

**ORIGINAL**



**Qwest**  
1801 California Street, 10<sup>th</sup> Floor  
Denver, Colorado 80202  
Phone 303-383-6671  
Facsimile 303-896-1107

**Harisha Bastiampillai**  
Senior Attorney

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**REDACTED -- FOR PUBLIC INSPECTION**

Via Courier

October 21, 2009

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

**FILED/ACCEPTED**

**OCT 21 2009**

Federal Communications Commission  
Office of the Secretary

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area -- WC Docket No. 09-135*

Dear Ms. Dortch:

Qwest Corporation (Qwest) hereby files its Reply Comments in the above-captioned proceeding. The Reply Comments contain confidential information. Pursuant to paragraph 6 of the July 29, 2009 First Protective Order in WC Docket No. 09-135, 24 FCC Rcd 9503, each page of the non-redacted submission is marked **CONFIDENTIAL -- SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 09-135**. Qwest requests that the non-redacted version of the Reply Comments be withheld from public inspection pursuant to the First Protective Order and Commission rules 47 C.F.R. §§ 0.457 and 0.459. The justification for confidential treatment pursuant to 47 C.F.R. §§ 0.457 and 0.459 (an Appendix to the cover letter associated with its Petition) was filed by Qwest on March 24, 2009.

The Reply Comments contain certain information integrated into the text and Exhibit 2 that are considered confidential; it was not feasible to separate out the confidential and proprietary information, *see* 47 C.F.R. § 0.459(a), without destroying the integrated nature of the information presented in the Reply Comments. Qwest is also filing today under separate cover a redacted version of its Reply Comments. The redacted version is marked "**REDACTED -- FOR PUBLIC INSPECTION**", with the confidential information omitted.

For the non-redacted version of the Reply Comments, Qwest is filing one copy with the Secretary's office; for the redacted version Qwest is filing an original and four copies. For both the redacted and non-redacted versions of this submission, Qwest is providing an extra copy, to be stamped and returned to the courier. In addition, pursuant to paragraph 6 of the First Protective Order, Qwest is providing a searchable electronic copy of the non-redacted version of its Reply Comments to Tim Stelzig ([Tim.Stelzig@fcc.gov](mailto:Tim.Stelzig@fcc.gov)) and Denise Coca

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Ms. Marlene H. Dortch  
October 21, 2009

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(Denise.Coca@fcc.gov). Also, pursuant to the July 29, 2009 Public Notice of its Petition, 24 FCC Rcd 9470, Qwest is also serving a copy of the redacted version of its Reply Comments on the Competition Policy Division of the Wireline Competition Bureau (CPDcopies@fcc.gov) and the FCC's contractor, Best Copy and Printing, Inc. (fcc@bcpiweb.com).

Please contact me at the above contact information or Melissa Newman in Qwest's Federal Relations office (202-429-3120) if you have any questions.

Sincerely,

/s/ Harisha Bastiampillai

Attachments

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Petition of Qwest Corporation for ) WC Docket No. 09-135  
Forbearance Pursuant to 47 U.S.C. § 160(c) )  
in the Phoenix, Arizona Metropolitan )  
Statistical Area )

**REPLY COMMENTS OF QWEST CORPORATION**

Craig J. Brown  
Harisha J. Bastiampillai  
Suite 950  
607 14<sup>th</sup> Street, N.W.  
Washington, DC 20005  
(303) 383-6671  
[Craig.Brown@qwest.com](mailto:Craig.Brown@qwest.com)  
[Harisha.Bastiampillai@qwest.com](mailto:Harisha.Bastiampillai@qwest.com)

*Attorneys for*  
QWEST CORPORATION

October 21, 2009

**REDACTED – FOR PUBLIC INSPECTION**

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## SUMMARY

The concept of forbearance, both in theory and practice, has certainly generated its fair share of controversy. It is hoped that the Commission can see its way through this controversy and recognize that forbearance is a valuable tool and is warranted in the Phoenix area. Under any reasonable forbearance standard the competitive nature of the Phoenix MSA would qualify for forbearance. And while Qwest does not endorse a market share-based standard, Qwest's petition would still meet the standard applied by the Commission in its *Verizon 6 MSA Order* and *Qwest 4 MSA Order*.

Rather than address the competitive data itself, the opponents of the petition raise a myriad of worn arguments as to why various data should not be considered. In short, certain carriers are advocating a stringent standard for forbearance with such a limitation on the data that can be relied on that a petition could never be successful.

The Commission should look beyond these attempts at obfuscation and examine what the data actually indicates, *i.e.*, a MSA in which there is substantial actual competition and potential for continued and rapid competitive growth. The reality is that Qwest's access line losses are accelerating even as the population of the MSA grows. These current and new customers are not disappearing; instead they are migrating to the numerous telecommunications options they have in the market.

