

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Review of the Section 251 Unbundling) CC Docket No. 01-338
Obligations of Incumbent Local Exchange)
Carriers)

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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SUMMARY

Cox claims that it is merely seeking a “clarification” of the Commission’s current rules and policies governing CLEC access to an ILEC’s inside wire subloop. This is disingenuous. Read carefully, Cox is actually requesting that the Commission adopt a set of national standards that does not currently exist – and which the Commission previously declined to issue, in the *Triennial Review Order*. Besides being substantively and procedurally improper, it is plain that this policy change would substantially curtail the authority and discretion of state regulators under Sections 251 and 252.

Clearly, the Commission’s *Triennial Review Order* requires that CLECs have physical access to an ILEC’s NID or terminal block, and is intended to preempt excessive and unnecessary costs and burdens. However, the Commission has previously ruled that access issues related to inside wire subloop should be handled through interconnection negotiations between carriers and through state-based arbitration. It is similarly clear that the Commission did not require that the CLECs have the broad and unconditional “direct access” rights of the type that Cox appears to be requesting, in which any cost or procedure might be invalidated as a burden.

In addition to altering current Commission policy, Qwest also believes that if Cox’s request for a “clarification” is granted, the Commission will be improperly preempting a state arbitration decision outside of the procedures established in Section 252(c)(6) of the Communications Act. Cox has singled out a single state arbitration decision by the Oklahoma Corporation Commission for reversal, asserting that it is too burdensome and that it does not accord with the extensive access rights that were granted to CLECs in the *Triennial Review Order*. Whether or not this arbitration decision is correct, it is clear that if the Commission rules that this decision is “erroneous,” as Cox has requested, the Commission will be preempting and

reversing it. The Commission should not do this. The appeals process established in Section 252(c)(6) is both mandatory and binding, and cannot be bypassed. What is more, permitting this subterfuge would be a bad precedent, and would undermine the arbitration authority of state regulators under Sections 251 and 252.

Qwest does not believe that the Commission may make a declaratory ruling on Cox's petition, due to these extremely serious substantive, legal and statutory problems. However, Qwest is also concerned that if the Commission does issue a clarification of its current access standards for inside wire subloop in response to Cox's petition, it is essential that the Commission continue to ensure that: (1) ILECs receive effective notice from the CLECs when their inside wire subloop is being reconfigured or disconnected by CLECs; and (2) that ILECs receive compensation when they perform work for the CLECs, or when the activities of the CLECs otherwise generate costs. Any "clarification" of CLEC rights that the Commission issues must continue to be tempered by these basic principles.

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Qwest Communications International Inc. (“Qwest”) respectfully submits these Comments in response to the Federal Communications Commission’s (“Commission”) *Public Notice* in this proceeding, seeking comment on the petition for declaratory ruling filed in the above-captioned proceeding by Cox Oklahoma Telcom, L.L.C. (“Cox”).¹ For the reasons discussed below, Qwest opposes Cox’s petition as an improper attempt to alter the Commission’s current rules governing inside wire subloop. Qwest also opposes Cox’s petition as an improper attempt to preempt a state arbitration decision outside the proper appeals process established in Section 252(c)(6) of the Communications Act, as amended. If the Commission issues a ruling on Cox’s request despite these substantive and procedural defects, however, Qwest asks that the Commission continue to ensure that: (1) incumbent local exchange carriers (“ILECs”) receive effective notice from competitive local exchange carriers (“CLECs”) when their inside wire subloop is being reconfigured or disconnected by CLECs; and (2) that ILECs receive compensation when they perform work for the CLECs, or when the activities of the CLECs otherwise generate costs.

¹ See *Public Notice, Pleading Cycle Established for Comments on Cox’s Petition for a Declaratory Ruling, for Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier’s Inside Wire Subloop*, DA 04-3520, rel. Nov. 4, 2004. Cox filed its petition on Oct. 27, 2004.

I. COX'S REQUEST FOR DECLARATORY RELIEF

In its petition, Cox requests that the Commission issue a declaratory ruling that ILECs must allow CLECs and their technicians to have “direct access” to the inside wire subloop in multi-tenant environments (“MTEs”). Cox contends that a “split” has developed between state regulators concerning the specific procedures under which CLECs obtain such access to the ILECs’ subloop, and that it is necessary for the Commission to “clarify” its existing rules and standards on subloop access in order to resolve the growing disorder.

