of data parameters defined by the Joint CLECs, the manner in which the data are being used by the Joint CLECs is seriously flawed, for a variety of reasons, and as shown above in the Minneapolis-St. Paul example, does not accurately measure CLECs' ability to compete without reliance upon Qwest's facilities.

First, the data in the GeoResults dataset are based on information GeoResults drew from the Telcordia-managed Central Location On-Line Entry System ("CLONES") database. A primary purpose of the CLONES database is to afford telecommunications providers a centralized means "to help you communicate with other carriers on interconnection requests."²¹ Qwest knows and understands the types of data that are input to CLONES, as Qwest also regularly inputs data to this system and is a subscriber to the database. CLONES is a repository for Common Language Location Identifier ("CLLI") codes, which provide information regarding functional equipment categories used by the various carriers to provide telephone services. Since

¹⁹ See Joint CLECs June 16 at 5.

²⁰ See Joint CLECs April 23 at the attached table entitled "GeoSummary Wire Center Analysis -- 2008-03-25, column 8.

²¹ See http://www.telcordia.com/services/commonlanguage/location_info.html.

input to CLONES is done on a voluntary basis, and carriers are under no regulatory or legal obligation to do so, there is absolutely no assurance that the CLONES data are complete. Additionally, data that reside in the CLONES system is unaudited and unverified, and is no more and no less accurate than the data input by the various entities that input such data. Any flaws in the CLONES data flow through unchecked to the GeoResults report relied on by the Joint CLECs. Accordingly, the FCC should exercise great caution as it considers the results of the GeoResults report, which is driven directly by the data resident in CLONES.

Next, the GeoResults data do not include unlit dark fiber. In the Joint CLECs June 16, the Joint CLECs claim that dark fiber is reflected in the GeoResults data, contrary to Qwest's contention. The Joint CLECs are flatly wrong and admit as much. The Joint CLECs state: "commercial buildings served by carriers that lease dark fiber and then place network terminating equipment at the ends of the dark fiber facilities appear in the GeoResults reports."²² In other words, in instances in which the CLECs have "lit" the fiber, those instances may appear in the GeoResults "lit building" data by virtue of the type of network terminating equipment the CLECs have chosen to voluntarily report to CLONES, but in instances in which CLECs have not "lit" the dark fiber, the presence of the dark fiber in a commercial building is not in the GeoResults data set because there would be no associated fiber terminating equipment in the CLONES database. Qwest has confirmed this understanding with GeoResults. Unlit dark fiber is a significant last mile alternative available to CLECs, as shown below.

Third, the Joint CLECs (which include XO, NextLink's parent company) tellingly do not dispute that NextLink is competing in each of the four MSAs at issue. However, the Joint CLECs claim that NextLink's "fixed wireless terminating equipment is in the spreadsheets obtained from GeoResults," without providing any validating statistics at all.²³ This may mean that the terminating equipment connected to the public switched network is reflected in the CLONES data relied upon by GeoResults (such as, for example, NextLink terminating equipment in a carrier hotel that is connected to lit fiber). It is noteworthy that NextLink, contrary to the Joint CLECs' suggestion that NextLink services are of "limited use by enterprise customers," is enjoying extraordinary revenue growth from its fixed wireless broadband operations. In its latest earnings report, for period ending March 31, 2008, XO reported that NextLink generated revenue of \$872,000 for the period (with \$589,000 associated with "revenue from external customers"), as opposed to \$222,000 (with \$172,000 coming from "external customers") for the period ending March 31, 2007.²⁴ In other words, NextLink's overall revenue from its fixed wireless broadband telecommunications operations grew by 293% and its revenue from "external customers" grew by 242% in a single year. To the extent NextLink is serving

²² Joint CLECs June 16 at 5.

²³ *Id.* at 6.

²⁴ See http://www.xo.com/SiteCollectionDocuments/about-xo/investor-relations/Annual_Reports/XOH%201Q%202008%2010-Q.pdf at 13-14.

