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March 2, 2010

VIA ECFS **REDACTED - FOR PUBLIC INSPECTION**

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

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

Dear Secretary Dortch:

The undersigned hereby submits Late-Filed Reply Comments of the Arizona Corporation Commission. The comments and exhibits to the comments have been redacted for public inspection.

Please do not hesitate to contact me at (602) 542-6022 if you have any questions concerning this matter.

Sincerely,

/s/ *Maureen A. Scott*

Maureen A. Scott
Senior Legal Counsel

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

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

LATE-FILED REPLY COMMENTS OF THE ARIZONA CORPORATION COMMISSION

I. INTRODUCTION.

The Arizona Corporation Commission ("Arizona Commission" or "ACC") submits the following late-filed reply comments (or in the alternative, ex parte comments) in response to the comments of others on Qwest's application for relief from important regulatory requirements in the Phoenix MSA. In addition the ACC submits some additional data regarding the positions taken by Qwest in its Application.

This is an extremely important case since it may dramatically impact the direction of competition in the Phoenix MSA. For the reasons, discussed below, like almost all of the other parties filing comments in this proceeding, we oppose Qwest's second request for forbearance at this time. We believe that it would adversely impact market dynamics in the Phoenix MSA at this time and that its grant would therefore be premature.

To begin with, we would note that it is difficult to assess Qwest's petition at this time since the appropriate framework for review of an important part of Qwest's second forbearance request has not been decided.[1] The FCC is just now evaluating that issue in

[1] Accord, Initial Comments of Broadview Networks, Inc., Nuvox, and XO Communications, LLC filed on September 21, 2009.

the Qwest/Verizon Remand Proceeding.[2] Second, because Qwest's second petition was filed within a window before the new forbearance procedural rules went into effect, Qwest is apparently not subject to some of them. But, Qwest was aware of the new forbearance procedural rules at the time it filed its petition for relief; so it should therefore be required to comply with them the same as any other forbearance applicant. All in all, however, both of these factors weigh in favor of requiring Qwest to refile its second request for forbearance in the Phoenix MSA. In the interim, the *TRRO* operates to provide Qwest the relief it seeks but on a reasonable, measured and predictable basis.

In response to the D.C. Circuit's Remand, the Arizona Commission is advocating that the FCC utilize a "market power" test in addition to other criteria to determine whether future forbearance petitions should be granted. The FCC should not lose sight of the fact that market power is just one consideration among others in the forbearance analysis. Indeed, the FCC itself has noted in at least one case, that while the Dominant Carrier market power test guides the forbearance determination, the forbearance analysis is much more than meeting a market share or market power test.

The parties filing initial comments argue very persuasively that Qwest has not met its burden of proof and that competition would be harmed if the FCC granted Qwest's second petition at this time in the Phoenix MSA. The ACC agrees and believes that even if the market share test weighs in favor of forbearance in some wire centers, other factors weigh against its grant at this time. The data provided by the ACC along with these comments, demonstrates that there are many deficiencies with Qwest's Petition. In addition to the deficiencies identified by the FCC in the *Qwest 4 MSA Order*, our comments discuss other problems with granting Qwest's Petition at this time.

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[2] *See Public Notice, Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, DA 09-1835, (rel. Aug. 20, 2009).

We also suggest some further refinements to the FCC's traditional analysis which should help to ensure that the forbearance analysis is complete and that it is not given prematurely. Perhaps most importantly, we believe that the FCC should expand its discussion of multi-request or pan-caked petitions such as Qwest's (petitions which request forbearance from a myriad of related requirements at one time) in light of the multiple reliefs requested under the Petition, and consider more the impact forbearance from one rule, may have on the appropriateness of granting forbearance from other rules.

Because of the unexpected adverse consequences forbearance grants can have upon a CLECs' business, as evidenced by the Omaha experience, we believe that any data discrepancies or shortcomings must be resolved in the CLEC's favor, not Qwest's. In addition, conclusions reached need to be based upon hard data and/or actual experience in other cases, rather than "predictive judgments". Safeguards also need to be put in place when forbearance is granted to prevent the same unintended dramatic adverse consequences for the CLECs as was the case in the Omaha market.

In the end, forbearance needs to be looked at as more of an extraordinary measure which is appropriate when it is clear that the regulations at issue are no longer necessary, and that the public interest would be served by their elimination. Where there is the least bit question regarding their utility in a particular market or wire-center, granting forbearance would be inappropriate.

II. BACKGROUND.

A. Qwest's First Request.

Qwest filed its first petition for forbearance from most of the same requirements at issue in this case, along with the same request in three other MSAs, including Denver, Minneapolis-St. Paul and Seattle in 2007. In a Memorandum Opinion

and Order released July 25, 2008[3], the FCC denied Qwest's requests in all four MSAs stating "…we find that the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Qwest seeks, and, accordingly, we deny the requested relief in the four MSAs. More specifically, the FCC found that with respect to Section 251(c) unbundling obligations, the record did not establish the existence of sufficient facilities-based competition to warrant forbearance. "The record indicates that a number of competitive LECs (i.e., intramodal competitors) compete with Qwest for mass market and enterprise customers in certain subsections of the four MSAs. The evidence also shows, however, that, in serving mass market and enterprise customers, these intramodal competitors rely significantly on access to Qwest's last-mile network facilities, including UNEs, and Qwest's other wholesale services in all four MSAs."[4]

With respect to Qwest's request for forbearance from Dominant Carrier obligations, the FCC found that:

> "Based upon this record, we find that Qwest does not satisfy section 10(a)(1) for mass market switched access services in any of the four MSAs. In particular, Qwest's market shares in the MSAs at issue, measured consistent with our approach in the Qwest *Omaha Forbearance Order, ACS Dominance Forbearance Order*, and *Verizon 6 MSA Forbearance Order* are sufficiently high to suggest that competition in these areas is not adequate to ensure that the 'charges, practices, classifications, or regulations … for [] or in connection with that…telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" absent the regulations at issue.' ….
>
> Indeed, where the Commission has found an incumbent carrier to be nondominant in the provision of access services, it had a retail market share of less than 50 percent and faced significant facilities-based competition." [5]

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[3] *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(C) In the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas,* Memorandum Opinion and Order, WC Docket No. 07-97 (Rel. July 25, 2008) (*Qwest 4 MSA Order*").

