

Moreover, Qwest seeks to portray Cox as a facilities-based competitor in the entire Phoenix MSA. This is false, because Cox is not franchised to provide cable services in the entire Phoenix MSA, nor does it provide telephone service throughout the entire MSA. Qwest's burden is to show in which of its wire centers Cox has deployed extensive facilities. Qwest's failure to provide this information is peculiar because it purports to rely on an online coverage map published by Cox to illustrate its facilities deployment in the Phoenix area.<sup>67</sup> Qwest easily could have determined from that map which wire centers overlap with Cox's cable television service area and which do not.<sup>68</sup> Qwest's failure to take even that preliminary step (let alone its failure to correlate physical coverage with population coverage as required by the Omaha Order) renders the information it did provide incomplete and insufficient to justify forbearance.

**F. Qwest Makes No Effort to Justify Its Individual Forbearance Requests, and Cannot Justify a Request for Forbearance from Its Inside Wire Subloop Unbundling Obligations.**

Qwest's reliance on the presence of competition in the Phoenix MSA and its purported loss of market share does not begin to address whether the rules currently in place still are needed to ensure the development of competition. Qwest does not even discuss the competitive basis for the Section 251 rules it seeks to eliminate, let alone show how existing competition weakens those bases.<sup>69</sup>

Most importantly for facilities-based carriers like Cox, Qwest has entirely failed to justify its request for relief from its obligation to offer unbundled inside wire subloops in multi-tenant

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<sup>67</sup> See Bingham and Teitzel Declaration at 14 & n.34.

<sup>68</sup> While Qwest should have performed the comparison described above, Cox notes that the actual map used by Qwest depicts areas where Cox provides video service, not where Cox provides telephone service, and shows general coverage, not specific service areas. In fact, the map was produced by Cox's advertising sales division.

<sup>69</sup> Moreover, Qwest never explains the competitive basis for the CEI and ONA requirements or why that basis has disappeared with Qwest's supposed diminution in market share. Both those requirements were imposed due to the enormous advantage conferred by Qwest's ubiquitous network. Qwest's network is still ubiquitous and it still is impossible to succeed in the Phoenix MSA without interconnecting with Qwest. Yet Qwest offers no explanation for how carriers will continue to receive the benefits of the CEI and ONA requirements if they are removed from Qwest.

environments (MTEs). Qwest lists Section 51.319(b), which includes the inside wire subloop unbundling requirement, as one of the rules for which it seeks forbearance, but never explains why removing this obligation would be consistent with the Section 10 forbearance criteria.<sup>70</sup> The Phoenix Petition thus provides no basis for granting Qwest's request for relief from its unbundled inside wire subloop obligations.

As the Commission has recognized, access to inside wire subloops is critical to the ability of facilities-based carriers like Cox to serve customers in MTEs.<sup>71</sup> Indeed, in the *Anchorage Forbearance Order*, the Commission recognized the importance of maintaining competitive LEC access to inside wire subloops and NIDs, specifically exempting such access from the loop unbundling relief it granted to ACS.<sup>72</sup> The Commission noted ACS's failure to demonstrate that competitive LECs can effectively compete for MTE customers without access to inside wire subloops and NIDs in those buildings.<sup>73</sup> Maintaining competitive LEC access to MTEs therefore requires that the Commission follow the same approach it used in the *Anchorage Forbearance Order* by denying Qwest's request for forbearance from its inside wire subloop unbundling responsibilities.

The Commission has affirmed repeatedly that competitive LEC market entry into MTEs is impaired on a nationwide basis without access to inside wire subloops.<sup>74</sup> The Commission recently reaffirmed the importance of ensuring competitive LEC access to inside wire subloops. In the *Inside Wire Declaratory Ruling*, the Commission granted a petition filed by Cox to ensure

<sup>70</sup> Phoenix Petition at 3; 47 C.F.R. § 51.319(b).

<sup>71</sup> See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3793 (2000) ("2000 UNE Remand Order").

<sup>72</sup> *Anchorage Forbearance Order*, 22 FCC Rcd at 1972-73.

<sup>73</sup> See *id.* The Commission distinguished this outcome from the result in the *Omaha Forbearance Order*, which apparently included inside wire subloop unbundling in the relief granted to Qwest. See *id.* at n.78; see also *Omaha Forbearance Order*, 20 FCC Rcd 19443 n.149. Regardless of the outcome in Omaha, where the inside wire subloop issue was not discussed or raised in the record, the appropriate approach in this proceeding is to ensure continued competitive access to inside wire subloops.

