Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 07-97
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	)	

REPLY COMMENTS OF EARTHLINK, INC. AND NEW EDGE NETWORK, INC.

INTRODUCTION AND SUMMARY

EarthLink, Inc. ("EarthLink") and its Competitive Local Exchange Carrier ("CLEC") subsidiary, New Edge Network, Inc. ("New Edge"), hereby submit these reply comments opposing the April 27, 2007 Qwest Corporation ("Qwest") petitions for forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.[1]

Reviewing the comments filed in this proceeding reveals striking unanimity – no commenter believes that forbearance is warranted. States, companies, and consumer groups are

[1] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Denver Petition); 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 (filed April 27, 2007) (Qwest Minneapolis-St. Paul Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Phoenix Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Seattle Petition) (collectively, "Qwest Petitions").

all in agreement: the regulations at issue are necessary to ensure just and reasonable rates and needed to protect consumers, while forbearance would retard rather than promote competition, contrary to the public interest. Thirteen million Americans in these four MSAs will be worse off if this petition is granted.

EarthLink focuses here on the comments filed by the states. Every single state that commented, including the State Commissions of Arizona, Colorado and Washington, called for the rejection of the petition, and reaffirmed that access to UNE loops at cost-based rates remains essential to competition. Through prior proceedings, market investigations, and extensive data collections, these states have first-hand knowledge of the local markets impacted by the Qwest petitions, knowledge that should not be ignored by the Federal Communications Commission ("Commission"). Importantly, the states filing comments not only point out that Qwest has failed to show that forbearance is justified, but also provide substantial evidence that forbearance is *unjustified* based on collected data and current market conditions. Moreover, the states' arguments support the basic points that EarthLink made in its first round comments – that forbearance results in, at best, duopoly in most broadband markets, and that even where present, duopoly is not sufficient to protect consumers and the public interest. Given this record, Qwest's petitions for forbearance must be denied.

I. THE STATES AGREE THAT FORBEARANCE WOULD REDUCE COMPETITION, INCREASE PRICES, AND STIFLE INNOVATION FOR MILLIONS OF CONSUMERS.

The states filing comments demonstrate that Qwest has failed to establish that forbearance is warranted – and instead point to state decisions and market evidence demonstrating that forbearance would harm consumers and competition. Indeed, the state filings confirm what EarthLink asserted in its initial opposition filing – that forbearance will condemn

consumers and businesses to, at best, the duopoly provision of services, thereby reducing competition, increasing prices, and stifling innovation.

The Washington Utilities and Transportation Commission ("Washington Commission") urges the Commission to deny Qwest's Seattle Petition, concluding that it "does not provide meaningful data or other sufficient justification to warrant" forbearance and that such action "would impair significantly the prospects for effective competition in the Seattle MSA, particularly in the enterprise market."[2] Objecting to forbearance from section 251(c), the Washington Commission contrasts Qwest's insufficiently granular analysis and relative silence with respect to competitors' reliance on UNEs against Washington Commission precedents, in which the state analyzed market data showing that "competitors rely heavily, and in some cases solely, on the availability of loop and transport UNEs from Qwest to compete, particularly for enterprise customers."[3] So too, the Washington Commission believes that it would be "imprudent and premature" to grant Qwest's requested forbearance from Part 61 pricing regulations on special access services in the Seattle MSA, particularly given the growing concern over the Commission's existing special access regulatory regime.[4] As EarthLink has argued, moreover, the Washington Commission doubts that, absent these regulations, Qwest's wholesale offerings can serve as a regulatory backstop, citing its experience with Qwest's ability to impose contract restrictions in commercial agreements.[5]

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2 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Washington Metropolitan Statistical Area*, "Comments of the Washington Utilities and Transportation Commission," WC Docket No. 07-97 at 15 (filed Aug. 29, 2007) ("Washington UTC Comments").

3 *Id.* at 5.

4 *Id.* at 13.

5 *Id.* at 13-14. *See 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*, "Earthlink, Inc. and New Edge Networks, Inc. Opposition to Qwest Corporation Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas," WC Docket No. 07-97 at 31-35 (filed Aug. 31, 2007) ("Earthlink Opposition").