[4] *Qwest MSA 4 Order* at para. 16.

[5] *Qwest 4 MSA Order* at para. 27.

The FCC also denied Qwest's requests for forbearance from its Section 271 obligations and from the *Computer III Inquiry* rules.

B. <u>Qwest's Second Request</u>.

In its second Forbearance Petition for the Phoenix MSA only, filed on March 24, 2009, in addition to seeking relief from loop and transport obligations under Section 251(c) of the 1996 Act, Qwest also seeks relief from its related obligations under Section 271 of the 1996 Act. As with its first petition, it further seeks relief from certain Dominant Carrier requirements (Tariffing requirements including: 47 C.F.R. § 61.32 (method of filing tariffs), § 61.33 (required transmittal letter), § 61.38 (required supporting information, § 61.58 (associated notice requirements), and § 61.59 (the effective period before any changes can occur); price cap rules including §§ 61.41 – 61.49); and § 214 obligations including obligations under Part 63 (the process for acquiring lines, discontinuing services, and making assignments of transfers of control). Finally, it has asked once again for forbearance from the Commission's *Computer III* requirements, including Comparably Efficient Interconnection ("CEI") and Open Network architecture ("ONA) requirements. For the reasons discussed below, the ACC opposes all of Qwest's requests at this time.

C. <u>Applicable Legal Standard</u>

The legal standard for forbearance is as follows.

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Like almost all of the other parties filing comments in this proceeding, we do not believe that Qwest has met the standards for forbearance at this time from the important Dominant Carrier/UNE obligations it seeks to be released from in the Phoenix MSA.

III. QWEST'S REQUEST FOR DOMINANT CARRIER FORBEARANCE SHOULD BE DENIED.

The following framework is typically used by the FCC in looking at requests such as Qwest's for forbearance from Dominant Carrier requirements.

A. Services for Which Forbearance is Sought

The FCC's analysis has traditionally looked at mass market and enterprise services separately. The ACC respectfully requests that the FCC refine its analysis so that it considers the residential market separate from the business market.[6] The data collected by the ACC indicates that the small business market is sufficiently different from the residential market in Phoenix, that it should be considered as part of the enterprise market.

B. Geographic Scope of Analysis

Traditionally the FCC's analysis for forbearance from Dominant Carrier requirements has been on an MSA basis, rather than a wire center basis. The ACC requests the FCC to look at applying its analysis on a wire center basis (or zip code basis), or the same geographic unit it uses for analysis of Section 251 UNE forbearance requests, since the degree of competition is not the same throughout the Phoenix MSA.

[6] Accord, Comments of Broadview Networks, Inc., Nuvox and XO Communications, Inc. at p. 23. ("Residential customers have different service needs and engage in a different decision-making process than do business customers. Residential customers typically require basic voice capability and have lesser data demands, whereas business customers, on the whole, have higher volume, sophisticated voice and data needs. Residential customers are served through mass marketing techniques, including regional advertising, and typically do not enter into long-term agreements, while businesses of all sizes tend to be served under individual, multi-year contracts marketed and administered through direct sales contracts.")

Some portions of the Phoenix MSA still have no facililties-based alternatives, including Cox.

C. Market Power Is Only One Part of the Analysis

The Verizon/Qwest Remand proceeding is currently reexamining the type of analysis of market dynamics that will be used for future petitions including Qwest's second petition. The ACC advocated in the Remand Proceeding that the FCC utilize a market power analysis for requests for forbearance from both Dominant Carrier requirements and Section 251. Some of the data used for such an analysis may be lacking from the record in this proceeding. To the extent it is, and Qwest's second petition goes forward, Qwest should be required to file it.

The FCC set forth what it looks at in the traditional market power analysis in the *AT&T Reclassification Order*: (1) AT&T's market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T's customers; and (4) AT&T's cost structure, size and resources.[7]

But this is only part of the forbearance analysis, and prior FCC orders recognize this.[8] Applicants such as Qwest appear to believe that just because a market share test may weigh in their favor, they should be entitled to forbearance regardless of other factors. But actual experience in Omaha instructs otherwise. Actual experience instructs that the public interest needs to consider a wide range of factors, in addition to market share.

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[7] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd 3271, 3293 (1995)("*AT&T Reclassification Order*")

[8] *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Orde*r"), at n. 52.

D. Circumstances in the Retail Business Market in the Phoenix MSA Have Not Changed To the Degree that Dominant Carrier Requirement Forbearance is Justified.

1. Evidence of Substantial Facilities Based Intra- and Intermodal Competition is Not Present

Qwest's Petition contains little useful information on the business market in the Phoenix MSA to support any change from the FCC's initial finding in the *Qwest 4 MSA Order* that there was "insufficient information in the record to reasonably assess market shares for enterprise switched access services…." There is also little information which would change the finding that "the record evidence suggests Qwest faces more limited facilities-based competition in these MSAs."

As far as intermodal competition, the only substantial retail non Qwest facilities-based switched access competition is from Cox. But Cox is not a significant player in the small, medium or large business market. We have attached comparative information which the ACC Staff collected which shows that Cox has both gained and lost market share on a wire center basis in the business markets in the Phoenix, MSA. See Highly Confidential Exhibits 1 through 6. As the data shows, Cox simply does not have the same competitive foothold in the business markets in the Phoenix MSA as it does in the residential market. See also Highly Confidential Exhibit 7, 8, 9 and 10.