Two of those competitive options are the facilities-based cable and wireless providers who are able to leverage their ownership of these facilities to provide services competitive with those Qwest offers and to offer services unique to their business. These providers serve residence and business customers. Cox, in fact, has not been shy about venturing into the business market. It has already established a significant foothold and continues to aggressively

market its services to businesses. In addition, despite the CLEC claims otherwise, Cox is offering a whole slate of viable alternative products on a wholesale basis.

Instead of building their own facilities or pursuing wholesale alternatives with agreements tailored to their needs, CLECs would prefer to remain subscribed to Qwest's network and obtain the use of Qwest facilities at below-market prices. This approach is anathema to the goals of the Act, however, in that it does not promote competition nor does it promote investment or innovation. And it is most certainly not deregulatory.

But perhaps the biggest sleight of hand opponents of the Qwest petition are attempting is to make one of the largest wireless markets in the nation disappear from the competitive analysis. The Phoenix MSA is particularly conducive to the "cut-the-cord" phenomenon, but the impact of the wireless industry stretches far beyond that, as many more customers view wireless as a substitute service. In addition, Qwest has to be responsive not only to Cox and the wireless providers, but also to VoIP providers whose market is growing exponentially in the MSA. This competition along with the competition Qwest faces from the CLECs has a price-constraining impact on Qwest.

Congress provided the Commission a vital deregulatory tool in Section 10 of the Act. The unequivocal deregulatory goals of the Act indicated that Congress intended for the Commission to use this tool when the market conditions were such that regulation was not needed to protect consumers or the public interest. The Phoenix MSA is a classic case of a market to which forbearance should be applied. The Commission should recognize this and grant Qwest's Petition.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Petition of Qwest Corporation for ) WC Docket No. 09-135  
Forbearance Pursuant to 47 U.S.C. § 160(c) )  
in the Phoenix, Arizona Metropolitan )  
Statistical Area )

**REPLY COMMENTS OF QWEST CORPORATION**

Qwest Corporation (Qwest) submits these Reply Comments in regard to the Commission's Public Notice seeking comments and reply comments on the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area.<sup>1</sup>

**I. INTRODUCTION**

Under any reasonable standard, the Commission should grant Qwest's Petition for Forbearance for the Phoenix MSA. The Phoenix MSA demonstrates both thriving actual competition and the potential for continuing rapid development of competition. And while Qwest eschews use of the standard the Commission applied in its *Verizon 6 MSA Order* and *Qwest 4 MSA Order*,<sup>2</sup> Qwest's Petition would meet that standard. The Phoenix MSA is the

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<sup>1</sup> See Public Notice, DA 09-1653, rel. July 29, 2009; Public Notice, DA 09-1836, rel. Aug. 20, 2009 (extending comment cycle). Qwest Phoenix MSA Petition for Forbearance, filed Mar. 16, 2009 (Petition or Phoenix MSA Petition).

<sup>2</sup> *In the Matter of 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*, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008) (*Qwest 4 MSA Order*); *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

quintessential locus of competition in the local telecommunications market featuring wireline, wireless and cable options for all segments of the Phoenix market. The Phoenix MSA is exactly the type of area ripe for forbearance as contemplated in Section 10 of the Act.

Those carriers that oppose the grant of forbearance posit the same litany of tired arguments attempting to distract the Commission from the vibrant state of competition in the market. As Qwest contended in its comments on the *Forbearance Remand Orders*, there are some cases that require forbearance regardless of the Commission's wariness of the forbearance process in general. The Phoenix MSA is one such case.

## **II. QWEST'S PHOENIX DATA WOULD MEET THE MARKET SHARE TEST IN THE QWEST 4 MSA ORDER**

### **A. Qwest Does Not Endorse a Market Share Approach.**

As a threshold matter, Qwest would like to emphasize that it is not a proponent of the use of historical market share and market power analyses, such as the market share test the Commission adopted in its *Verizon 6 MSA* and *Qwest 4 MSA Orders*, as the appropriate forbearance standard. As described in Principle 4 of the Weisman/Tardiff White Paper, a market share test represents a snap-shot view of competition at a point in time, and therefore ignores the dynamic nature of the market.<sup>3</sup> Such a static measure ignores the competitive capacity in the market, and does not reflect the alternatives that may be currently available. In addition, market share is not a proper indicator of market power: As Weisman and Tardiff note:

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(2007) (*Verizon Six MSA Order*), remanded, 570 F.3d 294 June 19, 2009 (D.C. Cir. No. 08-1012).

<sup>3</sup> See, Dennis L. Weisman and Timothy J. Tardiff, "Principles of Competition and Regulation for the Design of Telecommunications Policy," October 2009 ("*Weisman/Tardiff White Paper*") to the Declaration of Dennis L. Weisman and Timothy J. Tardiff In Support of the Reply Comments of Qwest Corporation ("*Weisman/Tardiff Declaration*") attached hereto as Exhibit 1s.