Specifically, Cox asserts that some states – such as Virginia, New York and Washington – have ruled that the ILECs must provide the CLECs with “direct physical access” to their subloop facilities (meaning that the CLECs use their own technicians, without any involvement by the ILECs, and are able to connect at the ILEC’s demarcation point inside the MTE without constructing any additional facilities). Cox approves of this approach, and contends that it follows the Commission’s requirements.

In contrast, Cox asserts that other state regulators do not permit CLECs to have such direct access to ILEC subloop facilities, and that the terms and conditions for such access place unreasonable burdens on CLECs. Cox draws particular attention to a recent arbitration decision by the Oklahoma Corporation Commission (“OCC”), which ruled that Cox does not have a right of direct physical access to the ILEC’s inside wire subloop. According to Cox, the OCC arbitration decision also requires Cox to use the ILEC’s technicians to perform conduit installations and connections, to pay “impractically high rates” for these services, and in some cases requires Cox to construct intermediate facilities between its terminals and those of the ILEC. Cox claims that the inconvenience and expense of working through the ILEC effectively thwarts Cox’s ability to compete for customers in MTEs within the state of Oklahoma.

On this basis, Cox therefore asks that the Commission “clarify and confirm” that federal law rather than state law controls the terms under which CLECs obtain access to inside wire subloops in MTEs, and that state law classifications regarding demarcation points and network interface devices (“NIDs”) must be “subordinated to federal UNE rules.”

II. COX IS INVITING THE COMMISSION TO SUBSTANTIVELY ALTER ITS RULES

Cox’s petition is disingenuous. Cox is not really seeking a “clarification” of the Commission’s current rules and policies governing inside wire subloop. What Cox is actually requesting is that the Commission adopt a set of national standards that does not currently exist, and which would substantially curtail the authority and discretion of state regulators under Sections 251 and 252. Still worse, the “clarification” that Cox is requesting would actually cause the Commission to change its prior rulings, as it would adopt a particular set of policies that the Commission has previously rejected in the *Triennial Review Order*.² The Commission needs to recognize Cox’s subterfuge for what it is, and refuse this invitation to commit legal error.

Cox’s claim that the Commission needs only to “clarify” that CLECs enjoy the particular access rights described in its petition is a clear mischaracterization of the Commission’s prior rulings. The particular set of rights that Cox describes in its petition does not currently exist. A review of the Commission’s decisions – specifically, the *Triennial Review Order* – shows that it is true that the Commission has expressly required ILECs to unbundle their inside wire subloops and NIDS in MTEs, based on a finding that CLECs are impaired without this access.³ At the

² See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003)(“*Triennial Review Order*”).

³ *Id.* at 17189-90 ¶ 347. Specifically, the Commission found that, “requesting carriers are impaired without access to unbundled subloops associated with accessing customer premises wiring at multiunit premises. Based on evidence in the record, we find that the barriers faced by

same time, however, the Commission declined to adopt more specific rules governing “the manner and scope of access to the unbundled NID functionality” on a nationwide basis.⁴

In the *Triennial Review Order*, the Commission made the following policy decision:

Individual incumbent LEC and competitive LEC arrangements governing the process and procedures for obtaining access to an UNE to which a competitive LEC is entitled, are more appropriately addressed in the context of individual interconnection agreements pursuant to section 252 of the Act. Should a competitive LEC believe that the incumbent LEC is imposing unreasonable or discriminatory requirements, either in the negotiation or implementation stage of an interconnection arrangement, forums to address such issues are set forth in the Act. These same forums are available to the incumbent LEC.⁵

It is therefore apparent that the Commission declined to issue the extensive inside wiring subloop rules that Cox was seeking in the *Triennial Review* proceeding. Not only did the Commission specifically refuse to adopt the national standards that Cox was advocating,⁶ but the Commission specifically ruled that such access issues should be handled through interconnection negotiations between carriers and through state-based arbitrations under Section 252.

Despite the black letter of the *Triennial Review Order*, Cox nonetheless argues that the Commission actually did issue such nationwide standards in both the *Triennial Review Order* as well as in the *Virginia Arbitration Order*, and that all the Commission needs to do in this proceeding is to “clarify” the applicability of these standards to state regulators.⁷ These assertions do not hold water.

requesting carriers in accessing customers in multiunit premises are not unique to customers typically associated with the enterprise market residing in such premises but extend to all customers residing therein, including residential or other tenants typically associated with the mass market.” [citations omitted].

