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

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Denver, Colorado Metropolitan Statistical Area	))))	WC Docket No. 07-97
In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Minneapolis- St. Paul Metropolitan Statistical Area	))))	WC Docket No. 07-97
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REPLY COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL

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Date: September 28, 2007

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I. INTRODUCTION

The New Jersey Division of Rate Counsel ("Rate Counsel") hereby submits its reply comments in response to the initial comments filed in response to the various Petitions asking for forbearance with regard to certain provisions of the Federal Telecommunications Act of 1996. Based upon the initial comments, Rate Counsel submits that the Federal Communications Commission ("FCC") should impose a complete when filed rule and dismiss these Petitions.

Numerous Competitive Local Exchange Carriers ("CLECs") have identified the lack of current, complete and accurate information that permeates Qwest's filings and the complete and total lack of empirical data and support to want finding that the requested relief is warranted or appropriate. Qwest should be directed to refile its Petitions on a wire center basis for mass markets and on a building by building basis for enterprise markets with all necessary empirical support and data to support its claims of compliance with Section 160(c) of the Act. Qwest should also be directed to file empirical data and support for each relevant product market within the mass and enterprise markets. By way of example, for the mass market, there are at least three product markets and they are local, long distance and bundles (local and long distance). Qwest should be directed file empirical data and support that shows last mile alternatives and a vibrant and viable wholesale market. The current filings are simply overbroad in terms of the relief sought and inconsistent with the criteria used and applied by the FCC in both the Omaha and ACS forbearance proceedings. These proceedings are contested matters and fundamental due process requires more than the scatter gun approach taken by Qwest as evidenced by asking for forbearance on the basis of statistical metropolitan areas. The FCC should not continue to permit the filing of overly broad Petitions, with the narrowing of those Petitions through numerous *ex parte* submissions during the 12 month period (extendable to 15 months) afforded for consideration of such Petitions. If a Petition asks for MSA relief and the facts contained in the filing do not show a *prima facie* case for MSA relief, the Petition should be dismissed. The record shows that Qwest's MSA relief requested simply cannot be granted as filed for the MSAs. The FCC has simply declined to grant relief on a MSA basis in these types of forbearance proceedings. As noted in the

comments of the Colorado Office of the Consumer Counsel, the FCC recently rejected a similar Forbearance Petition filed by Core Communications, Inc., because Core's allegations that market competition would help protect consumers was based on conjecture rather than on any concrete analysis of the potential impact of forbearance on consumers.[1] Qwest has failed to satisfy each of the three mandatory statutory prongs required for forbearance under §160(a)(1), (a)(2), (a)(3) and §160(b).[2] In essence, Qwest's Petition failed to demonstrate that continued regulatory oversight and enforcement is not necessary to for the protection of consumers or that a grant of forbearance would further promote competition among telecommunications service providers and is the public's interest. As a result, the FCC should direct dismissal with instructions as to what are the minimum requirements that must be met for filing such Petitions in the future.

If the FCC continues with the proceeding, Rate Counsel asks that the FCC supply to the parties all of its analyses related to market power, market concentration (including HHIs), supply and demand elasticity as to relevant product and geographic markets, the supply and demand elasticity of whether a service is a like or substitute service so that parties can have a meaningful opportunity to review and comment on the data relied upon and used in making the determinations of whether the statutory criteria are met. At a minimum, these analyses should be provided at least three months in advance of any

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[1] / Comments of the Colorado Consumer Counsel ("Colorado Consumer Counsel"), filed *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, at* p. 5, dated August 31, 2007, citing to *In the Matter of Petition of Core Communications, Inc., for Forbearance,* WC Docket 06-100, Memorandum Opinion and Order released on July 26, 2007.

