

June 7, 2010

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

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

Dear Ms. Dortch:

Qwest Corporation (“Qwest”), through undersigned counsel, hereby objects to the Commission’s introduction, in the final days of this proceeding, of new data, and apparently untested new lines of analysis, without any opportunity for Qwest to analyze or comment on the information or the uses to which it might be put.

As described in further detail below, the Commission on Wednesday, June 2, 2010 placed into the record “highly confidential” data – data of a sort never before utilized in a Commission order addressing a market-specific forbearance request. While the Commission has indicated that such data might assist it in evaluating competition in the Phoenix Metropolitan Statistical Area, it provided no insight into *how* it would assist, and no explanation of the methodology it intended to use in connection with the data. Moreover, the new information was placed into the record just days before the start of the “quiet period” in this proceeding, under circumstances that precluded any review by in-house experts and delayed review by outside counsel until just one business day before the last day on which submissions into the docket were permitted (*i.e.*, today). Given these circumstances, reliance on the data in this proceeding would violate Qwest’s Constitutional Due Process rights and the Administrative Procedure Act’s (“APA’s”) clear requirement that parties be permitted to comment meaningfully on facts and methodologies relied upon during agency decision-making. It would also be inconsistent with the Commission’s new rules requiring the “frontloaded, actively managed, transparent, and fair” processing of forbearance proceedings, which reflect one aspect of its oft-stated commitment to open, transparent, and participatory processes. As such, Qwest respectfully requests that the Commission disclaim any intention to rely on the data as it concludes its work in this docket. If it will not forego reliance on the new information, it must at least issue a Public Notice immediately, waiving the quiet period, setting forth the uses to which the data might be put in this proceeding, and seeking comment on whether such use is appropriate – though even that

course may fail to satisfy Qwest's procedural rights, given the impending June 22 statutory deadline.

## BACKGROUND

Qwest filed the underlying Petition on March 24, 2009.<sup>1</sup> Public comments were filed on September 21, 2009;<sup>2</sup> and reply comments (including Qwest's) were filed on October 21, 2009.<sup>3</sup> On March 2, 2010, the Commission extended until June 22, 2010 the statutory deadline by which the Petition would need to be addressed to avoid "deemed granted" status.<sup>4</sup> On May 13, 2010, more than six months after the close of the comment cycle in the proceeding, the Wireline Competition Bureau ("WCB") issued a Public Notice ("*May 13 PN*") stating that the Commission "may examine information contained in the Numbering Resource Utilization and Forecast (NRUF) reports filed by wireless telecommunications carriers and disaggregated, carrier-specific local number portability (LNP) data related to wireless telecommunications carriers," which "may assist the Commission in examining competition in the Phoenix marketplace."<sup>5</sup> The Notice further stated that "[a]ffected persons have until May 24, 2010 to oppose the disclosure of their NRUF and LNP data."<sup>6</sup> In light of the Notice's provision asking only "affected persons" to comment, and seeking comment only with respect to "the disclosure of their NRUF and LNP data," Qwest did not comment in response to the *May 13 PN*. Rather, Qwest expected that it would have the opportunity to review and comment on both the information (which the *May 13 PN* indicated would be made available subject only to the First Protective Order, such that in-house experts could review it)<sup>7</sup> and the methodology by which the Commission expected to use to measure competition (which Qwest expected the Commission to explain if indeed it entered the data into the record). Verizon – a parent of Verizon Wireless, whose data were at issue – did file comments; those comments did not object to importing the

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<sup>1</sup> See 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 (filed Mar. 24, 2009).

<sup>2</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Public Notice*, 24 FCC Rcd 10887 (WCB 2009).

<sup>3</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Order*, 24 FCC Rcd 11980 (WCB 2009).

<sup>4</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Order*, 25 FCC Rcd 2110 (WCB 2010).

<sup>5</sup> 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, *Public Notice*, DA 10-850, at 1 (rel. May 13, 2010) ("*May 13 PN*").

<sup>6</sup> *Id.* at 2.

<sup>7</sup> See *May 13 PN* at 1.

