Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc.	)	
Pursuant to Section 10 of the	)	WC Docket No. 05-281
Communications Act of 1934,	)	
as amended, for Forbearance from	)	
Sections 251(c)(3) and 252(d)(1)	)	
in the Anchorage LEC Study Area	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") hereby submits these reply comments in the above captioned docket.[1]

I. INTRODUCTION AND SUMMARY

In this proceeding ACS of Anchorage, Inc. ("ACS") seeks forbearance from the unbundling requirements and pricing standards for unbundled network elements established in Sections 251(c)(3) and 252(d)(1) of the Act in its local exchange area in Anchorage, Alaska. In its forbearance petition,[2] ACS claimed that it was subject to considerable facilities-based competition within the Anchorage exchange, and that its market share had dropped to below 50%. However, ACS claimed that a single competitor, General Communications Inc. ("GCI"), was the only carrier using unbundled loops priced at TELRIC rates in order to compete. GCI is a cable television provider that is also in the business of providing telephony although, apparently, it still purchases unbundled loops from ACS rather than construct or use its own facilities. This is true even where other competitors have constructed their own facilities, although GCI

[1] *See Public Notice,* WC Docket No. 05-281, DA 05-2709, rel. Oct. 14, 2005, and *Public Notice*, DA 05-3145, extending the date for filing comments and reply comments.

[2] Petition for Forbearance of ACS of Anchorage, Inc., filed Sept. 30, 2005.

apparently claims that it is using ACS' facilities on an interim basis as it constructs its own. Because the existence of facilities-based competition from others negates the basis for the requirement that loops be made available at TELRIC prices, ACS invoked the forbearance provisions of Section 10 of the Act and requested that the Federal Communications Commission ("Commission"), either as a general matter or as a decision specific to GCI, relieve ACS of the regulatory obligation to make unbundled network elements available in the Anchorage exchange.

Because forbearance petitions of this nature are of necessity fact-specific, Qwest, which does not provide local exchange service in Anchorage, did not initially comment on the ACS petition. Qwest was, however, a party to a forbearance proceeding which was at least facially similar to the one initiated by the ACS petition.[3] In reviewing the comments in opposition to the ACS petition, Qwest has observed that the *Omaha Order* is frequently misconstrued and misunderstood, and opponents of ACS have made some significant mischaracterizations of the *Omaha Order*. The potential confusion caused by miscomprehension of both the true scope of Section 10 of the Act and the Commission's *Omaha Order* causes Qwest to enter this particular proceeding at this time. In so doing, our participation is limited. We have not reviewed the evidence underlying the ACS petition, and accordingly take as given the fundamental factual assertions in the petition. We trust that ACS is capable of defending its own factual premises. But the basic misunderstandings of the *Omaha Order* and Section 10 of the Act cannot be allowed to pass without comment.

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[3] *In the Matter 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, rel. Dec. 2, 2005 ("*Omaha Order*"), *pets. for review pending sub nom., Qwest Corp. v. FCC*, Nos. 05-1450, *et al.* (D.C. Cir., filed Dec. 12, 2005).

Qwest makes three points in these reply comments:

- The principles recognized in the *Omaha Order* (*i.e.*, that facilities-based competition is a basis for forbearance even when the "impairment test" has not been met and that Section 251(c)(3) has been "fully implemented") must guide the Commission's analysis in any forbearance proceeding in which they are implicated.
- Section 251(c)(3) of the Act has been "fully implemented," and efforts to undermine this basic premise can do so only by eviscerating Section 10 of the Act itself.
- Competitive local exchange carriers ("CLECs") challenging the existence of competition in a given market must, as a precondition to being granted any credibility, put forth on the record their own factual material concerning competition in that market, especially facilities-based competition. They must not be permitted to withhold factual information which they uniquely possess and simply criticize an incumbent local exchange carrier's ("ILEC") evidence documenting the existence of competition.