[T]he standard relationship between market share and market power is likely to be particularly misleading in a regulated setting. This is necessarily the case because the various market shares are not the outcome of a market process, but rather the outcome of a regulatory (“command and control”) process.

*Weisman/Tardiff White Paper* ¶ 36. Weisman and Tardiff’s *White Paper* also emphasizes that “should the Commission determine that some market share metric is necessary to inform the record, one based on capacity rather than actual sales is likely to be superior.” *Id.* ¶ 39.

**B. Qwest Does Meet the Market Share Test Utilized by the Commission in the Remanded Orders.**

Despite the fact that Qwest is not generally supportive of the use of a market share test for evaluating forbearance petitions, Qwest nonetheless provided market share data for the Phoenix MSA Petition. Specifically, Qwest performed a market share analysis that complies with the *market share* standard defined by the Commission in the *Verizon 6 MSA Forbearance Order*<sup>4</sup> and in Appendix B to the *Qwest 4 MSA Order*.<sup>5</sup> The results of this market share calculation were included as Confidential Exhibit 14 to the Declaration of Robert H. Brigham. This calculation estimated that Qwest’s residential market share in the Phoenix MSA was

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Qwest has updated this market share calculation based on the most current access line and white pages listing data and the results are delineated in Confidential Exhibit 2 to these comments. This updated “Appendix B” calculation reflects the 25% wireless “cord cutting” percentage from the *Market Strategies* study provided as Exhibit 5 of Qwest’s March 2009

<sup>4</sup> *Verizon 6 MSA Order*, 22 FCC Rcd at 21323, App. B

<sup>5</sup> The Commission stated: “The formulas used to calculate market shares for purposes of this order are set forth in Appendix B.” See *Qwest 4 MSA Order*, 23 FCC Rcd 11740 ¶ 17, n. 64.

<sup>6</sup> Please note that in the original Appendix B calculation included as Exhibit 14 to the declaration of Robert H. Brigham, the quantities of residential listings inadvertently included some listings for facilities-based carrier customers that were not located in the Phoenix MSA. This overstatement has been corrected in Confidential Exhibit 1 described below.

filing, plus updated measures of “Qwest residential resold lines” and “Qwest residential platform service lines (QPP + QLSP lines)” as of August 2009.<sup>7</sup> In its “Appendix B” calculation in the *Qwest 4 MSA Order*, the Commission used the actual number of Cox Communications residential phone lines in the Phoenix MSA as reported to the Commission by Cox. However, in the *Qwest 4 MSA Order*, the Commission also found that “Qwest’s white page listings data, although providing an inexact estimate, are a reasonable proxy for the number of total residential access lines in service.”<sup>8</sup> Since Qwest does not have access to Cox’s confidential access line data, the “Appendix B” calculation in Confidential Exhibit 2 includes the number of residential directory listings for CLEC facilities-based providers, updated as of September, 2009. Consistent with the Commission’s guidance in the *Qwest 4 MSA Order*,<sup>9</sup> Qwest has made no adjustments to the residential listings data. Instead, it is assumed that the number of CLEC facilities-based residential listings equals the number of CLEC facilities-based residential access lines.

Based on these data, the updated “Appendix B” calculation estimate that Qwest’s residential market share in the Phoenix MSA is **\*\*\*BEGIN**  
**CONFIDENTIAL\*\*\*** [REDACTED] **\*\*\*END CONFIDENTIAL\*\*\***. However, Qwest provides this data as an *estimate* of the competitive residential facilities-based residential lines. As noted in Qwest’s initial filing, in order to assure accuracy in the facilities-based access line data, the Commission should request updated telephone line counts from Cox, as it did in the *Qwest 4 MSA* proceeding. The updated number may be substituted into the “Appendix B” calculations in Confidential Exhibit 2.

<sup>7</sup> This data is based on Qwest wholesale billing records for August 31, 2009.

<sup>8</sup> *Qwest 4 MSA Order*, 23 FCC Rcd at 11741 ¶ 18.

<sup>9</sup> *Id.*, n. 68.

It is noteworthy that none of the opposing comments in this proceeding address the Qwest Appendix B calculation directly, presumably because these parties are aware that this calculation demonstrates that Qwest has a market share of less than **\*\*\*BEGIN CONFIDENTIAL\*\*\*** **\*\*\*END CONFIDENTIAL\*\*\***, and that Qwest would meet the Commission's market share test for granting forbearance. Instead, in this proceeding and in the *Remand* proceeding, the opposing parties attack the standard itself, arguing for a different market share test. While Qwest does not believe the Appendix B test, or any other market share test, is the proper test for determining if forbearance should be granted, it is clear that Qwest *has* met the forbearance standard established in the *Verizon 6* and *Qwest 4* proceedings, based on the calculations in Confidential Exhibit 2, and should be granted forbearance on that basis alone. That is, while the current Qwest market share in the Phoenix MSA is *dispositive* that the competitive conditions necessary for forbearance are present, such a market share test is not *necessary* to make this point.