NRUF and LNP data, but raised concerns regarding the use of such data to evaluate competition.<sup>8</sup>

On June 2, WCB issued a Public Notice (“*June 2 PN*”) stating that “today, we are placing the NRUF and LNP data into the record pursuant to the provisions of the Second Protective Order adopted in this proceeding.”<sup>9</sup> Under the terms of the Second Protective Order, only outside counsel and consultants – but no Qwest personnel – may examine the data. The *June 2 PN* provided no indication as to how the Commission might utilize the data in connection with this docket. Contrary to Qwest’s expectation, then, the *June 2 PN* indicated that the information would *not* be subject to inspection by company experts, and did *not* set forth a rationale for comment; moreover, the June 2 release left just days before the opening of the quiet period. Thus, that day, Qwest initiated the process by which the undersigned (but not internal Qwest experts) could obtain access to the materials. Pursuant to these instructions, the undersigned contacted Commission staff on Thursday, June 3, took the additional steps required, and obtained a document containing the highly confidential data (the “Data”) on Friday, June 4. Later that day, WCB released another Public Notice (“*June 4 PN*”),<sup>10</sup> stating that Tuesday, June 8 would mark the beginning of the “quiet period” contemplated in the Commission’s rules, during which time parties would be barred from filing materials in the record.<sup>11</sup>

## DISCUSSION

### I. Use of the Data to Downplay Wireline-Wireless Substitution Would Be Arbitrary and Capricious.

As indicated above, Qwest has no way to know how the Commission plans to make use of the Data. That said, Qwest emphasizes that NRUF and LNP data of the sort at issue here cannot appropriately form the basis for a conclusion regarding the extent to which customers are replacing wireline telephone service with commercial mobile radio service. Wireline-to-wireless number ports of the type summarized by the Data do not at all reflect the most common

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<sup>8</sup> See Comments of Verizon, 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, at 1 (May 24, 2010).

<sup>9</sup> 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, *Public Notice*, DA 10-1010, at 1 (rel. June 2, 2010).

<sup>10</sup> See Quiet Period for the Qwest Phoenix MSA Forbearance Proceeding, WC Docket No. 09-135, *Public Notice*, DA 10-1034 (rel. June 4, 2010).

<sup>11</sup> See 47 C.F.R. § 1.58 (stating that “[t]he prohibition in § 1.1203(a) on contacts with decision makers concerning matters listed in the Sunshine Agenda shall also apply to a petition for forbearance for a period of 14 days prior to the statutory deadline under 47 U.S.C. 160(c) or as announced by the Commission”); *id.* § 1.1203.

circumstances under which customers surrender wireline service in favor of wireless. Specifically, LNP data accounts only for direct ports – *i.e.*, cases in which an existing wireline customer disconnects his or her wireline phone and at the same time establishes new wireless service, keeping the same telephone number. Thus, LNP data accounts for two scenarios: (1) cases in which a wireline customer *without wireless service* “cuts the cord” and transitions instantaneously to wireless, porting his or her wireline number, and (2) cases in which a customer with both wireline and wireless service cancels the wireline service and ports the wireline number to a brand new wireless account, rather than the preexisting account. Neither of these scenarios can be shown empirically to represent the typical context in which a customer “cuts the cord.”

In fact, the most likely scenarios under which wireless substitution occurs do *not* involve a direct port and are *not* captured by LNP data. These scenarios include the following:

- A customer has both wireline and wireless service, but finds that he or she is using the wireline service less and less. At some point, the customer decides that the wireline service is unnecessary and disconnects it, relying solely on wireless service. Because the customer already has a wireless phone and wants to keep the wireless number, he or she does not port the wireline number.
- A customer with no existing wireline service— for example, a new arrival in a given geographic area or a young adult – initiates wireless service and *never* initiates wireline service. This customer is substituting wireless service for wireline service, even though he or she did not migrate from an existing wireline account.
- A customer disconnects his or her wireline service and establishes wireless service, but decides not to keep the same phone number.

