

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**In the Matter of Petitions of Qwest
Corporation for Forbearance Pursuant
To 47 U.S.C. Section 160(c) in the
Denver, Colorado, Minneapolis-St. Paul,
Minnesota, Seattle, Washington and
Phoenix, Arizona Metropolitan
Statistical Areas**

WC Docket No. 07-97

**INITIAL COMMENTS OF THE
ARIZONA CORPORATION COMMISSION**

I. Introduction

On April 27, 2007 Qwest Corporation ("Qwest") filed petitions for forbearance pursuant to 47 U.S.C. Section 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Seattle, Washington and Phoenix, Arizona Metropolitan Statistical Areas ("MSAs"). On June 1, 2007, the Wireline Competition Bureau ("Bureau") issued a public notice establishing a schedule for comments and reply comments on Qwest's petitions for forbearance in all four of the affected MSAs. Subsequently, on July 6, 2007, at the request of the Arizona Corporation Commission ("Arizona Commission") the Bureau granted an extension of time to file comments and reply comments. Under the new schedule, comments on the petitions are due on August 31, 2007 and reply comments by October 1, 2007.

In its Petitions, Qwest asks the Federal Communications Commission ("Commission") to forbear from applying loop and transport unbundling pursuant to 47 U.S.C. §§ 251(c) and 271 (c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff requirements set forth in Part 61 of the Commission's rules for its mass market and enterprise services and from price cap regulations also set forth in Part 61.

Qwest further seeks forbearance from the Computer III requirements including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements. Finally, Qwest seeks forbearance from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules regarding the process for acquiring lines, discontinuing services and making assignments or transfers of control.

The Arizona Commission is the State agency with regulatory authority over telecommunications carriers providing service in Arizona. The Arizona Commission is a constitutionally created agency with exclusive jurisdiction over the intrastate rates charged by public service corporations in Arizona.

The Arizona Commission has propounded innumerable data requests to Qwest, Cox and other Competitive Local Exchange Carriers ("CLECs") providing service in the Phoenix MSA to ascertain the current state of competition and make a determination to what extent, if any, the Arizona Commission could support Qwest's petition. Collection of this data, and the corresponding analysis, are still ongoing and final conclusions regarding the market data are not available at this time. The Arizona Commission intends to have final observations regarding the data it has collected in its Reply Comments in this Docket. However, the Arizona Commission has a number of initial observations and concerns which the Arizona Commission asks the Bureau and the Commission to consider in its evaluation of Qwest's petition.

Several events have occurred since the Commission entered its forbearance order in the Omaha case¹, which should inform the Commission with regard to any findings it may make on the pending Qwest petitions. McLeod Telecommunications Services, Inc. ("McLeodUSA") recently filed a Petition for Modification of the Commission's *Omaha*

¹ *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; Commission, FCC 05-170; Memorandum Opinion and Order; Adopted: September 16, 2005 Released: December 2, 2005 ("Omaha Order").*

Order based upon significant price increases by Qwest in affected wire centers. In addition, a Report was submitted by the United States General Accounting Office ("GAO")² to the Chairman of the Committee on Government Reform, House of Representatives, in November, 2006, which noted several concerns regarding special access policies and pricing at the interstate level. While the Arizona Commission does not have first hand knowledge of the events leading up to these filings, they are both post-Omaha occurrences, which suggest that some modification of the approach with respect to forbearance from dominant carrier requirements and 251(c) transport unbundling obligations taken by the Commission in the *Omaha Order* is necessary.

The Arizona Commission also believes that the Commission should review the current state of competition in Omaha and what effect forbearance has had on the markets, including the ability of CLECs to effectively compete since the Commission's grant of forbearance to Qwest in that market. For CLECs that are dependent on piece parts of Qwest's wholesale network, the Omaha experience suggests that some of the Commission's findings in the *Omaha Order* should be reconsidered.

The Arizona Commission also has reservations as to the appropriateness of granting Qwest's forbearance in whole or in part given that the Triennial Review Remand Order ("*TRRO*") has not been fully implemented yet in the Phoenix MSA. Qwest and the CLECs have entered into a recent Settlement Agreement regarding application of the *TRRO* criteria with respect to Arizona wire centers which is still pending before the Arizona Commission for approval. The Arizona Commission would be particularly concerned if the results of the Bureau's forbearance analysis were to result in a significantly different outcome from that which would occur from a *TRRO* analysis, based solely upon Cox's presence in those wire centers.