**C. CLEC Complaints Regarding Data Pertaining to Facilities-based Competitors Is Much Ado about Nothing.**

In unison, the CLEC intervenors in this proceeding argue the mantra that Qwest's forbearance filing is fatally flawed because Qwest has allegedly not provided specific data on facilities-based competition. For example, the Broadview CLECs claim that Qwest "largely fails to provide the Phoenix-specific granular data necessary to measure and evaluate the presence of facilities-based competition in that market from this cable company [Cox]."<sup>10</sup> The Covad CLECs complain that Qwest "does not include any concrete factual information about the locations or extent of actual facilities-based cable competitive presence" and alleges that Qwest "relies on vague assertions of the existence of cable competition that are at best circumstantial" such as the

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<sup>10</sup> Broadview CLECs at 31.

Cox web site.<sup>11</sup> PAETEC similarly states that “Qwest’s petition does not include any concrete factual information about the location or extent of actual facilities-based cable competitive presence.”<sup>12</sup>

These complaints are not well founded. Obviously, Qwest has no way of obtaining specific Phoenix MSA subscriber and location data from Cox, and must rely on the Commission to gather this data, as it has done in the previous proceedings in Omaha and Phoenix. These critiques ring hollow because the CLECs criticize Qwest for not offering, in its initial filing, data that all parties understand Qwest has no access to. The contradictions of the CLEC arguments are exemplified by the Broadview CLECs, who on one hand fault Qwest for not providing detailed data on facilities-based providers, while on the other hand admitting Qwest has no means to obtain the data. However, the Broadview CLECs do recommend that “[w]here such information is not available to Qwest and is not offered voluntarily, the Commission should require the production of such data.”<sup>13</sup> Qwest concurs in this recommendation. As stated in Qwest’s initial comments, it is critical that the Commission obtain competitive data from Cox and other facilities-based providers regarding lines served and coverage area. Once the data is obtained, the Appendix B calculation should be updated with the Cox-specific data. The Commission should reject the pleas of CLECs to reject Qwest’s application simply because it has not provided this data up front.

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<sup>11</sup> Covad CLECs at 8.

<sup>12</sup> PAETEC at 8.

<sup>13</sup> Broadview CLECs at 27.

In a related vein, the CLECs criticize Qwest's filing because it is partially based on publicly available information (which they refer to as "anecdotal") regarding competitors,<sup>14</sup> including promotional materials, marketing statements and information posted on competitor web sites.<sup>15</sup> The CLECs claim that the publicly available data cited by Qwest is simply not enough to prove competition, and that Qwest must provide detailed data regarding each competitor, including where facilities are located, what customers are served, what products are provided, etc. Of course Qwest cannot know this confidential competitor information, as much of it is in the hands of only the very CLECs that protest Qwest's application.<sup>16</sup> Despite the CLECs' claims, publicly available data on competition in the Phoenix MSA is very relevant to this case because it demonstrates the competitive nature of the Phoenix market. This important data may be supplemented as the Commission obtains the proprietary data not available to Qwest.

The real aim of the CLECs is to construct an evidentiary standard that neither Qwest nor any other ILEC could possibly meet. By arguing that in order to grant forbearance the Commission must have perfect and comprehensive proprietary data regarding all competitors -- data that may never be fully available -- and that all publicly available data is irrelevant, the CLECs hope they can forestall forbearance forever. The most insidious aspect of the CLECs' advocacy is that it can lead to conclusions that clearly defy common sense and ignore obvious realities. For example, the CLECs argue that when a customer leaves Qwest, there is not enough

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<sup>14</sup> Since much, if not all of this data, emanates from public pronouncements of the CLECs themselves, it is hard to see how this data can be simply "anecdotal." The data is either accurate or inaccurate and if it is the latter, then the CLEC is the source of the inaccurate data.

<sup>15</sup> See, e.g., Broadview CLECs at 26.

<sup>16</sup> While some CLECs have provided limited data in this proceeding regarding "lit buildings" and "build-buy" decisions, this data is provided selectively, and complete data on competitors is not available to Qwest.

data to *prove* that the customer is moving to a competitor like Cox or wireless, since Qwest has no “customer exit” data to prove this. However, it is obvious to even the most casual observer that in the Phoenix MSA, as Qwest access lines are declining significantly, customers are moving to Cox, wireless and VoIP-based options, and the allegedly “anecdotal” data makes this clear.<sup>17</sup> The Commission should not adopt an unattainable data standard that would lead to a finding that may be contrary to common sense and observation, benefiting CLECs at the expense of Qwest and Phoenix MSA consumers.