II. IT WOULD BE UNREASONABLE TO IGNORE THE *OMAHA ORDER* IN EXAMINING A FORBEARANCE PETITION BASED ON THE EXISTENCE OF FACILITIES-BASED COMPETITION

As a matter of law, Qwest believes that it was entitled to considerably more forbearance than was actually enacted in the *Omaha Order*. Nevertheless, because the *Omaha Order* recognizes the importance of facilities-based competition in determining the appropriate regulatory structure for ILECs, and rejected claims by competitors that the Commission put their individual desires over the public interest, the *Omaha Order* stands as an important first step

towards rebalancing the regulatory regime wherever facilities-based competition has made economically significant inroads into a local exchange market.

But the importance of the *Omaha Order* is disputed by some commenting parties in this proceeding. One commentor, Covad Communications Group, Inc. ("Covad")[4] suggests that the Commission's landmark *Omaha Order* has no precedential value at all because "[t]he Commission makes clear in the *Qwest Omaha Order* that ILECs should not rely upon or invoke that decision in subsequent forbearance requests."[5] Covad reaches this conclusion because of statements by the Commission in the *Omaha Order* to the effect that the *Omaha Order* reached a decision based on the facts before the Commission, and that the conclusion reached therein would not necessarily apply to other factual situations.[6] Covad takes this innocuous statement and claims that, based on this language, the Commission must treat the *Omaha Order* as if it had never been issued at all. Covad's argument is that the *Omaha Order* should be treated like unpublished opinions of the D.C. Circuit Court of Appeals,[7] which cannot be cited for any purpose other than to show that it is *res judicata* in another proceeding involving the same parties and issues. This argument is directly contradicted by another opponent of forbearance, McLeod Telecommunications Services, Inc. ("McLeod"), which argues that the *Omaha Order* is absolutely binding on the Commission in this proceeding.[8] But more significantly, Covad is completely wrong.

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[4] Covad filed comments both in its own name and as part of a group. We refer here to the individual comments filed by Covad.

[5] Covad at 36.

[6] *Id.* at 36 note 60 citing to notes 4 and 46 of the *Omaha Order.*

[7] *Id*. at 37. *See* D.C. Circuit Rule 36(c)(2) "While unpublished orders and judgments may be cited to the court in accordance with Circuit Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."

[8] McLeod at 9-10.

The cited statements in the *Omaha Order* explain that in acting in *Omaha* on a specific set of factual presentations, the Commission was not deciding issues that were not before it. That is, it was making a determination that the facts warranted a grant of a portion of Qwest's petition in *Omaha*, but that other factual situations might or might not warrant forbearance, and that any such decision would be based on the specific facts demonstrated. This was not unnatural or illegal -- the Commission is clearly permitted to proceed to address important public policy issues in adjudicatory rather than rulemaking proceedings.[9] The *Omaha Order* clearly establishes useful precedent for evaluating future forbearance petitions (including the instant one). It does not seek to establish a hard and fast rule to govern all future proceedings involving forbearance from the unbundling rules.[10] But this certainly would not permit the Commission to ignore the analysis in the *Omaha Order* altogether in reaching a decision that could not be harmonized with that *Order*.

As a companion to this argument, both Covad and McLeod argue that the Commission should simply ignore the *Omaha Order* altogether because they do not like the Commission's reasoning,[11] a fairly blatant attempt at an untimely reconsideration of the *Omaha Order*.

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[9] *See SEC v. Chenery Corp.*, 332 U.S. 194, 200-203 (1947). The Commission treats proceedings involving forbearance petitions under the "permit but disclose" rules that customarily govern rulemaking procedures. *See Public Notice,* WC Docket No. 04-223, DA 04-1869, rel. June 25, 2004. Nevertheless, a forbearance action involving a single company is much closer to an adjudicatory proceeding than it is to a rulemaking proceeding.

[10] Covad cites a number of cases in which courts have formally limited a decision to particular facts of a case. Covad at 37 note 63. But that is not what the Commission did in the *Omaha Order*. Instead, the Commission simply stated that, in a fact-intensive situation involving forbearance, the *Omaha Order* would not necessarily apply to other factual situations.

[11] Covad at 37; McLeod at 3-4.