² GAO: *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Dated November 2006 (GAO Report).

Competition in the Phoenix MSA varies by service type and class of customer. It is evident to the Arizona Commission, that analysis of Qwest's petition should be more granular than just an examination of the Mass Market and Enterprise Market segments. The Arizona Commission recommends that analysis be performed at a zip code level and that independent consideration be given to residential, small business (1-3 lines), medium business (4 to 100 lines) and large business customers (101+ lines).³

The Arizona Commission recognizes, like the Commission, that Qwest must be given more flexibility to compete where it is facing significant competition from others. To achieve this, the Commission, using post-Omaha data, should perhaps look at striking a more informed balance between the regulatory requirements left in place and requirements from which forbearance is granted.

As the Commission recognized in its *Omaha Order*, what is appropriate in one market may not be appropriate in another market. As a result, the Commission stated that it would examine petitions of this nature on a case by case basis. In addition, the Commission now has information to verify whether its findings and conclusions in the *Omaha Order* were appropriate. The Arizona Commission's initial observations are that strict application of the analysis in the *Omaha Order* is no longer appropriate and needs to be revised based upon more recent information. The Commission needs to take a fresh look at the extent of forbearance granted in Omaha, and make appropriate modifications as necessary to ensure that competition will be promoted by any actions it takes in the Phoenix MSA.

II. The Forbearance Standard

The standard for granting forbearance is contained in 47 U.S.C. Section 160. That Section of the 1996 Act provides:

³ For purposes of its TRO reviews, the Commission has defined Mass Markets as residential and small business and Enterprise as medium and large business.

"SEC.10 COMPETITION IN PROVISION OF
TELECOMMUNICATIONS SERVICE.

(a) **REGULATORY FLEXIBILITY** – Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any of some of its or their geographic markets, if the Commission determines that--

- (1) enforcement of such regulation or provision 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 regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) **COMPETITIVE EFFECT TO BE WEIGHED**- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."

In its Petition, Qwest seeks forbearance from its loop and transport unbundling obligations under 47 U.S.C. §§ 251(c) and 271 (c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff requirements set forth in Part 61 of the Commission's rules for its mass market and enterprise services and from price cap regulations also set forth in Part 61. Qwest further seeks forbearance from the Computer III requirements including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements. Finally, Qwest seeks forbearance from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules regarding the process for acquiring lines, discontinuing services and

making assignments or transfers of control. Unless Qwest's Petition requests forbearance from specific subparts of these requirements, the specific subparts not referenced by Qwest in its Petition should not be considered by the Commission in its forbearance analysis.

III. The Omaha Standard

The Commission notes in its *Omaha Order* that it essentially used the framework set forth in the *LEC Classification Order*⁴, to determine whether a carrier is dominant. Under that framework, the Commission: 1) delineates the relevant product and geographic markets for examination of market power; 2) identifies firms that are current or potential suppliers in that market; and 3) determines whether the carrier under evaluation possesses individual market power in that market. The Commission then uses this information to inform it in making its determinations under the Section 10 standards.

A. Dominant Carrier Requirements and Forbearance - Relevant Product and Geographic Markets for Examination of Market Power

1. The retail market should be examined based upon zip code and wire center data

In the *Omaha Order*, the Commission stated that Qwest filed retail market data regarding the entire MSA, without disaggregating the state of competition by county, zip code, wire center or other more narrow geographic market.⁵ Therefore, for the purposes of analyzing dominant carrier regulation of Qwest, the Commission defined the relevant geographic market to be Qwest's service area in the Omaha MSA.⁶

⁴ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

⁵ *Omaha Order* at para. 23.

⁶ *Id* at para. 24.

