

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

In the Matter of
Petition of Qwest Corporation for Forbearance
Pursuant to 47 U.S.C. § 160(c) in the Omaha
Metropolitan Statistical Area

WC Docket No. 04-223

In the Matter of
Petition of ACS of Anchorage, Inc. Pursuant to
Section 10 of the Communications Act of 1934,
as Amended, for Forbearance from Sections
251(c)(3) and 252(d)(1) in the Anchorage Study
Area

WC Docket No. 05-281

In the Matter of
Petition of ACS of Anchorage, Inc. Pursuant to
Section 10 of the Communications Act of 1934,
as Amended (47 U.S.C. § 160(c)), for
Forbearance from Certain Dominant Carrier
Regulation of Its Interstate Access Services, and
for Forbearance from Title II Regulation of Its
Broadband Services, in the Anchorage, Alaska,
Incumbent Local Exchange Carrier Study Area

WC Docket No. 06-109

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

WC Docket No. 06-172

In the Matter of
Petitions of Qwest Corporation for Forbearance
Pursuant to 47 U.S.C. § 160(c) in the Denver,
Minneapolis St.-Paul, Phoenix, and Seattle
Metropolitan Statistical Areas

WC Docket No. 07-97

REPLY TO OPPOSITION TO MOTION TO MODIFY PROTECTIVE ORDERS

Cox's objection to Qwest's request to modify the protective orders is unpersuasive and, in key respects, badly confused. Qwest filed this motion solely to ensure that the Tenth Circuit can read the unredacted text of the Commission's orders in the above-captioned proceedings—and, most important, the *Qwest 4-MSA* and *Verizon 6-MSA Orders*—so that the Tenth Circuit may judge for itself whether the Commission's *Phoenix Order* impermissibly departs from key aspects of these prior orders.¹ Contrary to Cox's apparent misimpression, Qwest does *not* seek a broader right to submit any nonpublic information that was submitted into the record of those earlier proceedings but is not reflected in the Commission's orders. It seeks only to allow the Tenth Circuit to read—and the parties to submit confidential briefs quoting from—the full FCC precedent that the *Phoenix Order* pervasively cites and partially overrules.

The narrowness of the relief Qwest seeks here confirms the unreasonableness of Cox's lonely opposition. Throughout the two orders disputed here—the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order*—the Commission mentions Cox-specific proprietary information in *only a single passage*: the first sentence of footnote 106 in the *Qwest 4-MSA Order*, which identifies Cox's 2008 market share in Phoenix.² That market share information is not only dated, but

¹ See Mem. Op. and Order, *Petition of Qwest Corp. for Forbearance in the Phoenix, AZ MSA*, 25 FCC Rcd 8622 (2010) (“*Phoenix Order*”), *pet. for review pending*, No. 10-9543 (10th Cir. filed July 30, 2010); Mem. Op. and Order, *Petitions of Qwest Corp. for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs*, 23 FCC Rcd 11729 (2008) (“*Qwest 4-MSA Order*”); Mem. Op. and Order, *Petitions of the Verizon Tel. Cos. for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, 22 FCC Rcd 21293 (2007) (“*Verizon 6-MSA Order*”), *remanded*, 570 F.3d 294 (D.C. Cir. 2009).

² *Qwest 4-MSA Order*, 23 FCC Rcd at 11749 ¶ 27 n.106. Footnote 106 also provides “the implied market shares of the cable operators” in Denver, Minneapolis, and Seattle, but those MSAs are served by Comcast, which has consented to the relief Qwest seeks in this motion. See *id.* Separately, footnote 90 of the *Verizon Six-MSA Order* identifies “the combined market share for the cable companies” in each of several Verizon MSAs. *Verizon 6-MSA Order*, 22 FCC Rcd

highly generalized; for example, it is averaged across the Phoenix MSA and is not broken down by wire center or zip code. In contrast, the *Qwest 4-MSA Order* contains equally or more sensitive information from other providers, such as XO, PAETEC, Time Warner, Comcast, and Integra. See *Qwest 4-MSA Order*, 23 FCC Rcd at 11752 ¶ 33 n.119, 11755 ¶ 36 n.134.

Significantly, each of those providers has consented to the relief sought in this motion.

Moreover, even with respect to that Cox-specific passage in footnote 106 of the *Qwest 4-MSA Order*, Cox has identified no plausible reason for keeping the Tenth Circuit from knowing what the FCC said in the *Qwest 4-MSA Order* about Cox's 2008 Phoenix market share. As Cox acknowledges, the Tenth Circuit will have access to confidential information about Cox's 2010 market share, which is disclosed both in paragraph 81 of the *Phoenix Order* and the underlying record material, and is of course more competitively sensitive than the more dated information contained in the *Qwest 4-MSA Order*. Cox resists the disclosure of that dated information anyway on the theory that it "would yield competitors valuable insights into Cox's customer and line growth in the Phoenix market." Cox Opp. at 5. This is nonsense. Granting the relief Qwest seeks here would not "yield competitors valuable insights" into anything, because all proprietary information will remain subject to the usual safeguards against inappropriate disclosure.³ But

at 21308 ¶ 27 n.90. It does not list any market shares specific to Cox, although a subset of those MSAs is served, at least in part, by Cox. In any event, information specific to particular competitors in Verizon MSAs is less critical to Qwest's appeal than information specific to Phoenix, which is the subject of Qwest's Tenth Circuit appeal.