**D. Application of the CLECs’ Proposed Standard Would Render Section 10 a Nullity.**

In this proceeding, and in the *Remand* proceeding, the CLECs offer a new test for determining if forbearance should be granted. In general, the CLECs recommend that forbearance only be granted if there are at least two full facilities-based *wireline* competitors in the *relevant market*, with near ubiquitous coverage. They also define the relevant market narrowly, excluding wireless, VoIP-based services and other non-wireline substitutes from the analysis, and proposing a separate analysis for wholesale and retail, as well as residence and business markets. The Integra CLECs propose that either the Commission apply the FTC’s *Horizontal Merger Guidelines* as a market power test, or that the following conditions be met before a forbearance application may be granted:

- (1) at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market (“Wholesale Test”)<sup>18</sup>

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<sup>17</sup> The CLECs allege that Qwest line losses may simply be due to customers moving from second lines to DSL. This incorrect assumption is addressed later in these comments.

<sup>18</sup> Integra CLECs at 9.

or

(2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market (“Retail test”)<sup>19</sup>

As Qwest discusses in its companion comments in the *Remand* proceeding, the CLEC “market power” test is severely flawed and should be rejected by the Commission, for a number of reasons. First, there is no basis to utilize the FTC’s Horizontal Merger Guidelines in a forbearance case. As described in the *Weisman/Tardiff White Paper*, in a merger, the market forces being examined are becoming more centripetal (“center-seeking”) in nature, while in a forbearance proceeding, the market forces being examined are becoming centrifugal (“center-fleeing”) in nature. *Weisman/Tardiff White Paper* ¶ 56. In addition, the *Weisman/Tardiff White Paper* notes that there is an important difference between a merger and forbearance analyses concerning the important role of *path dependence*, i.e. in forbearance we are considering a market where the ILEC starts out with a 100% market share and experiences increased competition that reduces its share relatively quickly, and in a merger we are considering a market where two firms are combining to increase market share. These key differences render the merger guidelines to be of little value in a forbearance case. *Id.* ¶ 58.

Second, there is no basis to require the presence of *two* full facilities-based wireline competitors with *near ubiquitous* coverage in the Phoenix MSA in order to grant forbearance. According to the CLECs, only full facilities-based CLECs provide real price-constraining competition for Qwest services. The CLECs would like to draw very narrow market boundaries,

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<sup>19</sup> Integra CLECs at 10.

and pretend that intermodal options such as wireless and VoIP-based services are not price constraining substitutes for wireline service. However, as further described in the *Weisman/Tardiff White Paper*, these intermodal services do in fact constrain wireline prices, and it is a serious economic error to define the market to exclude these clear competitive options. *Id.* ¶ 25.

In addition, it is pure folly to argue that in today's dynamic market environment, there must be two competing wireline competitors competing *ubiquitously* in the MSA in order to constrain Qwest's prices. The fact is competitors do not need to offer service to all or nearly all customers in the Phoenix MSA in order for this competition to constrain Qwest's prices. If Cox or wireless providers offer competing telephone customers to many -- but not all -- customers in the Phoenix MSA, this provides sufficient competition to discipline Qwest's market behavior throughout the MSA. For example, Qwest markets services to all customers throughout the MSA, and does not develop separate mass marketing plans for individual customers that do not have a Cox option. Qwest competes with Cox on an MSA-wide basis, and the fact that Cox competes with Qwest throughout most of the MSA constrains Qwest's ability to raise prices above market levels.

The CLECs have constructed their "market power" test specifically as a barrier to prevent Qwest or other ILECs from *ever* gaining forbearance, since it is very unlikely that two other full facilities-based CLEC providers (in addition to cable and wireless) will *ever* ubiquitously serve Phoenix or any other MSA in the United States. To illustrate how little sense such a requirement makes, assume Qwest were to continue to lose access lines until it had only a few access lines left. According to the opposing CLECs, as long as there were not two full facilities-based CLECs offering service throughout the MSA, one would have to conclude that Qwest still had

market power. This, of course, would defy reality and represents a nonsensical conclusion. This illustrates the problem with defining a market too narrowly, and ignoring very real wireless and other intermodal options. The “15% market share” requirement for each competitor also has no basis, because it ignores the capacity of any competitors.

### **III. THERE IS THRIVING ‘ACTUAL’ COMPETITION IN THE PHOENIX MSA WITH POTENTIAL FOR CONTINUED COMPETITIVE GROWTH**

#### **A. Qwest Access Line Losses Continue to Outpace Growth in the Phoenix MSA.**

In the declaration of Robert H. Brigham filed with Qwest’s application, Qwest documented the significant loss of access lines that Qwest experienced between 2000 and 2008. Over a time period where Phoenix MSA households increased 25% and population increased 28%, Qwest access lines declined nearly 50%, as residential and business customers took advantage of the expanding array of competitive alternatives to Qwest’s local exchange services.<sup>20</sup> In the first eight months of 2009, Qwest access lines have declined at an even more accelerated pace, with total switched access lines declining over 8 percent, for an annualized decline of over 12%, as shown in the updated table below:

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<sup>20</sup> Residential, Business and Public access lines by wire center for the Phoenix MSA (December 2008) are provided in Confidential Exhibit 2.

