

EX PARTE OR LATE FILED

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VIA COURIER

EX PARTE

FILED/ACCEPTED

MAY 15 2008

Federal Communications Commission
Office of the Secretary

May 15, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition 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*

Dear Ms. Dortch:

Qwest Corporation hereby submits the attached *ex parte* and request for confidential treatment (pursuant to the First Protective Order) of certain confidential information included in the *ex parte*, in the above-captioned proceeding.

One copy of the non-redacted version is being submitted; and two copies of the redacted version are being submitted. For both the redacted and non-redacted versions, an extra copy is provided to be stamped and returned to the courier. Both the redacted and non-redacted versions of the *ex parte* are being served on Staff of the Commission's Wireline Competition Bureau as indicated below. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please contact me using the information above.

Sincerely,

/s/ Melissa E. Newman

Attachments

No. of Copies rec'd 0+2
List ABCDE

Ms. Marlene H. Dortch
May 15, 2008

Page 2 of 2

cc: (via e-mail)

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Daphne E. Butler
Corporate Counsel

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VIA COURIER

EX PARTE

May 15, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition 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*

Dear Ms. Dortch:

Qwest Corporation (“Qwest”) hereby requests confidential treatment of certain information included in the associated *ex parte*. The confidential information includes: market shares of the small and medium enterprise markets in the Omaha market.

The confidential information is submitted pursuant to the June 1, 2007 First Protective Order (22 FCC Rcd 10129, DA 07-2292) in WC Docket No. 07-97. As required by the First Protective Order, the confidential information (that is, the non-redacted version) is marked **CONFIDENTIAL – SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 07-97 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION.** Pursuant to the First Protective Order, Qwest requests that the non-redacted version of this *ex parte* (containing confidential information) be withheld from public inspection.

Qwest considers this confidential information as being competitively-sensitive in nature. This type of information is “not routinely available for public inspection” pursuant to both Federal Communications Commission (“Commission”) rules 47 C.F.R. §§ 0.457(d) and 0.459 (as Qwest explained and for which it provided legal justification in its Request for Confidential Treatment and Confidentiality Justification submitted with its four Petitions for Forbearance on April 27, 2007).

Ms. Marlene H. Dortch
May 15, 2008

Page 2 of 2

Qwest is simultaneously submitting, under separate covers, a non-redacted and a redacted version of the associated *ex parte*. The redacted version of the *ex parte* is marked "**REDACTED - FOR PUBLIC INSPECTION**". Both the redacted and non-redacted versions of the *ex parte* are the same except that in the non-confidential version the confidential information has been omitted. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please call me on 303-383-6653.

Sincerely,

/s/ Daphne E. Butler

Attachment

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EX PARTE

May 15, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition 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*

Dear Ms. Dortch:

Qwest Corporation ("Qwest") responds to several letters and *ex partes* filed with the Federal Communications Commission ("Commission") by competitive local exchange carriers ("CLECs") regarding this matter: (1) the letter from Covad, *et al.* ("Covad CLECs") dated April 24, 2008,¹ (2) the letter from a slightly different group of carriers, also led by Covad (also referred to as "Covad CLECs"), dated April 23, 2008 regarding CLEC fiber connections to commercial buildings,² (3) the April 22, 2008 *ex parte* from the Covad CLECs that includes

¹ See Letter from Brad Mutschelknaus, Genevieve Morelli and Thomas Cohen, Counsel to Covad Communications Group, NuVox Communications, and XO Communications, LLC and Francie McComb and Brad E. Lerner, Cavalier Telephone to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-97, dated Apr. 24, 2008 ("Covad CLECs Apr. 24, 2008 *ex parte*").

² See Letter from Brad E. Mutschelknaus and Genevieve Morelli, Counsel for Covad Communications Company, NuVox Communications, XO Communications, LLC, Thomas Jones and Nirali Patel, Counsel for Cbeyond Inc., Integra Telecom, Inc., One Communications Corp., and Time Warner Telecom Inc., John T. Nakahata and Stephanie Weiner, Counsel for EarthLink, Inc. and New Edge Networks, Inc., and Andrew D. Lipman, Russell M. Blau, Patrick J. Donovan and Philip J. Macres, Counsel for Cavalier Telephone Corporation, PAETEC, and U.S. Link, Inc. d/b/a TDS Metrocom to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-97, dated Apr. 23, 2008.

white papers regarding the treatment of wireless data in the forbearance analysis,³ and (4) the May 7, 2008 *ex parte* from Cbeyond that also relies upon Mikkelsen to argue that wireless voice is in a different product market than mobile wireless service.⁴ The Covad CLECs recommend several unwarranted changes in the Commission's forbearance analysis. The Commission should reject Covad CLECs' proposed changes.

