

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the matter of</b>	)	
	)	
<b>Qwest Petition for Forbearance Under</b>	)	
<b>47 U.S.C. § 160 from Title II and <i>Computer</i></b>	)	<b>WC Docket No. 06-125</b>
<b><i>Inquiry</i> Rules with Respect to its Broadband</b>	)	
<b>Services</b>	)	
	)	

**OPPOSITION OF COMPTTEL**

September 20, 2007

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**OPPOSITION OF COMPTTEL**

COMPTTEL, through counsel, hereby opposes Qwest’s Petition for Forbearance from Title II and the *Computer Inquiry* rules with respect to their broadband services. The Commission must deny the Petition because Qwest has not met its burden of showing that all of the statutory prerequisites for forbearance have been satisfied and that it is entitled to the relief requested. Surely, a finding that one of the largest local exchange carriers and providers of broadband services to enterprise customers in the nation is not required to be regulated as a dominant carrier, is not required to offer or price its broadband services on a nondiscriminatory basis, is not subject to the Commission’s complaint authority, is not required to negotiate in good faith, is not required to interconnect its broadband services with other providers, is not required to maintain the confidentiality of its customers’ network information and other data, is not required to make its broadband services accessible for the disabled, is not required to make its broadband services available for resale, and is not required to refrain from

slamming or cramming, must be based on more than the generic, conclusory allegations contained in the Qwest Petition.

## **I. Introduction and Summary**

Qwest<sup>1</sup> requests the same relief from Title II and the *Computer Inquiry* rules that Verizon enjoys as a result of the Commission's failure to deny Verizon's December 20, 2004 Petition for Forbearance.<sup>2</sup> The Verizon Petition was deemed granted by operation of law effective March 19, 2006 because the Commission, which had only four members at the time, was deadlocked on its disposition.<sup>3</sup> The Commission issued no decision explaining the action, nor even a Public Notice.<sup>4</sup> Instead, the public was informed that

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<sup>1</sup> Qwest Petition For Forbearance at 1.

<sup>2</sup> Petition of the Verizon Telephone Companies For Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect To Their Broadband Services, WC Docket 04-440, filed December 20, 2004 ("Verizon Petition"), *appeal pending sub. nom. Sprint v. FCC*, 06-1111 (D.C. Cir.).

<sup>3</sup> See, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules With Respect to their Broadband Services Is Granted By Operation of Law*, FCC News Release dated March 20, 2006 ("News Release"); Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 2. Section 10(c) of the Telecommunications Act of 1996, 47 U.S.C. §160(c) provides that a forbearance petition shall be deemed granted if the Commission does not deny the petition within one year unless the one year period is extended by the Commission for up to an additional 90 days. The Commission granted a 90 day extension for the Verizon Petition. *Petition of the Verizon Telephone Companies' Petition for Forbearance under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to their Broadband Services*, WC Docket No. 04-440, Order, DA05-3217 (released December 19, 2005).

<sup>4</sup> In *Radio-Television News Directors Association v. Federal Communications Commission*, 184 F. 3d 872 (D.C. Cir. 1999) ("*RTNDA*"), a deadlocked vote in a rulemaking proceeding left the existing rules in place. The Commission has traditionally treated forbearance petitions, including the Verizon Petition and the original Petition filed by Qwest in this docket on June 13, 2006, as rulemaking proceedings, accepting comments pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§1.415, 1.419. See *Comments Invited On Petition For Forbearance Filed By the Verizon Telephone Companies With Respect to Their Broadband Services*, DA 04-4049

forbearance was deemed granted by operation of law through a News Release, “an unofficial announcement of Commission action,”<sup>5</sup> issued by the Office of Media Relations.

One of the many difficulties arising from the Commission’s failure to issue a decision or even a Public Notice on the Verizon Petition is the inability to determine with any certainty the extent of the relief Verizon was granted by operation of law. Verizon’s original Petition requested forbearance for any broadband services that Verizon does or may in the future offer.<sup>6</sup> In response to a request for clarification from Commission staff, Verizon, by letter dated February 7, 2006, stated that, at a minimum, it was seeking forbearance for packet-switched services capable of 200 Kbps in each direction,<sup>7</sup>

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(Dec. 23, 2004); *Pleading Cycle Established for Comments on Qwest Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services, DA 06-1464* (July 19, 2006); *Pleading Cycle Established for Comments on the Embarque Local Operating Companies’ Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services, DA 06-1545* (July 28, 2006); *Pleading Cycle Established for Comments on the Frontier and Citizens Communications Incumbent Local Exchange Carriers’ Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services, DA 06-1671* (Aug. 23, 2006). In the Public Notice establishing the comment cycle for Qwest’s most recent Petition, the Commission for the first time made no reference to Sections 1.415 and 1.419 of the Commission’s Rules. See *Pleading Cycle Established for Comments on Qwest Petition for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services, DA 07-3923* (Sept. 13, 2007). COMPTTEL submits that the deadlocked vote on the Verizon Petition should have resulted in the denial of the Petition, rather than a deemed grant, consistent with the procedure followed in the event of a deadlocked vote in rulemaking proceedings.