Sharing the Washington Commission's "grave concerns,"[6] the Washington State Attorney General's Office and Washington Electronic Business and Telecommunications Coalition ("Washington AG's Office") filed joint comments opposing Qwest's petition on the grounds that "the loss of access to unbundled network elements, particularly the loop (UNE-L), would significantly reduce the level of competition in the Seattle MSA."[7] Both sets of comments point to a series of Washington Commission decisions in which the state recognized the availability of cost-based UNE-L as crucial to competitive choice in the state and relied on it when determining the regulatory framework for Qwest services.[8] In particular, the Washington Commission granted Qwest significant regulatory flexibility in the business market precisely because it found that the unbundled copper loops were "price constraining services" that allowed competitive carriers to differentiate their products and operate independently of Qwest's pricing decisions.[9] Thus, unlike resale services, the availability of cost-based UNE-L was credited with "prevent[ing] Qwest from exercising monopoly power."[10]

As the Washington Commission and the Washington AG's Office explain, forbearance will eliminate what the Washington Commission has found to be a necessary competitive check on Qwest.[11] Without UNE-L, CLEC's would be forced to rely on either resale, which does not permit differentiation and cannot constrain Qwest's prices, or special access services "priced far

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6 Washington UTC Comments at 2.

7 *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,* "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 for the Seattle MSA," WC Docket No. 07-97 at 3 (filed Aug. 31, 2007) ("Washington AG Comments").

8 *See* Washington UTC Comments at 5-7; Washington AG Comments at 4-7.

9 Washington AG Comments at 5.

10 *Id.* at 5-6.

11 *Id.* at 5.

in excess of the cost-based UNE rates that the Washington Commission has established."[12] The "final result would be that Qwest would be able to charge unjust and unreasonable rates" thereby "undercut[ting] the primary basis" for Washington's prior decisions on regulatory flexibility, and failing to "promote the public interest."[13] As EarthLink made clear in its opposition to Qwest, this is equally true of the broadband markets – the availability of UNE-L constrains prices in the high and low speed fixed Internet access markets, the bundled broadband and voice market, and the Internet video market.[14]

The Colorado Public Utilities Commission ("Colorado Commission") agrees that forbearance should not be granted, finding that "Qwest's Petition fails on all counts."[15] In particular, the Colorado Commission points out that Qwest's "broad-brush approach" does not provide the "granular data" required for the needed market analysis.[16] Indeed, the Colorado Commission provides its own data showing that in only 3 of the 43 Qwest wire centers in the Denver MSA do CLECs have a market share of 20 percent or more and that in nearly half of the wire centers Qwest is the only facilities based provider.[17] Based on the Colorado Commission's market analysis, "the likely outcome of forbearance is duopoly," and, in most instances, a duopoly "virtually indistinguishable from a monopoly."[18] In short, the Colorado Commission's evidence makes clear what Qwest's insufficient showing has obfuscated: while there may be

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12 *Id.* at 7.

13 *Id.* at 6-7.

14 EarthLink Opposition at 11-31.

15 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area*, "Comments of the Colorado Public Utilities Commission," WC Docket No. 07-97 at 33 (filed Aug. 31, 2007) ("COPUC Comments").

16 *Id.* at 19.

17 *Id.* at 29-30.

18 *Id.* at 30.

some competitive activity in a few isolated wire centers, the "Denver MSA lacks competition in an overall sense."[19]

More generally, the Colorado Commission explains that the local exchange market is characterized by high economic barriers to ubiquitous facilities-based entry – the type of entry necessary for an effectively competitive market. Because Qwest is the monopoly supplier of unbundled copper loops, forbearance would afford Qwest "the full panoply of anticompetitive strategies and tactics that will allow Qwest to raise the cost of entry for its retail competitors . . . an outcome that is completely at odds with the stated purpose of the 1996 Act."[20] Accordingly, the Colorado Commission cautions that "premature forbearance will permanently arrest the development of an effectively competitive market in the local exchanges in the Denver MSA since such action will eliminate alternative sources of supply. This would allow Qwest to solidify its domination through a number of means characteristic of a tight duopoly or oligopoly."[21] Forbearance, therefore, "cannot have the effect of increasing competition, but rather may in fact threaten the existence of many of the competitive alternatives available to business customers served by CLECs in the current environment."[22]

The Colorado Commission's analysis mirrors EarthLink's opposition. As EarthLink demonstrated, if the Commission grants forbearance, the same fate will befall the facilities-based broadband Internet access markets. Forbearance from cost-based UNE-L, will result in, at best, the duopoly provision of broadband Internet access services with higher prices and fewer choices for consumers.