The Arizona Commission believes that a more accurate result may be achieved by examining the data on both a zip code and wire center basis. The Arizona Commission has collected extensive data on retail competition on both a zip code and wire center basis and will present that in its Reply Comments in this proceeding. The Commission may obtain the most accurate results if the analysis is focused on a zip code basis. It is likely in the Phoenix MSA to produce a different result than if strict application of the criteria from the *Omaha Order* is used.⁷

2. More granular analysis of the business market is appropriate

In the *Omaha Order*, for purposes of evaluating Qwest's request for relief from dominant carrier regulation, the Commission analyzed the level of competition in the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). The Arizona Commission believes that for the Phoenix MSA, the Commission should separate its analysis of the business market into the following three groups: 1) small business (under 4 lines), 2) medium business (4 - 100 lines) and 3) large business (above 100 lines). The Arizona Commission has requested and received information from carriers using this more detailed data and will present its conclusions after further analysis.

B. Dominant Carrier Requirements and the Retail Market - Competitors and the Extent that Qwest Possesses Market Power

With respect to the interstate market in Arizona, Qwest first seeks forbearance from certain dominant carrier requirements. The Commission described those requirements in its *Omaha Order*:

“Under Title II of the Act, the Commission traditionally has applied a variety of regulations to carriers in order to protect consumers from unjust,

⁷ The format or granularity of the information submitted by Qwest should not control the definition of the appropriate markets at issue. The Arizona Commission has collected the information on a much more granular level than that provided by Qwest and will make this information available in its Reply Comments.

unreasonable, and unreasonably discriminatory rates and practices. These regulations include requirements arising under section 214 related to transfer control and discontinuance, cost-supported tariffing requirements, and price regulation for services falling under the Commission's jurisdiction."

The Arizona Commission agrees that the Commission should analyze the extent of retail competition in the relevant markets in Arizona to determine whether forbearance from any of the interstate dominant carrier requirements is appropriate. Further, as in the *Omaha Order*, the Commission should limit its consideration to the rules and regulations that Qwest specifically identified in its Petition.

At this time, the Arizona Commission is still in the process of conducting detailed data analysis that will be concluded in time for the reply comments deadline of October 1, 2007. The Arizona Commission, can however at this time, offer certain high-level observations regarding the available data from the Phoenix MSA.

1. The Phoenix MSA

The Phoenix MSA consists of 64 Qwest Wire Centers and contains approximately 200 Zip Codes. The Phoenix MSA includes Maricopa County, the largest county by population in Arizona, and Pinal County and it extends from Cave Creek, north of Phoenix, to an area just north of Tucson, Arizona. The Phoenix MSA is the highest population growth area in Arizona, indeed, one of the highest growth areas in the United States. Qwest, however, does not serve all markets in the Phoenix MSA as the Incumbent Local Exchange Carrier ("ILEC"). Therefore, the relevant market for Qwest's petition for forbearance should be limited to its service area in the Phoenix MSA, disaggregated on a zip code basis or, in the alternative, on a zip code and wire center basis.

a. The Retail Residence Market

1. Cable Telephony

Since the implementation of the 1996 Act, the Phoenix MSA has become increasingly dominated by two Local Exchange Carriers ("LECs") – the dominant ILEC

in Arizona, Qwest Corporation, and the dominant Cable Provider in Arizona, Cox Communications ("Cox"). In this regard, the Phoenix MSA shares some similarity to the Omaha MSA for which the Commission granted limited forbearance. As in Omaha, Qwest is the dominant ILEC and Cox is the dominant cable based provider.

2. Wireless Services

While the Arizona Commission has performed no independent studies of its own, the availability of wireless to residence customers appears to be wide-spread and has reached a point where the number of wireless phones approximates or could actually exceed the number of wireline access lines in Arizona.

We do not believe that Qwest presented sufficient data in its Petition to determine the extent that wireless service is actually a substitute for main line service. Again, while the Arizona Commission has not performed any independent studies on wireless use in the Phoenix MSA, the Arizona Commission believes residence customers still favor the use of wireless service more as a substitute for additional line service than main line service. The Arizona Commission has seen no evidence that residence customers favor the direct substitution of main line service by wireless to a degree that forbearance should be based on this factor. This is consistent with the Commission's findings in its *Omaha Order*.

3. Voice over the Internet Protocol ("VoIP") Services

While the Arizona Commission believes that the number of VoIP providers serving the Phoenix market continues to grow, it has no independent data to suggest that the market share of VoIP is significant.