Ms. Marlene H. Dortch
July 1, 2008

Page 8 of 17

“external customers” in commercial buildings, none of this growth is apparently reflected in the CLONES data relied upon by GeoResults.

As Qwest has advocated consistently in this proceeding with respect to confidential data regarding telephony customers served by cable MSOs, Qwest similarly encourages the Commission to simply ask XO to report the confidential number of commercial locations NextLink serves in each of the four MSAs. This is clearly the best means for the Commission to reconcile the clear contradiction between NextLink’s extraordinary revenue growth and what it would have the Commission believe regarding the “limited use” of NextLink’s service by enterprise customers.

Fourth, GeoResults has confirmed that it does not know whether buildings served by coaxial cable drops are reflected in the lit buildings data. Based upon its review of the CLONES database, Qwest does not believe that commercial buildings served by coaxial cable drops are reflected in the CLONES database, upon which the GeoResults data is based. For example, if a commercial building in the Phoenix MSA is served via DS0-level coaxial cable facilities by Cox Communications, the coaxial termination at that location is likely not in the CLONES database. Qwest has provided extensive evidence in this proceeding that the cable-based providers in each of the four MSAs at issue in this proceeding are now competing aggressively in the commercial business market, and they have deployed extensive hybrid fiber/coax networks in each of these MSAs. Exclusion in the CLONES database of commercial buildings served by coaxial facilities would cause the reported number of commercial buildings served by “facilities-based” CLECs to be far understated. The Commission should not rely on the incomplete and unvalidated GeoResults data proffered by the Joint CLECs, which only reflects a subset of the market.

Fifth, like the CLECs, Qwest serves certain commercial locations in each of the four MSAs with lit fiber in instances where sufficient customer demand exists to economically justify such deployments. For instance, in the Phoenix Main wire center, Qwest serves **[begin confidential] [end confidential]** commercial locations with lit fiber. The Joint CLECs’ non-confidential spreadsheet attached to their April 24 *ex parte*, which was obtained from GeoResults, suggests that 22 commercial buildings in the Phoenix Main wire center are served by “facilities-based CLECs” lit fiber. The **[begin confidential] [end confidential]** percent of commercial buildings in the Phoenix Main wire center served by Qwest lit fiber is **[begin confidential] [end confidential]** commercial buildings served by facilities-based CLEC lit fiber. In other words, in commercial locations housing the greatest telecommunications demand (*i.e.*, office towers or major business parks), facilities-based CLECs have deployed their own facilities to address that demand in a **[begin confidential] [end confidential]** This follows the economically-rational model the CLECs have employed for many years: deploy facilities to customer locations with the very high levels of demand, and then gradually deploy facilities to surrounding locations.

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IV. EXAMINING COMMERCIAL ACTIVITY OUTSIDE THE CONTEXT OF THIS PROCEEDING SHOWS THAT THE LAST MILE ALTERNATIVES NOT REFLECTED IN THE GEORESULTS DATA ARE COMMERCIALY IMPORTANT

Similar to the approach taken by the CLECs in repeating over and over again the many inaccuracies and mistruths regarding the status of competition in Omaha, the strategy employed here by XO and Covad is to repeat the “CLECs serve few commercial buildings with lit fiber” mantra frequently enough that it becomes viewed as a true measure of the level of competition in the four MSAs. However, the CLECs’ repeated presentation of “lit buildings” data are merely a red herring. The fact is, even if the GeoResults data could be presumed accurate, the number of buildings with CLEC “lit fiber” does not provide a good measure of the ability of CLECs to compete or to connect to customers using non-Qwest facilities, as Qwest has shown in Section II above. The CLECs have chosen to largely ignore the other ways in which telecommunications service providers now reach their enterprise customers.