I. AN AREA OF AGREEMENT

Unlikely as it may seem, there is an area where Qwest and the Covad CLECs agree. First, Qwest and the Covad CLECs agree that the Commission should rely upon cable companies' data about the number of homes that each company passes in each metropolitan statistical area ("MSA").⁵ Similarly, Qwest and the Covad CLECs agree that the Commission should rely upon cable companies' line counts.⁶ Qwest has submitted its best estimates based upon the information available to it. Qwest will continue to urge the Commission to ask the cable companies for this information, as the Commission did in the *Omaha*⁷ and *Anchorage Orders*.⁸ Finally, the Covad CLECs, Cbeyond and Qwest agree that there is some substitution of

³ See Letter from Brad E. Mutschelknaus and Genevieve Morelli, Counsel for Covad Communications Company, NuVox, and XO Communications, LLC, Thomas Jones and Nirali Patel, Counsel for Cbeyond Inc., Integra Telecom, Inc., One Communications Corp., and Time Warner Telecom Inc., John T. Nakahata and Stephanie Weiner, Counsel for EarthLink, Inc. and New Edge Networks, Inc., Andrew D. Lipman, Russell M. Blau, Patrick J. Donovan and Philip J. Macres, Counsel for Cavalier Telephone Corporation, PAETEC, and U.S. Link, Inc., d/b/a TDS Metrocom to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-97, dated Apr. 22, 2008, and its attachment "Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of Wireline Competition," by Kent W. Mikkelsen, dated Apr. 21, 2008 ("Mikkelsen").

⁴ See Letter from Thomas Jones and Nirali Patel, Counsel for Cbeyond Inc., Integra Telecom, Inc., One Communications Corp., and Time Warner Telecom Inc. to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-97, dated May 6, 2008 ("Cbeyond May 7, 2008 *ex parte*").

⁵ Covad CLECs Apr. 24, 2008 *ex parte* at 25.

⁶ *Id.* at 13-14.

⁷ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁸ *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958,

wireless for wireline service, and that the National Health Interview Survey (“NHIS”) is a reasonable source for such “cut-the-cord” estimates.⁹

II. MCLEOD’S TROUBLES IN OMAHA DO NOT STEM FROM THE OMAHA FORBEARANCE ORDER

The Commission should reject CLECs’ (including the Covad CLECs’) opportunistic use of McLeod’s long-standing problems in Omaha. CLECs claim that the *Omaha Forbearance Order* has resulted in a Qwest/Cox duopoly, leaving customers, especially business customers, little choice but to return to Qwest.¹⁰ According to CLECs, the *Omaha Forbearance Order* has harmed the wholesale market.¹¹ Finally, CLECs claim that McLeod is leaving the Omaha MSA because of the *Omaha Forbearance Order*.¹²

CLECs are just plain wrong when they claim that the *Omaha Forbearance Order* has resulted in a Qwest/Cox duopoly, and that customers have no choice but to return to Qwest.¹³ As detailed in Qwest’s Qwest Dec. 18, 2007 *ex parte*, the *Omaha Forbearance Order* has not

1977 ¶ 31 (2007) (“*Anchorage Forbearance Order*”), *appeals dismissed for lack of standing, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076 and 07-71222 (9th Cir. 2007).

⁹ Cbeyond May 7, 2008 *ex parte* at 3; Covad CLECs Apr. 24, 2008 *ex parte* at 16; *also see, e.g.*, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Seattle, Washington Metropolitan Statistical Area attached to Qwest’s Apr. 27, 2007 Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) at 35. A similar Declaration is attached to each of the other three forbearance petitions for Denver, Minneapolis-St. Paul and Phoenix as well.

¹⁰ Covad CLECs Apr. 24, 2008 *ex parte* at 6-7. *And see*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed July 23, 2007 at 7 (“McLeodUSA Petition”).

¹¹ Covad CLECs Apr. 24, 2008 *ex parte* at 7.