Qwest's Petition does not contain sufficient data to suggest that these providers constitute a significant competitive presence yet. The Arizona Commission is not aware of any market share or service area data for any of the VoIP providers listed in the Qwest

Petition.⁸ Certainly, no VoIP providers serving the Phoenix MSA have the level of customer recognition as that of Qwest, Cox or any other CLEC. VoIP services continue to undergo the difficult transition from embryonic to introductory to mainstream. The Arizona Commission doubts that VoIP has reached the “S-Curve” service state where it can even be considered to have fully emerged from the introduction level for mass-market, residence customers. VoIP should not be considered a serious local exchange service alternative for wireline service.

Absent additional information, the Arizona Commission believes that VoIP remains a nascent service hampered today by technological and legal issues⁹, a total dependence on broadband deployment, and questionable safety features and standards.¹⁰

4. Other CLECs Utilizing Qwest’s Network

The extent of competition in the residential market by CLECs utilizing Qwest’s network has fallen precipitously since the Unbundled Network Element-Platform (“UNE-P”) was no longer available under Section 251(c). The Arizona Commission is aware that CLECs continue to exit the residential local exchange service rather than enter it. During its August Open Meeting, for example, the Arizona Commission approved an application by an AT&T affiliate to withdraw from the residential local exchange service throughout Arizona.

5. Section 10 Criteria – Forbearance from Dominant Carrier Requirements in the Arizona Residence Market

With respect to forbearance from interstate dominant carrier regulation in the residential market, the Arizona Commission offers no opinion at this time, until it has completed its analysis of the data that has been submitted to it.

⁸ At least one provider that Qwest’s lists as providing service in the Phoenix MSA (Sunrocket) closed its service in July 2007 in an abrupt manner, and is no longer providing service.

⁹ *Verizon Services Corp. v. Vonage Holdings Corp.*, 2007 WL 528749 (E.D.Va. 2007)

¹⁰ For example, “This Is an Emergency 911 is a joke for VoIP customers”; By Ben Smith; Sept. 8, 2004; <http://slate.com/id/2106424/>; “VoIP and E911 services still not a guarantee”; June 21, 2006; by Michael Sciannamea; <http://voip.weblogsinc.com/2006/06/21/voip-and-e911-services-still-not-a-guarantee/>.

6. Summary

Qwest faces significant competition from Cox in the Phoenix MSA residential local exchange market. Qwest faces limited competition from CLECs which are dependent upon piece parts of Qwest's network to provide service or which resell Qwest's service. The Arizona Commission will present more detailed data regarding the extent of this competition in its Reply Comments. Qwest has not demonstrated in its Petition, nor does the Arizona Commission have any evidence at this time, that wireless providers and VoIP providers pose any significant local exchange competition at this time.

b. Dominant Carrier Requirements and the Retail Business Market

1. Cable Telephony

The available data suggests that cable telephony has a growing presence in the business market. Cable providers, such as Cox, have largely focused on the residence market but are moving into the business market. For example, in an August 27, 2007 article, Cox was identified as one of the top four ethernet providers for business¹¹.

The Arizona Commission has not concluded its analysis of the data available for the Phoenix MSA but does expect that cable telephony by Cox is contributing to the competitive nature of the business local exchange market.

As indicated above, the Arizona Commission believes a more granular analysis of the business market is warranted in the Phoenix MSA. The Arizona Commission recommends the following breakdown: 1) small business (below 4 lines), 2) medium business (4 - 100 lines), and, 3) large business (above 100 lines).

¹¹ Cox Joins Top Four Ethernet Providers; <http://www.teleclick.ca/2007/08/cox-joins-top-four-ethernet-providers-att-lead-softens/>.

2. Other CLECs

There are several CLECs with a significant presence in the Arizona business marketplace. But as will be discussed below, these carriers are dependent upon Qwest's wholesale network elements.

The Arizona Commission strongly believes that CLECs without their own last mile facilities, serving the business market may not be able to compete with either Qwest or Cox, who have their own standalone networks, if forbearance of the unbundling obligations under Section 251(c) is granted as discussed below. This forecasts the emergence of a situation similar to that seen in the Residence Market, one dominated by two providers - an ILEC (Qwest) and a Cable Provider (Cox).