As Qwest explained in its May 15, 2008 *ex parte*,²⁵ the GeoResults data filed by the Covad CLECs on April 24, 2008²⁶ -- which has been presented repeatedly since then by XO/Covad and by XO -- reflects a subset of the market and by no means captures the full scope of telecommunications competition in the business market. Plainly, the data submitted by the Joint CLECs are only an artifact of the nature in which CLECs target customers in the larger end of the enterprise business market. They initially target the largest commercial buildings in metropolitan areas that represent the most lucrative customer opportunities, install fiber facilities to that subset of buildings, and then expand their focus to other customers over time. This is known colloquially in the industry as “cherry picking.”

The CLEC *ex partes* that tout the GeoResults data also completely ignore the option of connecting a building to an existing fiber ring. While Qwest notes the information filed by XO May 20, 2008²⁷ included its own unverified report of the number of commercial buildings within 500 feet and 1,000 feet of XO fiber, the GeoResults industry-wide data otherwise failed to take into account any commercial buildings within a similar distance of a competitive fiber route. The fact is, as Qwest pointed out in its May 15, 2008 *ex parte*, it is entirely feasible for a CLEC to connect a building to an existing fiber ring in Denver, Minneapolis-St. Paul, Phoenix or

²⁵ See *ex parte* Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed May 15, 2008 at 6-10 (“Qwest May 15”).

²⁶ See Joint CLECs April 23.

²⁷ See *ex parte* Letter from Genevieve Morelli, counsel for XO Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97, filed May 20, 2008.

Seattle. The GeoResults data do not consider this option. When talking to investors, the CLECs highlight their ability to conveniently connect buildings to these fiber rings. For example, McLeod's Royce Holland stated that "It's easy enough to get into a manhole and get the fiber into a building,"²⁸ but when filing *ex partes* with the Commission, the CLECs pretend that this option does not exist or is prohibitively expensive.

The public GeoResults data submitted on April 24 bear out Qwest's theory that CLECs deploy to locations with very high levels of demand. These data show that the "Percent of Customer Demand Addressed by Facilities-Based CLECs" is often between *two and four times* as high as the "Percent of Commercial Buildings With Facilities-Based CLECs." This makes sense -- presumably CLECs build fiber to buildings with above-average demand, so when a particular CLEC reaches 1% of buildings it might still serve 3-4% of overall demand. Since the fiber is likely located in a central business district, the other buildings nearby are likely to also house above average demand. Thus, for example, the Commission should evaluate XO's May 20 figures regarding the percentage of buildings within 1000 feet of its fiber in light of this admission that demand reached is often as many as three of four times as high as the percent of buildings reached. Accordingly, the percentages in the right-hand column of XO's Table 2 should be multiplied by four to get a sense of the percentage of overall demand that resides in buildings within 1000 feet of XO fiber.²⁹

A. Competitors' Statements Outside The Context Of This Proceeding Demonstrate The Importance Of Competitive Alternatives That The GeoResults Data Do Not Capture

Competitors' statements in other venues, such as statements to investors, and marketing documents, demonstrate the competitive importance of competitive alternatives that the GeoResults data do not capture, specifically unlit dark fiber and fiber near an enterprise building. Fiber providers take great pride in the number of miles of metro fiber they have in place and the number of buildings they pass with their fiber. If data regarding the amount of competitive fiber within a metro area and the number of commercial buildings "passed" by that fiber were truly as irrelevant to a competitive marketplace as the CLECs would have the Commission believe, it is counterintuitive that CLECs and other competitive fiber providers would proudly highlight the breadth and reach of their networks, both in presentations before investors and via network

²⁸ See http://telephonyonline.com/access/finance/paetec_acquires_mcleodusa_091707/index.html, visited Apr. 30, 2008.

²⁹ Additionally, as discussed below, other fiber-based telecommunications service providers report the number of commercial buildings that could potentially be served by non-ILEC fiber is many times greater than the number of "lit buildings" that currently exist. For instance, Level 3 reports that the number of commercial buildings within 500 feet of its fiber network is 13 times greater than the number of commercial buildings it already directly serves.

information provided on the company websites. Yet, reports of fiber availability figure prominently into the advertising of CLECs and other fiber wholesalers -- whether to investors, or to wholesale or retail customers.