¹² *See, e.g.*, Letter from John T. Nakahata, Counsel to EarthLink, Inc. to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 07-97, dated Apr. 15, 2008 at 3-4 (“McLeod’s anticipated departure from the market due to the lack of loops and transport at cost-based rates”) (“EarthLink Apr. 15, 2008 *ex parte*”). *And see*, The Minnesota Association of Community Telecommunications Administrators *ex parte*, WC Docket No. 07-97, dated Mar. 21, 2008 at 4. *Also see*, McLeodUSA Petition at ii.

¹³ *See* Letter from Ms. Melissa Newman and Ms. Daphne Butler, Qwest, to Ms. Marlene H. Dortch, Federal Communications Commission, WC Docket No. 04-223, dated Dec. 18, 2007 at 12 (“Qwest Dec. 18, 2007 *ex parte*”).

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stemmed Qwest's business losses in Omaha. As of the third quarter of 2007 [BEGIN
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[END CONFIDENTIAL].¹⁴ Moreover, the *Omaha Forbearance Order* has not even resulted in higher prices for most CLECs. Due to their refusal to sign amendments to their interconnection agreements reflecting the *Omaha Forbearance Order*, the Covad CLECs and McLeod still purchase circuits at UNE rates throughout the Omaha MSA, even in the nine wire centers in which Qwest was granted forbearance.

Just like their claims about Omaha's retail market, CLECs' claims about the Omaha wholesale market are incorrect. The Covad CLECs are incorrect when they state that "Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeod USA and other competitive carriers."¹⁵ The Covad CLECs seem not to have read McLeod's filings on the subject. In its filings McLeod admits that Cox is competing with Qwest to provide wholesale services to other carriers at prices that McLeod, at least, did not find objectionable.¹⁶ Moreover, consistent with the Commission's predictive judgment, Qwest has introduced a replacement service for DS0 UNE loops in the nine Omaha wire centers where forbearance was granted. This product is priced at just and reasonable levels, and is available via commercial agreement. As to DS1 and DS3 loops and transport, Qwest offers CLECs special access, just as it does in wire centers declared non-impaired under the *TRRO*.

Finally, the Commission should reject the CLECs' arguments that McLeod's plans to exit the Omaha market stem from the *Omaha Forbearance Order*.¹⁷ McLeod's statements to investors undermine this theory. In September 2007, McLeod's Royce Holland told investors that Omaha is a small market where McLeod had not sold much in two years. That is, Holland told investors that McLeod's troubles in Omaha started prior to the December 2005 release of the Commission's *Omaha Forbearance Order*, much less Qwest's implementation of the *Order*. Holland said:

But once again, Omaha is a very small market, one that we really haven't sold in, in two years. It's not one -- we've got too many other opportunities that are way underutilized with some of our large networks everywhere to put salespeople and putting them in Omaha didn't make a lot of sense.¹⁸

¹⁴ *Id.* at 13.

¹⁵ Covad CLECs Apr. 24, 2008 *ex parte* at 7 n.27.

¹⁶ See McLeod Reply to Opposition, WC Docket No. 04-223, dated Sept. 13, 2007 at ii, 3.

¹⁷ See, e.g., Covad CLECs Apr. 24, 2008 *ex parte* at 8.

¹⁸ <http://www.secinfo.com/d14D5a.u66q2.htm>, visited May 12, 2008.

Thus, McLeod's problems in Omaha do not stem from forbearance. Rather, McLeod made a business decision to put salespeople elsewhere, perhaps in places where it does not face [BEGIN
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III. THE COMMISSION SHOULD REJECT COVAD CLECS' PROPOSED CHANGES TO THE COMMISSION'S FORBEARANCE ANALYSIS

The Covad CLECs propose multiple changes to the Commission's unbundling forbearance analysis. First, disregarding the Commission's analysis in the Omaha and Anchorage petitions, they propose that the Commission create a formal market definition using the DOJ-FTC Merger Guidelines as part of its unbundling forbearance analysis. Second, the Covad CLECs propose that in each wire center there should be "at least two facilities-based competitors offering substitutable services,"¹⁹ rather than the Commission's previous standard of looking at one facilities-based competitor, *i.e.*, the cable provider.²⁰ Second, the Covad CLECs claim there "is no reason for the Commission not to perform market share calculations for the enterprise market in each wire center and to use that information as threshold criteria for deciding whether forbearance is warranted."²¹ Finally, Covad CLECs ask the Commission to either eliminate cut-the-cord wireless from its analysis or to greatly modify its use in a number of ways.²² The Commission should reject the Covad CLECs' proposed changes.