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19 *Id.* at 29.

20 *Id.* at 15.

21 *Id.* at 16.

22 *Id.* at 32.

The Colorado Office of Consumer Council ("Colorado OCC") similarly concludes that the "granting of this Petition will not be in the public interest and will not protect consumers."[23] Critical that the Qwest Petition "lacks evidence" and "relies upon broad and conclusory statements,"[24] the Colorado OCC counters with its own data of Qwest's dominance in the Denver MSA. Echoing EarthLink's opposition, the Colorado OCC explains that merely counting competitors cannot substitute for an analysis of market competition. But, even if counting competitors were an adequate measure of competition in the market, the Colorado OCC points out that the number of competitive carriers has been dwindling. In particular, the Colorado OCC notes that Comcast recently filed an application to discontinue the provision of circuit switched residential service.[25] Helping to fill the void in the record, the Colorado OCC also reports survey results demonstrating that Qwest maintains "a near-monopolistic wireline market share" in the Denver area with over 85 percent of the residential market.[26]

Joining its sister states, the Arizona Corporation Commission ("Arizona") agrees that the Qwest Petitions are inadequate. The "initial data does not support Qwest's request for forbearance from the unbundled loop requirements . . . nor does it appear to be in the public interest."[27] Arizona reports that it is currently gathering and analyzing data on competitive conditions in the Phoenix MSA, but in the meantime, it calls on the Commission to perform a

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23 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area*, "Comments of the Colorado Office of Consumer Counsel," WC Docket No. 07-97 at 10 (filed Aug.31, 2007) ("OCC Comments").

24 *Id.* at 5.

25 *Id.* at 2 & Exhibit 1. Comcast will continue offering consumers its VoIP service.

26 *Id.* at 34.

27 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Seattle, Washington and Phoenix, Arizona Metropolitan Statistical Areas*, "Initial Comments of the Arizona Corporation Commission," WC Docket No. 07-97 at 15 (filed Aug. 31, 2007) ("Arizona Comments").

more granular market analysis, to evaluate the effect of forbearance in the Omaha MSA, and to focus on the effects of forbearance on the CLEC wholesale market.

First, Arizona adds its voice to the criticism in the record opposing Qwest's MSA-wide approach. As Arizona explains, the Commission can and should achieve a "more accurate result" by "examining the data on both a zip code and wire center basis."[28] Second, Arizona argues that, in light of the evidence presented by the McLeodUSA petition,[29] the Commission should not grant forbearance in Phoenix or elsewhere until it has analyzed the effects of forbearance in the Omaha market. EarthLink could not agree more. Indeed, the Commission should reassess the approach taken by the plurality in the *Omaha Forbearance Order* and refrain from relying on predictive judgments like those now proven to be false in Omaha.[30] Finally, Arizona confirms that forbearance in the Phoenix MSA will lead to a market "dominated by two providers – an ILEC (Qwest) and a Cable Provider (Cox)."[31] As Arizona explains, the residential market is already a duopoly and, if forbearance is granted, that high degree of market concentration will be replicated in the business market. Given that CLEC competition is dependent on the availability of cost-based UNE-L, Arizona concludes "that it is still too early to restrict the availability of UNE loops under Section 251(c)" and that "a migration to market pricing would be detrimental to the state of competition."[32] Again, this corroborates EarthLink's opposition, which demonstrated how forbearance would similarly confine the

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28 *Id.* at 7.

29 Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007) ("McLeod Petition").

30 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* Comments of Earthlink, Inc. and New Edge Network, Inc., on McLeod Petition, WC Docket No. 04-223 at 1-4 (filed Aug. 29, 2007).

31 Arizona Comments at 12.

32 *Id.* at 16.

broadband Internet access markets to, at best, a duopoly. Loop unbundling at cost-based rates for facilities-based entrants remains necessary to protect residential and business consumers, safeguard the public interest, and ensure that the market can deliver broadband services on terms and conditions that are affordable, just and reasonable.

CONCLUSION

The Commission should heed the views of the affected states that granting these forbearance petitions will harm consumers and competition in each of these states. In order to forbear, the Commission must affirmatively find that the regulations are not necessary for the protection of consumers, and not necessary to ensure just and reasonable rates. The overwhelming evidence here is that forbearance will not "promote competitive market conditions," but will instead affirmatively harm competition and choice for thirteen million Americans. Qwest's petitions must be denied.

Respectfully submitted,

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