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REDACTED - FOR PUBLIC INSPECTION

VIA COURIER

ORIGINAL

June 30, 2008

EX PARTE

FILED/ACCEPTED
JUN 30 2008
Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

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

Dear Ms. Dortch:

On behalf of Time Warner Telecom Inc., please find enclosed two copies of a redacted version of an *ex parte* letter for filing in the above-captioned docket. Pursuant to the Second Protective Order in this proceeding, one copy of the highly confidential version is being filed with the Secretary's Office under separate cover, two hard copies of the highly confidential version will be provided to Gary Remondino, and one copy of the highly confidential version will be provided electronically to Denise Coca, Jeremy Miller, and Tim Stelzig.

Please do not hesitate to contact me if you have any questions with respect to this submission.

Respectfully submitted,

Nirali Patel/TG

Thomas Jones
Nirali Patel

Attorneys for Time Warner Telecom Inc.

Enclosures

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VIA COURIER ***EX PARTE***

June 30, 2008

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

Re: ***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:

Time Warner Telecom Inc. ("TWTC"),[1] by its attorneys, hereby submits this *ex parte* letter to supplement the highly confidential data it has already filed in the above-referenced proceeding and to urge the Commission to conduct a separate analysis of competition in the market for business services when considering Qwest's requests for forbearance from unbundling needed to serve business customers in the Denver, Minneapolis, Phoenix, and Seattle MSAs.

TWTC provided the following highly confidential data for the four MSAs at issue in its initial comments in this proceeding:[2] (1) the percentage of existing TWTC customer locations in each MSA to which it has deployed its own loops; (2) the number and percentage of buildings with two or more DS1s of demand in each MSA to which TWTC has deployed its own loops;

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[1] Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

[2] *See* Opposition of Time Warner Telecom Inc. et al., WC Dkt. No. 07-97, at 4 & 19 (filed Aug. 31, 2007) ("Opposition"); *see also id.*, Attachment A (Declaration of Stephanie Pendolino on Behalf of Time Warner Telecom Inc. ¶¶ 5, 8 and Tables 1-3) ("Pendolino Dec.").

and (3) the number and percentage of buildings with two or more DS1s of demand to which TWTC could theoretically deploy its own loops based on an application of TWTC's "build-buy" decision model. In this *ex parte*, TWTC provides: (1) the number of total commercial buildings with two or more DS1s of demand, and the number and percentage of TWTC active on-net buildings with two or more DS1s of demand, within 300 feet and 1000 feet of TWTC's fiber network in each of the 4 MSAs at issue; and (2) the number of TWTC on-net broadband connections to end users (in circuit counts), and the number of TWTC on-net voice telephone lines to end users (in voice grade equivalents), in each of the 4 MSAs at issue.

First, Highly Confidential Table 1 below shows, based on data from GeoResults, the number of commercial buildings with a demand of two DS1s or greater in the Denver, Minneapolis, Phoenix, and Seattle MSAs that are within 300 feet and 1000 feet of TWTC's fiber network. It demonstrates that TWTC's addressable commercial building market is extremely small. But it is important to emphasize that TWTC's *actual* addressable demand is *even smaller*. This is because, as explained herein, and in detail in TWTC's previous filings in this docket, there are many commercial buildings for which TWTC cannot economically construct its own loop facilities.[3] This is true even if the building is located near the TWTC network. Indeed, as demonstrated by Highly Confidential Tables 2 and 3 below, TWTC has been able to construct loop facilities to relatively few of even those buildings with a demand of two DS1s or more that are within 300 feet and 1000 feet of TWTC's network in each MSA. This is not surprising because, as explained below, the proximity of a commercial building to TWTC's transport network is merely one of several factors that TWTC considers in determining whether to construct its own facilities.[4] TWTC is nevertheless submitting proximity data to ensure that the Commission has all of the information it may deem relevant to its consideration of the instant petitions.

[BEGIN HIGHLY CONFIDENTIAL]

[3] *See* Pendolino Dec. ¶¶ 3-9 (explaining TWTC" build-buy" analysis); *see also* Opposition at 20-21.

[4] *See* Pendolino Dec. ¶ 5 (discussing factors); *see also infra* text accompanying note 7.

[END HIGHLY CONFIDENTIAL]

The addressable market data yielded by application of TWTC's "build-buy" model already submitted in this docket is more reliable than the data based solely on proximity to TWTC's network submitted herewith. As explained in detail in the previously-filed Declaration of Stephanie Pendolino on Behalf of Time Warner Telecom Inc., in order to determine whether it is cost-effective to deploy its own loop facilities, TWTC conducts a build-buy analysis in which it assesses whether the revenue opportunity associated with a given building or customer is large enough to justify construction.[5] As explained by Ms. Pendolino, "the potential revenue must be sufficient to cover the total cost of construction and recurring expenses and simultaneously achieve a reasonable rate of return on investment."[6] Costs vary based not only on the distance between TWTC's transport network and the customer location, but also on the costs associated with obtaining access to poles, ducts, conduits, rights-of-way, and commercial buildings, the type of services provided, and the customer's willingness to enter into a longer-term contract.[7] After taking these factors into consideration, TWTC is generally able to deploy loop facilities

[5] *See* Pendolino Dec. ¶ 5.