Further "…Qwest ignores other problems inherent to cable-based provision of services to the business market in Phoenix due to a lack of physical proximity, technical inability, or both."[9] Broadview et al notes in their Initial Comments the following:

> "To the extent that Cox relies on its hybrid fiber/coaxial cable system rather than other modes of delivery to provide telecommunications services to business customers, cable system technology still faces serious operational hurdles before it can be used to provide business-level services in any competitively meaningful fashion. …

[9] See Initial Comments of Broadview Networks, Inc., Nuvox, and XO Communications, LLC.

> Within many of those buildings Cox's network does reach, Cox may only be serving, or be capable of serving without significant additional investment or securing of rights from the owner or landlord, a small subset of tenants, and only certain floors. In order to provide business-level telephony services on a scale which might warrant serious consideration of a forbearance request, the Commenters submit that it is probable that Cox would first have to make significant additions to its network capacity at considerable expense. …
>
> Cox's business level services are subject to other constraints. The services to a building have a limited capacity if provided over Cox's core cable network. Based on the Commenters' experience with cable operators nationally, and XO's experience with Cox in the Phoenix MSA in particular, Cox's present hybrid fiber/coaxial network cannot readily support more than a T-1 level of capacity over a given access line."

Other intermodal competitors in the business market that the FCC has considered in the past include fixed VoIP providers. However, there is no evidence that the ACC is aware of that fixed VoIP is used to any great extent in the business market. See Highly Confidential Exhibit 7. As discussed below, nomadic VoIP or over-the-top VoIP should not factor into the FCC's analysis at all since there is no reliable data in the record regarding nomadic VoIP.

Qwest also cites to a myriad of intramodal competitors claiming that apart from cable there are **Begin Confidential ___ End Confidential** competitive providers that operate their own fiber networks in areas where enterprise customers are concentrated in the Phoenix, MSA. They also state that competitors serve business customers in **Begin Confidential ___ End Confidential** of Qwest's wire centers. But Highly Confidential Exhibit 7 indicates that most of this competition is dependent upon Qwest's facilities. While intramodal competition exists, the evidence in the record already and the data collected by the ACC, indicate that it is by and large non-facilities based and relies primarily upon Qwest's facilities. See Highly Confidential Exhibit 7.

Moreover, the potential for any significant additional retail competition appears limited at this time. This is reinforced by the Comments of Broadview et al which

indicated that it is not cost-effective to add a building unless customer demand at the location exceeds three DS-3's:[10]

> "While some competitive carriers have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings. Carriers must construct building 'laterals' to serve customers located in those commercial buildings. The construction of laterals, even of relatively short length, is extremely difficult, time consuming, and costly. According to XO, the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3's of capacity."

Finally, we do not advocate that competitive lines provisioned through Section 251(c)(4) resale and Qwest's QPP/QLSP service be considered in the forbearance market share analysis. This presumes that if the FCC were to grant forbearance, the market share of those competitors which rely upon Qwest's facilities would not change. Experience in Omaha indicates that market share of these intramodal competitors may be dramatically impacted. The Commission has not included these lines in its analysis in the past and should not change now.

2. Market Share Should be Used as Only a Prima facie Showing of Competition; which is only One Factor Among Many that the FCC Should Consider in its Forbearance Analysis

The FCC in determining the state of competition, should employ a market power analysis. Actual market share is only one consideration in a market power analysis. As the FCC noted in the *Verizon 6 MSA* Order, "the Commission does not limit itself to market share alone, but also looks to other factors including supply substitutability, elasticity of demand, and firm cost, size and resources."[11] The market power test is yet but one consideration, among others, in determining whether forbearance is appropriate.

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[10] *Id.* at 38.
[11] *Verizon 6 MSA Order* at para. 28.

The FCC has recognized that while the Dominant Carrier test guides the forbearance determination to an extent, the forbearance must necessarily include other considerations given the legal standards that apply.

3. Wholesale Alternatives

With respect to the Phoenix MSA, we agree with the comments of one party:

> "Specifically, the Commission should evaluate the extent to which competitive service providers – including the Commenters and other wireline CLECs – can easily obtain wholesale facilities and services, including last-mile capabilities, from non-ILEC sources in the Phoenix MSA at reasonable rates and terms. To the extent that facilities and services (including last mile access) cannot easily be purchased elsewhere on reasonable rates and terms, the Commission should recognize that Qwest may continue to possess market power." [12]

As discussed below under UNE Forbearance, there are not a lot of wholesale alternatives in the Phoenix MSA particularly for last mile facilities. Thus, the likelihood or potential for significant retail facilities based switched access line competition is not high.

4. The Legal Analysis Under Section 10 Does Not Support Dominant Carrier Forbearance in the Business Market

We do not believe that granting Qwest forbearance from Dominant Carrier Requirements in the enterprise or business markets meets the legal standards set out in Section 10. Enterprise switched access lines do not come close to meeting the standard for non-dominance in the Phoenix MSA. Forbearing from the Dominant Carrier requirements would free Qwest from the FCC's price cap rules. Dominant Carrier requirements, most specifically price cap rules, are an important safeguard if and when the FCC finds that Qwest is entitled to Section 251(c)(3) relief. Its grant at this time with respect to interstate enterprise switched or special access[13] (to the extent Qwest is requesting forbearance for special access as well) would be inappropriate. In addition,

[12] Comments of Broadview Networks, Inc., NuVox, and XO Communications, LLC.

[13] We do not believe that special access is part of Qwest's request but to the extent it is, any grant of relief from Dominant Carrier requirements should only come after the Commission resolves the important issues raised in outstanding proceedings before it.

the Company would no longer be required to file tariffs for these services on seven or more days' notice, but could file tariffs on one day's notice or could offer these services under negotiated rates and therm. Further, if granted the Company would also be released from requirements governing the Section 251 processes for transfers of control and discontinuance of service.