<sup>5</sup> See News Release at 1.

<sup>6</sup> Verizon Petition at 1.

<sup>7</sup> The expansive definition of broadband services as all services capable of 200 Kbps in each direction encompasses virtually all telecommunications services other than single line, circuit-switched voice service.

including Frame Relay, ATM, IP-VPN and Ethernet, and non-TDM based optical networking, optical hubbing and optical transmission services. Verizon excluded from its clarified request TDM-based special access services at DS1 or DS3 speeds, and stated that it was not seeking forbearance from the application of universal service obligations to its broadband services.<sup>8</sup> Chairman Martin and Commissioner Tate appear to believe that the relief granted was that described in Verizon's February 7, 2006 *ex parte*,<sup>9</sup> as opposed to that requested in Verizon's original Petition. Commissioner Copps, on the other hand, seems to believe that Verizon obtained forbearance from Title II and the *Computer Inquiry* rules for all broadband services, including DS1 and DS3 services, the traditional special access services that "are the backbone of business communications in this country" and for its universal service obligations.<sup>10</sup>

Not surprisingly, the Commissioners' confusion carries over to Qwest's Petition in this docket. Qwest seeks the removal of statutory regulation from all packet-based services capable of 200 Kbps in each direction and non-TDM based optical networking, optical hubbing and optical transmission services, including Frame Relay, ATM, Ethernet Based Services, Local Area Network Switching Service, Synchronous Service Transport, Broadcast Digital Transport Video Service, video transport service, self healing network service, Dense Wave Division Multiplexing Services, private line OC3, OC12 and OC48

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<sup>8</sup> Letter from Edward Shakin, Verizon, to Marlene H. Dortch filed February 7, 2006 in WC Docket 04-440, at 2-3 ("Verizon 2/7/06 Ex Parte).

<sup>9</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 1-2.

<sup>10</sup> Statement of Commissioner Michael J. Copps In Response To Commission Inaction On Verizon's Forbearance Petition, WC Docket No. 04-440 at 2.

services and Metro Private Line Service.<sup>11</sup> Qwest's Attachment A describes its Frame Relay Service as supporting transmission speeds up to DS3 and its ATM service as supporting transmission speeds of DS1, NxDS1 and DS3. Its website describes Metro Private Line Service as "point-to-point intraLATA private lines at speeds ranging from DS-1 to OC-48 for on-net to on-net connectivity and DS-1 to OC-12 for on-net to off-net locations."<sup>12</sup> Thus, Qwest's Petition expressly seeks forbearance from Title II regulation for the traditional special access DS1 and DS3 services that Chairman Martin and Commissioner Tate believed were excluded from Verizon's request.<sup>13</sup>

Chairman Martin and Commissioner Tate stated that "[i]t arguably would have been preferable to have reached consensus on a proposal clearly setting forth the relief granted today."<sup>14</sup> Not only would it have been preferable, the statute requires no less. Section 10(c) unambiguously provides that "[t]he Commission may grant or deny a

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<sup>11</sup> Qwest Petition at 1 and Attachment A.

<sup>12</sup> Qwest Petition at Attachment A;  
[http://www.qwest.com/pcat/large\\_business/product/1,1016,1145\\_4\\_2,00.html](http://www.qwest.com/pcat/large_business/product/1,1016,1145_4_2,00.html).

<sup>13</sup> It is not at all clear that Verizon will not try to argue that the relief it was granted goes beyond the services described in the February 7, 2006 letter to the Commission. The Buckingham Research Group reported on July 6, 2006 that "One of the more interesting comments came from a Verizon executive who suggested that while the company was somewhat hamstrung in raising special access rates due to FCC conditions imposed as part of the VZ-MCI merger, it was looking at other ways to extract higher prices for its services, including the recent FCC forbearance petition that could lead to better pricing on SONET and other inter-central office transport services." The Buckingham Research Group, Equity Research Report on Communications Services issued July 6, 2006 at 2. In their Reply Comments in WC Docket No. 06-120, Verizon referenced a subsequent Buckingham Research Group Report which it claims "corrected" the July 6 story. The "correction" merely states that Verizon clarified the company's position on "rate relief." The Buckingham Research Group, Equity Research Report on Communications Services issued July 19, 2006 at 2.