In each of these situations customers are substituting wireless service for wireline service, but there is no porting of the wireline number. The LNP data fails to account for any of these common scenarios.<sup>12</sup> Meanwhile, NRUF data provides little or no insight at all into wireless

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<sup>12</sup> While the Commission has previously relied on NRUF and LNP data in the context of transfer-of-control proceedings, such data were used for a different purpose there than that described herein. In those proceedings, the Commission relied on NRUF and LNP data to ascertain the total number of wireless subscribers and the number of ports between two wireless providers – not to determine the number of wireline-to-wireless ports, much less to assess the extent of wireless substitution. *See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, 12489, 12533-35 (2008).*

substitution. This is because the number and type of ported numbers will be shown in the LNP data, not the NRUF data, which shows only assigned numbers. Thus, any use of the Data as a basis for assessing wireless substitution would be arbitrary and capricious, because such Data is inapposite or overlooks a large proportion of such substitution.<sup>13</sup>

**II. Reliance on the Data Absent Informed Comment on It and the Uses to Which It Might Be Put Use Would Be Unlawful and Contrary to Open, Transparent Processes.**

Ultimately, however, there is simply no way for Qwest (or any other party) to know what the Commission has in store for the Data, or to provide informed comment on the propriety of that use. As described above, the Data were first entered into the record last Wednesday, with no indication of the Commission's plans other than the *May 13 PN*'s claim that NRUF and LNP data "may assist the Commission in examining competition...."<sup>14</sup> To Qwest's knowledge, data of this type have never been relied upon in a proceeding of this type.<sup>15</sup> Moreover, in-house Qwest experts familiar with the Phoenix market and with the NRUF and LNP databases have no access to the Data,<sup>16</sup> and Qwest's outside counsel first obtained the Data on Friday – one business day before the last day on which filings could be made. In short, Qwest and other parties lack any ability to consider and comment on the Commission's theory regarding the Data. Under these circumstances, reliance on the Data would violate Qwest's due process rights and the requirements of the APA, as well as the new forbearance procedural rules and this Commission's oft-stated commitment to open, transparent processes.

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<sup>13</sup> Qwest emphasizes that had the Commission stated the ends to which the Data might be put in this docket, and done so in a timely manner, it could have responded more fully to that proposed use. For example, it might have procured expert testimony regarding the points addressed here (or other points relevant to whatever use was proposed), or conducted detailed analysis of the Data, assessing how well it served the proposed use.

<sup>14</sup> *May 13 PN* at 1.

<sup>15</sup> While the Commission has previously relied on NRUF data to determine a provider's total *share* of the wireless-only market, *see* Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, *Memorandum Opinion and Order*, 23 FCC Rcd 11729, 11763-64 (2008) (subsequent history omitted); 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, 21323-34 (2008) (subsequent history omitted), it did not in those matters use porting information to assess the extent of region-wide wireline-wireless substitution.

<sup>16</sup> Although Qwest personnel obviously have access to Qwest's own NRUF data, it has no access to other companies' individual data. Likewise, Qwest receives neither monthly nor cumulative LNP data from Neustar.

***Reliance on the Data Would Be Unlawful Absent Informed Comment.*** Given the manner in which the Data were made available – *i.e.*, at the eleventh hour, without any explanation of the Commission’s proposed methodology for using the information, and under rules prohibiting review by internal experts – any use of the Data in this proceeding would vitiate Qwest’s rights under the Fifth Amendment’s Due Process Clause and the APA. As the courts have made clear, agency decisions based (in whole or in part) on data and/or methodologies that were not subject to evaluation and criticism vitiate such rights, and are arbitrary and capricious.

As an initial matter, Qwest is entitled to meaningful comment on the Data and the Commission’s proposed use for the Data, irrespective of whether this forbearance proceeding is a “rulemaking” or an “adjudication.”<sup>17</sup> The Supreme Court has made clear that the Fifth Amendment’s due process clause affords parties to administrative adjudications rights that mirror those that apply in the courts: “[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.”<sup>18</sup> A web of APA provisions serve to effectuate this guarantee, and to erect similar protections in the rulemaking context. Section 554, which governs adjudications, requires an agency to “give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.”<sup>19</sup> Likewise, section 553 requires the agency to “give interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”;<sup>20</sup> the courts have explained that “[this] opportunity for comment must be a meaningful opportunity.”<sup>21</sup> Section 556(d), which governs hearings, provides that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>22</sup> And section 556(e) provides that “[w]hen an agency decision rests on official notice of a material fact not appearing

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<sup>17</sup> In the *Forbearance Procedures Order*, the Commission stated that “arguments whether a forbearance proceeding more closely resembles rulemaking or adjudication [were] largely beside the point.” Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, *Report and Order*, 24 FCC Rcd 9543, 9554 (2009) (“*Forbearance Procedures Order*”).