Given the extensive reliance yet of Qwest's competitors upon Qwest's wholesale inputs, and the barriers facing prospective facilities-based competitors in the enterprise or business market discussed above, Qwest's requests do not satisfy the Section 10 criteria. Qwest has not demonstrated that forbearance from Dominant Carrier regulations is unnecessary for the protection of consumers. Qwest has not demonstrated that forbearance from the application of these regulations is in the public interest.

E. Intra- and Intermodal Competition in the Residential Market in the Phoenix MSA Is Only One Factor Among Many and It Does Not Support Forbearance From Dominant Carrier Requirements.

Qwest's claims in its Petition to the contrary notwithstanding, the data collected for the Phoenix MSA indicates that there is only one facilities-based wire-line competitor, Cox, with any significant residential market share other than Qwest.

Qwest claims that the mass market or residential consumer in the Phoenix MSA has access to a wide range of competitive alternatives. But this is simply not the case. Qwest lists a myriad of carriers that it claims provide service in the residential market in the Phoenix MSA. In addition to Cox, Qwest states that there were over **Begin Confidential ___ End Confidential** unaffiliated CLECs currently competing with Qwest for residential customers in the Phoenix MSA. It further states that as of the December, 2008, **Begin Confidential ___ End Confidential** CLECs were serving residential customers using non-Qwest network facilities. It also states that **Begin Confidential ___ End Confidential** were using the QLSP finished wholesale service and **Begin Confidential ___ End Confidential** were reselling Qwest retail service.

In Highly Confidential Exhibit 7 attached hereto, the ACC has analyzed the meaningfulness of this data through information it collected. As one can see, that data establishes that despite the numerous competitors listed by Qwest there is only one meaningful wire-line competitor in the Phoenix MSA, Cox. The only other carrier that has significant line share beyond Cox's relies upon Qwest's facilities to provide service. All of the carriers that Qwest claims rely upon their own facilities to provide service (with the exception of Cox) do not have significant market share in the Phoenix MSA. Further, it is not known to what extent such carriers use their own facilities and to what extent they rely upon certain of Qwest's facilities as well. Two of the providers, AT&T and MCI, to the best of the ACC's knowledge, have not been actively marketing any residential services to customers in the Phoenix MSA for some time. The other CLECs (using non-Qwest network facilities) relied upon by Qwest simply do not have any significant market share.

We urge the FCC to exclude carriers that rely upon Qwest's facilities to provide service from its analysis, as there is no assurance that those carriers will continue to operate as before once forbearance is granted. A case in point is the Omaha experience. In that case, even though UNEs remained available, they were not an adequate substitute (pricewise) once forbearance was granted and therefore one of the primary competitors of Qwest in that market (which utilized Qwest's facilities) was forced to withdraw from the market altogether. Thus, there is no assurance that the market shares of providers who rely upon Qwest's facilities will remain intact after forbearance is granted. Resale or UNE based lines should not be included in any market share analysis for forbearance purposes. The ACC has collected the data on a zip code basis from Qwest's UNE-Based CLEC competitors, but has not included that information because the FCC does not traditionally include such information as part of its analysis and the ACC is not advocating that it do so now.

As far as intermodal VoIP competition, Cox is the predominant fixed VoIP provider in the Phoenix MSA. Cox's fixed VoIP market share is contained in Highly Confidential Exhibit 7 attached hereto. That is a significant part of its market share. If VoIP is included, the FCC should limit its inclusion to fixed VoIP only, like it has in the past. [14] The FCC has not in the past included providers of "over-the-top" or nomadic VoIP services in its competitive analysis "because there are no data in the record that justify finding that these providers offer close substitute services."[15] The FCC should continue to exclude nomadic VoIP providers since there is no reliable information in the record on the operations of these providers in the Phoenix, MSA. The ACC Staff attempted to obtain this information but was unsuccessful in its efforts to do so. Therefore, it should not be included.

Further, Qwest has submitted no reliable evidence that VoIP has gained in market share to any great extent since Qwest filed its last petition. As Qwest notes, in order to utilize VoIP, a customer must have a high speed connection, such as Digital Subscriber Line ("DSL"), a cable modem or a high speed wireless connection. The national growth rates relied upon by Qwest in its petition (p. 18), may or may not reflect what is going on in the Phoenix MSA.

1. Cox's Market Facilities-Based Residential Market Share Does Not Provide a Sufficient Basis for Forbearance of Dominant Carrier Requirements

As discussed above, actual market share data shows that Cox is Qwest's only real wireline competitor in the Phoenix MSA. We have attached as Highly Confidential

[14] But, note Qwest's comments in footnote of its petition: "The regulatory status of local telephone service provided by VoIP technology is the subject of an open FCC proceeding (IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863). Currently, telecom provides are not required to report VoIP-based access lines per FCC instructions for Form 477 (the reporting tool used by telecom providers to report in-service access line counts to the FCC). If the FCC concludes in its pending IP services proceeding that VoIP service is a telecommunications service, providers of these services may in the future be required to report access lines served via VoIP. However, until that time, providers utilizing VoIP to provide service are not required to report in-service data to the FCC."

[15] *Qwest 4 MSA Order* at para. 16.

Exhibits 11 and 12, data recently collected by the Arizona Commission from Cox which shows its residential market share in 2007 (when the last Qwest case was processed) and Qwest's residential market share several months ago in 2009, on both a zip code and wire center basis. The data shows that Cox has both gained and lost market share in Phoenix MSA since the FCC denied Qwest's first petition. Overall, Cox has picked up approximately **Begin Confidential __ End Confidential** residential customers since 2007. This is less than **Begin Confidential __ End Confidential** of total access lines in the Phoenix MSA. When compared with the line loss for Qwest, it is apparent that Cox is not picking up the lion's share of these lines.