<sup>14</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 2.

petition in whole or in part and *shall explain its decision in writing.*” 47 U.S.C. §160(c) (emphasis added). There is no exception to the written explanation requirement for forbearance petitions deemed granted by the Commission’s failure to deny the petitions in a timely fashion. On the contrary, the language requiring a written decision immediately follows the language stating that if the Commission fails to act within the statutory timeframe, “such petition shall be deemed granted.”

The lack of a decision explaining any reasoning for the grant of forbearance has prompted Qwest to presume that the representations in the Verizon Petition relating to the state of competition for broadband services are not only true, but also entitle them, *a priori*, to the same relief. In the absence of any indication as to the factual basis for the deemed grant, there is no foundation for Qwest’s presumption. On the contrary, the Chairman has stated publicly that a majority of the Commission did not support a grant of the Petition and that six months after the deemed grant, there was still no majority view on the appropriate outcome of Verizon’s Petition.<sup>15</sup> Simply mimicking the statements Verizon made in its Petition is not sufficient to meet Qwest’s burden of proving that it is entitled to forbearance from Title II and *Computer Inquiry* regulation.

## **II. The Statutory Criteria For Forbearance Have Not Been Met**

Qwest bears a heavy burden in proving that it meets the requirements to obtain forbearance from *Computer Inquiry* and Title II regulation of its broadband services. Section 10(a) of the Act, 47 U.S.C. §160, provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make

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<sup>15</sup> Nominations Hearing Held on September 12, 2006, Post-Hearing Questions for Chairman Kevin J. Martin at 22.

affirmative determinations that (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision or regulation is not necessary for the protection of consumers; *and* (3) forbearance from applying such provision or regulation is consistent with the public interest. In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition.

Qwest has not come close to meeting its burden of proving that grant of its Petition to forbear from regulating its broadband services would satisfy each prong of Section 10(a) and would promote competitive market conditions and enhance competition as required by Section 10(b). Instead, emboldened as it is by the deemed granted status of the Verizon Petition, Qwest maintains that the Commission *must* grant its Petition because it would be unlawful for the Commission to regulate its broadband services when Verizon has been freed from such regulation.<sup>16</sup> Qwest goes so far as to contend that the grant of its Petition is a mere “ministerial act” that the Commission is compelled to perform and that the Commission need not undertake a detailed forbearance analysis.<sup>17</sup> Neither of these arguments has merit.

Sections 10(a) and (b) set out explicit standards that bind the Commission’s consideration and disposition of forbearance petitions. There are no exceptions. The Commission cannot grant forbearance unless it affirmatively determines that the statutory

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<sup>16</sup> Qwest Petition at 6-10.

<sup>17</sup> *Id.* at 7-9.

criteria are satisfied. Nowhere does Section 10 authorize the Commission to grant forbearance to eliminate allegedly disparate treatment. Moreover, by failing to issue a decision on Verizon’s Petition, the Commission has effectively repealed without explanation Title II of the Act insofar as it applies to Verizon. A grant of the Qwest Petition would result in the repeal of Title II of the Act as it applies to another of the nation’s largest telecommunications carriers. Contrary to Qwest’s assertion, the administrative repeal of a federal statute is not a ministerial act.<sup>18</sup> Accordingly, the Commission must reject Qwest’s suggestions that the deemed granted status of the Verizon Forbearance Petition constitutes a grant of forbearance of its obligations to meet the Section 10 standards.

**A. Qwest Has Not Appropriately Defined Relevant Product and Geographic Markets For Its Broadband Services**

The Commission has previously determined that forbearance from dominant carrier and other Title II regulation is warranted only where there is sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected.<sup>19</sup> In evaluating whether sufficient competition exists to justify forbearance, the Commission has reviewed the level of competition in both the retail and wholesale

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<sup>18</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998) (repeal of statutes must conform with Article I of the Constitution; there is no provision of the Constitution that authorizes the President to repeal statutes); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 954, 958 (“[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I [of the Constitution]”; “[t]he explicit prescription for legislative action contained in Art. I cannot be amended by legislation.”) (1983).

<sup>19</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (released December 2, 2005), *aff’d. sub nom. Qwest Corporation v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007) (“*Omaha Forbearance Order*”).

markets.<sup>20</sup> The Commission has properly recognized that application of the Section 10(a) criteria “is no simple task and a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met.”<sup>21</sup> Qwest’s Petition is devoid of substance and contains nothing more than broad, unsupported allegations relating to the extent and level of competition for its broadband services. Based on those broad, unsupported allegations, Qwest asks the Commission to conclude that *Computer Inquiry* and Title II regulation is not necessary to ensure just and reasonable rates, prevent discrimination, protect consumers or protect the public interest. The Commission cannot draw such a conclusion based on Qwest’s submission, and for this reason, the Petition must be denied.