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Table 1

Change in Qwest Retail Access Line Counts in the Phoenix MSA

<u>Retail Service</u>	<u>Dec. 2000</u>	<u>Dec. 2008</u>	<u>Difference 2000-2008</u>	<u>% Difference</u>	<u>Aug. 2009</u>	<u>Difference 8 months 2009</u>	<u>% Difference (annualized) 2008-2009</u>
Residential	██████	██████	██████	██████	██████	██████	██████
Business	██████	██████	██████	██████	██████	██████	██████
Public	██████	██████	██████	██████	██████	██████	██████
Total	██████	██████	██████	██████	██████	██████	██████

\*\*\*END CONFIDENTIAL\*\*\*

The Broadview CLECs and the Integra CLECs claim that the loss in Qwest switched access lines is not relevant to the forbearance discussion. They note that in its *Qwest 4 MSA Order*, the Commission indicated that "line loss does not necessarily indicate the capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up internet access to an incumbent LEC broadband line for internet access."<sup>21</sup> They imply that this is why Qwest is losing access lines, not competition from other providers.

This is an incorrect conclusion. First, it is clear from the evidence that line losses today are in most cases *not* the result of conversions from dial up internet access to Qwest high speed Internet service. Qwest has performed an analysis which demonstrates that a very small fraction of the Qwest retail access line decline over this period can be attributed to the conversion of additional lines used for dial-up Internet access to Qwest DSL lines. Qwest analyzed all residential DSL installations from February 2000 through August 2008, and for each customer account, tracked whether the customer disconnected an additional line the month prior, the

<sup>21</sup> Broadview CLECs at 52-53; Integra CLECs at 30.

month after, or the same month as the DSL service was installed. If such a disconnection occurred, it may be assumed that the disconnected line was associated with the installation of DSL. For the Qwest wire centers in the Phoenix MSA, a total of **\*\*\*BEGIN CONFIDENTIAL\*\*\*** **\*\*\*END CONFIDENTIAL\*\*\*** of additional line disconnects were identified as being attributable to DSL installations. However, since the vast majority of lines lost by Qwest are primary lines, the additional line disconnects attributed to DSL substitution represent only **\*\*\*BEGIN CONFIDENTIAL\*\*\*** **\*\*\*END CONFIDENTIAL\*\*\*** of the total reduction in residential access lines identified in Table 1. The analysis demonstrates that the replacement of second lines with DSL is responsible for a very small percentage of the line losses experienced by Qwest.

Second, it is obvious to even the casual observer that customers are disconnecting Qwest wireline services, and moving to competitive alternatives, including CLECs, cable providers, wireless providers and VoIP providers, as described below and in Qwest's Petition. It does not require a sophisticated analysis to see that this is the case. The Broadview CLECs claim that the only line losses that are relevant are those that "result from customers migrating to facilities-based last-mile competitors."<sup>22</sup> This makes no sense, since clearly customers are substituting these alternatives for Qwest wireline service, and thus intermodal competition has a price-constraining impact on Qwest's wireline service. As demonstrated in the *Weisman/Tardiff White Paper*, the CLECs define the market far too narrowly, and in a manner that ignores dynamic market realities.<sup>23</sup> However, the CLECs do this because by narrowly defining markets, they can

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<sup>22</sup> Broadview CLECs at 53.

<sup>23</sup> *Weisman/Tardiff White Paper* ¶¶ 50, 51, 57.

exclude real customer alternatives from the analysis, thereby distorting what is really occurring in the market.

**B. Cox's Coverage in the Phoenix MSA is Comparable to its Coverage in Omaha at the time of the *Omaha Order*.**

PAETEC claims that while the Commission relied on the existence of a facilities-based competitor in granting forbearance in Omaha, "there is no similar evidence that competitors are using their own networks to compete or have 'credibly demonstrated' their plans to do so"<sup>24</sup> in Phoenix. This claim is fallacious. Cox Communications was a major competitor to Qwest in Omaha, and is a major competitor to Qwest in the Phoenix MSA. As noted earlier, the Commission should obtain the access line and coverage data from Cox to verify its presence in the Phoenix MSA. Based on Qwest's experience in competing with Cox, Qwest believes that this data will confirm that Cox has captured a significant share of the wirelines in the Phoenix market; a share that is comparable to its share in Omaha. The Broadview CLECs claim there is "no reason to presume this in advance."<sup>25</sup> Qwest agrees, and this is why it is critical for the Commission to obtain the data from Cox. Finally, contrary to PAETEC's claims, competitors such as Cox do not "continue to rely heavily on Qwest's facilities."<sup>26</sup>

The Broadview CLECs claim that competition from Cox must be discounted because Cox "does not provide telephone service throughout the entire MSA."<sup>27</sup> PAETEC claims that Qwest has not shown that competitive facilities "ubiquitously exist" in the Phoenix MSA, and that "there is no evidence that Qwest's competitors have facilities that cover a percentage of the

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<sup>24</sup> PAETEC Comments at 31.