Further, despite Cox's significant competitive presence in the Phoenix MSA, Cox still does not offer its phone service in all portions of the Phoenix MSA. In response to an ACC inquiry, Cox provided the following list of communities in the Phoenix MSA where it does not provide service yet **Begin Confidential _____ End Confidential**.

The FCC has also considered the number of housing units passed in determining whether the potential for significant competition exists. While the "potential" for competition should be considered, it is not a viable substitute for actual competition. The ACC has no way of verifying whether Qwest's statements regarding the number of housing units passed by Cox or the portion of its geographic coverage area served by Cox are accurate. Unless Qwest can verify those statements, they should not be relied upon by the FCC. (*See* page 15 of Qwest's Confidential Petition). If the Commission desires this information for its analysis, it needs to obtain data from Cox, which should be more reliable on this point.

2. Evidence of "lines lost" should be considered but not relied upon as a reliable basis to determine the extent of competition in the marketplace.

Highly Confidential Exhibit 13 contain comparative information obtained from Qwest on its residential access line counts for 2007 and 2009. This information is

presented on a wire center basis. On an aggregate basis, Qwest lost **Begin Confidential** ___ **End Confidential** residential access lines. As the FCC noted, however, it is difficult to rely solely upon access line loss since there are many reasons for the loss, some unrelated to competitive pressures. In addition to nomadic VoIP, Qwest itself offers through QCC both VoIP and bundles containing Verizon wireless service to residential customers in the Phoenix MSA. Further, when comparing the Highly Confidential Exhibits provided with these Comments, it does not appear that the bulk of this line loss went to another facilities-based wire-line provider.

3. Wireless Market Share in the Phoenix MSA

In the *Verizon 6 MSA* Order and *Qwest 4 MSA* Order, the FCC for the first time included cut-the-cord wireless market share for purposes of the forbearance Dominant Carrier analysis. In the FCC's *Qwest 4 MSA Order*, the FCC stated in part with respect to Qwest's request for forbearance from Dominant Carrier requirements:

> For example, Qwest's submission of geographically-specific data regarding the measure of wireless substitution in the four MSAs primarily consists of information Telephia published based on some sort of survey conducted of the wireless-only household rate in specific market areas, including the Denver, Phoenix, Minneapolis-St. Paul, and Seattle metropolitan areas. If we were to rely on the Telephia data, Qwest's market share would be approximately 49% in the Phoenix MSA, which, in conjunction with other evidence, likely would be sufficient to grant forbearance under the Commission's precedent. However, the only substantive information in the record regarding the Telephia survey is a news release that does not describe Telephia's methodology or provide any other information to support the significance of the data. To the contrary, the news release states that the "[d]ifferences in wireless penetration rates between cities may not be statistically significant." Thus, the margin of error in such a survey alone would not allow us to draw any firm conclusions as to whether the criteria had been met. [16]

[16] *Qwest MSA 4 Order* at para. 21.

Qwest in an attempt to bolster its second petition's chances for success, commissioned its own cut the cord wireless survey for the Phoenix MSA.[17] The survey conducted by Market Strategies International ("Market Strategies"), however, was based upon a very small sample of customers (791 interviews) and therefore is not reliable and should not be used by the Commission in making its determination in this case. That study showed a 25% cut the cord percentage for the Phoenix MSA which is far higher than any other study to-date. This indicates that the results of the survey should be viewed as an outlier and should be given little to no weight in an analysis of the Phoenix MSA market. This is in sharp contrast to another study by Nielsen which Qwest also relies upon which shows a 17.8% wireless substitution rate in the Phoenix MSA, which is 1.3% percentage points higher than the national average.

The Nielsen white paper appears to be based upon a much wider sample of customers but the details of the survey were not contained in the white paper which is part of this proceeding. The Nielsen white paper contains broad statements about the Phoenix MSA, but the details of how those conclusions were derived are not set forth or contained in the record. There is no discussion in the white paper on how the surveys were conducted, what questions were asked, and how the various conclusions were derived. Therefore, to the extent that the FCC continues to rely upon wireless cut-the-cord as a viable competitor to Qwest's wireline service, it should choose the most conservative numbers available, in order not to overstate the importance of this cut-the-cord wireless service in the overall determination. It is important to also note that some of these same surveys (including Neilsen) have found that approximately 10 percent of customers that have cut-the-cord, eventually go back to wireline service. This finding needs to be factored into any cut-the-cord rate.

[17] We believe that the parties to this proceeding have raised sufficient concerns regarding the inclusion of wireless in a market share analysis. Cut-the-cord surveys are necessarily imprecise and contain estimates only based upon limited surveys of consumers in the relevant market.

With wireless, one needs to also consider that while Qwest sold its own wireless operations, it now provides Verizon Wireless service as part of a bundle of services offered to its customers. Qwest and Verizon Wireless have entered into an agent agreement under which Qwest markets and sells Verizon Wireless' services as a sales and billing agent. As of September, 2009, approximately **Begin Confidential ___ End Confidential** Verizon Wireless main telephone numbers (MTNs) were billed by Qwest in Arizona. Qwest stated that while it does not have the ability to determine how many of these are within the Phoenix MSA, however, but it is likely that the majority are within the Phoenix MSA.

In summary, there have been some changes in the residential market since the *Qwest 4 MSA Order*, but Qwest has not established that those changes are significant enough to result in a change from the findings in the *Qwest 4 MSA Order* all considerations in favor of or against forbearance are weighed.

4. Summary – Legal Standard Not Met for Residential Market

Actual market share, however, is and should be only one consideration in the overall forbearance analysis. If the forbearance analysis were based strictly upon market share, Qwest would have its strongest case for forbearance in the residential market with respect to Dominant Carrier regulations in the Phoenix MSA. But, under a traditional market power analysis, much more than actual market share is considered. In addition, the forbearance legal standard is much broader than an examination of market power. The first standard is that the (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classification, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.