It is also significant that the Arizona business markets continue to undergo drastic changes, particularly with respect to mergers and acquisitions. Consolidation of telephone providers has been occurring at a rapid pace as demonstrated by the following list of mergers and acquisitions:

- SBC acquisition of AT&T
- AT&T acquisition of BellSouth
- Verizon acquisition of MCI
- Eschelon acquisition of Mountain Telecommunications
- Integra acquisition of Electric Lightwave
- Integra acquisition of Eschelon
- Sprint acquisition of Nextel
- Time Warner Telecom acquisition of Xspedius
- XO Communications acquisition of Allegiance Communications
- Level 3 acquisition of Broadwing
- Cox Communications acquisition of Cable America
- Qwest acquisition of OnFiber
- First Communications acquisition of Lightyear Network Solutions
- AT&T (proposed) acquisition of Dobson Communications
- Acceris Management transfer to First Communications
- Adephia transfer to Telecom Management
- Sprint transfer to Trinsic
- Startec Global Licensing Company transfer to Teligent Services
- Global Crossing transfer to Matrix Telecom, Inc.

3. Application of Section 10 Criteria to Interstate Dominant Carrier Requirements in the Retail Business Market

Again, it is not possible for the Arizona Commission to comment at this time on whether it supports Qwest's petition for forbearance from interstate dominant carrier requirements in the Phoenix MSA with respect to the retail business market, without completing its analysis of the underlying data.

C. Section 251(c) and Section 271(c)(2)(B)(ii) Requirements and Forbearance - The Relevant Product and Geographic Markets for an Examination of Market Power

1. The Analysis Should be Based Primarily Upon Wholesale Market Data

The determination to forbear from Section 251(c) and 271(c)(2)(B)(ii) unbundling obligations in the *Omaha Order* was based primarily upon an analysis of the retail market in the Omaha MSA.¹² The Arizona Commission believes that this approach should be modified, especially given more recent information that is available from the *GAO Report* and the *McCleodUSA Petition*.¹³ For the unbundling obligations, the Commission should continue to primarily focus upon the extent of competition in the wholesale markets. This will produce a much more accurate result with respect to the Section 251(c) and 271(c)(2)(B)(ii) unbundling obligations.

Relying principally upon retail data to determine the extent of forbearance for Qwest from its wholesale obligations appears to have lead to problems for Qwest's competitors in the wholesale market, as discussed by *McLeodUSA* in its petition for reconsideration. The Arizona Commission believes that in order to reach a conclusion that is fair, the Commission needs to look primarily at the wholesale market dynamics

¹² The Commission stated at para. 59 of the *Omaha Order*: "...[T]he substantial intermodal competition for telecommunications services provided over Cox's own extensive facilities is sufficient to grant Qwest forbearance from the application of its section 251(c)(3) obligations with respect to loops and transport, in light of the continued application in the Omaha MSA of other statutory and regulatory provisions designed to promote the development of competitive markets for telecommunications services and the actual competition these regulations have facilitated.

which do not appear to have been affected to any significant degree by increased competition in the retail market from Cox.

Since, Qwest seeks relief from its loop and transport unbundling obligations under Sections 251(c) and 271(c)(2)(B)(ii), the relevant market should be the loop and transport wholesale markets by wire center or zip code in Qwest's service area in the Phoenix MSA.

2. Further separation of the business market is appropriate

The Arizona Commission's initial review of data submitted to it strongly suggests that analysis of Qwest's forbearance petition should be more granular than an evaluation of the Mass Market and Enterprise Market segments. Once again, the Arizona Commission believes that a Mass Market definition that includes Small Business is not appropriate for the Phoenix MSA. The small business market is distinct enough from the residential market in the Phoenix MSA that it should be considered separate and apart from the residential market. The Arizona Commission believes that significant differences in competition exist in the residential and small business components of mass market. For example, in the residential market, local exchange voice and broadband access competition exists primarily between Cox and Qwest.

3. Analysis on a zip code basis is most appropriate

The Commission has determined that information on a wire center basis is appropriate for determining whether the impairment standard is met under Section 251(c). The Commission also used information on a wire center basis for determining the extent of forbearance of the 251(c) and 271(c)(2)(B)(ii) requirements in the *Omaha Order*. The Arizona Commission believes that this same type of granular analysis should be used for determining whether forbearance of Qwest's wholesale obligations in Arizona is appropriate.