A. The Commission Should Reject Covad CLECs' Request That It Define The Product Market Using The DOJ-FTC Merger Guidelines, Or Using Any Other Tool, When Analyzing Unbundling

First, the Commission should reject the Covad CLECs' argument that a product market definition is necessary when analyzing whether to forbear from unbundling. The Commission did not perform such an analysis in the *Omaha* and *Anchorage* forbearance decisions. In those proceedings the Commission explicitly declined to define relevant markets in connection with the unbundling analysis.²³ In the *Omaha Order*, the Commission referred at various points to the retail market, the wholesale market, the local market, the business market and the residential

¹⁹ Covad CLECs Apr. 24, 2008 *ex parte* at 5.

²⁰ See *Omaha Forbearance Order*, 20 FCC Rcd at 19450-53 ¶¶ 69-70.

²¹ Covad CLECs Apr. 24, 2008 *ex parte* at 19. Some CLECs argue that the Commission should not change its approach. *EarthLink* Apr. 15, 2008 *ex parte* at 3-4.

²² Covad CLECs Apr. 24, 2008 *ex parte* at 15-18.

²³ The market at issue for the issue of forbearance from dominant carrier regulation is exchange access services mass market and enterprise market. *Omaha Forbearance Order*, 20 FCC Rcd at 19427-28 ¶ 22 and n.64.

market, in a broader evaluation of competition, and as a reflection of how parties submitted data, rather than as part of a traditional market power review.²⁴ In the *Anchorage Order*, the Commission continued to structure its forbearance analysis without a formal market definition. Rejecting the parties' request that it define the market, the Commission found that a formal market definition would be impracticable and would encourage disputes over whether a particular customer is a residential or business customer. The Commission found that any differences in the cable company's deployment and capabilities were taken into account in the geographic scope of relief, *i.e.*, the 75 percent coverage analysis.²⁵

B. Covad CLECs Have Not Provided A Valid Rationale For Requiring A Third Facilities-Based Competitor In Each Wire Center

The Covad CLECs have provided no valid rationale for requiring a third facilities-based competitor in each wire center. They point to Omaha, and the supposed development of a Qwest/Cox duopoly.²⁶ As stated above, and detailed in Qwest's Dec. 18, 2007 *ex parte*, a Qwest/Cox duopoly has not developed. Nor has there been "tacit collusion between Qwest and the competitor."²⁷ The Covad CLECs ask the Commission to change its standard without even pointing to any evidence of the conditions that they say would warrant such a change: a Qwest/cable duopoly or tacit collusion. Thus, the Commission need not look for an additional facilities-based competitor in each wire center. In any event, the four MSAs benefit from numerous facilities-based competitors, including cable-based providers, fixed and mobile wireless providers, fiber-based providers, and Voice over Internet Protocol providers.

C. The Commission Should Reject The Proposal To Examine Market Share By Wire Center, And Should Also Reject The GeoResults Data That The Covad CLECs Offer

Qwest opposes the Covad CLECs' proposal to evaluate market share in each wire center before deciding whether to forbear. Not even other CLECs agree that such a deviation is desirable.²⁸ EarthLink rejects such analysis, albeit for fear that CLECs may have a high market share in certain wire centers.²⁹

²⁴ *Anchorage Forbearance Order*, 22 FCC Rcd at 1966 n.41.

²⁵ *Id.* at 1966-67 ¶ 13.

²⁶ Covad CLECs Apr. 24, 2008 *ex parte* at 7.

²⁷ *Id.* at 5-6.

²⁸ *See, e.g.*, EarthLink Apr. 15, 2008 *ex parte* at 4.

²⁹ *Id.*

The Covad CLECs submitted an *ex parte* on April 23, 2008, consisting of spreadsheets purporting to show the number of commercial buildings in the Seattle, Denver, Phoenix and Minneapolis-St. Paul MSAs “served by facilities-based Competitive Local Exchange Carriers” as well as the total customer demand that could potentially be served by such providers. The spreadsheets the Covad CLECs submitted were obtained from GeoResults. Qwest takes issue with the misleading manner in which this data is being presented by the Covad CLECs.