Cox's market share combined with the other limited wire-line alternatives available do not rise to the level where forbearance would be appropriate. In past cases, the FCC has required a demonstration of significant facilities-based competitor market

share along with significant facilities based competition. Here while Cox has significant market share, Qwest's market share is still "sufficiently high" to suggest that competition in this area is not adequate to ensure that the 'charges, practices, classifications, or regulations … for or in connection with that … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" absent the regulations at issue."

While the FCC has begun to consider cut-the-cord wireless, the market share figures are based upon estimates derived from surveys. For this reason, the FCC needs to be very cautious to the extent that any grant of forbearance relies upon the inclusion of wireless data. Further as some parties point out, wireless service, even though included in Qwest's last case in the forbearance Dominant Carrier market share analysis, may not act as a reliable constraint on unjust or unreasonably discriminatory pricing or practices.

The Commission should also consider the interplay of forbearance requests for both Dominant Carrier price cap rules and Section 251(c) unbundling obligations more closely. There is a close nexus between the two in that the Dominant Carrier price cap rules will act as an important safeguard if and when the FCC ultimately determines that unbundling relief is warranted. Given this, it would simply not be appropriate to grant forbearance from some of the Dominant Carrier requirements before or at the same time as Section 251(c) relief is granted.

The second prong of the legal forbearance standard is that (2) enforcement of such regulation or provision is not necessary for the protection of consumers. To the extent removal of the Dominant Carrier requirements will adversely impact Qwest's competitors, it will also adversely impact their consumers. We believe that removal of some of these requirements in the Phoenix MSA would not be in the best interest of consumers since we believe that the requirements are necessary yet for the protection of consumers.

The third and final prong of the legal forbearance standard is that (3) forbearance from applying such provision or regulation is consistent with the public interest. Qwest has not demonstrated that its release from these obligations would be in the public interest. In particular, as with combined requests for Section 251 and 271 forbearance, granting forbearance from some Dominant Carrier requirements at the same time as or before Section 251 forbearance is granted is simply not in the public interest.

IV. THE RECORD EVIDENCE DOES NOT SUPPORT QWEST'S REQUEST FOR SECTION 251(c) AND 271 UNE FORBEARANCE

A. UNE Forbearance is Not Justified for the Business Market.

1. Competition in the Business Market Is Not Sufficient

The ACC does not believe that Qwest has overcome the deficiencies identified by the FCC with respect to Qwest's first petition which it denied for the business markets. In its *Qwest 4 MSA Order*, the FCC noted that it had tailored its unbundling rules:

> "… to account for the presence of competition by establishing "triggers" designed to eliminate high-capacity loop and transport unbundling obligations with respect to wire centers with significant demand, such as in central business districts, by declining to order unbundling of network elements to provide service in the mobile wireless services and long distance market, due to the evolution of retail competition that has not relied upon UNE access. …Nevertheless, the Commission announced that it might one day be appropriate to conclude, based upon sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition would justify forbearance from UNE obligations."[18]

In its Order denying Qwest's first petition which was issued approximately one and a half years ago,[19] the FCC found that "the record evidence in this proceeding demonstrates that Qwest is not subject to a sufficient level of facilities-based competition in the four MSAs to grant relief under the Commission's precedent." This has not

[18] *See Qwest 4 MSA Order* at para. 34.

[19] *See In the Matter of the Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97, Memorandum Opinion and Order (Released July 25, 2008).

changed. Qwest submitted scant information on the business market in the Phoenix MSA to support any change from the FCC's initial finding.

Cox is not as significant a player in the overall business market at this time, and its market share is certainly not sufficient to justify forbearance from Section 251 obligations. The data collected by the ACC indicates that Qwest is by far the dominant facilities-based carrier yet in the business or enterprise market. See Highly Confidential Exhibit 7.

The Phoenix MSA certainly does not rise to the standard set forth in the Qwest *Omaha Forbearance Order*, the *ACS UNE Forbearance Order* or the *Qwest Terry Forbearance Order* where the incumbent LEC had lost "significant market share to facilities-based competitors that had substantial deployment of last-mile facilities capable of providing competing services in the wire center service areas where forbearance was granted."[20]

As far as intramodal competitors, Confidential Exhibit 7 shows the major intramodal competitors in the Phoenix MSA and the extent they provide service using non-Qwest facilities and the extent that they provide service using Qwest facilities. The extensive intramodal non-Qwest facilities competition that Qwest cites to in its Petition for the business market is not borne out by the data collected by the ACC.

Of concern also is the fact that no carrier other than Qwest has deployed significant last mile connectivity to multi-tenant complexes where many of the business customers are located. For instance, Qwest states that AGL Networks and SRP offer access to commercial buildings in the Phoenix MSA. But the data collected by the ACC, indicates that the number buildings served by these networks is extremely limited at this time. See Highly Confidential Exhibit 14. This was one of the reasons that the FCC rejected Qwest's first petition for forbearance in the Phoenix MSA. No amount of

[20] *See Qwest 4 MSA Order* at para. 34.

rhetoric can replace the fact that alternative last mile facility providers are not an option yet for much of the Phoenix MSA business community. As one CLEC operating in the Phoenix MSA stated:

> "…Qwest overlooks the fact that, today these providers access with their own facilities substantially fewer than 1000 commercial buildings… … Moreover, when a competitor lights a building, this does not mean that the property owner or manager has given the carrier access to serve the entire building. Rather, access may be limited to certain tenants or certain floors, whereas Qwest alone is much more likely to have access to the entire building.
>
> Further, as explained below, adding buildings to a network is not as straightforward as Qwest maintains. There are considerable costs associated with adding 'new net' buildings, and there must first be a business case for doing so. XO will consider adding a building only when customer demand equals or exceeds 3 DS-3s of capacity, due to the costs associated with construction, rights of way access, building access, and other matters. While Qwest attempts to paint a rosy picture of the impact alternative facilities providers are having on enterprise competition within the Phoenix MSA, a closer look at these providers reveal their limited suitability as a source of leased facilities for competitive carriers.[21]

