

**VIA ECFS**

***EX PARTE***

July 22, 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:

The undersigned opponents of Qwest's petitions for forbearance in the above-referenced proceeding hereby file this summary of the record evidence in this proceeding to assist the Commission in its assessment of the petitions. Under Section 10(a) of the Communications Act of 1934, as amended (the "Act"),<sup>1</sup> the Commission may grant forbearance *only* if it affirmatively determines that forbearance is in the public interest. Section 10(b) of the Act informs the Commission that forbearance is in the public interest only when it "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."<sup>2</sup> As summarized below, there is abundant record evidence demonstrating that granting Qwest's forbearance petitions would not be in the public interest because it would result in less competition, higher prices and harm to consumer welfare in both the business and residential markets in the four MSAs at issue. Moreover, the state public utility commissions with regulatory oversight responsibility in each of the four states covered by Qwest's forbearance petitions, as well as numerous other state officials and public interest groups, have determined that forbearance would not be in the public interest, and have urged the Commission to deny the petitions.<sup>3</sup>

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<sup>1</sup> 47 U.S.C. § 160(a).

<sup>2</sup> *Id.* § 160(b).

<sup>3</sup> See Letter from Brad E. Mutschelknaus, Counsel, Covad Communications Group et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 14, 2008).

## 1. Absence of Actual Competition in the Wholesale and Retail Markets

Opponents of the forbearance petitions have submitted extensive and detailed filings in this proceeding demonstrating the absence of sufficient actual, facilities-based competition in the Phoenix MSA and three other MSAs at issue to justify eliminating unbundled network elements or dominant carrier regulation for mass market switched access services. That evidence, which has been supplied for each relevant product market, including voice and data services for both the residential and business markets at both the wholesale and retail levels, is summarized briefly below.

### a. Absence of Actual Competition in the Wholesale Market

- Opponents explained that they have few, if any, competitive alternatives to Qwest for DS0, DS1, and DS3 loops and transport needed to serve residential and business customers and that there is no functioning wholesale market for loops.<sup>4</sup>
- Opponents jointly filed GeoResults data demonstrating that competitors serve a miniscule number of commercial buildings using their own facilities in each of the four MSAs at issue.<sup>5</sup> Opponents also showed that the commercial buildings served by their facilities represent a miniscule percentage of the total demand in each wire center in the four MSAs.<sup>6</sup> In addition, XO, tw telecom, Integra, Cbeyond, and PAETEC each provided the percentage of commercial buildings they serve using their own facilities in each of the relevant MSAs.<sup>7</sup>

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<sup>4</sup> See, e.g., Letter from Andrew D. Lipman et al., Counsel, Affinity Telecom Inc. et al, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 4-10 (filed July 14, 2008) (“*Affinity et al. July 14th Ex Parte*”); Letter from John Nakahata, Counsel, EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, Attachment, at 2 (filed July 16, 2008); Letter from Russell M. Blau, Counsel, PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, Attachment, at 2-3 (filed June 25, 2008) (“*PAETEC June 25th Ex Parte*”).

<sup>5</sup> See Letter from Brad E. Mutschelknaus et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed Apr. 23, 2008); see also Letter from Brad E. Mutschelknaus, Counsel, Covad Communications Group et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 19-22 (filed Apr. 24, 2008) (“*Covad April 24th Ex Parte*”); *Affinity et al. July 14th Ex Parte* at 5-6.

<sup>6</sup> See *Covad April 24th Ex Parte* at 22.

<sup>7</sup> See Letter from Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed June 30, 2008), at 4 (“*tw telecom June 30th Ex Parte*”); Letter from Thomas Jones, Counsel, Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 1, 2008) (“*Integra July 1st Ex Parte*”); Letter from Thomas Jones, Counsel, Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 1 (filed July 9, 2008); Letter from Genevieve Morelli, Counsel, XO Communications, LLC, to

- Opponents submitted evidence that, as in the Omaha MSA, Qwest's post-forbearance copper loop<sup>8</sup> and special access rates would be substantially higher than its current UNE rates in the four MSAs at issue.<sup>9</sup> Opponents also demonstrated that (1) Qwest's DS1 and DS3 special access channel termination and mileage rates have increased over time, a clear sign of market power; and (2) the rates Qwest charges for these special access services in Phoenix, where it has received pricing flexibility, are substantially higher than Qwest's rates for the same services under price caps, another clear sign of market power.<sup>10</sup>
- Opponents explained how they would be price squeezed out of the market for DS0, DS1, and DS3-based services if Qwest's forbearance requests were granted.<sup>11</sup>

**b. Absence of Actual Competition in the Retail Market**

- Opponents explained that there is at best an ILEC/cable duopoly in the retail markets in the four MSAs at issue, and UNEs remain essential to providing consumers with an alternative to this duopoly.<sup>12</sup> Opponents further explained that maintaining affordable

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Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 2 (filed May 20, 2008) (“*XO May 20th Ex Parte*”); Letter from William A. Haas, Vice President - Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 1-2 (filed June 30, 2008) (“*PAETEC June 30th Ex Parte*”).

<sup>8</sup> Letter from Andrew D. Lipman, Counsel, Affinity Telecom, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 2 (filed June 30, 2008) (“*Affinity et al. June 30th Ex Parte*”).