First, and most importantly, the data filed by the Covad CLECs reflects only a subset of the market, since it only reflects buildings that are directly served by CLEC-owned lit fiber facilities.³⁰ The GeoResults data excludes commercial buildings served by dark fiber, traditional copper cable, coaxial cable, fixed wireless broadband services, and other technologies.³¹ Apparently, by the use of the phrase “commercial buildings served by facilities-based Competitive Local Exchange Carriers” in its *ex parte* cover letter introducing the GeoResults data, the Covad CLECs would have the Commission believe the GeoResults data are all-encompassing. At best, the data presented by the Covad CLECs can be viewed to be a subset of the competitive telecommunications market. Given the numerous exclusions, it would be an error for the Commission to view the data as demonstrating that only a tiny fraction of commercial buildings in Qwest’s four largest MSAs are served by non-Qwest facilities.

Second, the data presented by the Covad CLECs ignores any commercial buildings within a reasonable distance, such as 1,000 feet, of a competitive fiber route. In the Brigham/Teitzel Declaration attached to Qwest’s initial petitions for each of the four MSAs, Qwest provided maps displaying the significant amount of competitive fiber now in place. To the extent customer demand dictates installation of a lateral from an existing fiber route to serve a commercial building, CLECs are very capable of doing so. In fact, Royce Holland, McLeodUSA’s CEO, recently provided the following insights in this regard in an interview published in TelephonyOnline, as follows:

‘A lot of our metro fiber is in places like Chicago, Minneapolis, St. Paul, Michigan,’ Holland said. ‘Most of the buildings we have on that fiber are

³⁰ On April 30, 2008, Qwest confirmed directly with GeoResults that the GeoResults data presented by the Covad CLECs represents strictly buildings served by lit fiber facilities owned by CLECs.

³¹ Since the data underlying the GeoResults data is not available for public review, it is not clear whether CLECs that are leasing dark fiber from Qwest at commercial rates are included in the count of “commercial buildings with facilities-based CLECs.” However, since Qwest offers dark fiber on a wholesale basis at commercial rates in each of the four MSAs, and dark fiber will continue to be available on that basis regardless of the outcome of Qwest’s forbearance petitions in this docket, leased dark fiber should be included in any analysis of commercial buildings served by facilities-based CLECs.

collocation centers -- ILEC central offices and carrier hotels. One thing we haven't done is put [a] lot of that fiber in office buildings, because our business has been the small and medium enterprise business. That doesn't mean we couldn't light a lot of buildings throughout the Midwest. That's one of the potential upside advantages of getting together with Paetec. Our fiber can be useful for that. **It's easy enough to get into a manhole and get the fiber into a building.**³² (Emphasis added.)

Third, even though Covad CLECs has access to the non-confidential list of Qwest wire centers in each of the four MSAs, the Covad CLECs chose to file GeoResults data for a number of wire centers that are clearly beyond the scope of this docket. For example, the GeoResults data contained in Covad CLECs' April 23 *ex parte* shows information for a number of wire centers in Everett, Washington -- an area served by Verizon and not by Qwest. Covad CLECs chose to provide data for the Carnation wire center (CLLI CRNTWAXX), a small community northeast of Everett in Verizon's serving territory, showing that no facilities-based CLECs serve commercial buildings there. Inclusion of such data is irrelevant to this proceeding and serves only to artificially expand the list of wire centers showing a low proportion of facilities-based CLEC-served buildings.

Fourth, the Covad CLECs neglect to mention in their filing that alternatives to direct fiber feeds are readily available to serve commercial buildings. For example, Nextlink, which is a subsidiary of XO Communications and a signatory to the April 23 *ex parte* at issue, offers fixed wireless broadband services in each of the four MSAs covered by Qwest's forbearance petitions.³³ Importantly, Nextlink provides such services on a retail basis to its own customers as well as on a wholesale basis to other carriers as direct alternatives to Qwest's wholesale loop and transport services. In its current website, Nextlink states:

Carrier-grade reliability and network reach -- that's what you get when you choose Nextlink™ for your alternative 'last mile' access needs. Nextlink offers compelling alternative access solutions in comparison to the access offerings of the incumbent telephone companies. With access solutions including 10/100 Mbps Ethernet, DS-3 (45 Mbps) and OC-3 (155 Mbps), Nextlink offers carriers not only cost effective broadband wireless alternative access options, but also an additional carrier-grade approach to meeting your own internal networking requirements without resorting to leasing circuits from the local telephone company.

³² http://telephonyonline.com/access/finance/paetec_acquires_mcleodusa_091707/index.html, visited Apr. 30, 2008.