In order to perform the required competitive analysis, the Commission must examine the relevant product and geographic markets and identify firms that are current or potential suppliers in those markets. *Omaha Forbearance Order* at ¶18. The Commission defines relevant product markets by identifying and aggregating consumers with similar demand patterns and treats as relevant geographic markets areas in which all customers will face the same competitive alternatives for a product. *Id.* The Commission has also found it appropriate to define separate relevant product markets based on the class of customer. Residential consumers fall into one product market, small enterprise customers fall into a separate product market and mid-sized to large

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<sup>20</sup> *Id.* at ¶65.

<sup>21</sup> *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 To Certain Activities*, CC Docket 96-149, Memorandum Opinion and Order, DA98-220 at ¶16 (released February 6, 1998).

retail enterprise customers fall into a third.<sup>22</sup> Qwest's failure to submit any usable data on relevant product or geographic markets precludes a grant of its Petition.<sup>23</sup>

The only competitor Qwest identifies for its broadband services is Verizon, but it provides absolutely no specifics. While Qwest claims that it is at a disadvantage when competing with Verizon for broadband sales to medium and large enterprise customers,<sup>24</sup> it casts its forbearance net much wider. Qwest seeks forbearance for its broadband services “*regardless of the nature of the customer to whom the service is offered.*”<sup>25</sup> Qwest's broad request for forbearance includes Frame Relay Services, which the Commission recently described as a “cost effective service option for smaller businesses that do not generate enough traffic to support a full T-1.” *SBC/AT&T Merger Order* at ¶ 57, n.164. Qwest also seeks forbearance for its video transmission services. “Qwest Choice TV” is offered to residential customers and its website states that the television service is available for “non-commercial use” only.<sup>26</sup> Under no circumstances can the small business customers for Qwest's Frame Relay services and the residential customers for its video services be said to occupy the one-size-fits-all medium and large business customer class described by Qwest as subject to competition from Verizon.

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<sup>22</sup> *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183 (released November 17, 2005 (“*SBC/AT&T Merger Order*”) at ¶¶ 60, 81.

<sup>23</sup> *See Omaha Forbearance Order* at ¶ 50 (denial of request for forbearance for enterprise services due to a lack of relevant market data).

<sup>24</sup> Qwest Petition at 2, 5, 7, 15-16.

<sup>25</sup> *Id.* at 2 (emphasis added).

<sup>26</sup> See “Qwest Offers Innovative TV Service Solutions,” available at <http://www.qwest.com/residential/products/tv>.

Qwest's showing with respect to the relevant geographic market(s) is similarly deficient. It contends simply that because it competes with Verizon on a nationwide basis and Verizon submitted national data,<sup>27</sup> it need not submit any evidence with respect to the state or level of competition for broadband services in its serving territories. In allowing Verizon's Petition to be granted by operation of law, the Commission made no findings with respect to the appropriate geographic market for broadband services. However, Qwest's contention that the market for broadband services is national – *i.e.*, that all broadband customers across the nation face the same competitive choices -- is directly at odds with the Commission's geographic market analysis undertaken in the *SBC/AT&T Merger Order* and the *Verizon/MCI Merger Order*. There, the Commission determined that the relevant geographic market for small enterprise customers with a single location in the ILEC's region was that customer's location and that the relevant geographic market for large, multi-location enterprise customers was all geographic locations within the ILEC's region where they had a presence. Only for large enterprise customers with locations throughout the United States did the Commission define the relevant geographic market as national.<sup>28</sup>

Because Qwest did not limit its forbearance request to broadband services sold only to large enterprise customers with locations throughout the United States, and indeed seeks relief from Title II and *Computer Inquiry regulation* for broadband services *regardless of the nature or location of the customer*, the Commission cannot possibly find

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<sup>27</sup> Qwest Petition at 7.

<sup>28</sup> See *SBC/AT&T Merger Order* at ¶¶ 62-63; *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Transfer of Control*, 20 FCC Rcd 18433 at ¶¶ 62-63 (2005).

that the appropriate geographic market for purposes of analyzing whether there is sufficient actual or potential competition to justify forbearance for all broadband services is the entire nation. As the Commission has recognized, “the economic barriers to self-providing facilities can be substantial and ‘can differ from city to city, within the same city or between a city and its suburbs because of differences in municipal right-of-way and permitting policies as well as conduit availability’ among other factors.” *Omaha Forbearance Order* at ¶ 104. Such variations mandate that the forbearance analysis be conducted on a market-by-market basis. *Id.* at ¶14, n. 46. To conclude otherwise would be a gross disservice to broadband customers located in Qwest’s service areas, especially those whose competitive options are either limited or non-existent. That such customers exist was recently confirmed by the Chairman of AT&T who conceded that there are “many customers who have had limited access to broadband.”<sup>29</sup>