1. Level 3

In a recent presentation to stockholders, for example, Level 3 -- a major provider of wholesale fiber facilities -- highlighted the following facts about its network:

- **Over 7,600 buildings on net.**³⁰
- **Over 100,000 enterprise buildings within 500 ft of US network.**³¹
[Emphasis added.]
- IP/optical costs are improving more rapidly than alternatives.³²
- Given rapidly increasing demand, **fiber will be economically justified at an increasing number of fixed locations.**³³ [Emphasis added.]

The statistics provided by Level 3 illustrate the misleading nature of the GeoResults data that have been presented by the CLECs, since these data address only "lit" CLEC fiber. The opportunity for connecting additional buildings to competitor-owned fiber is demonstrated by the fact that the number of commercial buildings within a mere 500 feet of Level 3's fiber is **13 times** the number of buildings that Level 3 shows as being currently "on-net."³⁴

Level 3's fiber network serves Denver, Minneapolis-St. Paul, Phoenix and Seattle. Among its wholesale customers -- and Level 3 reported that wholesale revenues comprised 57 percent of its 1Q08 core services revenue -- Level 3 lists Comcast, Cox, Sprint and Verizon.³⁵ Level 3 has been partnered with the cable companies for several years. For example, by June 2003, when Level 3 announced that it had signed an agreement to provide multiple optical

³⁰

http://www.level3.com/brochures/investor_relations/2008%20LVT%20Annual%20Meeting%20Presentation.pdf, Level 3 Communications, Presentation to 11th Annual Meeting of Stockholders, May 20, 2008, Broomfield, Colorado ("Level 3 May 20, 2008 Presentation"), Slide 16.

³¹ *See id.*, Slide 10.

³² *Id.*, Slide 35.

³³ *Id.*, Slide 36.

³⁴ Denver, Phoenix, Minneapolis and Seattle are each shown by Level 3 to be an "On-Net Market with Metro Fiber Network." *See* http://www.level3.com/images/global_map/Level_3_Network_map.pdf.

³⁵ Level 3 May 20, 2008 Presentation, Slide 13.

Ms. Marlene H. Dortch
July 1, 2008

Page 12 of 17

wavelength services to Cox, Cox reported that Level 3 had become “a seamless and integral part of [its] business, as well as an important extension of [its] own network.”³⁶ In that same release, Level 3 reported that Cox was utilizing a “full suite of Level 3 services, including (3)CrossRoads Internet access, (3)Center Colocation, (3)Link Private Line, (3)Voice Termination, and **metropolitan dark fiber services.**” [Emphasis added.]

Comcast also has an agreement with Level 3 “to provide inter-city **and metro dark fiber as part of Comcast’s extension of its fiber footprint.**” It states that “This backbone ensures that Comcast has a technically advanced and fully upgradeable nationwide broadband network -- today and in the future -- over which it can deliver new and enhanced services to its customers.”³⁷

Level 3’s wholesale arrangements are not limited to cable companies, as demonstrated by its September 2006 teaming with Covad Communications “**to accelerate VoIP adoption in the small and medium business market.**”³⁸ Covad’s director of product development commented at the time that Level 3 was “an ideal business partner for Covad” because of “[Level 3’s] deep experience in and understanding of SMB telecommunications, nationwide coverage, **and speed to market.**”³⁹

There are a few common themes running throughout these various Level 3 announcements: 1) access to Level 3’s metro dark fiber appears to have been a major consideration for Level 3’s wholesale partners, even though the GeoResults data include no metro dark fiber statistics; 2) Level 3’s ability to assist with the provision of high-speed Internet services and VoIP services is important to its partners; and 3) Level 3 appears to be respected for its “speed-to-market” capabilities, which would suggest that Level 3 and its partners are fairly adept at building the necessary loop laterals from Level 3’s fiber in the street into the buildings which may not already be ‘on-net’ -- a task which XO claims to be so burdensome.⁴⁰

2. XO Communications

XO claims in its May 20, 2008 *ex parte* that:

XO could not reach all buildings within 1,000 or even 500 feet of its network in a commercially-reasonably [sic] manner. Whether or not XO could build laterals to

³⁶ See <http://www.level3.com/newsroom/pressreleases/2003/20030617.html>.