[6] *Id.*

[7] *See id.*

only to those buildings for which customers individually or collectively demand multiple DS3s of service. Very few customer locations meet this revenue requirement. Indeed, as of June 30, 2007, TWTC had constructed loops to only **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] Moreover, based on its build-buy analysis for the four MSAs at issue, TWTC determined that it could theoretically build to only **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

Second, Highly Confidential Table 4 below shows: (1) the total number of on-net broadband connections (circuit counts) to end users provided by TWTC in each of the four MSAs at issue as of December 31, 2007; and (2) the total number of on-net voice telephone lines (voice-grade equivalents) to end users provided by TWTC in each of these MSAs as of December 31, 2007. The source of this information is TWTC's most recent completed FCC Form 477. It should be noted that TWTC does not serve residential customers, and therefore, this data refers only to end-user connections to business customers.

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[END HIGHLY CONFIDENTIAL]

The purpose of TWTC's submission of this market share data, as well as TWTC's submission of network coverage data in its initial comments in this proceeding,[10] is to assist the

[8] *Id.*

[9] *Id.* ¶ 8.

[10] *See supra* note 2 and accompanying text.

Commission in analyzing whether it should grant forbearance from unbundling needed to serve *business customers* in the four MSAs at issue. In order to grant such forbearance, the FCC must find that the market share and network coverage tests established in previous forbearance orders are met *in the business market*. This approach is consistent with the FCC's own analysis in the *6-MSA Order*[11] and the *Omaha Order*.[12]

First, in the *6-MSA Order*, the Commission recognized that forbearance from loop and transport unbundled network elements ("UNEs") needed to serve business customers should not be granted unless facilities-based competitors have achieved sufficient market share[13] in the retail market for business services. In particular, the FCC found that, despite fairly high residential market shares of the incumbent cable companies in the relevant MSAs, "*the record lacks sufficient information for us to determine the cable operators' market shares for enterprise services*, [and] we find that other evidence in the record demonstrates the comparatively limited role of the cable operators in serving enterprise customers in these MSAs today."[14] In other words, the FCC understood that cable companies could make substantial gains in the residential market and still not pose a competitive threat in the business market. The FCC should follow its analysis to its logical conclusion and perform a separate market share calculation for the business market.

In the *6-MSA Order*, the FCC also implicitly recognized that it should not grant forbearance from loop and transport UNEs needed to serve business customers unless facilities-based competitors' network coverage in the business market exceeds 75 percent in a particular wire center. Specifically, the Commission held:

> *Nor does the record reveal other competitors in these MSAs that have deployed their own extensive last-mile facilities for use in serving the enterprise market.* Indeed, there is significant record evidence that much of the competition from competitive LECs *for enterprise services in these MSAs* instead depends on Verizon's own facilities, including UNEs. While Verizon and other parties submitted certain evidence from a commercial data provider regarding competitive LEC lit buildings, the facilities "coverage" suggested by those data

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[11] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (rel. Dec. 5, 2007) ("*6-MSA Order*").

[12] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (rel. Dec. 2, 2005) ("*Omaha Order*").

[13] The Commission has made public its preference for 50 percent as the threshold for "sufficient" market share. *See 6-MSA Order* ¶ 30 & n.99.

[14] *6-MSA Order* ¶ 37.

> do not approach the 75 percent threshold relied upon by the Commission in the past.[15]

Thus, in the instant proceeding, Qwest must demonstrate that facilities-based competitors' network coverage *in the business market* exceeds 75 percent.

Second, under the FCC's own analysis in the *Omaha Order*, before the FCC can find that there is sufficient competition in the wholesale market, significant levels of retail competition must exist. Specifically, the FCC predicted that, where there are "very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little to no revenue ," Qwest has "the incentive to make attractive wholesale offerings available so that it will derive revenue more directly from retail customers who choose a retail provider other than Qwest."[16] The FCC found that such incentives would exist as a result of "significant competition from Cox" in the "residential voice market" in the Omaha MSA.[17] It is not at all clear whether the presence of a single facilities-based competitor with significant market share in the voice market would actually provide an ILEC with the incentive to offer service to wholesale third-party competitors in the voice market. But in all events, *the Commission must apply its wholesale analytical framework to the business market.* That is, if competitors using their own loops must achieve very high levels of network coverage and retail market share that do not rely on Qwest's facilities in order to give Qwest an incentive to offer loops and transport to competitors serving residential customers on reasonable terms and conditions, then this must also be true for the loops and transport needed to serve business customers. Accordingly, proof that competitors relying on their own loops have achieved significant levels of network coverage and retail market share in the provision of ADSL used by small businesses and DS1-/DS3-based services must be required before forbearance from unbundling for DS0 loops used to provide xDSL, DS1, or DS3 loops is granted. Thus, the FCC must determine that both the 50-percent market share test and the 75-percent network coverage threshold are satisfied in the business market before it can grant forbearance from UNEs needed to serve business customers.

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[15] *Id.* (emphasis added); *see also id.*, n.118 (finding no basis in the record to depart from the approach that Verizon must demonstrate that competitive LEC lit buildings in the relevant MSAs meet the Commission's 75-percent coverage threshold).

[16] *Id.* ¶ 67.

[17] *Id.* & n.177.

Respectfully submitted,

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