Less than two months before Qwest filed its Petition requesting forbearance from Title II and *Computer Inquiry* regulation for its broadband services, the Commission granted it substantial relief from the tariffing requirements of Title II and the Commission’s rules for its in-region, interstate, interLATA telecommunications services. The Commission declined, however, to grant Qwest forbearance from Title II dominant carrier regulation of its access services, including the services for which Qwest seeks forbearance here. The Commission also denied Qwest’s request that it forbear from applying Section 214 of the Act to Qwest’s in-region, interstate, interLATA

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<sup>29</sup> “AT&T Initiatives Expand Availability of Advanced Communications Technologies,” Detroit, Michigan, May 8, 2006, available at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272>.

telecommunications services.<sup>30</sup> The basis for the Commission’s denial was its conclusion that Qwest had failed to present persuasive evidence that “it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network.”<sup>31</sup>

Although Qwest was clearly on notice that the Commission found its evidentiary showing deficient in the *Qwest Nondominance Order*, it submitted no reliable market evidence in support of its broadband forbearance Petition. Qwest’s failure to present any new or additional evidence that would allow the Commission to change its conclusion that Qwest continues to possess exclusionary market power in its serving areas compels the denial of Qwest’s Petition. Having elected not to address the deficiencies in its proof which the Commission identified in the *Qwest Nondominance Order*, Qwest is not entitled to any additional forbearance relief. Qwest’s invocation of the mantra that the Section 10 criteria are satisfied because broadband competition is robust nationwide is not sufficient to carry the day. Qwest continues to maintain control over ubiquitous telephone exchange service and exchange access networks in its 14 state region and continues to have exclusionary market power. For these reasons, the Commission should deny Qwest’s request for forbearance from Title II regulation beyond that which the Commission has already granted in the *Qwest Nondominance Order*.

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<sup>30</sup> *In the Matter of Qwest Communications International Inc for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207 (2007) (“*Qwest Nondominance Order*”) at ¶¶54-59.

<sup>31</sup> *Id.* at ¶47.

## **B. Qwest Has Failed To Identify Broadband Competitors Operating In Its Service Territories**

In addition to flunking the product market/geographic market test, Qwest has presented no credible evidence that sufficient competition exists in either its retail or wholesale broadband markets such that Title II and the *Computer Inquiry* regulations are not necessary to ensure just, reasonable and nondiscriminatory rates, terms and conditions for the broadband services at issue here. Instead of identifying actual or even potential competitors that provide broadband services in its local service areas, Qwest makes the conclusory, unsupported allegation that broadband services are available from multiple suppliers and that it lacks market power.<sup>32</sup> Although it contends that it competes with Verizon on a national basis, Qwest identified no retail or wholesale competitors that provide broadband services in its serving territories. Nor did Qwest provide its actual market shares or analyze the demand elasticity or supply elasticity for broadband services in its serving areas. Without such information, the Commission cannot possibly conclude that Qwest merits forbearance in the retail<sup>33</sup> or wholesale market<sup>34</sup> for broadband services either in its service territories or nationwide.

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<sup>32</sup> Qwest Petition at 12, 14.

<sup>33</sup> See *Omaha Forbearance Order* at ¶ 50 (forbearance from dominant carrier regulation for retail enterprise services denied where Qwest failed to provide sufficient data to evaluate competitiveness of market). Qwest has provided no evidence that would warrant a reconsideration of the Commission's findings for Omaha, Nebraska, much less the nation as a whole.

<sup>34</sup> See *Id.* at ¶ 60 (forbearance from 251(c) obligations denied where Qwest failed to demonstrate that it was subject to significant competition from competitors that do not rely on its wholesale services). Again, Qwest has provided no evidence that would warrant a reconsideration of the Commission's findings for Omaha, Nebraska, much less the nation as a whole.

To bolster its argument that competition for broadband services is robust, Qwest contends that in connection with the Verizon/MCI and SBC/AT&T mergers, the Commission analyzed the competitive market “for medium and large enterprise customers, such as those who buy Frame Relay, VPN and other broadband products” and found that competition is strong with a significant number of competitors.<sup>35</sup> Qwest’s characterization is misleading at best. In the Merger Orders, the Commission found a “high level of concentration” for high-capacity data services for mid-sized and large enterprise customers with significant operations in SBC’s (now AT&T’s) and Verizon’s regions after the mergers.<sup>36</sup> In the *Wireline Broadband Order*, the Commission confirmed that stand-alone ATM service, Frame Relay, gigabit Ethernet service and other high capacity special access services that carriers and end users traditionally use for basic transmission purposes should remain subject to Title II requirements.<sup>37</sup> Qwest has provided no evidence of a change in circumstances within the last two years that would compel a reversal of the Commission’s determination that broadband transmission services should remain subject to Title II.

Although Qwest submitted data purporting to show “market share” for itself, Verizon and MCI for several broadband services,<sup>38</sup> the data is unreliable and entitled to

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<sup>35</sup> Qwest Petition at 15-16.