[2] / 47 U.S.C. §§160(a)1-3 and (b).

decision on the merits. Rate Counsel also requests that Qwest be directed to supply all studies and analyses that it relies upon in support of its Petitions to the parties. In addition, Rate Counsel asks that if the FCC considers the imposition of conditions is necessary to protect the public interest, if any relief is granted, the FCC should identify the tentative conclusions on relief to be granted and tentative conditions under consideration and provide an opportunity for parties to comment on and recommend changes, and modifications to the tentative conditions, or recommendations on the imposition of additional conditions based upon the record. Fundamental due process is denied, if parties do not have the opportunity to address whether conditions under consideration are appropriate and adequate to remedy the perceived harms to the public interest.

Rate Counsel also submits that a hearing is required to resolve disputed matters raised by the comments. The Petitions under consideration involve a sole company and its claims that the requirements of Section 10 of the Act have been met. The grant of these Petitions will affect other individuals adversely, including competitive local exchange carriers, state commissions and the individuals that purchase services within the MSAs. In addition, the nature of the findings required are adjudicated facts which further support the need for a hearing under the applicable provisions of the Administrative Procedure Act.[3] The essence of a Section 10 proceeding is an adjudication of facts necessary to show that the criteria of the law are met.[4] A formal adjudication is also compelled to the extent constitutional infirmities are raised that goes to the very ability of

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[3]/ See 5 U.S.C. §§ 551 *et. seq*.

[4]/ See *Londoner v. Denver*, 210 U.S. 373 (1908).

the FCC to exercise its forbearance authority.[5]

Rate Counsel also submits that the requisite findings required under Section 10 of the Act can not be made at this time due to the lack of decisions in various FCC proceedings now pending.[6] The issues raised in these proceedings affect the application of the statutory criteria and whether forbearance is in the public interest. Until the intercarrier compensation and special access proceeding are resolved, serious market issues exists that affect the analysis and determinations of whether the markets are sufficiently competitive to warrant exercise of the forbearance.[7] Similarly, until the separation freeze is lifted and the cost are properly allocated between intrastate and interstate jurisdictions to account for the numerous regulatory changes that have occurred, the necessary economic and market analyses necessary to ensure cross subsidies are not present and joint and common cost are properly allocated consistent with the requirements of Section 254(k) of the Act and other regulatory requirements,

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5/ At the very least, the issues raised in a Section 10 proceeding implicate Section 555 of the APA and even in that context, finding to all issues raised must be made.

6/ As noted in Rate Counsel's initial comments, there are also unresolved issues related to the failure of states to reform the intrastate access rates (which affects competitors ability to compete),and what is the appropriate regulatory classification of over the top VoIP and facility based VoIP that directly impact and affect whether the pubic interest is served and whether consumers are protected and whether sufficient competition is present.

7/ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of the Ratepayer Advocate, June 13, 2005; Reply Comments of the New Jersey Division of the Ratepayer Advocate, July 29, 2005; and *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of Rate Counsel, August 8, 2007, Reply Comments of the New Jersey Division of Rate Counsel, August 15, 2007.

cannot be made.[8] Determinations as to the competitiveness of the markets and whether there exists market failures cannot be made in a vacuum and require review and reassessment of whether charges, practices and classifications are just and reasonable. As discussed below, the record shows that the Petitions should be denied.

II. SUMMARY

If the FCC declines to dismiss the Petitions for the reasons discussed above and proceeds to consider the merits, Rate Counsel urges the Commission to deny all four Petitions due to the Petitioner's failure to meet the standards of proof set forth in Section 10 of the Telecommunications Act of 1996, which is required before the Commission can exercise its forbearance authority.

The forbearance under Section 10 is only allowed where the enforcement of the regulation or section of the Act at issue is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, not necessary for the protection of consumers, and is in furtherance of the public interest.[9] Rate Counsel submits that Qwest has failed to demonstrate that each element required for forbearance has been met. If the Petitions are granted, consumers will be exposed to an unregulated duopoly without necessary safeguards to ensure that rates, terms and conditions are just, fair, and reasonable; consumers will have no

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[8]/ *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the New Jersey Division of Rate Counsel filed on October 24, 2006, December 6, 2006, January 3, 2007, February 1, 2007, March 19, 2007 and April 12, 2007; See *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, FCC CC Docket No. 80-286, Initial Comments of The National Association of State Utility Consumer Advocates, The New Jersey Division of Rate Counsel, and The Maine Office of the Public Advocate, August 22, 2006.