³³ http://www.nextlink.com/spectrum_map.htm, visited Apr. 30, 2008.

In addition, Nextlink helps to facilitate service continuity by enabling physically redundant broadband wireless network links. Timely provisioning and competitive Service Level Agreements (SLAs) complete the package, delivering the network availability and service that both you and your customers demand. Nextlink-economically extending your network reach for a competitive advantage.³⁴

Clearly, fixed wireless services, such as those offered by Nextlink as highlighted above, are readily available for use in extending facilities-based CLECs' reach into commercial buildings that may not currently be served by competitive lit fiber facilities. Neither commercial buildings now served by such fixed wireless services nor commercial buildings that may potentially be served in this manner are reflected in the GeoResults data filed by the Covad CLECs, providing yet another reason why the Covad CLECs' data should not be viewed to be a reliable indicator of the proportion of commercial buildings that can be served by facilities-based competitors.

Finally, since the GeoResults data filed by the Covad CLECs contains only lit fiber data, it excludes any commercial buildings that may be served via coaxial cable facilities owned by providers such as Cox and Comcast. Both Cox and Comcast have clearly stated that they are aggressively pressing into the small business and Enterprise business markets in the commercial space. See, for example, an article entitled "Cable companies intensify enterprise service ambitions; Comcast, Cablevision, Cox, Time Warner and others see multi-billion dollar opportunity," as follows:

For Comcast, it's reportedly \$3 billion to \$5 billion in five to seven years. For Cablevision, it's \$1.5 billion in two years. And for Cox, it's \$1 billion in four years. These are revenue targets cable companies say they can achieve from selling phone, data and other services to corporate customers, large and small. Indeed, cable multisystem operators (MSO) are increasingly investing in and targeting enterprise businesses to broaden their market and take competition with the phone companies beyond the residential market.

It's a quieter story, but the RBOCs certainly know we're there taking business from them,' says Hyman Sukiennik, vice president and general manager of Cox Business Services in Omaha, NE.

Sukiennik says revenue from Cox Business Services is currently growing at 20% per year. That would put 2006 revenue at just under \$500 million and 2010's at just over \$1 billion.

³⁴ http://www.nextlink.com/communications_carriers.htm, visited Apr. 30, 2008.

Cox Business Services has been in the enterprise market for eight years, but has predominantly targeted small and medium-sized businesses. Sukiennik says the company also has large enterprises in its sights and can offer them anything from a single POTS line to an OC-48.³⁵

It is clear that cable providers are now targeting the commercial business sector and are experiencing strong success in doing so. As discussed extensively in the Brigham/Teitzel declarations in this proceeding, Cox is a very significant competitor in the Phoenix MSA and Comcast is a very significant competitor in the Denver, Minneapolis-St. Paul and Seattle MSAs. In its *Omaha Forbearance Order*, the Commission stated:

we grant Qwest's forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to section 251(c)(3) in those portions of its service territory in the Omaha MSA where a facilities-based competitor (Cox) has substantially built out its network.³⁶

The Commission relied on confidential information it obtained directly from Cox regarding the coverage of its network facilities in the Omaha market to determine which wire centers had sufficient coverage by facilities-based telecommunications service providers to warrant forbearance. Now, the Covad CLECs appears to be attempting to have the Commission depart from this precedent and ignore cable-based competition by submitting only fiber-lit building data in its April 23 *ex parte*. The Commission should reject the Covad CLECs' attempt to cloud the record with incomplete data. Instead, Qwest again urges the Commission, as it did in the Omaha Forbearance proceeding, to require facilities-based telecommunications providers, both wireline and wireless, to supply information to the Commission regarding the scope of their networks in the four MSAs at issue. Only then can the Commission gain a more complete view into the actual scope of facilities-based competition in the four MSAs.

**D. The Commission Should Reject The Proposed Modifications
Related To Cut-The-Cord Wireless Data**

The Covad CLECs ask the Commission to either eliminate cut-the cord wireless from its analysis or to greatly modify its use in a number of ways that distort the data and fail any test of reasonableness.³⁷ These proposed changes to the Commission's analysis are more fully described in two separate white papers which challenge the notion that wireless services are substitutes for traditional landline telecommunications services and suggest that wireless services

³⁵ *Cable companies intensify enterprise service ambitions; Comcast, Cablevision, Cox, Time Warner and others see multibillion-dollar opportunity*, Network World, Oct. 25, 2006.