<sup>36</sup> *SBC/AT& Merger Order* at ¶70; *Verizon/MCI Merger Order* at ¶70-71.

<sup>37</sup> *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (released September 23, 2005) at ¶9, *appeal pending sub. nom. Time Warner Telecom Inc. v. Federal Communications Commission*, Nos. 05-4769, *et al* (3<sup>rd</sup> Circuit).

<sup>38</sup> Qwest Petition, Attachment B.

no consideration for at least four reasons. First, the service categories for which revenue data is provided are for the most part undefined (*e.g.*, “U.S. CPE-Based IP VPN Services” and “U.S. Business IP Revenue”) and uncorrelated to the services for which Qwest seeks forbearance. Second, even if it were possible to fit the services into a relevant product market, the market share percentages Qwest shows for wholesale IP and business IP revenue are based on data that is five years old and the market share percentages for ATM and Frame Relay are based on data that is four years old. Qwest offers no explanation as to why a Petition for Forbearance filed in 2007 should be evaluated based on market data dating back to 2002 and 2003. Third, the data is apparently national in scope and provides no insight into Qwest’s competitive position in its ILEC serving areas.<sup>39</sup> Finally, the numbers presented are analysts’ projections, not actual market shares. At most Qwest’s “market share” information demonstrates that analysts predicted that Verizon and MCI would realize larger revenues on some services than would Qwest. It does not show that Qwest competes with Verizon/MCI (or any other vendor) for those revenues and therefore is irrelevant for determining the extent or level of competition for broadband services in Qwest’s territory.

Qwest’s failure to submit any reliable data on relevant product and geographic markets, as well as its failure to identify with specificity any facilities-based or non-facilities-based entities with which it actually or potentially competes in providing retail or wholesale broadband services in its local serving area, precludes a meaningful forbearance analysis. For this reason alone, the Commission must deny the Petition.

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<sup>39</sup> See *Verizon/MCI Merger Order* at ¶49, n.135 (2005) (rejecting analyst projections of national market share as unreliable and likely masking variations in market share among narrower geographic regions).

*Omaha Forbearance Order* at ¶¶ 59-67 (forbearance denied where Qwest failed to demonstrate existence of actual or potential competition).

**C. *Computer Inquiry* and Title II Regulation Remain Necessary To Protect Consumers and Prevent Discrimination**

The removal of *Computer Inquiry* and Title II regulation for all broadband services will allow Qwest to engage with impunity in price and service quality discrimination, to raise the prices for wholesale inputs used by facilities-based and non-facilities based providers to unjust and unreasonable levels, to refuse to sell wholesale inputs to any actual or potential competitors in its markets, and to refuse to interconnect with other carriers seeking to exchange traffic with its broadband facilities. Other than its broad, conclusory allegations about the allegedly robust competition in the broadband market, Qwest did not discuss why enforcement of Title II is not necessary to ensure that its charges, practices, classifications or regulations for broadband services are just, reasonable and not unjustly or unreasonably discriminatory.

While Qwest contends that Title II regulation “prevents more effective competition that would lower prices,”<sup>40</sup> there can be no doubt that Qwest will raise its broadband service rates if forbearance is granted. Qwest’s complaint that the Commission’s requirement that broadband rates be cost-justified prevents it “from experimenting with market-based pricing models,”<sup>41</sup> cannot possibly be viewed as a suggestion that it would *lower* prices if deregulated, unless Qwest is asking the Commission to sanction below-cost pricing. Qwest reported that for the second quarter

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<sup>40</sup> Qwest Petition at 15.

<sup>41</sup> Qwest Petition at 13.

2007, data and Internet services revenue represented 36% of its total operating revenue.<sup>42</sup>

It is not reasonable to assume that Qwest would price products that generate more than one-third of its total revenue at below-cost rates. Thus “market-based pricing” must be read as unfettered freedom to increase prices.

In any event, Qwest’s claims that it is hamstrung by Title II rate regulation are overblown. “Qwest continues to aggressively market the value and convenience of its full-featured bundled offerings, which include digital voice, Broadband services, a national wireless offering and integrated TV services through Qwest’s own Choice TV or its marketing alliance with DIRECTV, Inc.”<sup>43</sup> In fact, Qwest’s “bundle penetration” rate has reached 60%.<sup>44</sup> Because the Commission does not regulate the rates at which it prices its bundled services, Qwest can hardly claim to be disadvantaged in its ability to compete in the broadband market by Title II’s requirement that its broadband rates be just, reasonable and nondiscriminatory.