[9]/ 47 U.S.C. § 160(a).

protections to ensure that cross subsidization is not occurring, and consumers will be denied the promise of the Act, more choice, technological innovation and lower prices.

The grant of the Petitions will jettison the goals of the Act and foreclose the possibility of new entrants to enter the marketplace. The Petitions call for the complete elimination of unbundling of loops and transport under Sections 251 and 271. If granted, new entrants will be left with only the option of competing through the deployment of their own facilities. There has been no showing that any new entrant can economically compete by facility-based deployment. With such evidence, there is no basis for meeting the criteria required for granting forbearance in the first instance. As correctly noted in comments filed UNE-P is no longer available to constrain Qwest's ability to increase rates, if UNE-L is not available by the approval of this Petition, then, the bulk of the price constraining lines will be eliminated.[10] CLECs would then have to rely on Qwest's month-to-month special access services to reach most end-user customer locations at a much higher cost. In fact, ARMIS data demonstrates that no competition for special access services currently exists. The data reveals Qwest's persistent and escalating supracompetitive earnings on its interstate special access services, which has permitted Qwest to earn a rate of return for these services into the triple-digit range, with a realized rate of return on interstate special access of 76.84% in year 2004, 109.42% in year 2005

[10] / Comments of the Public Counsel Section of the Washington State Attorney General's Office, and The Washington Electronic Business and Telecommunications Coalition In Opposition to the Qwest Petition for Forbearance (Washington State Public Counsel & WEBTC") filed *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97*, at pp. 6-7, dated August 31, 2007.

and 132.21% in year 2006.[11] The only alternative would be Qwest's Regional Commitment Plan ("RCP"), which rates are 22% lower than the month-to month rates but remain significantly higher (91% to 11% higher) than the UNE rates (for the nine wire centers)[12] and requires CLECs to enter into a four year term and purchase at least 90 percent of all DS1s and DS3s it buys from Qwest throughout Qwest's 14-state service territory.[13] Qwest's supracompetitive profits for the past several years along with these practices illustrate that Qwest exercises significant market power over special access services, and that CLECs already confront formidable barriers to entry, effectively foreclosing them from creating a serious challenge to Qwest's *de facto* monopoly. Because Qwest is not subject to any price regulation for its special access services within the four MSAs for which forbearance is being sought, a grant of forbearance will serve only to enhance and facilitate Qwest's ability to engage in anticompetitive practices forcing additional competitors out of the market. A grant of these Petitions would remove the only constraining effect left over Qwest's retail dedicated and switched services exposing CLECs and their customers to increased rates over which market forces will not remedy since Qwest will effectively have unchecked and absolute monopoly market power.

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[11] / See FCC, ARMIS, Report 43-04, Access Report: Table I Separations and Access Data, YE 1999-2006, as referenced in Attachment A, Declaration of Lee L. Selwyn on behalf of the AD HOC Telecommunications Users Committee, p. 23 and Table 4 on p. 24, annexed to the Comments of the AD HOC Telecommunications Users Committee, dated August 31, 2007.

[12] / Comptel's Opposition to Qwest's Petitions For Forbearance, *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No,. 07-97, dated August 31, 2007

[13] / *See also,* Comments of the Washington State Public Counsel & WEBTC, dated august 31, 2007, at p.8, citing to footnote 13.

Notwithstanding the fact that each of these forbearance Petitions are without merit and should be denied by the Commission based on the reasons discussed above, Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

Each Petition is without merit and should be denied. Each Petition lacks empirical and evidentiary support and offers mere conclusions in support of the Petition.