³ Cox threatens that "Cox and other similarly situated parties" may stop "cooperat[ing]" with the Commission's information requests if the Commission modifies the protective orders here to permit meaningful judicial review. Cox Opp. 7-8. This is untenable in several respects. First, all "similarly situated parties" disagree with Cox on this, because they have all consented to the relief sought here. Second, as we have discussed, Cox previously agreed to the modification of these same protective orders in earlier appeals, and most people who would gain access to the redacted information *already had* access to the same information two years ago by participating in those appeals and the underlying FCC proceedings. Any incremental confidentiality concerns Cox might have now are thus de minimis. Third, Qwest does not seek

granting this motion will yield “valuable insights” to the *Tenth Circuit* about whether it makes sense to continue regulating Qwest as a monopolist despite the very magnitude of “Cox’s customer and line growth in the Phoenix market”—a key argument Qwest intends to stress on appeal.

Cox also stumbles when, in seeking to downplay the precedential importance of these prior FCC orders, it tries to anticipate the issues in this appeal (to which Cox is not a party). Cox contends that Qwest “cannot seriously argue to the Tenth Circuit” that the *Phoenix Order* “unjustifiably diverges from the *Verizon 6-MSA Order* [and] the *Qwest 4-MSA Order*,” given that “[t]he D.C. Circuit held that the *Verizon 6-MSA Order* [was] arbitrary and capricious.” Cox Opp. at 6. That passage reveals only that Cox does not know what Qwest’s current appeal is about and why the complete text of the *Qwest 4-MSA* and *Verizon 6-MSA Orders* is so relevant to that appeal.

The D.C. Circuit remanded (but did not vacate) the *Verizon 6-MSA Order* on the ground that the Commission had inadequately explained why it had departed from its earlier precedent by imposing a loss-of-majority-share requirement as a precondition for MSA-specific forbearance relief. *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).⁴ In the subsequent *Phoenix Order*, the Commission nonetheless decided to retain a market share requirement. In

“a perpetual writ . . . to use confidential data from all earlier proceedings” (*id.* at 8); it seeks modification of orders that would otherwise keep the Tenth Circuit from performing meaningful judicial review by reading official Commission orders closely related to the order under review. Finally, the Commission is not, as Cox implies, a mere supplicant to the industry, limited to hoping that regulated entities will “cooperate” in supplying information the Commission needs to discharge its responsibilities. It can simply direct them to do so. *See, e.g.*, Report and Order, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10*, 24 FCC Rcd 9543, 9552-53 ¶ 15 (2009).

⁴ The court separately granted the Commission’s motion for a voluntary remand of the *Qwest 4-MSA Order* in light of the court’s remand of the *Verizon 6-MSA Order*. *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009).

this Tenth Circuit appeal, Qwest will not focus on the Commission’s threshold decision to retain such a requirement—the only issue the D.C. Circuit addressed. Instead, it will challenge the Commission’s separate decision in the *Phoenix Order* to make the market share standard far more difficult to meet than even the disputed standard adopted in the *Verizon 6-MSA* and *Qwest 4-MSA Orders*.

For example, Qwest will argue that, in the *Phoenix Order*, the Commission unjustifiably repudiated its holdings in the *Verizon 6-MSA* and *Qwest 4-MSA Orders* on two distinct issues: (1) whether to include wireless substitution when calculating a petitioning ILEC’s market share for purposes of the market share requirement, and (2) exactly what market share a petitioning ILEC needs to show when it faces one ascendant cable competitor (here, Cox) rather than several smaller wireline competitors. Those issues were not before the D.C. Circuit because, in both the *Verizon 6-MSA* and *Qwest 4-MSA Orders*, the Commission had resolved them in favor of the ILEC. In assessing Qwest’s claim that the *Phoenix Order* impermissibly departed from those two prior orders on these and other issues, the Tenth Circuit will need to see what the Commission said in those prior orders, and specifically what it said about market share.⁵

Finally, it bears repeating that the *Qwest 4-MSA Order* discloses Cox-specific proprietary information only in the first sentence of footnote 106. As discussed above, the information in that sentence is material to Qwest’s Tenth Circuit appeal, and the Commission should not

⁵ For example, on the issue of the market share threshold that must be met, compare *Phoenix Order*, 25 FCC Rcd at 8664-65 ¶ 81 (identifying Qwest and Cox market shares), with *Qwest 4-MSA Order*, 23 FCC Rcd at 11743-45 ¶ 21 (identifying but redacting Qwest market share figure that “likely would be sufficient to grant forbearance under the Commission’s precedent”). And on the issue of wireless substitution, compare *Phoenix Order*, 25 FCC Rcd at 8656 ¶ 61 (“We recognize that excluding mobile wireless service from the product market for residential wireline service may appear to represent a change in course from the statements in some prior Commission orders.”), with *Qwest 4-MSA Order*, 23 FCC Rcd at 11742-45 ¶¶ 19-21 (discussing but redacting Qwest market shares when certain cut-the-cord figures are considered).

prevent the Tenth Circuit from reading it or the parties from quoting it in the confidential versions of their briefs. But apart from that single sentence, there can be no conceivable justification for denying the Tenth Circuit access to any of the other redacted material in the *Qwest 4-MSA Order*. Similarly, there is no conceivable justification for denying the Tenth Circuit access to the unredacted version of the *Verizon 6-MSA Order* with the possible exception of footnote 90 (*see* note 2, *supra*). All of the remaining material in both orders reflects either (1) general market information that is not specific to any single provider but Qwest or (2) is specific to providers that have consented to the relief sought in this motion—*i.e.*, all providers except for Cox.

* * *

Under the Tenth Circuit's schedule, Qwest's opening brief is likely to be due by mid-November, and Qwest has begun preparing that brief in earnest. Qwest thus renews its existing request that the Commission resolve this motion by October 1, 2010—or, at the latest, October 6—so that, if need be, Qwest can seek any necessary intervention from the Tenth Circuit.

Respectfully submitted,

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