<sup>18</sup> *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

<sup>19</sup> 5 U.S.C. § 554(c).

<sup>20</sup> *Id.* § 553(c).

<sup>21</sup> *Gerber v. Norton*, 294 F.3d 173, 180 (D.C. Cir. 2002) (citing cases).

<sup>22</sup> 5 U.S.C. § 556(d).

in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”<sup>23</sup>

Short of the action requested herein, however, any order based in any part on the Data will violate these Constitutional and statutory rights, for two reasons: (1) the Constitution and the APA provisions cited above require an agency to release any data on which it plans to rely early enough in the process to permit for meaningful review and comment, and (2) these protections likewise require an agency to reveal any plans to employ a new *methodology* with respect to such data in time to permit similarly meaningful review and comment.

First, an agency may not render decisions based on data that were not made available in a manner permitting appropriate examination and comment. “The agency cannot . . . rely on data known only to the agency: ‘when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond.’”<sup>24</sup> Nor is it any better to shield from comment information that is (eventually) placed into the record:

The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process . . . . To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.<sup>25</sup>

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<sup>23</sup> *Id.* § 556(e). As discussed below, moreover, the Commission has expressly recognized the importance of informed participation in forbearance dockets. In the *Forbearance Procedures Order*, the Commission “disagree[d] with comments to the effect that public notice and comment cycles for forbearance petitions are not required and may not always be appropriate” in forbearance proceedings, stating that “[t]he main issue is the adequacy of the record regardless of the nature of the proceeding.” *Forbearance Procedures Order*, 24 FCC Rcd at 9554 n. 76, 9559. The Commission “[fou]nd public comment necessary to identify issues and to help the Commission understand the policy ramifications of a petition from varying points of view.” *Id.* at 9559.

<sup>24</sup> *Nat’l Classification Comm. v. United States*, 779 F.2d 687, 695 (D.C. Cir. 1985) (quoting *Heckler v. Campbell*, 461 U.S. 458, 469 (1983)).

<sup>25</sup> *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982); see also *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (“Among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies.”) (internal quotations omitted); *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“[E]ven in the informal rulemaking context, we have cautioned that the most critical factual material that is used to support the agency’s position on review must have been made public *in the proceeding* and exposed to refutation.”) (citation omitted).

Thus, for example, where the Fish and Wildlife Service sought comment on a developer's application but failed to make public a map showing the location of land the developer proposed to set aside for conservation purposes to "mitigate" environmental harms associated with the development, the D.C. Circuit found that this lapse invalidated the application's subsequent approval: Access to the map was "indispensable" to opponents' ability "to have a meaningful opportunity to comment on [the] permit application."<sup>26</sup> The court thus remanded the matter to the agency for further consideration.<sup>27</sup>

Similarly, the courts have consistently held that a party to an administrative adjudication enjoys a right to cross-examine adverse witnesses and otherwise respond to the evidence used against it. For example, where an alien appealed his deportation on the ground that the Immigration and Naturalization Service had introduced an affidavit containing adverse evidence but its author did not honor a subpoena to provide oral testimony, the Ninth Circuit remanded the Immigration Judge's deportation order, holding that the failure to produce the witness violated the alien's due process rights.<sup>28</sup> The result has been the same where parties to an adjudication have been denied the opportunity to rebut facts of which the agency has taken administrative notice,<sup>29</sup> or presented with adverse facts that they had not been warned would be introduced.<sup>30</sup>

The courts have reached similar result in at least two cases involving this Commission. In *American Radio Relay League, Inc. v. FCC*,<sup>31</sup> the D.C. Circuit found that "[t]he Commission failed to satisfy the notice and comment requirements of the [APA] by redacting studies on

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<sup>26</sup> *Gerber*, 294 F.3d at 182.

