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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12 St. NW  
Washington, D.C. 20554

SEP 28 2010

Federal Communications Commission  
Office of the Secretary

Dear Ms. Dortch:

Please file the attached Opposition to Motion to Modify Protective Order of Cox Communications, Inc. in WC Docket No. 07-97.

Please contact me if any questions should arise.

Sincerely,

Jason E. Rademacher  
Counsel for Cox  
Communications, Inc.

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

In the Matters of )  
 )  
 Petition of Qwest Corporation )  
 for Forbearance Pursuant to )  
 47 U.S.C. § 160(c) in the Omaha )  
 Metropolitan Statistical Area )  
 )  
 Petition of ACS of Anchorage, Inc. )  
 Pursuant to Section 10 of the )  
 Communications Act of 1934, as Amended, )  
 for Forbearance from Sections 251(v)(3) )  
 and 252(d)(1) in the Anchorage Study Area )  
 )  
 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 )  
 )  
 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 )  
 )  
 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. 04-223

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Federal Communications Commission  
Office of the Secretary

WC Docket No. 05-281

WC Docket No. 06-109

WC Docket No. 06-172

WC Docket No. 07-97

**OPPOSITION TO MOTION TO MODIFY PROTECTIVE ORDER**

Cox Communications, Inc. ("Cox") objects to Qwest's efforts to continue using competitively sensitive confidential information that Cox disclosed for the purpose of aiding the

FCC in its evaluation of Qwest's 2007 4-MSA Petition and Verizon's 2006 6-MSA Petition.<sup>1</sup>

Both Qwest and Verizon now have voluntarily withdrawn those forbearance requests, and there

is no legitimate reason for Qwest to gain or maintain access to Cox's confidential information

from either of those proceedings.<sup>2</sup> Cox's confidential information remains competitively

sensitive, and Qwest's motion fails to identify a single piece of confidential information

submitted by Cox in those terminated proceedings that is necessary to the Tenth Circuit's

consideration of Qwest's appeal of the Commission's recent *Phoenix Forbearance Order*.<sup>3</sup>

Under these circumstances, no basis exists for the relief Qwest seeks and the Commission should

deny its motion to the extent that it would permit signatories to the protective orders in WC

Dockets No. 06-172 and 07-97 to continue using Cox's confidential information.

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<sup>1</sup> Petitions of Qwest Corporation for Forbearance Pursuant to 47 USC §160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Phoenix, Arizona, and Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (collectively, the "4-MSA Petition"); Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, Massachusetts, New York, New York, Philadelphia, Pennsylvania, Pittsburgh, Pennsylvania, Providence, Rhode Island, and Virginia Beach, Virginia Metropolitan Statistical Areas, WC Docket No. 06-172 (filed Sept. 6, 2006) (collectively, the "6-MSA Petition"). Cox objects to continued use of any and all of its confidential information in these dockets regardless of whether it was originally denominated as "confidential" or "highly confidential."

<sup>2</sup> As Cox explained in its email response to Qwest's initial request for Cox's consent to modification of the relevant protective orders, Cox does not object to modification of the protective order in the Omaha proceeding (WC Docket No. 04-233), because that proceeding remains open pursuant to the Petition for Modification of the *Qwest Omaha Order* filed by McLeodUSA Telecommunications Services, Inc. See Motion, Attachment A; see also Pleading Cycle Established for comments on McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the *Qwest Omaha Order*, WC Docket No. 04-223, DA 07-3467 (rel. July 30, 2007). Cox also does not oppose modification of the protective orders in WC Docket Nos. 05-281 because Cox did not submit any confidential information in that proceeding.

<sup>3</sup> See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, AZ Metropolitan Statistical Area, *Memorandum Opinion and Order*, WC Docket No. 09-135, FCC 10-115 (rel. June 22, 2010) (the "*Phoenix Forbearance Order*"), appeal pending, NO. 10-9543 (10th Cir. filed July 30, 2010).

## I. BACKGROUND

Cox provided confidential information regarding its customer line figures and facilities deployment at the request of FCC staff to aid the Commission in resolving Qwest's 4-MSA Petition and Verizon's 6-MSA Petition. In both cases, Cox sought to cooperate with reasonable staff requests for highly sensitive competitive information. Cox provided its confidential information subject to protective orders that guaranteed the information would be available to closely circumscribed groups of attorneys, employees, and consultants within the Qwest and Verizon organizations.<sup>4</sup> Those protective orders ensured that Cox's confidential information would be returned or destroyed once the forbearance proceedings were completed.<sup>5</sup>