³⁷ See <http://www.level3.com/newsroom/pressreleases/2004/20041207.html>.

³⁸ See <http://www.level3.com/newsroom/pressreleases/2006/20060912a.html>.

³⁹ *Id.*

⁴⁰ See XO May 20 at 3.

REDACTED – FOR PUBLIC INSPECTION

these buildings would depend greatly on building demand, as well as other factors such as building access and specific loop plant build characteristics.⁴¹

XO then goes on to explain in footnote 3 that “XO does not even consider the construction of a lateral in the absence of a term commitment for no less than 3 DS3s worth of demand.”⁴²

Essentially, XO argues that it only wants to build laterals when it has three DS3s of capacity, and would *prefer* to rely on Qwest facilities -- available at artificially low rates -- in the remainder of the circumstances. However, the fact is XO has “approximately 1 million miles of metro fiber”⁴³ and it could build laterals to connect additional buildings to this network, including those that do not meet XO’s “3 DS3” criteria. It simply elects not to do so based on the current economics of the situation. The Telecommunications Act did not envision the *permanent* provision of unbundled network elements (“UNEs”) by incumbent local exchange carriers (“ILECs”) at below-cost prices to align with particular competitors’ business models, regardless of how competitive telecommunications markets may become. Instead, Section 10 of the Act allows the Commission to forbear from regulating Qwest’s wholesale rates when competition is robust. Clearly, XO and its CLEC brethren would like to be able to purchase below-cost UNEs *ad infinitum*, but that is not the purpose of the Act, which was to make available low-priced wholesale network elements to “jump start” competition in the telecommunications industry.

In its *ex parte*, XO would have the Commission believe that its extensive one million miles of metro fiber network is not a significant competitive consideration in this proceeding. However, XO is already making good use of that network. XO lists among its business, government, carrier and wholesale customers: “50% of the Fortune 500; Federal, state and local governments; regulatory agencies and educational organizations; 13 of the world’s largest telecommunications companies; the five largest U.S. wireless companies; the five largest U.S. cable companies; 2 of the 5 most popular search engine companies.”⁴⁴

Importantly, when not talking to the Commission, *XO does not limit itself to fiber* as its only means of delivering competitive telecommunications services to commercial buildings, even though it elected to provide only XO fiber-lit data to the Commission as “evidence” of the limited number of commercial buildings it actually serves. In the company description it provides to the press with news releases, XO states: “Utilizing its unique and powerful nationwide IP network and extensive local metro networks and *broadband wireless facilities*,

⁴¹ *Id.*

⁴² *Id.*

⁴³ See <http://www.xo.com/about/Pages/overview.aspx>.

⁴⁴ See *id.*

Ms. Marlene H. Dortch
July 1, 2008

Page 14 of 17

XO offers customers a broad range of managed voice, data and IP services in 75 metropolitan markets across the United States.”⁴⁵ [Emphasis added.]

XO’s broadband wireless access is provided through its sister company, NextLink Wireless, Inc. (“NextLink”). NextLink, which offers its services to business, government and carrier customers, maintains “a fixed wireless spectrum footprint that covers 95% of the population in 81 of the top markets in the United States.”⁴⁶ [Emphasis in original.] NextLink broadband wireless service is available in **each of the four** metropolitan areas at issue in this proceeding. For wireless and wireline carriers, NextLink offers “[a] highly scalable, alternative access solution to support bandwidth-intensive, next-generation mobility applications and content, as well as a **cost-effective “last-mile” replacement of local telephone company offerings.**”⁴⁷ [Emphasis added.]