<sup>27</sup> *Id.* at 186 ("We therefore . . . remand to the district court with instructions to remand to the agency for further proceedings.").

<sup>28</sup> *See Saidane v. INS*, 129 F.3d 1063, 1065 (9<sup>th</sup> Cir. 1997).

<sup>29</sup> For example, the Tenth Circuit granted the appeal of a Polish asylum seeker whose application was denied based on facts of which the Board of Immigration Appeals had taken administrative notice regarding changed political conditions in Poland without permitting the applicant to respond. This outcome, the court held, violated the applicant's Fifth Amendment due process rights. *Kowalczyk v. INS*, 245 F.3d 1143, 1148-49 (10<sup>th</sup> Cir. 2001); *see also Kaczmarczyk v. INS*, 933 F.2d 588, 596 (7<sup>th</sup> Cir. 1991) ("We believe the due process clause of the fifth amendment requires that petitioners be allowed an opportunity to rebut officially noticed facts . . . . [N]ot to allow petitioners an opportunity to rebut noticed facts would sanction the creation of an unregulated back door through which un rebuttable, non-record evidence could be introduced against asylum petitioners outside of the statutorily-mandated hearing context . . . .").

<sup>30</sup> *See, e.g., Robbins v. United States R.R. Ret. Bd.*, 594 F.2d 448, 452 (5<sup>th</sup> Cir. 1979) (finding that board hearing in which referee collected evidence against a party and did not give notice of evidence being gathered did "substantial violence" to "[t]he principle that a due process hearing includes the right to know what evidence is being used against one and the opportunity to rebut it.").

<sup>31</sup> 524 F.3d 227 (D.C. Cir. 2008).

which it relied in promulgating the rule . . . .”<sup>32</sup> That failure was prejudicial to the parties, who were denied the ability to challenge the redacted information.<sup>33</sup> The court remanded the matter to the Commission, ordering it to “afford a reasonable opportunity for public comment on the unredacted studies on which it relied in promulgating the rule [and] make the studies part of the rulemaking record.”<sup>34</sup> Likewise, in *National Black Media Coalition v. FCC*, the Second Circuit found that conclusions “based on maps which were appended to [its final] order and internal studies” were “arbitrary and capricious” where neither the maps nor the studies were disclosed during the proceeding: “It is clear that it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [in] critical degree is known only to the agency.”<sup>35</sup>

These principles prohibit reliance on the Data here. The NRUF and LNP information was first made available less than four business days before the quiet period, under procedural hurdles that precluded any review by Qwest experts and prevented Qwest’s outside counsel from obtaining immediate access. These circumstances simply do not constitute release “in time to allow for meaningful commentary.”<sup>36</sup>

Second, even if the information had been made available in time for meaningful review and comment, reliance on the Data would still be precluded because the Commission has provided no indication as to how the information “may assist the Commission in examining competition in the Phoenix marketplace.” The Fifth Amendment and the APA require that an agency provide insight into the methodology it intends to apply in reaching a conclusion, such that parties may comment meaningfully on that methodology and point out any flaws. For example, in *National Black Media Coalition*, the Commission had argued that the studies omitted from the record “were based on public data and were largely corroborated by the comments.”<sup>37</sup> This, the court held, was inconsequential: “[I]t is the methodology used in creating the maps and studies, and the meaning to be inferred from them that should have been a part of the public record. This non-disclosure thus prevented petitioners and perhaps others from making relevant comments . . . . The agency, therefore, cannot be said to have taken into account all relevant factors in reaching its decision.”<sup>38</sup> This alone rendered the decision arbitrary and

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<sup>32</sup> *Id.* at 231. Notably, these “studies” consisted merely of “data” compiled by the Office of Engineering and Technology. *See id.* at 237.

<sup>33</sup> *See id.* at 238.

<sup>34</sup> *Id.* at 242.

<sup>35</sup> *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (internal quotations omitted) (modification in original).

<sup>36</sup> *Conn. Light & Power Co.*, 673 F.2d at 531.

<sup>37</sup> *National Black Media Coalition*, 791 F.2d at 1023 (citations omitted).