⁴ *Id.* at 17198-99 ¶ 358 [citations omitted].

⁵ *Id.* at 17198-99 ¶ 358.

⁶ *See id.* at 17198 n.1088 (noting that Cox had requested that the Commission adopt a “uniform nationwide rule” on NID access which would “prohibit unreasonable requirements”).

⁷ *See Cox petition* at 2.

For example, the Cox petition asserts a CLEC's entitlement to access an ILEC's inside wire subloop under the *Triennial Review Order* must mean that the CLEC's technician is "entitled to perform the connection" rather than an ILEC technician. In essence, Cox is claiming that the fact that a CLEC technician may perform the connection means that a CLEC must perform the connection. But this is not what the Commission said in the *Triennial Review Order*. The Commission does not require that the CLEC's technician perform such connections in all circumstances, or otherwise provide CLECs with an unfettered and unconditional right to access ILEC subloops at time, place or manner of their choosing, as Cox claims in its petition.⁸

Cox also claims that since CLECs have a right to access an ILEC's inside wire subloop to connect its own customers to its own NID, this access must necessarily be direct and unconditional "as a matter of logic," and cannot involve the ILEC or its technicians in the process, since any cost or burden would "effectively deny" the CLEC access to the ILEC's inside loop facilities.⁹ Far from being logical, however, this reasoning is circular, and it once again distorts the Commission's ruling in the *Triennial Review Order*. What the Commission ruled was the following:

We note, however, that the record contains evidence that at least one incumbent LEC requires competitive LECs seeking access to the NID or inside wire subloop to undertake a lengthy and burdensome process at the customer premises to "collocate" a separate terminal facility in order to gain access to the inside wire subloop, or other inside wire used by the LEC to access customers in multiunit premises. We find such a requirement to be contrary to the NID and inside wire subloop unbundling rules we adopt today and therefore prohibit such requirements. Similarly, a competitive LEC seeking to make contact with the incumbent LEC's NID for the purpose of disconnecting wiring on the customer's side of the NID so that the competitive LEC can reconnect such customer wiring to its own NID is *not* accessing the incumbent LEC's NID as a UNE. As such, an incumbent LEC requirement to have its technician present and to impose an associated charge on the competitive LEC for such contact on the non-network

⁸ See *id.* at 8-9, citing *Triennial Review Order* at 17199.

⁹ See *id.* at 9.

side of the NID would also be contrary to the rules we adopt today. Accordingly, we therefore prohibit these types of requirements as well. (footnotes omitted).¹⁰

Plainly, the Commission required that CLECs have physical access to the ILEC's NID or terminal block, and intended to preempt the excessive and unnecessary costs and burdens that were identified in this paragraph. But it is similarly clear that the Commission did not require that the CLECs have the broad and unconditional access of the type that Cox appears to be requesting, in which any cost or procedure could be potentially invalidated as a burden on the CLEC's rights.

It is also clear that the *Virginia Arbitration Order* does not establish a national, federal standard for state arbitrations that requires direct subloop access by CLECs. On its face, the *Virginia Arbitration Order* is a Commission arbitration of an interconnection dispute between an ILEC and a CLEC, which was decided by the Commission because the Virginia Corporation Commission refused to adjudicate the matter. It was not a rulemaking, and did not establish national standards. Likewise, a plain reading of the *Virginia Arbitration Order* does not support Cox's claim that the Commission has established a clear and unambiguous federal standard.

When this web of mischaracterizations is stripped away, it becomes clear that Cox is not really asking the Commission to "clarify" its prior decisions. What Cox is really asking the Commission to do is change its mind, reconsider a portion of the *Triennial Review Order* and establish a new policy. This is improper. As Cox is surely aware, a declaratory ruling is

¹⁰ *Triennial Review Order*, 18 FCC Rcd at 17198-99 ¶ 358.

substantively different from a petition for reconsideration,¹¹ and is an inappropriate vehicle in which to ask the Commission to reconsider its prior rulemaking decisions.¹²

Such a decision would not be cost-free. If the Commission issues a “clarification” that federalizes the rates, terms and conditions under which CLECs can access ILEC facilities inside MTEs, the Commission will be fundamentally altering its current rules, and it will be establishing a new standard for inside wire subloop access outside of a proper rulemaking or reconsideration proceeding. As such, the Commission would be broadly preempting state regulatory authority over inside wiring and network access, and would be substantially curtailing the discretion and authority that state regulators currently have in adjudicating inside wire subloop issues. This would be a substantial redistribution of authority under Sections 251 and 252 of the Communications Act, as amended. As discussed below, this would throw the terms of dozens of interconnection agreements into dispute, since decisions which clash with this “clarification” would presumably be invalidated.