<sup>9</sup> See, e.g., *Affinity et al. July 14th Ex Parte* at 7-10; *PAETEC June 25th Ex Parte*, Attachment, at 2 (filed June 25, 2008); Letter from Thomas Jones, Counsel, Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 1-2 (filed July 15, 2008).

<sup>10</sup> See Letter from Thomas Jones, Counsel, Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 1-2 & Attachments A-C (filed July 3, 2008); *Affinity et al. July 14th Ex Parte* at 8.

<sup>11</sup> See Opposition of Time Warner Telecom Inc. et al., WC Dkt. No. 07-97, at 43-44 (“*TWTC Opposition*”) & *id.*, Attachment D (Declaration of William D. Markert on Behalf of Eschelon Telecom, Inc. ¶¶ 4-8) (filed Aug. 31, 2007); see also *Affinity et al. July 14th Ex Parte* at 5; *Affinity et al. June 30th Ex Parte* at 10; Letter from William A. Haas, Vice President - Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 8 (filed July 10, 2008).

<sup>12</sup> See, e.g., *Covad April 24th Ex Parte* at 5-7; *TWTC Opposition* at 5-6.

UNE-based alternatives is a key to increasing broadband subscription and that 35% of dial-up users would switch to broadband if it were more affordable.<sup>13</sup>

- Opponents explained in detail why mobile wireless service does not belong in the same product market as wireline voice service.<sup>14</sup>
- Opponents explained why there is no basis for including mobile wireless carriers as a source of competition in the provision of data services, including mass market xDSL services.<sup>15</sup>
- Opponents provided retail market share data. In particular, Cox, tw telecom, and Integra submitted data on the number of business access lines they serve in the four MSAs at issue.<sup>16</sup> This data shows that facilities-based competitors have failed to capture a large enough market share in any relevant product market to support Qwest's forbearance petitions.
- Opponents showed that, in addition to all the factors discussed above, there is insufficient retail competition in the mass market and the business market in the Phoenix MSA to warrant forbearance. They used data submitted by Qwest, Cox and others to demonstrate that competitors have not achieved market penetration comparable to the level considered by the Commission to be adequate to justify forbearance relief in Omaha.<sup>17</sup>

## **2. Absence of Potential Competition in the Wholesale and Retail Markets**

In addition to the record evidence demonstrating the absence of actual, facilities-based competition in the MSAs in question, the undersigned parties have also submitted in the record

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<sup>13</sup> See John B. Horrigan, Pew Internet and American Life Project, "Home Broadband Adoption 2008" at 11 (July 2008), WC Dkt. No. 07-97 (filed July 22, 2008).

<sup>14</sup> See, e.g., *Covad April 24th Ex Parte* at 14-15; Letter from Thomas Jones, Counsel, Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 2-10 (filed May 7, 2008).

<sup>15</sup> See, e.g., Letter from Thomas Jones et al. to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed Apr. 22, 2008) (attaching Kent W. Mikkelsen, "Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of Wireline Competition," at 10 (Apr. 21, 2008)).

<sup>16</sup> See Letter from J. G. Harrington, Counsel, Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 5 (filed June 17, 2008); *tw telecom June 30th Ex Parte* at 4; *Integra July 1st Ex Parte* at 2.

<sup>17</sup> See Letter from Brad E. Mutschelknaus, Counsel, Covad Communications Group et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 2, 2008); see also Letter from Brad E. Mutschelknaus, Counsel, Covad Communications Group et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed July 11, 2008).

abundant evidence demonstrating that there is no reasonable prospect of such competition developing in the near or foreseeable future. That evidence, which has been supplied for each relevant product market, including voice and data services for both the residential and business markets at both the wholesale and retail levels, is summarized as follows:

- tw telecom submitted information, based on its “build-buy” decision model, demonstrating that there are few locations to which it could construct loop and transport facilities in the four MSAs at issue.<sup>18</sup>
- Opponents provided carrier-specific addressable commercial building demand data. Specifically, XO and PAETEC provided the percentage of commercial buildings within 500 feet and 1000 feet of their fiber in the four MSAs at issue.<sup>19</sup> Similarly, tw telecom provided the percentage of commercial buildings within 300 feet and 1000 feet of its fiber in the relevant MSAs.<sup>20</sup>
- Opponents cited a recent Verizon survey of landline phone owners indicating that 83 percent of respondents “intend[ed] to continue using their landline home phone *indefinitely*” as evidence that mobile wireless service is not, and will not be for the foreseeable future, a substitute for wireline voice service.<sup>21</sup>

### 3. Conclusion

As the evidence described herein demonstrates, the record in this proceeding overwhelmingly supports denial of Qwest’s forbearance petitions.

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<sup>18</sup> See *tw telecom June 30th Ex Parte* at 3-4; see also TWTC Opposition at 4 & 19 & Attachment A (Declaration of Stephanie Pendolino on Behalf of Time Warner Telecom Inc. ¶¶ 5, 8 and Tables 1-3).

<sup>19</sup> See *XO May 20th Ex Parte* at 2; *PAETEC June 30th Ex Parte* at 2.

<sup>20</sup> See *tw telecom June 30th Ex Parte* at 2-3.

<sup>21</sup> See, e.g., Letter from Thomas Jones, Counsel, Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 6-7 (filed May 7, 2008) (quoting Press Release, “Verizon, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features” (Mar. 27, 2008), <http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html>) (emphasis added); see also *Covad April 24th Ex Parte* at 15 (same).

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Respectfully submitted,

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