<sup>38</sup> *Id.* (internal quotations omitted) (citations omitted).

capricious.<sup>39</sup> Likewise, in 2007's *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, the D.C. Circuit "conclude[d] that the [Federal Motor Carrier Safety Administration ('FMCS')] violated the Administrative Procedure Act because it failed to give interested parties an opportunity to comment on the methodology of the crash-risk model that the agency used to justify an increase in the maximum number of daily and weekly hours that truck drivers may drive and work."<sup>40</sup> There, the FMCS had devised a new "operator-fatigue" methodology for computing crash risk figures, which incorporated for the first time data accounting for how much time a driver spent on the job – known as "time-on-task multipliers" –without disclosing its plan to adopt the new methodology until the rule was issued. "The failure to provide an opportunity for comment on the model's methodology," the court held, "therefore constitutes a violation of the APA's notice-and-comment requirements."<sup>41</sup> Critically, the court rejected FMCSA's claim that its approach was permissible because the new approach was "an update" of its prior approach:

It is true that an agency does not violate the APA if its "methodology remain[s] constant" and new data is merely "used to check or confirm prior assessments." But FMCSA's methodology did *not* remain constant. The operator-fatigue model may have employed an "update" of the methodology disclosed in [an earlier assessment], but the nature of the update – the *derivation* of the time-on-task multipliers, and even the *use* of time-on-task multipliers – was entirely new.... Although interested parties may have known that FMCSA would incorporate time-on-task effects into its crash-risk model, they had no way of knowing that the agency would calculate the impact of time on task in the way that it did.<sup>42</sup>

The court vacated the aspects of the order that relied on the new methodology.<sup>43</sup>

The Commission's failure to explain and seek comment on the methodology it plans to apply to the Data presents the very same problems. As in *Black Media Coalition*, the Commission's "non-disclosure [has] prevented [parties] from making relevant comments," and, to the extent it bases an order on an undisclosed theory about use of the NRUF and LNP data, the Commission "cannot be said to have taken into account all relevant factors in reaching its decision."<sup>44</sup> As in *Owner-Operator Independent Drivers Association*, use of that data – whether to measure wireless substitution or otherwise – would be "entirely new"; "[a]lthough interested parties may have known that [the Commission] would incorporate [NRUF and LNP data] into its

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<sup>39</sup> See *id.* at 1024.

<sup>40</sup> 494 F.3d 188, 193 (D.C. Cir. 2007).

<sup>41</sup> *Id.* at 201.

<sup>42</sup> *Id.* at 201-02 (quoting *Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991)) (other citation omitted).

<sup>43</sup> See *id.* at 212.

<sup>44</sup> *National Black Media Coalition*, 791 F.2d at 1023, 1024.

[competition analysis], they [will have] had no way of knowing that the agency would calculate the impact of [that data] in the way that it [does].”<sup>45</sup>

***Reliance on the Data Would Also Flout This Commission’s Commitment to Open, Transparent Processes.*** Under the leadership of Chairman Genachowski, this Commission has placed openness, transparency, and data-driven decision-making at the center of its agenda. Remarking to Commission staff upon swearing-in, Chairman Genachowski stated: “How we will work will be central to what we can achieve. We will be fair. We will be open and transparent. Our policy decisions will be fact-based and data-driven.”<sup>46</sup> In November, the Chairman reiterated his view that “openness and transparency are core areas of our current focus at the FCC.”<sup>47</sup> In December, he stated that “the FCC is at its best . . . when we engage the public through open, participatory processes [and] when we are making decisions based on facts and data.”<sup>48</sup> This theme has been pervasive in the Chairman’s public remarks.<sup>49</sup>

The commitment to open, transparent processes has not, of course, been limited to Chairman Genachowski. In February, the Commission unanimously adopted two Notices of Proposed Rulemaking expressly designed to further this central Commission goal. In one, it sought comment on proposals that were “intended to . . . enhance the openness and transparency

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<sup>45</sup> *Owner-Operator Indep. Drivers Ass’n*, 494 F.3d at 202.

<sup>46</sup> Julius Genachowski, Chairman, Federal Communications Commission, Remarks to the Staff of the Federal Communications Commission, at 4 (June 30, 2009).