¹¹ See *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-2 (2nd Cir. 1972)(distinguishing clarifications or interpretive rulings regarding existing policies from new policies that substantively alter substantive rights and obligations).

¹² *Id.* See 47 C.F.R. § 1.429, *et seq.*, of the Commission’s Rules which provides: Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. In the present case, it is clear that Cox has not followed the proper procedures for filing a petition for consideration, nor has Cox alleged changed facts or circumstances (other than the fact that state regulators are making differing findings regarding inside wire subloop access in arbitrating interconnection agreements – a result that was clearly anticipated and intended by the *Triennial Review Order*).

III. COX'S PETITION IS AN IMPROPER ATTEMPT TO PREEMPT A STATE ARBITRATION DECISION

While Cox's petition praises the work of several state regulators that have permitted "direct access" to inside wire subloop, Cox singles out a recent arbitration ruling by the Oklahoma Corporation Commission ("OCC") for criticism. Cox asserts that this OCC decision "would require Cox's telephone affiliate in Oklahoma to employ burdensome ordering procedures, undertake needless and time-consuming construction of new facilities, and rely on [Southwestern Bell Telephone's] technicians to establish service connections for MTE customers wishing to subscribe to Cox's telephone service."¹³ Cox contends that the rates, terms and conditions the OCC has placed on this access violate the Commission's rules and the Communications Act, and therefore asks that the Commission declare whether or not the OCC's ruling is "erroneous" or not.

Once again, Cox is being disingenuous, and is disguising the true nature of its request. It is clear that if the Commission issues the "clarification" demanded by Cox, the Commission will be preempting and reversing the OCC's arbitration decision. While this indirect approach is creative, it is readily apparent that in substance, Cox is singling out a single state arbitration decision for reversal, and is using an improper method in challenging a state interconnection decision that was made pursuant to the power delegated by Sections 251 and 252.

Section 252(c)(6) of the Communications Act establishes the following method of overturning such decisions:

In any case in which the State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

¹³ See Cox petition at 2.

For reasons known only to Cox, the company wishes to skirt the process laid out in the statute. Whatever its motives, Cox does not have this option. Section 252(c)(6) is both mandatory and binding on both Cox and on the Commission, and it is plain that the statute does not allow the proper appeals process to be bypassed.

The Commission cannot permit Cox to pursue evoke the Communications Act. Whether or not the OCC's decision is correct, permitting such a subterfuge would undermine the arbitration authority of state regulators under Sections 251 and 252. By effectively creating a new, back-channel appeals process to the Commission, this would alter the division of authority between federal and state regulatory agencies intended by Congress. Still worse, would likely preempt most of the pricing and access conditions that state regulators have placed on CLEC access. Such a decision would also subvert the several hundred interconnection agreements that have been arbitrated between CLECs and ILECs to date.

Qwest is also concerned that unless the Commission insists on the primacy of Section 252(c)(6) in this proceeding, the Commission will be lending itself to a violation of the Communications Act.

Because of the complicated and unusual issues that are in play, the Commission needs to tread carefully. Qwest believes that the only proper way to proceed is to dismiss Cox's petition. In addition, Qwest encourages the Commission to preempt state regulations only when state regulators clearly violate the Commission's access policies, and only when such preemption is properly sought under Section 253(d) of the Communications Act, as amended.

IV. ILECS NEED TO BE NOTIFIED AND COMPENSATED WHEN CLECS ACCESS THEIR INSIDE WIRE SUBLOOPS

Qwest does not believe that the Commission may make a declaratory ruling on Cox's petition, due to the extremely serious substantive, legal and statutory problems described above.