The Arizona Commission is collecting data at both the zip code level and wire center level and will make this information available to the Bureau for its consideration.

This level of detailed analysis should insure that the competitive goals of the Act are met and the criteria for any grant of forbearance are in fact met and at the appropriate level. Analysis on a zip code basis may produce the best results, however, because in some instances Cox and CLECs are not providing services throughout an entire wire center. Because of the impact forbearance may have on telecommunications markets in Arizona, the Commission should conduct its analysis at the most granular level possible to achieve the fairest outcome for all carriers.

The Arizona Commission has collected considerable data on the wholesale unbundled loop and transport markets in Arizona. It has collected this data both as part of the *TRRO* proceeding now underway at the Arizona Commission and most recently in its *State Generic Competition Docket*¹⁴. After a more thorough analysis is done, the Arizona Commission will present this information along with more detailed conclusions in its Reply Comments in this Docket.

a. Loops – extent of alternative suppliers and the extent to which Qwest maintains market power

At this time, the Arizona Commission's high level review of the initial data does not support Qwest's request for forbearance from the unbundled loop requirements of Sections 251(c) and 271(c)(2)(B)(ii) nor does it appear to be in the public interest. CLECs, other than Cox, which have expressed their opinions regarding forbearance to the Arizona Commission serve largely business customers which have end-office switches and limited facilities of their own to reach end-user customers. However, there are Carriers, such as Covad, which rely on Qwest loops to provide DSL service to both business and residential customers in Arizona. Even Cox is dependent to some extent upon Qwest for the sub-loop element in the Phoenix MSA to provide service to MDUs.

¹⁴In the Matter of Generic Investigation of Competition in Arizona Telecom Markets, Docket No. T-000001-04-0749.

CLECs appear to have the necessary brand recognition to compete with Qwest but continue to be dependent on Qwest in many cases for Unbundled Network Element ("UNE") loops to reach customers. The available information suggests that no CLECs, other than Cox, have fully independent networks that would compete on a par with Qwest if forbearance were granted. The Arizona Commission will present more information regarding Cox's use of Qwest's sub-loops to provide service to MDU's in its Reply Comments.

Service provider alternatives for small business are not as limited as those available for residential customers. CLECs are actively competing for this market segment. However, much of this competition is dependent upon the availability of UNE loops for last mile access to the customer. The Arizona Commission believes that it is still too early to restrict the availability of UNE loops under Section 251(c) to this market segment and that a migration to market pricing would be detrimental to the state of competition and the benefits received by small business customers.

The discussion regarding the small business market is also pertinent to medium and large business customers. Further, the competitive alternatives available to medium and large business customers are more extensive than those available to small business.

Due to the size and needs of larger business customers, however, competition is further enhanced with service offerings from fiber providers and fixed wireless service providers. The pervasiveness of wireless WiFi and 3G data networks is increasing and some types of businesses are highly dependent upon their use. Also, it appears that these businesses, as well as wireless service providers, are making increasing use of fixed wireless for primary and backup facilities at DS1 or higher levels in lieu of wireline circuits. However, there is limited information available at this time to suggest how this is impacting the wholesale markets in Arizona. In addition, Qwest has provided limited information in its petition on the impact of these types of alternatives upon wholesale facility availability in Arizona.

For some larger customers, CLECs provide fiber connections from their networks directly to the customer and are, therefore, not dependent upon Qwest facilities for access. While there are many similarities between the types of competitive alternatives available to medium and large segments, the Arizona Commission believes further analysis of the data may indicate that due to differences in the scope of coverage by service providers, different treatment for these markets segments may be appropriate.

b. Transport – Extent of Alternative Providers and the extent to which Qwest possesses market power

The Arizona Commission anticipates presenting a more detailed analysis of the data it has collected at the state level relating to the wholesale transport market in its Reply Comments. The Arizona Commission has considerable data to review regarding the transport market, from both its own pending *TRRO* proceeding and its *State Generic Competition Docket*.

4. Reliance upon the *TRRO* results would weigh heavily against forbearance of Qwest's Section 251(c) and 271 obligations in most wire centers at this time.