III. THE PETITIONS SHOULD BE DENIED.

The four Petitions for the most part repeat and offer mere conclusions without record support as to why each of the criteria for granting forbearance is satisfied. Rate Counsel incorporates by reference the comments and replies filed in opposition to the grant of Verizon's Petition and relies upon them as further support as to why the current Petitions fail to satisfy Section 10 of the Act.[14]

In addition, Rate Counsel notes that Commissioner Copps recent dissent in approval of the transfer of control of Adelphia's cable operations to Comcast Corporation and Time Warner Inc., fully justifies why the grant of these Petitions are not in the public

[14]/ See In the Matter of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160 (c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440.

interest. Broadband is monopolized by RBOCs and large cable companies.[15] Commissioner Copps concluded that:

> We all know the future of communications is broadband. I am worried that this decision tightens the grip that cable companies share with telephone companies over our nation's broadband access. FCC data show **that these two industries control some 98 percent of the broadband market**. Despite this, the majority's Order goes on at length about the supposedly competitive broadband market. Indeed, the competitive picture the majority spins is at odds with too many other reports. A few weeks ago, the Congressional Research Service characterized the broadband market as a "cable and telephone duopoly." Just last week, the International Telecommunications Union (ITU) released its Digital Opportunity Index. It's a more nuanced metric than the broadband penetration statistics the ITU employed to peg the United States at 16th in the world in broadband penetration this past year. On this new assessment of digital opportunity, your country and mine is ranked 21st. Right after . . . Estonia. If we want to continue to lay claim to the United States as the Land of Opportunity, we'd better find a way to make this country the Land of Digital Opportunity. Placing more control in a handful of entrenched broadband providers may not be the best way to go about it. (emphasis added)
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> I also am disappointed that this Order gives such short shrift to network neutrality. It has been our practice to condition recent mergers of this scale on enforcement of the four principles of the Internet Policy Statement that the Commission adopted last year. But here we backtrack and are too timid to even apply them in an enforceable fashion to the transaction at hand. More than that, I believe the Commission needs to consider the addition of a fifth principle to its Internet Policy Statement. We are entering a world where big and concentrated broadband providers are searching for new business models and sometimes even suggesting that web sites may have to pay additional charges and new tolls for the traffic they generate. This could change the character of the Internet as we

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[15]/ See **DISSENTING STATEMENT OFCOMMISSIONER MICHAEL J. COPPS** in *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor to Comcast Corporation, Transferee*, Memorandum Opinion and Order (MB Docket No. 05-192).

> know it. To keep our policies current, we need to go beyond the original four principles and commit industry and the FCC to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

No amount of unsupported rhetoric can overcome the facts that grant of these various Petitions will not promote the public interest and protect consumers. Rate Counsel also incorporates by reference its comments filed in *I/M/O Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirement of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112, CC Docket No. 00-175, FCC 03-111, Further Notice of Proposed Rulemaking (2003). ("*FNPRM*"). In particular, even if the FCC were to grant the Petitions-which it should not- Rate Counsel submits that at a minimum, the FCC should continue to impose non-structural safeguards requirements of Section 64.1903[16] should be applied to the RBOCs and to cable companies and continues to be applied to independent LECs and cable companies to provide disincentives to engage in discriminatory behavior.

The protections of Section 64.1903 are necessary to accomplish the goals and objectives of the Act, especially in an ever-shrinking telecommunications market. While the 1996 Act fostered competition, and in turn the prospects of competition fueled economic growth, investment and development, the prospect of a return to monopolistic control can overpower economic investment, development, and enthusiasm, an outcome

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[16]/ Section 64.1903 requires that interexchange carriers affiliated with independent LECs would be regulated as non-dominant provided that the affiliate providing interstate interexchange services: (1) maintain separate books of account, (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms, and conditions. *See Competitive Carrier Fifth Report and Order*, 98 FCC2d at 1198, para. 9.