However, Qwest is also concerned that if the Commission does issue a clarification of its current access standards for inside wire subloop, it is essential that the Commission continue to ensure that: (1) ILECs receive effective notice from the CLECs when their inside wire subloop is being reconfigured or disconnected by CLECs; and (2) that ILECs receive compensation when they perform work for the CLECs, or when the activities of the CLECs otherwise generate costs. Qwest finds it disturbing that Cox's petition mentions neither issue while dwelling extensively on CLEC access rights. This is unbalanced, and Qwest believes it is essential that any "clarification" of CLEC rights continue to be tempered by these basic principles.

Inside wire subloop is part of an ILEC's network, and it is part of the facilities that ILECs use to serve their customers. These facilities are not cost-free for an ILEC to construct, nor can they be reconfigured without time and effort. At a bare minimum, it is therefore essential that ILECs receive effective, prompt notification when their inside wire subloop is being accessed, reconfigured, removed or disconnected by another carrier. In all fourteen states in Qwest's ILEC territory, state regulators have concluded this necessary for the CLEC to provide the ILEC with some form of notification when the CLEC accesses the ILECs' inside wire subloop – including the Washington Utilities and Transportation Commission ("Washington Commission"), whose interconnection order concerning Qwest is cited in Cox's petition.¹⁴

Qwest has procedures in place for all applicable states (not just Washington) to efficiently process any CLEC request for inside wire subloop. This process assures that if the

¹⁴ See Cox petition at n.46 citing to AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation, *Second Supplemental Order*, Docket No. UT-003120 (Washin. Pub. Util. and Trans. Comm'n, rel. April 5, 2001 (AT&T has a right to access Qwest's inside wiring, but the parties are required to negotiate business arrangements for providing Qwest with notice and compensation.)).

cable belongs to Qwest, not the building owner,¹⁵ Qwest determines the appropriate non-recurring costs for providing the inside wire subloop to the CLECs, and also establishes the monthly recurring cost for use of the inside wire subloop. In turn, the recurring monthly cost for use of this type of subloop varies by state from \$0.295 to \$1.17.

Separately, it is essential that ILECs continue to receive fair compensation either when they perform work for the CLECs or when the CLECs cause the ILECs to incur costs for the CLECs' benefit. Costs are also incurred when Qwest's inside wire subloop facilities are connected, disconnected, or reconfigured by CLECs, and it is necessary for Qwest to input information into its databases when a Qwest cable pair has been rerouted and re-terminated on a CLEC's equipment. As a result, Qwest has established recurring charges (ranging from \$110.46 to \$283.15) in its statements of generally available terms ("SGATs") to recover costs associated with tracking the use of Qwest's facilities. Qwest also bills one-time dispatch and construction charges for each such cable pair that is rerouted for a CLEC, depending on whether the CLEC requests that Qwest perform the work or whether the CLEC does it itself.

Qwest stresses that it is not necessary for an ILEC to perform all of the connections and rerouting of inside wire subloop themselves, and that Qwest has no objection to CLECs using their own personnel. Qwest also stresses, however, that it is essential that the CLECs follow correct procedures for notifying and reimbursing ILECs when they disconnect and reroute the ILEC's inside wire subloop. Too often, the CLECs are wholly failing to do this. To date, no CLEC has ever provided Qwest with notice that they have accessed Qwest's inside wire subloop. Moreover, many CLECs in Qwest's service territory – including Cox – are arbitrarily accessing Qwest's terminals and subloops without compensation to Qwest, and are doing so without any

¹⁵ If the cable belongs to the property owner, there is no charge to the CLEC.

attempt to follow the processes that Qwest has established. This chaotic and widespread scofflaw behavior by the CLECs has become an increasing problem for Qwest. These facts underscore that the Commission needs to balance the access rights of the CLECs with the legitimate interests of ILECs to be notified when their facilities are rerouted and to be compensated when they incur state-recognized costs.

V. CONCLUSION

As Cox is surely aware, a declaratory ruling is an inappropriate vehicle for reconsidering a prior Commission decision or for making substantive changes to the Commission's rules. Policy changes cannot legally be "clarified" into existence. But that is precisely what Cox is asking the Commission to do. The Commission must refuse this inducement to commit serious legal error, which could potentially mire the issue of inside wire subloop access in litigation and uncertainty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System, 2) served, via e-mail on Ms. Janice Myles of the Wireline Competition Bureau, Competition Policy Division, at janice.myles@fcc.gov; 3) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 4) served, via First Class United States mail, postage prepaid, on the party listed on the attached service list.

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