This same fact is underscored by Broadview's comments that the GeoResults data for the Phoenix MSA reveals that only a few hundred commercial buildings in the Phoenix MSA, out of more than 133,000 commercial buildings, are "CLEC Lit Commercial Buildings."[22] According to Broadview, the data showed that only 0.19% of commercial buildings are lit by CLECs, which amounts to fewer than 270 buildings.[23]

Further the data submitted by Qwest for competitive lit buildings does not suggest that any competitor comes close to meeting the 75% threshold relied upon by the FCC in the past. Again, in the *Qwest 4 MSA Order*, the FCC stated "Although Qwest and others submitted data regarding competitive LEC lit buildings, the facilities 'coverage' suggested by those data do not approach the 75 percent threshold relied upon by the Commission in the past."[24]

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[21] *Id* at 5.
[22] *Id*. at 39.
[23] *Id.*
[24] *Id*. at para. 36.

2. Viable Wholesale Alternatives are Not Available Yet.

The FCC found in its *Qwest 4 MSA Order* that "[t]he record does not reflect any significant alternative sources of wholesale inputs for carriers in the four MSAs [including the Phoenix MSA]."[25] The data collected by the ACC Staff indicates that nothing has changed in this regard.

Qwest cites to a myriad of other wholesale providers, including affiliates of some of the CLECs themselves. But upon closer inspection and review of CLEC subscription rates, most of those providers do not offer truly viable alternatives at this time. See Highly Confidential Exhibit 15.

Further, certain of the data Qwest relies upon has been rejected by the FCC in the past.

> "…[W]e acknowledge that Qwest has submitted assorted competitive fiber network data, including fiber network maps; the number of route miles on these networks; the percentage of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors' web-sites describing their service offerings and territories. …. [T]he fiber maps submitted by Qwest do not contain sufficient detail upon which the Commission could base a forbearance determination, and the Commission previously has found that such maps provide only limited evidence of market-wide deployment. Similarly, just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the Commission's unbundling rules, we also find that such data have limits for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center."[26]

Of even more concern, no carrier other than Qwest has deployed significant last mile connectivity to multi-tenant complexes where many of the business customers are located.

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[25] *Id.* at p. 29.
[26] *Qwest 4 MSA Order* at 30.

3. Summary – Legal Standard Analysis – Business

Qwest does not meet the legal standard for forbearance in the business market. Nothing has changed since the FCC denied Qwest's first petition for forbearance in the Phoenix MSA and the other three MSAs. Qwest does not provide any evidence of the type of significant facilities-based competition present in other cases in which the FCC has granted forbearance. Absent this type of evidence, there can be no assurance that the legal standards are met and that enforcement of the regulations at issue are no longer necessary to ensure that the charges, practices, classifications or regulations are just and reasonable and not necessary for the protection of consumers, or in the public interest. While the Commission indicated in its last Order that in some wirecenters cable operators had met the 75 percent coverage threshold, it also stated that Qwest in order to obtain relief had to show a more competitive environment since its last petition. There is nothing in the record to indicate that this is the case in the business market. All indications are that significant hurdles still exist for competitive carriers to gain access to commercial buildings.

B. Conditions in the Residential Market Do Not Justify UNE Forbearance

1. Cox's Market Share Alone is Not Enough

The market share analysis set forth above for Dominant Carrier forbearance should be considered as well as other factors in determining whether Qwest's request for forbearance from its Section 251 obligations in the residential market is appropriate. However, there are some important distinctions. The FCC should not consider cut-the-cord wireless for purposes of its determinations regarding 251 UNE obligations. The FCC did not make any determination in the *Qwest 4 MSA Order* as to whether it was appropriate to include cut-the-cord wireless lines in its market share determination. In footnote 131 it stated:

> "…For the reasons explained above, we find the record does not contain data sufficient to evaluate the extent of wireless substitution in the specific markets at issue. We therefore do not need to address the merits of arguments regarding the inclusion of wireless substitution in our UNE forbearance analysis."

The ACC believes that with respect to Qwest's obligations under Section 251, it is more appropriate to look only at wireline competition. This is consistent with the FCC's own comments in the *TRRO* where it indicated that significant facilities based competition by a cable provider could form the basis for forbearance of the Section 251 UNE obligation.

We agree with the comments of several parties[27] that:

> **"**In the *Omaha Forbearance Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP and wireless services are substitutes to Section 251(c)(3) loop and transport facilities, it did not rely on 'intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.' In addition, the Commission has repeatedly and correctly held that intermodal competition from wireless and VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an IlEC's wireline service."

In addition, it is very important to note that the UNE analysis is done on a wire-center basis. It is the ACC's understanding that the wireless cut-the-cord surveys are all done on an MSA basis. Utilization of MSA wide data to make conclusions about wireless market share in specific wirecenters would not be appropriate.

Finally, as several commenting parties[28] pointed out:

> "…[W]ireless service should not be counted as an intermodal competitor because major wireless carriers remain heavily dependent on ILEC special access and transport services and because wireless service is not a viable substitute for wireline last mile facilities. In the *TRRO*, the Commission recognized that "CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity. This applies equally in both the residential and

[27] Opposition of Covad Communications Company; Alpheus Communications, L.P.; U.S. Telepacific Corp. and Mpower Communications Corp., Both D/B/A Telepacific Communications; First Communications, Inc.; Deltacom, Inc.; Trucom LLC D/B/A CityNet – Arizona; and TDS Metrocom, LLC.
[28] *Id*.

> business markets. It also applies to fixed wireless, which the Commission found did 'not … offer significant competition in the business loop market.'"