<sup>47</sup> Julius Genachowski, Chairman, Federal Communications Commission, “ICT: Global Opportunities and Challenges,” Remarks at International Telecommunication Union Global Symposium for Regulators, at 4 (Nov. 10, 2009).

<sup>48</sup> Julius Genachowski, Chairman, Federal Communications Commission, “Innovation in a Broadband World,” Remarks at The Innovation Economy Conference, at 2 (Dec. 1, 2009).

<sup>49</sup> *See, e.g.*, Julius Genachowski, Chairman, Federal Communications Commission, “America’s Mobile Broadband Future,” Remarks at International CTIA WIRELESS I.T. & Entertainment, at 9 (Oct. 7, 2009) (“[W]e [will] pursue [the FCC’s Mobile Broadband] agenda . . . [t]hrough fact based, data driven, open and transparent processes . . .”); Julius Genachowski, Chairman, Federal Communications Commission, Remarks on National Broadband Plan Process at FCC Open Meeting, at 2 (July 2, 2009) (“We have a plan that will be data-driven. That means not starting with conclusions, but using data to develop analysis. It also means not just accepting data, but digging into data, to find concrete solutions that supersede ideology . . .”); Julius Genachowski, Chairman, Federal Communications Commission, Remarks at National Broadband Plan Workshop: eGovernment and Civic Engagement, at 2 (Aug. 6, 2009) (“[T]he process for developing the National Broadband Plan w[ill] be . . . [t]he most open ever at FCC; [t]he most participatory ever at FCC; [t]he most data driven ever at FCC . . .”); Julius Genachowski, Chairman, Federal Communications Commission, Remarks on National Broadband Plan FCC Open Agenda Meeting, at 1 (Dec. 16, 2009) (“The process [for developing the National Broadband Plan] w[ill] be open and transparent [and will] allow for public participation in ways that would be unprecedented for this agency. This process w[ill] also be data-driven, meaning there w[ill] be no pre-baked conclusions.”).

of Commission proceedings . . . .”<sup>50</sup> In the other, the Commission sought “comment on proposals to improve our ex parte and other procedural rules to make the Commission’s decision-making processes more open, transparent, and effective.”<sup>51</sup> There, it highlighted the critical role of public comment:

The *ex parte* process allows parties in most Commission proceedings to speak directly (or have written communications) with Commission staff and decisionmakers, providing a way to have an interactive dialogue *that can root out areas of concern, address gaps in understanding, identify weaknesses in the record, discuss alternative approaches, and generally lead to more informed decisionmaking.*<sup>52</sup>

Moreover, in circumstances particularly relevant here, in the *Tower Shot Clock Order* issued just months ago, the Commission unanimously chastised a party for filing information too close to the issuance of an Order, and “strongly encourage[d] parties to submit relevant evidence as early as possible in the course of a proceeding . . . so that it may be subjected to the crucible of a response.”<sup>53</sup> On that occasion, the Commission declined to give any weight to the filing at issue, which was submitted eight days before the Order’s issuance and one day before the beginning of the “sunshine” period.<sup>54</sup>

The Commission’s efforts to promote sound decision-making through the crucible of openness and comment have been *especially* robust in the context of forbearance petitions. In last year’s *Forbearance Procedures Order*, the Commission unanimously emphasized that interested parties must be able “to file complete and thorough comments on a fully-articulated proposal,” rather than facing “a moving target, which frustrates their efforts to respond fully and early in the process.”<sup>55</sup> The Commission emphasized that informed comment is “necessary to identify issues and to help the Commission understand the ramifications of a petition from varying points of view.”<sup>56</sup> To this end, the Commission adopted (inter alia) a requirement that

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<sup>50</sup> Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, *Notice of Proposed Rulemaking*, 25 FCC Rcd 2430 (2010).

<sup>51</sup> Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules, *Notice of Proposed Rulemaking*, 25 FCC Rcd 2403 (2010).

<sup>52</sup> *Id.* (emphasis added).

<sup>53</sup> Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd 13994, 14006 n.108 (2009).

<sup>54</sup> *See id.* (filing afforded no weight where “sunshine period” began next day).