On May 29, 2008, NextLink announced that it was enhancing its access solutions product line by launching Gigabit Ethernet in 75 markets:

NextLink Wireless, Inc., a **leading provider of broadband wireless alternative access services**, has added Gigabit Ethernet (Gig-E) to its access solutions product portfolio. NextLink’s addition of **Gig-E addresses the increasing bandwidth demands of communication carriers and larger enterprises in fiber-deprived areas.** . . . Gig-E joins Nexlink’s robust product line of access solutions which include 10 Mbps, 30 Mbps and 100 Mbps Ethernet, DS-3 (45Mbps) and OC-3 (155 Mbps) services.⁴⁸ [Emphasis added.]

It strains credibility for XO to pronounce to the Commission that its only access to buildings is through CLEC “lit fiber” when its sister company is actively marketing its fixed wireless solutions to other carriers, and while XO itself is advertising its ability to reach customers via NextLink’s fixed wireless facilities. In its *ex parte*, XO mentions neither its massive fiber network nor the commercial buildings that may be served over XO/NextLink’s broadband wireless facilities. This non-fiber “last mile” access solution does not appear to have been discussed with the Commission by XO in its May 20 *ex parte*. Again, it bears repeating that XO and its NextLink subsidiary are actively competing with Qwest in all four metropolitan areas at issue in this proceeding.

⁴⁵ *Id.*

⁴⁶ See <http://nextlink.com/about-nextlink.html>.

⁴⁷ See [http://www.NextLink.com/assets/docs/Wireless Metro Ethernet.pdf](http://www.NextLink.com/assets/docs/Wireless_Metro_Ethernet.pdf).

⁴⁸ See <http://nextlink.com/nextlink-launches-gigabit-ethernet-enhances-access-solutions-product-line.html>. Press release issued May 29, 2008.

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3. Time Warner Telecom

Time Warner Telecom (“TWTC”) is another major fiber-based competitor that includes Denver, Phoenix, Minneapolis and Seattle among the markets it serves. In a recent presentation to investors, TWTC highlighted its “local metro focus with national scale” and provided these network statistics:

- Nearly **26,000 metro & regional fiber route miles** across [its] markets.
- Nearly **8,600 buildings** lit with fiber based services.
- National footprint interconnected with fiber and **multipurpose 10 Gig IP backbone.**⁴⁹ [Emphasis in original.]

TWTC notes that “**nearly 900,000 ‘target’ businesses are within 1 mile of TWTC’s fiber.**”⁵⁰ [Emphasis added.] The clear implication here is that TWTC does not find a distance of even one mile between its fiber and a potential customer to be a major deterrent in providing service to that customer.

4. AboveNet, Inc.

AboveNet, a major fiber provider with **1.5 million metro fiber miles** in major U.S. markets and London, and whose markets include Phoenix and Seattle,⁵¹ also emphasizes in its marketing materials the attractiveness of its fiber network:

Today’s networks are about more than traditional voice services. Critical business applications rely on Gigabit Ethernet services, transparent LAN/WAN services and business continuity storage services. **Emerging VoIP and video applications require optical infrastructure** to deliver the performance needed at a cost that’s affordable. **AboveNet offers integrated access services built on its high-density metro fiber networks.** We can connect thousands of businesses to each other and to their customers, partners and suppliers. . . . AboveNet designed its architecture with few elements. In fact, there are only two layers: **dark fiber and optical networking technology.**⁵² [Emphasis added.]

⁴⁹ See

http://www.twtelecom.com/documents/investors/presentations/2008/TWTC_Investor_Presentation_May08-2.pdf, Slide 8.

⁵⁰ *Id.*, Slide 9.

⁵¹ See <http://www.abovenet.com/products/maps.html>.

⁵² See <http://www.abovenet.com/products/transport-wdm.html>.

The GeoResults data originally relied upon by the Covad CLECs, and presented again by XO/Covad and XO June 3, included no statistics regarding the widespread availability of dark fiber in U.S. metro areas. And AboveNet is not alone in its promotion of dark fiber solutions.