Obviously dissatisfaction with the *Omaha Order* should be addressed through appeal or reconsideration,[12] not by pretending that it does not exist.

In all events, while the Commission is not bound by the judicial principle of *stare decisis,* and can modify past decisions based on reasoned decision-making subject to judicial review, it cannot simply ignore its past decisions no matter how they are limited.[13] Under the basic precepts of the Administrative Procedure Act, the issuance of inconsistent decisions without explaining the basis for their inconsistency is one of the hallmarks of a failure of reasoned decision-making that routinely result in judicial reversal of regulatory decisions.[14] Whether the Commission "limited" the *Omaha Order* to its facts or not, the Commission will nevertheless ultimately be required to harmonize in some lawful fashion whatever decision it issues in the instant proceeding with its *Omaha Order*.

In short, Covad's demand that the Commission ignore the *Omaha Order* altogether simply makes no sense. The *Omaha Order* does not formally establish a rule that the Commission is bound to follow to the same extent as if it were a rule. On the other hand, the *Omaha Order* represents an analytical structure for reviewing forbearance decisions that is readily applicable to other forbearance proceedings, and which cannot be ignored in the ACS (or any other) proceeding.[15] Should the Commission fail to take account of the realities of the

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[12] McLeod has in fact filed an appeal of the *Omaha Order* and a petition for stay of the *Order* with the Commission. Petition for Review, No. 05-1469, D.C. Cir., filed Dec. 28, 2005. Motion for Stay, WC Docket No. 04-223, filed Feb. 3, 2006. Qwest filed its Opposition to Motion for Stay, WC Docket No. 04-223 on Feb. 10, 2006.

[13] *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970).

[14] *See Miner v. FCC*, 663 F.2d 152, 157 (D.C. Cir. 1980).

[15] To be sure, there are parts of the *Omaha Order* that Qwest finds flawed, and has appealed those parts of the *Order*. *See* note 3, *supra*. The *Omaha Order* has not been stayed at this time (although a stay petition filed by McLeod is pending (*see* note 12, *supra*), and remains the

Omaha Order in its decision in the instant proceeding, it would have violated reasoned decision-making and made its *Order* vulnerable to reversal upon judicial review.

III. SECTION 251(c)(3) OF THE ACT HAS BEEN FULLY IMPLEMENTED

McLeod and Covad, joined by GCI, argue that the ACS petition cannot be lawfully granted because Section 251(c) has not been "fully implemented," as required by Section 10(d) of the Act.[16] Because forbearance from Section 251(c) cannot be granted until after the section has been "fully implemented," McLeod, *et al*., claim that the ACS petition is legally, and fatally, defective. Here the commentors face a serious problem because the argument that they advance is directly inconsistent with the decision in the *Omaha Order* that Section 251(c)(3) of the Act had been "fully implemented" upon implementation of final unbundling rules by the Commission.[17] The Commission cannot accept their argument on "fully implemented" unless it reverses itself in the Omaha proceeding, which is currently in court.[18]

Moreover, the position of McLeod, Covad and GCI evidences a fundamental misconception of the Communications Act. They all argue, in one variety or another, that Section 251(c) of the Act cannot be "fully implemented" until after there is no finding of impairment under Section 251(d)(2)(B) of the Act for the network elements in question.[19] This standard would transpose Section 251(d)(2)(B)'s impairment structure into Section 10

Commission's most current thinking on forbearance pending further action by the Court or the Commission.

[16] Covad at 6-12; McLeod at 3-7; GCI at 57 note 216.

[17] *Omaha Order* ¶¶ 51-57.

[18] *Id.* ¶ 51. *And see* note 3, *supra*. It should be noted that the position adopted by the Commission in the *Omaha Order*, which is clearly correct and sustainable, is different than what Qwest had advocated in that proceeding. Qwest argued that Section 251(c)(3) was "fully implemented" upon grant of all of Qwest's Section 271 interLATA applications.