the FCC must take definitive steps to avoid. Rate Counsel also submits that if any relief were granted, such relief should be considered an exogenous event and cause revisions to rate cap filings at the Federal level for Qwest.[17] It simply not in the public interest to grant the Petitions when important matters such as but not limited to separations, universal service, and intercarrier compensation remain open and unsettled. The current rate cap regime is undermined by the failure of the FCC to reinitialize and adjust rate caps to reflect regulatory changes. To grant these Petitions, when rates remains distorted and to abandon the protections afforded by Title II is simply not in the public interest.[18] Rate Counsel also notes that Qwest's Petitions completely ignore that fact that the services offered by cable companies for the mass market include only the bundled product market. Cable companies do not offer a stand alone local service or a stand alone long distance product to mass market customers. The FCC has identified three relevant product markets for the mass market, the basic local service, long distance, and bundles (local and long distance combined). Since cable companies do not offer services in all relevant product markets, Qwest's Petitions do not meet the criteria for granting forbearance. Likewise, in addressing and discounting the competitive broadband transmission options, that Qwest pointed to in it's Petitions, EarthLink, Inc., ("EarthLink") and New Edge Network, Inc., ("New Edge") noted the Federal Trade Commission's ("FTC's") recent report on Broadband Connectivity and Competition

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[17]/ See *In the Matter of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs Under Section 61.45(d)*, CC Docket No. 95-116, Order (FCC 06-97) (rel. July 10, 2006). Rate Counsel submits that removal of broadband from Title II regulation should trigger a downward adjustment to federal rate caps when all other exogenous events are considered.

[18]/ The Petitions also fail to specifically identify the sections of Title II for which forbearance is requested. This alone is an adequate basis to reject the Petitions. Title II of the Act encompasses 38 areas (sections) which are within the scope of the forbearance requested.

Policy, which stated that "the mere counting of providers using new technologies does not answer the question of whether or not they are effective competitive alternatives to cable and DSL."[19] Moreover, the FCC must address the impact that a grant of forbearance would cause on resale agreements. For example, since the *Wireline Broadband Internet Access Order*[20], ILECs have had more ability to use commercial negotiations to limit or control the extent of resale competition. Even where services were offered under tariff, some RBOCs, set unreasonably high rates for high-speed DSL to protect legacy T1 pricing structures.[21] Commentators such as EarthLink assert that maintaining the availability of UNE based DSL is crucial as it provides both a check on these types of restrictions, and a necessary antidote.[22] Likewise, a grant of forbearance would foreclose the development of UNE loop-based internet video services to compete with cable and fiber-based multichannel video services by creating a higher-speed duopoly and lower-speed monopoly as Qwest would be able to raise the rates of UNEs substantially and affect retail prices charged by UNE looped-based broadband competitors. Thereby Qwest as the monopoly supplier of unbundled loops, would be able to engage in anticompetitive practices by "raising its rivals' cost" of doing business. As noted by commentators, the FCC has recognized that the potential for executing a raising

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[19] / Broadband Connectivity Competition Policy, FTC Staff report, at 104 (June 2007), cited in the comments filed by EarthLink, Inc and New Age Network, Inc., ("EarthLink & New Age") *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* at p. 11-12, dated August 31, 2007.

[20] / *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("Wireline Broadband Internet Access orders").

[21] / *See Comments,* EarthLink and New Edge, at pp. 5-6, dated August 31, 2007.

[22] / *Id.,* at pp. 12-13.

rivals' costs strategy is grounds for a denial of forbearance.[23] The same analysis is applicable to the internet video market, as correctly noted by EarthLink, "a grant of forbearance would effectively foreclose the development of a UNE loop-based Internet video service to compete with cable and fiber-based multichannel video services, and would be contrary to recent FCC policy to enhance the ability of new entrants to provide video services, increase video competition and thereby advance universal broadband access for Americans."[24] While Qwest cited statewide and national data on wireless and VoIP usage, it offered no reliable evidence that consumers in the Denver, Minneapolis, Phoenix or Seattle MSAs rely on interconnected over-the-top VoIP or wireless services as complete substitutes for wireline service, or any other MSA specific data on either over-the-top VoIP or wireless subscribership.[25] In fact, while both residential and enterprise consumers may buy wireless services, statistics demonstrate that these services are purchased "addition to" traditional landline services.[26] Wireless services do not

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[23] / *Id.,* at pp. 24-25, dated August 31, 2007. Citing to, *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access services, and for Forbearance from Title II Regulation of Its Broadband Services, In the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area,* WC Docket No. 06-109, (rel. Aug. 20, 2007). ("Anchorage II") at p. 25, fn 49.