Nor did Qwest even mention, much less discuss, why the Section 251 requirements that it (1) negotiate the terms and conditions for access to its broadband networks and facilities in good faith, (2) provide other carriers with interconnection to its broadband network, (3) offer its retail broadband services for resale at avoided cost wholesale discounts and (4) provide reasonable notice of changes in its broadband network that would affect interoperability are not necessary to ensure that its wholesale

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<sup>42</sup> “Qwest Reports Steady Second Quarter 2007 Results – Continued Improvement in Revenue, Cash Flow and Margin Trends,” Aug. 1, 2007, available at [http://media.corporate-ir.net/media\\_files/irol/11/119535/Q\\_2Q07\\_er2.pdf](http://media.corporate-ir.net/media_files/irol/11/119535/Q_2Q07_er2.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

charges, practices, classifications and regulations for broadband services are just, reasonable and not unjustly or unreasonably discriminatory. As the Commission has acknowledged, these requirements facilitate existing and potential competition and are necessary to ensure just, reasonable and nondiscriminatory prices and practices and to protect consumers where, as here, all competitors rely on access to the Qwest network to exchange traffic and competing providers use resale to reach their customers. *See Omaha Forbearance Order* at ¶¶ 84, 87.

Qwest has also not demonstrated that it is subject to competition from competitors that do not rely on its wholesale broadband inputs. Although there is clearly wholesale demand for broadband transmission services, Qwest has not provided any evidence that significant alternative sources of wholesale inputs exist for competitors in its serving areas. In the absence of any evidence of alternative wholesale broadband transmission suppliers operating in its service territories, relieving Qwest of its obligations to make wholesale inputs available to facilities-based and non-facilities-based competitors pursuant to Sections 201, 202 or 251 would significantly undermine, or even eliminate, whatever competition does exist. *See Omaha Forbearance Order* at ¶¶ 60, 84-87.

Forbearance would give Qwest a license to eliminate its competitors by refusing them wholesale inputs altogether or pricing those inputs at uneconomic rates to protect and increase its own market share. What's more, forbearance from enforcing Sections 201, 202, 204 and 208 would deprive competitors and end users of their only avenue to challenge the lawfulness of broadband rates, terms and conditions. Under these circumstances, the Commission cannot possibly find that forbearance will promote competitive market conditions or enhance competition.

Qwest also neglected to mention, much less discuss, how relieving it of the obligation under Section 222 to safeguard its customers' proprietary network information ("CPNI"), the obligation under Section 214 to provide its customers reasonable notice of the discontinuance or withdrawal of a service, the obligation under Section 228 to refrain from slamming and cramming, or the obligation under Section 255 to ensure access to its broadband services for the disabled will protect consumers. These Title II obligations are paramount for the protection of all telecommunications customers, from the mid-sized and large enterprise customers who subscribe to Qwest's Ethernet services, to the smaller business customers who subscribe to its Frame Relay services to the residential customers who subscribe to its video transmission services.

The requirements of Section 10 (a) are conjunctive. The Commission must deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.<sup>45</sup> Qwest's failure to show that retail and wholesale competition throughout its franchise areas is vibrant enough to protect consumers and ensure that the rates, terms and conditions for broadband services are just, reasonable and nondiscriminatory in the absence of *Computer Inquiry* and Title II regulation mandates denial of its Petition.

#### **D. Forbearance Will Not Serve The Public Interest**

In order to meet the public interest criterion of Section 10(a), the Commission has ruled that a petitioner must explain how the benefits of a regulation can be attained in the event of forbearance.<sup>46</sup> Qwest has not even attempted to show that in the absence of

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<sup>45</sup> *Core Communications v. Federal Communications Commission*, 455 F.3d 267 (D.C. Cir. 2006).

<sup>46</sup> *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, CC

enforcement of *Computer Inquiry* and Title II regulation, facilities-based and non-facilities based participants in the broadband market will remain viable, that customer CPNI will not be used for improper marketing or other purposes, that customers will have a right to challenge the lawfulness of Qwest's broadband rates, terms and conditions of service or that competition and consumers will be protected.

Even if the Commission were to find that Qwest is subject to sufficient retail competition to justify forbearance, which it should not do because of the absence of any evidence of competition, such a finding cannot be made for the wholesale market. Not even Qwest itself alleges that there is any competition in the wholesale market for broadband transmission or other services. The Commission has made clear that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to serve their customers. In the 1998 Biennial Review, the Commission found as follows:

[F]orbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.<sup>47</sup>

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Docket No. 98-65, Memorandum Opinion and Order, FCC 99-215 at ¶ 7 (released August 31, 1999).

<sup>47</sup> See *In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order in CC Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶63 (released December 30, 1999).