³⁶ *Omaha Forbearance Order*, 20 FCC Rcd at 19417 ¶ 2.

³⁷ Covad CLECs Apr. 24, 2008 *ex parte* at 15-18.

should be excluded, or at a minimum, severely discounted, in the Commission's analysis of telecommunications competition as it considers Qwest's forbearance petitions in this proceeding. The Commission should reject the Covad CLECs' proposals for several reasons.

First, the Covad CLECs and CBeyond imply that the wireless substitution concept is an "either/or" proposition. That is, unless all landline customers view wireless services to be a full substitute for landline service, the Covad CLECs suggest that wireless service has no place in the Commission's review of telecommunications competition. The point the Covad CLECs and CBeyond ignore is that, while every customer may not regard wireless service to be a complete substitute for traditional wireline service, a significant and ever-increasing subset of Qwest's customer base does view wireless service as such. Importantly, the "cut-the-cord" metrics being considered in this docket address households that have already "cut-the-cord" entirely. These data exclude any households that may have removed an additional local exchange line in lieu of wireless service, and do not include customers who view wireless as a substitute for wireline service, but may not yet have cut the cord.³⁸ Thus, the "cut-the-cord" data may understate the percentage of customers who view wireless as a substitute for wireline service. Wireless services are a substitute for many customers, and this substitution is contributing to the overall reduction in ILEC local exchange access lines. Wireless service must be considered to be a factor when determining the overall level of competition in the telecommunications market. The Commission recognized competition from wireless services in its consideration of Verizon's petition for forbearance in its six largest MSAs. In developing telecommunications "share" estimates in its analysis, the Commission stated:

In addition, based on the record here, and consistent with recent precedent, we include cut-the-cord wireless substitution.³⁹

³⁸ As noted below, the NHIS data show increasing numbers of cord cutters each year. This means that a number of last year's wireline customers considered wireless a substitute while they still had wireline service, and ultimately cut the cord. For example, in June 2006, 10.5% of U.S. households had cut the cord. At the end of 2007, enough wireline customers cut the cord to raise the percentage of cord-cutters to 15.8 percent. By definition, a number of wireline customers that had not yet cut the cord in June 2006 must have viewed wireless as a substitute, as many of these customers did cut the cord in the next twelve months, raising the percentage of cord cutters to 15.8 percent -- a trend that shows no signs of abating. There can be little doubt that the percentage of cord cutters will continue to increase. Therefore, many current wireline customers, who may not yet have cut the cord do view wireless as a reasonable substitute for their wireline service.

³⁹ *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293,

In its analysis, the Commission relied upon the most current results from the NHIS that were available at the time, for the period ending December 2006, in its analysis which showed that 12.8% of households had “cut-the-cord” and were relying strictly on wireless services for their telecommunications needs. There is no reason for the Commission to now deviate from use of similar NHIS data as it examines Qwest’s petitions.

Second, the Covad CLECs attempt to show, by providing only 2006 and mid-year 2007 data, that the year-over-year increase in the “cut-the-cord” percentages identified in the study are not significant. However, the Covad CLECs neglect to provide the cord-cutting trends for the last several years as delineated in the most recent NHIS survey:⁴⁰

<u>Survey Period</u>	<u>Wireless-Only Households</u>
January 2004-June 2004	5.0%
July 2004-December 2004	6.1%
January 2005-June 2005	7.3%
July 2005-December 2005	8.4%
January 2006-June 2006	10.5%
July 2006-December 2006	12.8%
January 2007-June 2007	13.6%
July 2007- December 2007	15.8%

Clearly, between 2004 and year-end 2007, the NHIS findings show that the incidence of “cord cutting” has more than tripled and shows no signs of abating. In view of the clear trend, and in view of the fact that it is now nearly six months after the most recent NHIS survey period, it is highly likely that the “cut-the-cord” percentage is now at an even higher level. In light of such data, the Commission should reject the Covad CLECs’ argument, as embodied in the Mikkelsen white paper, that wireless service is not in the relevant market. Mikkelsen argues that demand elasticity for wireline service is very inelastic. In making this argument Mikkelsen relies almost entirely upon papers that were based on data from 2000 to 2001.⁴¹ As Mikkelsen admits, demand elasticity can change over time.⁴² The substitutability of wireless service for wireline service is very dynamic. More and more people are quickly finding that they can give up wireline service in favor of wireless service, as shown in the NHIS cord-cutting data presented above.