<sup>25</sup> Broadview CLECs at 34.

<sup>26</sup> PAETEC at 31.

<sup>27</sup> Broadview CLECs at 32.

end user locations” comparable to Omaha.<sup>28</sup> As noted above, it is critical for the Commission to obtain the data from Cox showing its coverage in the Phoenix MSA, which is substantial. However, there is no need for this data to show that Cox can serve *all* Qwest customers throughout the MSA. There is little doubt that Cox does not reach every customer in the Phoenix MSA, but such coverage is not required for Cox’s presence to discipline Qwest’s prices. The data will show that Cox can provide service to a significant number of customers in the MSA, and this has a dramatic competitive impact on Qwest. As noted in the *Weisman/Tardiff White Paper*, competition occurs at the margin,<sup>29</sup> and as long as there are significant numbers of customers that have access to Cox service, this disciplines Qwest’s prices throughout the MSA.

*Weisman/Tardiff White Paper* ¶ 62

### **C. The Myth of the ILEC/Cable Duopoly**

The opposing CLECs claim that even if Cox is a major competitor, the result is a duopoly that would harm consumer welfare, resulting in supra-competitive prices.<sup>30</sup> This is not a legitimate claim. If the market is defined properly to include real substitutes for wireline service, such as wireless and VoIP services, as well as CLEC services, the market is not a duopoly at all.

As noted in the *Weisman/Tardiff White Paper*,

In reality, the fiction of the duopoly in the market for local telephone service is itself an artifact of ignoring the history of telecommunications rate design. In other words, because wireline rates have been pegged at artificially low levels by regulatory fiat, market boundaries are drawn too narrowly and this leads policymakers to mistakenly conclude that wireless is not in the same product market as wireline. It is in this sense that the need for regulatory oversight, inclusive of mandatory unbundling, becomes a self-fulfilling prophecy. To wit,

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<sup>28</sup> PAETEC at 35.

<sup>29</sup> When a carrier has high sunk costs, the loss of customers that will migrate to another carrier if there is a price increase greatly impact the ability of the carrier to recover its fixed joint and common costs. Thus, this constrains pricing of the carrier.

<sup>30</sup> Integra CLECs at 29.

regulators set artificially low local telephone service rates that discourage the very competitive entry that they seek as evidence that they can safely forbear from regulation.

*Id.* ¶ 51

**D. Cox Has Become a Significant Player in the Business Market and is Continuing to Move Aggressively into and within the Market.**

The opposing CLECs claim that Cox is an insignificant factor in the market for business services in the Phoenix MSA. For example, the Broadview CLECs claim that Qwest offers “no hard evidence that Cox is providing extensive facilities-based telephony services to business customers in Phoenix today.”<sup>31</sup> The CLECs claim that Qwest’s reference to Cox’s statements, press releases, marketing materials and Cox’s descriptions of product offerings in the Phoenix MSA do not provide meaningful evidence of Cox’ presence in the business market in the Phoenix MSA. Contrary to the assertions of these CLECs, such data clearly *is* relevant to this case, as it demonstrates that Cox *is offering* business services throughout the Phoenix MSA, and that business services are now available to many customers. As noted in the declaration of Robert H. Brigham that was filed with Qwest’s Petition, Cox is offering voice telephone service, digital trunks, Centrex service, long distance and “toll free” services, private line service (DS1, DS3 and OC3 to OC192), transparent LAN service, virtual private network service and business video service in the Phoenix MSA.<sup>32</sup> In fact, Cox has established a separate marketing division, Cox Business Services, focused *specifically* on the small, medium and Enterprise business market segments.<sup>33</sup>

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<sup>31</sup> Broadview CLECs at 33.

<sup>32</sup> See: <http://www.cox.com/arizona/business/services.asp>, visited 1-27-09.

<sup>33</sup> See: <http://www.coxbusiness.com/index.html>, visited 1-27-09.

The CLECs claim that in order to show that Cox is a legitimate competitor in the Phoenix MSA, Qwest must demonstrate the location of *all* Cox fiber facilities in the MSA. For example, PAETEC claims Qwest's filing is deficient because Qwest "fails to show precisely where Cox's purported fiber cable network is in relation to the business customers."<sup>34</sup> While the Commission should obtain data from Cox regarding the business lines served and its coverage in the Phoenix MSA -- data which is not available to Qwest -- the important fact is that Cox services are *available* to business customers in the Phoenix MSA. It is the existence of this competitive capacity and willingness to serve business customers throughout its territory in the Phoenix MSA that has a price-constraining effect on Qwest's business services. While the CLECs would like to discount the presence of Cox in the Phoenix MSA business market, the fact is that Cox business services are now aggressively marketed to businesses throughout the MSA.