[24] / EarthLink and New Edge Network comments at pp.23-24, citing in part to the comments made by FCC Chairman Martin, *I/M/O/ Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5190 (2006) ("Chairman Martin Statement on Cable Franchise Order").

[25] / As noted by Comptel in its comments at p. 42, and at fn 19. Although Qwest cites to a Telephia study which purports to show wireless substitution rates of 11.3% in Denver, 15.2% in Minneapolis, 13.5% in Phoenix and 13.2% in Seattle, Qwest omits stating that the figures were determined through an online survey of households in the 20 largest cities (as opposed to the MSAs in the country, meaning the numbers are not valid for MSAs for which Qwest seeks forbearance. *See also* http://www.telephia.com/html/documents/TotalCommunications_000.pdf.

[26] / Approximately only 6% of the total US population rely exclusively on wireless phones. See, *Annual Report and Analysis of Competitive Market conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, FCC 06-142, released September 29, 2006, at ¶ 205.

replace and at present are not a substitute for wireline services. Moreover, even assuming, *arguendo,* that wireless service is capable, in theory, of servicing as a complete substitute for mass market wireline service today or in a reasonably short time frame (which it is not), a grant of the Petitions is not in the public interest. As noted by Covad in comments filed in this matter, "even should the Commission find that wireless is a substitute for wireline service for mass market customers (which it should not), Qwest has provided inadequate information to permit the Commission to take wireless competition into account in conducting its Section 251(c)(3) forbearance analysis.[27] Qwest has still failed to meet its burden and has failed to provide concrete data and therefore forbearance from Section 251(c)(3) throughout the MSAs would be contrary to the public interest. As noted by Comptel in its comments, Qwest has demonstrated an unwillingness to negotiate rates, terms and conditions for loops and transport. Therefore, FCC must include in its analysis the extent to which existing competitors use UNE loops and transport to serve their customers and the availability of alternative suppliers of wholesale loops and transport in each of the MSAs that may serve to constrain Qwest's wholesale rates. Without such information, the Commission cannot find that enforcement of Section 251(c)(3) is not necessary to ensure that Qwest's wholesale charges, practices, classifications and regulations are "just, reasonable and not unjustly discriminatory."[28] Qwest has failed to provide evidence that the carriers that currently

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[27] / Initial Comments of Covad Communications Group, Nuvox Communications and XO Communications, LLC, *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* at pp. 35-36, dated August 31, 2007.

[28] / Comments of Comptel in Opposition to Qwest's Petitions for Forbearance, *I/M/O Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) In the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* at p. 31, dated August 31, 2007.

purchase UNE loops and transport from Qwest have alternative sources of supply throughout the four MSAs, and for this additional reason the Petitions should be denied.

IV IF THE FCC IMPOSES CONDITIONS IN ORDER TO GRANT FORBEARANCE, THOSE CONDITIONS MUST BE SUBJECT TO NOTICE AND COMMENT BEFORE THEY CAN BE IMPLEMENTED.

Rate Counsel notes that the FCC in approving ACS of Anchorage, Inc. imposed a number of conditions as necessary to protect consumers.[29] Rate Counsel submits that the unilateral implementation of conditions in forbearance proceedings that are contested matters is a denial of due process and arbitrary, capricious, and agency action lacking a reasoned basis. Rate Counsel submits that all parties should be afforded the opportunity to weight in and propose alternative conditions to the extent such conditions affect whether the statutory criteria for granting forbearance are met, as a matter of law. The unilateral imposition of conditions without opportunity to contest or support is a denial of due process.

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[29]/ See *I/M/O ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, FCC 07-149 (released August 20, 2007)

V. CONCLUSION

The Commission should not grant the Petitions. Ultimately, the grant of any relief would harm ratepayers. Such a result is contrary to the public interest. Therefore, Rate Counsel urges that the FCC deny the Petitions.

Respectfully submitted,

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