This precedent compels the Commission to conclude that forbearance from the *Computer Inquiry* and Title II requirements will not promote competitive market conditions because the result of forbearance will be higher costs for facilities-based and non-facilities-based competitors who rely on Qwest's wholesale inputs. Higher costs will adversely impact the ability of these competitors to enter, compete and remain competitive in Qwest's service territories. Moreover, because Qwest is the only carrier with ubiquitous access to all residential and business customers in its serving territories, the total deregulation of its broadband services will allow Qwest to effectively eliminate all facilities-based and non-facilities-based competitors by simply refusing to sell them the necessary wholesale inputs. Such a result will not serve the public interest.

Qwest's complaints that *Computer Inquiry* and Title II regulation harm the public interest by raising its costs, delaying the introduction of new services, imposing undue administrative burdens and restricting its ability to respond to customer demand<sup>48</sup> are not credible. As demonstrated below, Qwest is a powerful force in the broadband market and publicly brags about its innovativeness, its rapid and aggressive roll-out of new services and its customer responsiveness despite being subject to *Computer Inquiry* and Title II regulation.

### **III. Section 706 Does Not Compel Forbearance**

Qwest contends that that the *Computer Inquiry* and Title II common carrier regulations deter broadband investment and innovation, delay the introduction of new services, limit its flexibility to customize service offerings, and limit its ability to respond

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<sup>48</sup> Qwest Petition at 13-14, 18-19.

to competition.<sup>49</sup> For these reasons, Qwest argues that Section 706, which directs the Commission to use its forbearance authority to remove barriers to infrastructure investment and encourage the deployment of advanced services, mandates the grant of its Petition.<sup>50</sup>

Qwest's representations to the Commission cannot be reconciled with the representations it is making to the public and investors about its broadband initiatives, flexibility and competitiveness. For example, in the press release announcing its second quarter operating results, Qwest stated as follows:

During the quarter, Qwest launched initiatives designed to enhance customers' online experience. The company now offers Qwest Broadband subscribers a single-letter email domain – q.com. In addition, Qwest became the first communications provider in the nation to partner with Microsoft to provide new and current Qwest Broadband customers with Windows Live services. Windows Live from Qwest includes a customized home page, an all-in-one security and performance package and an advanced web-based e-mail platform. Windows Live from Qwest is designed to be the foundation for the company's future voice and data convergence.

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During the quarter, the U.S. General Services Administration (GSA) announced Qwest won participation in the Networx Enterprise contract – second part of the GSA's Networx Program to provide leading-edge voice, data and video services to federal agencies nationwide. Earlier in the year, Qwest was awarded the opportunity to bid on the Networx Universal program. Combined, Networx Universal and Networx Enterprise have a value of up to \$68 billion over 10 years. Qwest is only one of three companies to participate in the entire Networx Program.<sup>51</sup>

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<sup>49</sup> Qwest Petition at 12-13.

<sup>50</sup> *Id.*

<sup>51</sup> Of course, the other two companies are Qwest's fellow Bells, AT&T and Verizon.

Qwest was the first of the three companies on the Network Universal contract to launch products and services.<sup>52</sup>

And in its 2006 Annual Report, Qwest Chairman and CEO Dick Notebaert stated as follows:

In response to increasing demand for high-speed Internet (HSI) capabilities, we continued to expand broadband availability as well as higher speeds. In fact, by year end, HSI was available to 83 percent of Qwest's mass market customers, more than half of whom can benefit from speeds ranging from 3 to 7 Mbps.

In addition, the [Business Markets Group] refined and upgraded various technical applications, including Qwest iQ Networking service with project management capabilities, which helps customers avoid migration issues as they move to updated networks.<sup>53</sup>

Qwest's words to the public and to its investors regarding its broadband initiatives and its selection by GSA as one of only three companies to participate in the Network Program to provide leading-edge voice, data and video services to the federal government for the next 10 years belie the fictional complaints contained in its Petition that the *Computer Inquiry* and Title II regulations dampen its incentives to invest and impede their ability to compete. Qwest cannot have it both ways. Qwest's assertions that *Computer Inquiry* rules and Title II regulation stifle broadband development, innovation and its ability to innovate and compete are contrary to the reality painted by its corporate leaders and should be accorded no weight by the Commission.

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<sup>52</sup> "Qwest Reports Steady Second Quarter 2007 Results – Continued Improvement in Revenue, Cash Flow and Margin Trends," Aug. 1, 2007, available at [http://media.corporate-ir.net/media\\_files/irol/11/119535/Q\\_2Q07\\_er2.pdf](http://media.corporate-ir.net/media_files/irol/11/119535/Q_2Q07_er2.pdf).

<sup>53</sup> Qwest 2006 Annual Report, "Dear Fellow Shareholder" Letter from Dick Notebaert at 2-3.

#### **IV. Conclusion**

For the foregoing reasons, COMPTTEL respectfully requests that the Commission deny the Qwest Petition for Forbearance from *Computer Inquiry* and Title II regulation.

September 20, 2007

Respectfully submitted,

/s/

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