21308 n.89 (2007) (“*Verizon 6 MSA Forbearance Order*”), *pet. for rev.* filed Jan. 14, 2008 (D.C. Cir. No. 08-1012).

⁴⁰ Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2007, rel. Dec. 10, 2007, Table 2 (“*NHIS Wireless Substitution Report*”).

⁴¹ Mikkelsen at 4 and 5.

⁴² *Id.* at 6.

Third, while the Covad CLECs concede that the NHIS is a reasonable source for such "cut the cord" estimates, it encourages the Commission to deviate from the method the Commission used in its order regarding Verizon's forbearance petitions in the six MSAs. Remarkably, the Covad CLECs suggest that the Commission should parse the NHIS data to exclude certain categories of adults that it believes may not be representative of the "average adult" in the U.S., ostensibly because the Covad CLECs believe that younger adults "cut-the-cord" at a rate higher than the average for all adults and, by excluding this segment, the average percentage can be driven downward. This is nonsense. There is no basis to selectively exclude certain segments of the adult population from the analysis. The purpose of the NHIS "cut-the-cord" survey -- and the Commission's use of this data in its forbearance analysis is to determine the proportion of households that have decided to rely solely on wireless service. Taking the Covad CLECs' logic to the next step, it could be argued that two other demographic groups -- households classified as "poor" and Hispanic households -- which "cut-the-cord" at a rate significantly higher than the national average, should also be excluded from the NHIS averages since they deviate from what the Covad CLECs believe the "average" adult "cut-the-cord" behavior would be. The Covad CLECs' invitation to the Commission to trim away segments of the adult population from the NHIS findings is simply an inappropriate attempt to manipulate the NHIS results.

Fourth, the Covad CLECs observe that the NHIS "cut-the-cord" estimates are based on a survey methodology that extrapolates survey results, and that such research methods have a range of statistical variance vs. actual customer behavior. The Covad CLECs then encourage the Commission to use the estimate at the lower range of the "95% confidence interval" rather than the reported average. This also represents a clearly inappropriate manipulation of the data, designed solely to arbitrarily reduce the "cut-the-cord" percentage. All surveys have a confidence interval, since they do not survey the entire population. This fact, however, does not justify picking either the high or low end of the confidence interval as the best estimate.

As stated above, the average "cut-the-cord" values reported in the NHIS studies have been steadily increasing for years. Taking all of those data points into consideration, the most appropriate way to view such trends is to compare the averages as reported for each period. It is possible that the reported averages understate actual customer behavior for some periods and overstate it in others. Such is the nature of survey-based research. However, if the Commission were to only utilize the lower bound of the estimate for the most recent period to estimate actual customer behavior, it would ignore the clear trend shown in the NHIS data.

Fifth, the Covad CLECs urge the Commission to geographically parse the NHIS findings on a regional basis, since it observed some variation in the rate of "cord cutting" in different regions across the country. This is a naked attempt to manipulate the data in order to drive down the proportion of cord cutters the Commission may include in its competitive analyses regarding Qwest's forbearance petitions in this docket. However, the Covad CLECs neglect to mention that the NHIS data also show that the incidence of "cord cutting" in "metropolitan" areas is

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significantly greater than it is in “non-metropolitan” areas.⁴³ Since Qwest’s petitions are specific to the four largest metropolitan areas in its service territory, the Covad CLECs could have suggested that the Commission use the NHIS findings regarding metropolitan areas instead of the national average for all areas. However, that would have increased the competitive “share” calculation for these four MSAs and run contrary to the advocacy interests of the Covad CLECs in this docket.

In sum, the Commission should reject the Covad CLECs’ and CBeyond’s attempts to distort the facts in this proceeding and, instead, utilize the national “cut-the-cord” findings of NHIS as they are expressed, and as Qwest used the data in the Appendices to its *ex parte* filings of Feb. 21, 2008, Mar. 5, 2008, Mar. 10, 2008 and Mar. 14, 2008.

IV. CONCLUSION

The Commission should reject the proposed changes to the standard, by rejecting the GeoResults data and fully utilizing the NHIS wireless cut-the-cord data, as it did in the *Verizon 6 MSA Forbearance Order*.

Respectfully submitted,

/s/ Daphne E. Butler

⁴³ *NHIS Wireless Substitution Report*, table 2, page 2.