<sup>74</sup> *Triennial UNE Order*, 18 FCC Rcd 16978.

that state law does not interfere with competitive LEC direct access to incumbent LECs' unbundled inside wire subloops.<sup>75</sup> The Commission acted to "remove both economic and operational barriers to infrastructure investment in the communications market" and to ensure that "[n]ew entrants . . . [are] not foreclosed from competing for consumers in multi-unit buildings based on regulatory technicalities or costly and inefficient industry practices."<sup>76</sup> By seeking forbearance from its inside wire subloop obligations, Qwest is simply trying to erect new barriers to competition.

Access to inside wire subloops is important in the Phoenix MSA because a large proportion of potential customers live and work in apartments and on office campuses. Cox makes extensive use of inside wire subloops to reach MTE customers. Without access to these facilities, Cox's ability to serve as many as [confidential \*\*\*\*] of its current telephone subscribers in the MSA would be impaired significantly.

Cox already has faced resistance from Qwest in its use of inside wire subloops in Phoenix. Qwest has made unsubstantiated charges that Cox technicians are routinely damaging Qwest facilities when gaining access to connect new Cox customers. Audits have demonstrated that Qwest's claims are substantially without basis, but Qwest continues to press these claims in an effort to convince regulatory authorities that Cox's competitive efforts in MTEs should be saddled with burdensome and costly procedures and review. Thus, even under the current rules, Qwest is seeking to thwart competition. The Commission cannot, therefore, afford to further relax Qwest's network opening obligations in MTEs. Forbearance from inside wire subloop obligations likely would foreclose further competition in MTEs, contrary to the Commission's oft-expressed policies.

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<sup>75</sup> Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection Act of 1992: Cable Home Run Wiring; Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier's Inside Wire Subloop, CS Docket No. 95-184; MM Docket No. 92-260; WC Docket No. 01-338, FCC 07-111 (released June 8, 2007).

<sup>76</sup> *Id.* at ¶ 3.

In this case, as in Anchorage, the issue is clear cut. Qwest has provided no evidence that competitive LECs have any alternative to using incumbent LEC inside wire subloops in MTEs. In addition, Qwest has provided no evidence that competitive LECs have made significant gains in capturing MTE customers without using Qwest's inside wire subloops. Absent specific, individual, market-based information showing vigorous competitive LEC entry into MTEs using their own inside wiring facilities, the Commission should resist granting any incumbent forbearance relief for inside wire subloops. Qwest has provided no such evidence in the Phoenix Petition, and its request for relief from this obligation should be denied.

**IV. THE COMMISSION SHOULD GRANT QWEST RELIEF FROM DOMINANT CARRIER STATUS ONLY UNDER LONGSTANDING NON-DOMINANCE PRECEDENT.**

Cox does not object to Qwest's request that it be treated as a non-dominant carrier for the purposes of federal regulation in the provision of its mass-market services in Phoenix.<sup>77</sup> Under relevant Commission precedent, Qwest's showing regarding its generally declining retail market share and competition from facilities based-providers like Cox likely would preclude a finding that Qwest continues to exercise the kind of market power the Commission had in mind when it established the dominance/non-dominance distinction in the Competitive Carrier proceeding.<sup>78</sup> The Commission, however, should not allow Qwest to obtain non-dominant carrier status through the back door by forbearing from dominant carrier regulations as Qwest seeks.<sup>79</sup>

<sup>77</sup> Qwest seeks treatment as a non-dominant carrier through forbearance requests that cover the range of dominant carrier regulation. Phoenix Petition at 3.

<sup>78</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d (1980); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981); *Second Further Notice of Proposed Rulemaking*, FCC 82-187, 47 Fed. Reg. 17,308 (1982); *Second Report and Order*, 91 FCC 2d 59 (1982); *Order on Reconsideration*, 93 FCC 2d 54 (1983); *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983), *vacated*, *AT&T v. FCC*, 978 F2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S Ct 3020 (1993); *Fourth Further Notice of Proposed Rulemaking*, 96 FCC 2d 1191 (1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F2d 1186 (D.C. Cir. 1985).

<sup>79</sup> The Commission granted Qwest limited forbearance from some dominant carrier regulation of its mass-market services in the *Omaha Forbearance Order*, applying a forbearance analysis that

Instead, the Commission should require Qwest to request a declaratory ruling that it is a non-dominant carrier for mass-market services in the Phoenix market and to make the showings necessary to demonstrate that it does not, in fact, continue to exercise market power in the geographic and product markets included in the Phoenix Petition.<sup>80</sup>

**V. THE COMMISSION SHOULD IMPOSE REASONABLE CONDITIONS ON ANY RELIEF GRANTED TO QWEST, AS IN OMAHA AND ANCHORAGE.**

If the Commission ultimately determines that forbearance from some or all of the incumbent LEC and dominant carrier regulations at issue in this proceeding, it should impose conditions similar to those it imposed on the incumbent LEC in the Omaha and Anchorage orders. The Phoenix Petition does not acknowledge or commit to any of the competitive protections built into those orders, so in many respects the relief it seeks is much broader than granted in other cases.