The Broadview CLECs claim that "cable system technology still faces serious operational hurdles before it can be used to provide business-level services in any competitively meaningful fashion."<sup>35</sup> This is nonsense, as Cox already offers a full slate of business services in the Phoenix MSA, as described below. PAETEC claims that cable operators such as Cox "cannot offer sufficient service level guarantees to support competitive business services and have security and reliability concerns."<sup>36</sup> Of course this has to be a significantly exaggerated or inaccurate claim, since the fact that Cox is serving many businesses today, and is expanding its network to meet growing business demand, as exemplified by the "case study" examples below, belies any notion of security and reliability concerns.

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<sup>34</sup> PAETEC at 17.

<sup>35</sup> Broadview CLECs at 34.

<sup>36</sup> PAETEC at 17.

The Broadview CLECs also argue that Cox faces challenges gaining access to buildings, does not have adequate capacity today, and thus would need to build facilities to serve some business customers. Certainly Cox may need to add facilities to serve some business customers, but this is certainly not an insurmountable obstacle, as all carriers, including Qwest, must often add facilities to meet business demand.

While Cox clearly serves many areas with fiber today, and can increase its breadth to serve additional customers, Cox is also able to serve business customers via its Hybrid Fiber Coaxial (HFC) network, where fiber is utilized to the head end, and coaxial cable is used to serve the link to the end user. The Integra CLECs imply that Cox is not able to provide high-speed services, such as a DS1 service, over its HFC network.<sup>37</sup> This claim is also inaccurate, as Cox today is utilizing its HFC network to provide broadband services and DS1 equivalents to business customers throughout the Phoenix MSA. In fact, the Broadview CLECs admit that Cox can provide T-1 services over its HFC network.<sup>38</sup> While very high-speed optical services such as OC-24 and OC-48 require Fiber, Cox also touts that it provides broadband at speeds far higher than 1.544 mbps to many locations over its HFC network. For example, Cox Metro Ethernet is available at “a large number of locations served by Cox’s Fiber-To-The-Premise or Hybrid Fiber Coax (HFC) networks, both serviced by Cox’s highly redundant and reliable metro network.”<sup>39</sup>

To illustrate Cox’s presence in the Phoenix MSA business market, the Cox website contains a number of “case studies” that describe business customers that purchase Cox services in Phoenix, as well as in other parts of its United States serving area. For example, Cox inked a

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<sup>37</sup> Integra CLECs at 22.

<sup>38</sup> Broadview CLECs at 35.

<sup>39</sup> See: <http://ww2.cox.com/business/arizona/data/metro-ethernet.cox>.

contract with Shea Properties, a major real estate firm in the Phoenix area. The following description appears on the Cox Website:

### **Shea Properties**

Scottsdale, Arizona

#### *History*

"(Partnering with Cox Business) has increased the value of our projects because it's provided a service the buyers and tenants want, which is essential for their businesses."

*Jim Riggs - President, Shea Commercial Properties*

Services Provided: PRI Digital T-1, Full T-1 to Internet, Flat Business Telephone Line, Cox Business Internet<sup>SM</sup>

Located in Scottsdale, Arizona, Shea Commercial Properties is the largest office condominium developer and brokerage firm in the greater metropolitan Phoenix area, with properties in Arizona and Nevada. Standing out in a crowded market is important to developers, and Shea wanted to provide tenants with offices that were fully equipped with a variety of voice, video and data services. Shea needed a reliable, responsible carrier to provide that support.

#### *Solutions*

Cox Business' broadband telecommunications platform provided the high-quality, scalable services Shea's tenants required without high upfront costs or long installation delays. So the companies partnered together to design, build and market the communications infrastructure for a new Shea development, a 16-building complex called Sundown Ranch.

Cox Business acquired the necessary easements and approvals to pull broadband wiring onto the property, while advising Shea on how best to wire each building. Shea incorporated sufficient space for Cox Business' interior and exterior equipment into the site plan. Cox Business then worked with the new tenants from the beginning to develop specific programs that fit their respective needs. That was a tremendous selling point for Shea and a great benefit to the tenants.<sup>40</sup>

Cox has also signed a contract to provide "state-of-the art" facilities to the Phoenix school district:

**Cox Communications® brings state-of-the-art connectivity to Elementary School District**

Phoenix, Arizona

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<sup>40</sup> <http://ww2.cox.com/business/arizona/industries/real-estate/cs-rea-sheaproperties.cox>.