<sup>55</sup> *Forbearance Procedures Order*, 24 FCC Rcd at 9549-50; *see also id.* at 9557 (“[T]he rules we adopt today promote a clearly defined, front-loaded, transparent, and actively managed process.”).

<sup>56</sup> *Id.* at 9559.

forbearance petitions be “complete as filed,” stating with particularity “(1) each statutory provision, rule, or requirement from which forbearance is sought; (2) each carrier, or group of carriers, for which forbearance is sought; (3) each service for which forbearance is sought; (4) the geographic location, zone, or area in which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief.”<sup>57</sup> Finally, the Commission stressed that the two-week “quiet period” would not undermine advocacy precisely because the complete-as-filed rule and related requirements would “help to ensure that the record is filled out early in the proceeding.”<sup>58</sup> The new rules focus not only on the conduct of forbearance petitioners and other outside parties, but also on the Commission itself, specifying internal processes and guidelines to ensure that the Commission and its staff engage in a timely and open manner in forbearance proceedings.<sup>59</sup>

Here, the Commission seems poised to engage in precisely the sort of closed and opaque decision-making it has consistently criticized. The quiet period will commence tomorrow with parties having been left unable to comment meaningfully on the Data, and unable to comment at all on the use to which the Data will be put. Analysis and data originating from the Commission, no less than that originating from parties, must be subject to the “crucible of a response,” and cannot be credited if it is not. A ruling based on evidence submitted in a manner that precludes timely, informed comment, for use in connection with a legal theory that has likewise been shielded from scrutiny would deeply undermine norms of “openness and transparency,” not to mention “open, participatory processes.” Such a ruling would deny commenters the opportunity to “address gaps in understanding, identify weaknesses in the record, [and] discuss alternative approaches,”<sup>60</sup> or “to help the Commission understand the ramifications of a petition from varying points of view.”<sup>61</sup>

### **III. The Commission Must Forswear Reliance on the Data, Or At Least Describe Its Proposed Methodology and Seek Comment Thereon.**

As discussed above, use of the Data as the basis for any conclusions in this proceeding would violate not only the Commission’s commitment to open processes, but also Qwest’s Due Process rights and the APA, both because the information itself was not made available in a manner that permitted meaningful comment and because the Commission has not explained the ways in which it will be used and sought comment on that approach. An agency decision that “is subject to the APA’s procedural requirements, but was adopted without them, is invalid,”<sup>62</sup> and

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<sup>57</sup> *Id.* at 9553.

<sup>58</sup> *Id.* at 9561.

<sup>59</sup> *Id.* at 9557-61.

<sup>60</sup> *See supra*, note 52.

<sup>61</sup> *Forbearance Procedures Order*, 24 FCC Rcd at 9559.

<sup>62</sup> *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989).

Marlene H. Dortch  
June 7, 2010  
Page 14

courts considering such a decision “must vacate the [relevant requirement] and remand the issues raised . . . so that the agency can comply with [those] requirements . . . .”<sup>63</sup> For these reasons, the Commission must avoid any reliance on the Data in its order, lest that order be “h[e]ld unlawful and set aside” as a consequence of having been adopted “without observance of procedure required by law.”<sup>64</sup> Alternatively, in the event the Commission is set on use of the Data to form its conclusions, it must at the least waive the quiet period, explain the ways in which it proposed to rely upon and use the Data, and seek expedited comment on that proposal – though even these steps may be insufficient, given the imminence of the statutory deadline.<sup>65</sup>

\* \* \*

Qwest thanks you for your attention to this matter. Please do not hesitate to contact the undersigned or the company with any questions.

Sincerely yours,

/s/ Russell P. Hanser

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<sup>63</sup> *SBC Inc. v. FCC*, 414 F.3d 486, 495 (3d Cir. 2005); see also *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) “[A]n utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.”).

<sup>64</sup> 5 U.S.C. § 706(2)(D).

<sup>65</sup> Qwest does not here suggest that review and comment in this proceeding’s closing days would necessarily cure the procedural defects discussed herein. Given the pending statutory deadline, it could well be the case that even a comment period opened today would fail to satisfy the relevant requirements.

Marlene H. Dortch

June 7, 2010

Page 15

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