The Commission largely denied the relief requested in both the Qwest 4-MSA and Verizon 6-MSA proceedings.<sup>6</sup> Both Verizon and Qwest appealed those rulings, arguing, among other things, that the orders unlawfully deviated from Commission precedent established in the earlier Omaha and Anchorage forbearance proceedings.<sup>7</sup> The D.C. Circuit agreed with

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<sup>4</sup> See 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 Virginin Beach Metropolitan Statistical Areas, *Protective Order*, WC Docket No. 06-172, DA 06-1870 (rel. Sept. 14, 2006) (the "First Verizon Protective Order"); *Order*, DA 07-208 (rel. Jan. 25, 2007) (the "Second Verizon Protective Order"); see also 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, DA 07-2292 (rel. June 1, 2007) (the "First Qwest Protective Order"); DA 07-2293 (rel. June 1, 2007) (the "Second Qwest Protective Order").

<sup>5</sup> First Verizon Protective Order ¶ 14; Second Verizon Protective Order ¶ 20; First Qwest Protective Order ¶ 14; Second Qwest Protective Order ¶ 19.

<sup>6</sup> 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 Red 11279 (2008) ("*Qwest 4-MSA Order*"); 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 Virginin Beach Metropolitan Statistical Areas, *Memorandum Opinion and Order*, 22 FCC Red 21293 (2007) ("*Verizon 6-MSA Order*").

<sup>7</sup> See Verizon Petition for Review, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008); Qwest Petition for Review, No. 08-1257 (D.C. Cir. filed July 29, 2008).

Verizon's argument in its 6-MSA appeal and remanded the *6-MSA Order* as an arbitrary and capricious departure from past Commission precedent.<sup>8</sup> The Commission then requested remand of the *4-MSA Order*, and the court granted that request.<sup>9</sup>

On August 20, 2009, the Commission initiated proceedings to further consider the 6-MSA and 4-MSA proceedings in light of the D.C. Circuit's remand.<sup>10</sup> Before the Commission could complete those proceedings, however, both Qwest and Verizon formally withdrew their forbearance petitions, and the Commission terminated both dockets.<sup>11</sup>

## II. ARGUMENT

Cox opposes further use and disclosure of confidential information it submitted to the Commission in Dockets No. 06-172 and 07-97. Under the terms of the operative protective orders, parties that hold confidential information are required to return or destroy that information within two weeks following termination of the proceeding.<sup>12</sup> Qwest should have destroyed Cox's confidential data in its possession no later than September 3, 2010.<sup>13</sup> While the protective orders contemplate that outside counsel may retain confidential information, the protective orders make no provision for continued use or disclosure of that information, which is

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<sup>8</sup> See *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).

<sup>9</sup> See Motion of the Federal Communications Commission for a Voluntary Remand, No. 08-1257, at 2 (D.C. Cir. filed July 17, 2009); see also Order, *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009).

<sup>10</sup> See Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings, WC Docket Nos. 06-172, 07-97, *Public Notice*, DA 10-1115 (rel. June 22, 2010).

<sup>11</sup> See Qwest 4 MSA Forbearance Petitions Withdrawn; Proceeding Terminated, *Public Notice*, DA 10-1561 (rel. Aug. 20, 2010); Verizon 6 MSA Forbearance Petitions Withdrawn; Proceeding Terminated, *Public Notice*, DA 10-1665 (rel. Aug. 31, 2010).

<sup>12</sup> First Verizon Protective Order ¶ 14; Second Protective Order ¶ 20; First Qwest Protective Order ¶ 14; Second Qwest Protective Order ¶ 19.

<sup>13</sup> Cox has confirmed that the Qwest confidential information in its possession from WC Docket No. 07-97 has been destroyed.

why Qwest has filed its motion. Qwest claims that Cox offers “no plausible rationale” for opposing further disclosure,<sup>14</sup> but that is incorrect, not to mention beside the point: the burden is on Qwest to demonstrate why such expanded access is justified. Qwest’s motion entirely fails to carry that burden.

First, despite Qwest’s protests, the confidential information Cox submitted in the 6-MSA and 4-MSA proceedings remains competitively sensitive. The information is just three to four years old, is the only information of its kind that Cox has submitted to the FCC, and never has been made public. In other words, the information is relatively fresh and extremely reliable. While updated information might be more valuable, the Cox information retains significant value to competitors and Cox has a strong interest in maintaining the confidentiality of that information. Moreover, Cox’s 2006 and 2007 data gains even greater value as a point of comparison with the data submitted in Qwest’s 2009 Phoenix Forbearance Petition by the Arizona Corporation Commission and included in the *Phoenix Forbearance Order*. As Qwest points out, that information remains available for use in Qwest’s Tenth Circuit appeal, and it will be disclosed. The ability to compare the more recent information with Cox’s 2006 and 2007 data would yield competitors valuable insights into Cox’s customer and line growth in the Phoenix market.