In the *TRRO*, the Commission revised the list of network elements that must be provided as UNEs. As the Commission noted in its *Omaha Order*, it made impairment determinations in part by drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets. In making such inferences for high-capacity loops and transport, the Commission adopted a wire-center-based analysis that used the number of access lines and fiber collocations in a wire center as proxies to determine impairment for high-capacity loop and dedicated transport UNEs.¹⁵

The *TRRO* has not been fully implemented in Arizona yet. Since the Commission released its *TRRO Order*, there have been a number of disputed issues involving the

¹⁵ *Omaha Order* at p. 5.

Order as between Qwest and certain CLECs in Arizona. The CLECs¹⁶ and Qwest recently submitted a Settlement Agreement to the Arizona Commission on the issues in dispute. The Arizona Commission Staff is in the process of reviewing the Settlement Agreement and filing testimony. A hearing has been scheduled by the Arizona Commission on the Settlement Agreement. Once the proceeding is concluded, an initial list of Non-Impaired Wire Centers¹⁷ consistent with the Commission's *TRRO*¹⁸ will be designated.

The Arizona Commission notes that the *TRRO* already provides effective mechanisms for Qwest to seek additional Non-Impaired Wire Center designations. The *TRRO* process utilizes fact-based criteria and provides for the lifting of Section 251(c) unbundling requirements as competitive alternatives evolve. Upon approval, the designation of Non-Impaired Wire Centers by the Arizona Commission will provide the relief sought by Qwest in the wholesale markets without imposing competitive restraints on the CLECs in areas where competition still needs to be fostered.

The Arizona Commission's initial observation is that the Public Interest is best served by a potential outcome in this Forbearance proceeding that does not represent a dramatic departure from the *TRRO* proceeding. In the *TRRO* proceeding, the Commission utilized collocation and access line information at the wire center level while in its *Omaha Order* the Commission relied heavily on market coverage information by the dominant cable provider, Cox.

The *TRRO* criteria directly addresses the competitive presence and impact of the CLECs in Qwest's wire centers. However, the Forbearance criteria used in the *Omaha Order* places considerable emphasis on the competitive presence and impact from only

¹⁶ Covad Communications Company, Mountain Telecommunications, Inc, Eschelon Telecom of Arizona, Inc., McLeodUSA Telecommunications Services, Inc. and XO Communications Services, Inc.

¹⁷ Application by Joint CLECs re *TRRO* & Commission approval of Non-Impaired Wire Center List; T-03632A-06-0091; T-03267A-06-0091; T-04302A-06-0091; T-03406A-06-0091; T-03432A-06-0091 & T-01051B-06-0091.

¹⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290, Order on Remand, (rel. February 4, 2005) ("*TRRO*").

facilities-based competitors with their independent networks, in this case, Cox. Logically, the data analysis for the *TRRO* and forbearance should arrive at similar conclusions, with regard to Qwest's unbundling obligations under Section 251(c). The customer markets served by the corresponding CLECs and Cox are dramatically different. The CLECs utilizing portions of Qwest's network in Arizona largely serve the Small, Medium and Large business markets. Cox, on the other hand, largely serves the Residential market¹⁹.

The Arizona Commission will have Phoenix MSA data analysis ready for its Reply Comments filing on October 1, 2007 and urges the Commission to reconsider the consequences of granting forbearance of Section 251(c) unbundling obligations in wire centers which are impaired under the *TRRO* criteria. The costs of Qwest's implementing unbundling in Phoenix do not outweigh the benefits to CLECs that are currently dependent upon Qwest UNEs to provide service.

5. Application of the Section 10 Criteria to the Unbundling Requirements in the Wholesale Market in Arizona

The Arizona Commission's high level review of the initial data as it pertains to Section 10 criteria does not support Qwest's request for relief from loop or transport unbundling obligations in many wirecenters in the Phoenix MSA. However we intend to comment more fully upon this in the Reply Comment stage of this proceeding.

IV. Post Omaha Events Strongly Suggest that the Actual Effect of Forbearance in the Omaha MSA Needs Be Analyzed Before New Grants of Forbearance are Made

A. Forbearance produced unexpected results and significant price increases in some affected Omaha markets

In the *Omaha Order*, the Commission decided to forbear from loop and transport unbundling obligations of Qwest in nine of the 24 wire centers in the Omaha MSA based

¹⁹ However, forbearance of Section 251 unbundling obligations is likely to adversely impact the few remaining CLECs, other than Cox, that serve the residential market.

on competition from Cox. In Omaha, the Commission found that the costs of the unbundling obligations that Qwest faced outweighed the benefits. The Commission also found that eliminating dominant carrier regulations that apply to interstate switched access services is consistent with the public interest where vigorous local competition has emerged.