5. American Fiber Systems

American Fiber Systems (“AFS”) is a major competitive fiber provider in Minneapolis-St. Paul and eight other metropolitan areas. It owns over 76,000 miles of metro fiber.⁵³ AFS makes clear that not only can it reach end-user customer locations, but it specializes in doing just that:

Dark Fiber – Fiber connectivity leases, specialize in building directly to your customer’s premises.⁵⁴ [Emphasis in original.]

AFS also offers Optical Ethernet, Metro Wavelength Service, transport services and dedicated Internet access.⁵⁵

B. Sales Agents Use Fiber Route Information, Not Just Lit Building Information, When Selling Telecommunications Services

Telarus, Inc., a leading telecommunications master agent (*i.e.*, independent sales agent) and creator of sales tools for agents, announced last month that it had completed the development of in-house software that shows its agents “where fiber is physically located.”⁵⁶ Telarus’ addition of fiber routes complemented the “lit building locator” it created last year. In its May 14, 2008 announcement, Telarus reported:

The fiber route add-on to GeoQuote was completed with cooperation from Telarus’ newest vendor, **American Fiber Systems**, as well as **Level3, [sic] the leading fiber backbone provider in the United States**. Telarus reports that all American Fiber Systems and Level3’s domaestic [sic] fiber routes are visible, **with fiber footprints of other vendors coming online in the coming weeks**.

“As we move further and further into the enterprise space,” added Lance Akins, VP of Sales for Telarus, “our agents require tools that enable them to find out where metro Ethernet is available, and where it is potentially available. **This new fiber route locator will help our agents diagnose opportunities for build**

⁵³ See <http://www.americanfibersystems.com/history.php>.

⁵⁴ See <http://www.americanfibersystems.com/files/AFS-Quick-Facts.pdf>.

⁵⁵ *Id.*

⁵⁶ See <http://www.telecomassociation.com/vendor/telarus/080515.htm>.

Ms. Marlene H. Dortch
July 1, 2008

Page 17 of 17

outs for customers who are not in a fiber-lit building, but are located very close to a subterranean fiber route.”⁵⁷ [Emphasis added.]

Telarus would not have spent the money to develop this tool without the belief that knowing the location of fiber rings, not just the locations of lit buildings, would result in more sales. As Telarus’ VP of Marketing, Patrick Oborn observed:

“With the knowledge of the whereabouts of fiber lit building and the fiber routes themselves, we hope to enable our own agents to make more sales of enterprise grade services as well as to attract veteran agents and partners who see value in the research tools we provide.”⁵⁸

In sum, the CLECs have attempted to mislead the Commission by presenting only partial data regarding the actual scope of actual competition in the business market, or in XO’s case, by implying that its only alternative to an already-lit building is to build potentially “uneconomic” laterals from its own fiber network. The CLECs make no mention of their significant successes in reaching customers via broadband wireless facilities nor via dark fiber available from other carriers. Nor do they acknowledge the capacity of cable telephony providers to access enterprise customers with hybrid fiber coax, or broadband wireless, or even through partnerships with commercial building developers. Finally, the CLECs fail to discuss their various partnerships with one another, wherein they might be on either end of a wholesale arrangement that allows them to provide or access the necessary “last mile” facilities to reach enterprise customers. These types of arrangements between CLECs are promoted by the companies themselves through their carrier services organizations, and are facilitated by master agents, such as Telarus, as well. The GeoResults data, as characterized by the CLECs, are simply a red herring attempt by the Joint CLECs to lead the Commission to believe the enterprise business market has few competitive options beyond retail and wholesale services provided by Qwest by providing data that captures only a subset of the actual commercial market.

V. CONCLUSION

The Commission should reject the manner in which the GeoResults data are being characterized by the CLECs, since it represents only a subset of commercial buildings served by facilities-based telecommunications service providers and is not dispositive of the actual level of competition in the Enterprise telecommunications markets in the four MSAs at issue.

Respectfully submitted,

/s/ Daphne E. Butler

⁵⁷ *Id.*

⁵⁸ *Id.*