For instance, in Omaha the Commission conditioned forbearance from loop and transport unbundling on Qwest's agreement to provide competitive LECs a six-month period to transition from providing service using UNEs to alternative arrangements.<sup>81</sup> The Commission also conditioned forbearance from enforcing a number of dominant carrier regulations on Qwest's agreement to be governed by the tariffing and other service rules applicable to non-dominant carriers.<sup>82</sup> Similarly, in the *Anchorage Forbearance Order*, the Commission also adopted comprehensive conditions designed to guarantee the ongoing availability of UNE loops and transport through commercially negotiated agreements.<sup>83</sup> To encourage negotiation of forward-

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was "informed by the Commission's traditional market power analysis." 20 FCC Rcd at 19425. The more extensive relief from dominant carrier regulation sought by Qwest in this case warrants the closer attention to the market power question provided by the Commission's traditional dominance/non-dominance analysis.

<sup>80</sup> See, e.g., *Comsat Corporation, Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 14083 (1998); *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC 3271 (1995).

<sup>81</sup> See *Omaha Forbearance Order*, 20 FCC Rcd at 19453.

<sup>82</sup> See *id.* at 19429, 19432, 19434, 19435, 19436, 19437 n.123, 19438.

<sup>83</sup> See *Anchorage Forbearance Order*, 22 FCC Rcd at 1983-88.

looking commercial agreements, the Commission established the terms and conditions ACS offers in Fairbanks as the governing terms during the negotiation process.<sup>84</sup> This concrete condition provides regulatory relief while ensuring a fair negotiation process, and reduces the chances that incumbent LECs will fail to negotiate commercial agreements in good faith.

Should the Commission grant forbearance relief in this case, it should impose a similar condition. The post-forbearance Omaha market, where no such conditions were imposed, has been plagued by problems.<sup>85</sup> Indeed, recently McLeodUSA, a local competitive LEC, filed a petition seeking revocation of the relief the Commission granted due to Qwest's failure to negotiate commercial terms for formerly unbundled network elements.<sup>86</sup> Qwest seeks to portray the transition from regulation to deregulation in Omaha as seamless and claims it has continued to make its services available to carriers on fair and nondiscriminatory terms.<sup>87</sup> McLeodUSA's petition tells another story. Whatever the facts in that dispute, the delay and possible end to new facilities deployment in Omaha by a large facilities-based competitor cannot possibly be the forbearance result the Commission is seeking.

To avoid a similar post-forbearance result in this case, the Commission should impose conditions to safeguard existing competition and ensure that regulation of Qwest is not reduced to a level that harms consumers. At the very least, the Commission should confirm that the same pro-competitive conditions it placed on unbundling relief in the *Omaha Forbearance Order* and

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<sup>84</sup> *See id.* at 1984.

<sup>85</sup> Letter from Chris MacFarland, Group Vice President – Chief Technology Officer, McLeodUSA, to Marlene H. Dortch, WC Docket No. 04-223, dated December 15, 2006 (“the forbearance granted by the FCC in the Omaha market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in our network facilities in that market. Barring relief from the appellate court in the appeal of the Omaha Forbearance Order, McLeodUSA will either sell or cease its operations in the Omaha market, despite its enormous investment in its own network facilities”).

<sup>86</sup> *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed July 23, 2007 (seeking revocation of forbearance relief granted in Omaha); *see also* Pleading Cycle Established for Comments on McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the *Qwest Omaha Order*, Public Notice, DA 07-3467 (released July 30, 2007).

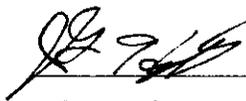
<sup>87</sup> Phoenix Petition at 4.

the *Anchorage Forbearance Order* will apply to any relief granted for Phoenix. Moreover, as the Commission and the parties analyze the Phoenix market, the Commission should consider other conditions that may be appropriate to the particular characteristics present there.

## VI. CONCLUSION

Qwest has not provided the Commission with sufficient evidence to grant it the forbearance from incumbent LEC regulations sought by the Phoenix Petition. For that and the other reasons described herein, Cox requests that the Commission resolve this proceeding consistent with these comments.

Respectfully submitted,  
COX COMMUNICATIONS, INC.



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**CERTIFICATE OF SERVICE**

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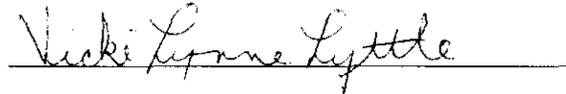
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