[19] *See* note 18, *supra*.

forbearance proceedings. But that is not what the Act calls for at all. If impairment cannot be lawfully found under Section 251(d)(2)(B), then the Commission may not, as a matter of law, require that the network element in question be subject to Section 251(c)(3) unbundling. A forbearance petition is unnecessary. The ACS petition, as did the Qwest petition in *Omaha*, assumed that a valid impairment decision had been made, and that the forbearance criteria of Sections 10(a) and (b) had been met in that context. The forbearance standards and the impairment standards are simply different yet complementary standards. The "fully implemented" language of Section 10(d) precludes the Commission from examining the Section 10(a) factors until after the Commission, as decided in the *Omaha Order*, had finalized its rules implementing Section 251(c)(3) of the Act, which it had accomplished some time ago.[20]

If the arguments of McLeod, Covad and GCI were to be accepted, they would write Section 10 out of the Act when it comes to application of the network element unbundling rules. The Act specifies that Section 10 forbearance cannot be applied to Section 251(c) obligations until after Section 251(c) has been "fully implemented." If "full implementation" of Section 251(c) means that implementation does not occur until after the Section 251(d)(2)(B) impairment can no longer be found, then Section 10 has no vitality in the context of the unbundling of

[20] Indeed, the basic structure for implementing Section 251(c)(3) has been in place since August of 1996. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom., Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997).

network elements. As Section 10(d) clearly contemplates the opposite, the argument of McLeod, *et al.*, would simply eliminate that section of the Act from the statute altogether.

This said, the fact that Section 251(c)(3) has been "fully implemented" and is subject to forbearance petitions does not mean that Section 251(c)(3)'s unbundling obligations are automatically eliminated upon such full implementation. To the contrary, the Section 251 unbundling obligations remain in place until and unless an ILEC makes a showing that meets the criteria of Section 10(a) of the Act. All that full implementation of Section 251(c)(3) means in this context is that the Commission is now charged with evaluating forbearance petitions on their merits under Section 10(a) and (b) of the Act (something that was foreclosed to the Commission before such full implementation). Whether the forbearance petition is granted or not must be based on the nature of the showing made by the petitioner.

IV. OPPONENTS OF A PETITION SEEKING FORBEARANCE FROM SECTION 251(c)(3) UNBUNDLING OBLIGATIONS CANNOT AVOID PUTTING THEIR OWN COMPETITIVE FACTS ON THE RECORD, UNDER A PROTECTIVE ORDER IF NECESSARY

One of the most frustrating aspects of the *Omaha* proceeding was the extreme reluctance of those opposing the Qwest forbearance request in that market to actually document their assertions about the absence of competition in Omaha. To a very large extent, the initial response of opponents to the Qwest petition in Omaha was to criticize Qwest's evidentiary showing without putting forth any evidence of their own. It was only after the Commission's staff insisted that some documentation be supplied that the record began to become more balanced. It was clear that much of the most direct evidence of competition in Omaha was held by CLECs who were, to a very large extent, unwilling to share this information with the Commission.

It looks like the same situation is being repeated in the instant proceeding. ACS contended that it faced massive competition from facilities-based competitors that made the continued forced unbundling of its network elements at TELRIC prices unnecessary and contrary to the public interest. The opponents of the petition generally complain that the ACS information is not accurate or not compelling, but decline to actually put any information on the record that would permit intelligent testing of their assertions. Qwest submits that in this case, and in all future cases, the Commission must be very clear. CLECs challenging a forbearance petition must, in order to gain the most rudimentary attention to their position, be willing to make available to the Commission factual data on their own competitive facilities in order to permit the Commission to make a reasoned evaluation of the bona fides of their allegations.[21] It cannot be acceptable for CLECs, who have the best (and often the only) information on the competitive situation in a market, to challenge an ILEC's own competitive presentation without being required to submit their own relevant information.

Respectfully submitted,

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[21] As was the case in *Omaha*, the Commission can use the device of a protective order to ensure the confidentiality of commercially-sensitive information.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS** of Qwest Communications International Inc. to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 05-281, 2) served, via e-mail on Ms. Janice Myles, Competition Policy Division, Wireline Competition Bureau 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, upon the parties listed on the attached service list.

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