We also urge the FCC to exclude Qwest's QPP/QLSP and resold lines from the market share calculations for the reasons discussed above. We believe that this is consistent with prior FCC practice. While the residential market share in Phoenix would not be impacted to any great degree if it were included, we believe that it is better excluded because there is no assurance that the same level of competition would continue if forbearance were granted. In fact, based upon the McLeod experience, there is every reason to conclude that it would not be the same.

Cox's residential share standing alone does not support Qwest's release from its Section 251 obligations in the Phoenix MSA. In its last *Qwest 4 MSA Order*, the FCC stated: "Our analysis extends beyond this point because we do not rely on market share as the 'sole determining factor in deciding' the outcome of this proceeding."[29] Under a market power analysis, and when the forbearance legal standards are considered, Qwest is not entitled to relief.

2. The Legal Standards Are Not Met for the Residential Market.

Forbearance from Section 251 obligations for residential service in the Phoenix MSA would not be in the public interest. The market share of facilities-based wireline providers (largely Cox in the residential market) is not enough. In addition, as Confidential Exhibit 4 shows that other than Cox, the facilities based competition Qwest cites is exaggerated. Based upon this alone, and the prior *Qwest 4 MSA* Order, Qwest should not receive forbearance from Section 251(c) requirements in the residential market in the Phoenix MSA.

An argument could be made that there are not many carriers utilizing Qwest's UNEs to provide residential service in the Phoenix MSA, and therefore there would be no harm in doing away with Qwest's obligations in this regard. But, on the other hand, since

[29] *Qwest MSA 4* Order at footnote 4.

there are not many carriers utilizing Qwest's facilities to provide residential service, any impact upon Qwest that forbearance would produce would be minimal.

Importantly, the evidence shows that outside of Cox, the other wireline competitors in the Phoenix MSA rely for the most part upon Qwest's facilities. Any action on the FCC's part eliminating Qwest's obligation to provide these elements under Section 251 will likely be enough to drive this little bit of competition out of the Phoenix residential market. In the end, forbearance in the residential market in the Phoenix MSA will simply act to ensure that no further competition develops by taking away an important alternative available to carriers to provision service using Qwest's facilities. As proof of this, one need only look at the result that the elimination of UNE-P produced in the Phoenix MSA.

The McLeod experience in Omaha shows that at least one significant competitor in that market had to exit as a direct result of forbearance and the significant price increases that resulted. These price increases would necessarily be passed on to consumers. This is likely to be the result if Qwest is granted forbearance of its UNE obligations in the residential market in the Phoenix MSA. This would not be in the public interest.

Where the Commission has found an incumbent carrier to be non-dominant in the provision of access services, it had a retail market share of less than 50% and faced significant facilities-based competition. [30] This is not the case in the Phoenix MSA.

IV. SECTION 271 RELIEF WOULD BE INAPPROPRIATE AT THIS TIME.

In the Omaha case, the FCC denied Qwest's request for forbearance from Section 271 checklist items 4, 5 and 6, which establish independent obligations to provide unbundled access to local loops, local transport and local switching. It relied upon the

[30] *Id*. at p. 16.

continued availability of wholesale access to Qwest's network under Section 271 in forbearing from Section 251(c)(3).

Certainly if Section 251(c)(3) relief is not warranted, Section 271 relief is not warranted either. Further, Section 271 requirements are an important safeguard if and when the FCC finds that Qwest is entitled to 251(c)(3) relief.

In addition, before Section 271 relief would be appropriate, we believe that the FCC needs to first address the issues raised in the Petition for Expedited Rulemaking[31] filed recently by the Section 271 Coalition. As the Petition points out, the Courts have rejected state enforcement of Checklist obligations. We believe that determinations regarding the issues raised in the CLEC's request may be necessary for those Checklist Items to be "fully implemented" for purposes of forbearance.

V. QWEST DOES NOT MEET THE STANDARD FOR FORBEARANCE FROM *COMPUTER III* REQUIREMENTS.

Finally, the ACC does not support Qwest's request for forbearance of *Computer III* requirements. Qwest has not demonstrated that it has met the legal standard for forbearance and that forbearance from these requirements would be in the public interest. The FCC found in the last case that "…there is no evidence in the record demonstrating why, on balance, the *Computer III* requirements are not necessary to ensure that the 'charges, practices, classifications, or regulations…for [] or in connection with [Qwest's local exchange and exchange access services] are just and reasonable and are not unjustly or unreasonably discriminatory. And necessary for the protection of consumers.'" [32] The same conclusion can be reached in this case based upon the scant evidence on this issue. Moreover, the following finding in both the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* is also pertinent here:

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[31] *See In the Matter of Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. Section 271(c)(2)(B) of the Act, WC Docket No. 09-___;* filed on November 9, 2009.
[32] *Qwest 4 MSA Order* at para. 44.

> "…the Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards in order to prevent the BOCs from using 'exclusionary market power' arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market. The record here does not demonstrate that Qwest no longer possesses exclusionary market power, and thus as in the Qwest Section *272 Sunset Order*, we must assume that Qwest still possesses such market power. Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations … for[] or in connection with' Qwest's interexchange services that are unjust, unreasonable, or 'unjustly or unreasonably discriminatory' and could harm consumers**."** [33]

VI. CONCLUSION.

Qwest does not meet the standards for forbearance of important Dominant Carrier requirements, Section 251(c) and Section 271 unbundling requirements and *Computer III* requirements in the Phoenix MSA at this time. The ACC respectfully requests that the FCC deny Qwest's petition at this time.

RESPECTFULLY SUBMITTED this 2nd day of March, 2010.

/s/ Maureen A. Scott

Janice M. Alward, Chief Counsel
Maureen A. Scott, Senior Staff Counsel

[33] *Id*.

HIGHLY CONFIDENTIAL

EXHIBIT NO. 1

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 2

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 3

REDACTED

HIGHLY CONFIDENTIAL

EXHIBIT NO. 4

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EXHIBIT NO. 5

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EXHIBIT NO. 14

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EXHIBIT NO. 15

REDACTED