By granting partial forbearance in Omaha, the Commission was under the assumption that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions. The Commission was also optimistic that Qwest would not inhibit wholesale access to its DS0, DS1, and DS3 facilities. However, what has actually happened in the Omaha MSA is much different.

According to the McLeodUSA Omaha Modification²⁰ Petition, CLECs trying to compete in the nine wire centers in the Omaha MSA have experienced wholesale monthly price increases from Qwest in the range of 30% or more for DS0 stand alone loops. A minimum increase of 86% for DS1 access loops and a 360% increase in associated non-recurring charges for installing DS1 access loops have also been realized by the CLECs. While the cost to install a UNE DS1 loop and cross connect in Nebraska is \$136.15; that same loop costs \$626.50 to install in one of the nine Omaha wire centers. The monthly recurring charge ("MRC") for a UNE DS1 in Zone 1 increases from \$76.42 to a special access rate of \$182.22 in that same Omaha wire center. Even at the discounted special access rates, if term and volume commitments are met, the lowest discounted MRC in the affected Omaha wire centers is \$145.95. This is a 91% increase over the monthly UNE DS1 rate. Based on the current state of competition in the nine Omaha MSA wire centers, the ability of CLECs to continue to effectively compete in the Omaha market is questionable.

²⁰ See, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Doc. No. 04-223, July 23, 2007 ("Modification Petition").

B. The McCleodUSA petition should be thoroughly reviewed and resolved before further grants of forbearance

The Modification Petition filed by McCleodUSA, should be considered in this proceeding. Since forbearance in Omaha was granted, McCleodUSA has experienced dramatic price increases in wholesale facilities from Qwest. According to McCleodUSA, the recurring and non-recurring pricing is at non-negotiable terms and conditions. McCleodUSA and presumably other CLECs, are severely disadvantaged without an alternative supplier of network elements. Since the nine affected wire centers in the Omaha MSA contain the majority of McCleodUSA's business customers, any current and new revenue opportunities are affected.

The key participants in the Phoenix market are the same as those in the Omaha market. Therefore, the effects of forbearance in the Omaha market should be analyzed before forbearance is granted in Arizona as well the other markets addressed by Qwest petitions. Price increases in the wholesale market will likely occur, forcing competitors to leave both the wholesale and retail markets, resulting in fewer choices to consumers.

C. The Recent GAO Report Raises Additional Concerns with the degree of Forbearance Requested by Qwest in its Petition.

The recent *GAO Report* had several findings of significance to this proceeding. In the 16 major metropolitan areas the GAO examined, available data suggest that facilities-based competitive alternatives for dedicated access are not widely available. Available data suggest that incumbents' list prices and average revenues for dedicated access services have decreased since 2001, due to regulation and contract discounts. However, in areas where the Commission granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues tend to be higher than or the same as list prices and average revenues in areas still under some Commission price regulations.

The Arizona Commission believes that if effective special access competition existed, the GAO would have found that pricing had, in fact, decreased where the Commission had granted full pricing flexibility.

V. Conclusion

The Arizona Commission appreciates the opportunity to participate in this important proceeding. The Arizona Commission's initial observations are that the FCC should modify its forbearance analysis given post-Omaha information that has come to light. The Arizona Commission recommends initially that the FCC perform its analysis on a more granular basis and that it focus more on underlying CLEC wholesale market data, rather than Cox's penetration in a particular wire center, in deciding to grant forbearance of the Section 251(c) and Section 271(c)(2)(B) requirements. The Arizona Commission intends to complete its analysis of the extensive data it has collected and submit further comments in the reply round containing more specific findings and recommendations with respect to Section 10 of the 1996 Act.

RESPECTFULLY SUBMITTED this 31st day of August, 2007

/s/ Maureen A. Scott

Christopher C. Kempley, Chief Counsel
Maureen A. Scott, Senior Staff Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402