While Cox has a strong interest in maintaining the confidentiality of its competitively sensitive information, Qwest offers no reasonable argument for why it should be permitted to use it. Qwest argues that access to fully unredacted versions of the 6-MSA Order and the 4-MSA Order is essential to the Tenth Circuit’s review of the Commission’s more recent *Phoenix Forbearance Order*. This is untrue because the *Phoenix Order* barely mentions the analysis

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<sup>14</sup> See Motion at 3.

employed in those orders, and does not cite to any of Cox's confidential data to support its analytic framework.<sup>15</sup>

Qwest nonetheless claims that it plans to argue that the *Phoenix Order* "unjustifiably diverges from the *Verizon 6-MSA Order* [and] the *Qwest 4-MSA Order*."<sup>16</sup> This argument makes no sense. The D.C. Circuit held that the *Verizon 6-MSA Order* to be arbitrary and capricious, and the Commission sought remand of the *4-MSA Order* because both orders rested on the same rationale. Qwest cannot seriously argue to the Tenth Circuit that the *Phoenix Order* fails because it is inconsistent with orders that were judged arbitrary and capricious by a sister federal court of appeal. Moreover, the Commission's reasoning in those orders is not confidential, only the data used to apply that reasoning is subject to the protective order.

Even assuming for the sake of argument that reviewing unredacted portions of the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order* might be useful to the Tenth Circuit, Qwest provides no basis for finding that the Cox confidential information contained in those orders will in any way aid the court's review. Indeed, Qwest does not identify a single piece of Cox confidential information that the Tenth Circuit must review to determine whether the *Phoenix Forbearance Order* was lawfully decided. The *Phoenix Forbearance Order* contains no Cox confidential information, because Cox did not provide any information to the Commission during the course of that proceeding.<sup>17</sup> More importantly, the *Phoenix Forbearance Order's*

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<sup>15</sup> Qwest cites only a single instance where the Commission described its forbearance analysis from the 6-MSA and 4-MSA Orders, and that portion of its analysis did not rely on Cox confidential data. See Motion at 3 & n.4. It appears that the cited wireless data extracted from the 4-MSA and 6-MSA Orders and redacted from the *Phoenix Forbearance Order* was submitted by Qwest, so Cox obviously has no objection to disclosure of that information.

<sup>16</sup> Motion at 4.

<sup>17</sup> The *Phoenix Order* does contain confidential information submitted by the Arizona Corporation Commission that pertains to Cox's Phoenix operations, but Cox did not submit that information to the Commission.

discussion of the *6-MSA* and *4-MSA Orders* contains no confidential information from those proceedings at all. Thus, it is not at all evident what relevance Cox's confidential information from the earlier proceedings would have to the Tenth's Circuit's analysis of the *Phoenix Forbearance Order*. Qwest's inability to show how even a single piece of Cox confidential information would be useful, let alone necessary, to the court's review, should be sufficient reason to deny the motion to the extent it seeks expanded access to Cox's confidential information.<sup>18</sup>

Qwest next argues that the Commission should grant its motion because the Commission modified the protective orders to facilitate the D.C. Circuit's review of the *6-MSA* and *4-MSA Orders*, and Cox consented to that modification.<sup>19</sup> Cox consented to the modification of the *6-MSA* and *4-MSA* protective orders to permit simultaneous court review of two closely related orders in proceedings that were pending in the courts and before the Commission. Today the situation could not be more different. Qwest and Verizon have voluntarily dismissed the *6-MSA* and *4-MSA* proceedings. The Commission and the courts no longer require Cox's cooperation to resolve those proceedings – they have been terminated. Thus, the Commission's previous decisions to modify the *6-MSA* and *4-MSA* protective orders are entirely inapposite in this case.

And this difference highlights the important policy issue at stake here. The Commission cannot expect Cox and other similarly situated parties to cooperate if it cannot guarantee that

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<sup>18</sup> Qwest's argument that it has a due process right to submit versions of the *4-MSA* and *6-MSA Orders* that contain Cox's confidential information borders on the frivolous. Motion at 9-10. Qwest offers no argument that any piece of Cox confidential information constitutes "pertinent evidence in support of its case," so the cases protecting litigants' rights to present such evidence are inapplicable. Moreover, it is well established that a party has no due process right to present irrelevant evidence to a court. *E.g., Wood v. Alaska*, 957 F.2d 1544, 1549 (9th Cir. 1992). Qwest has not shown how any Cox confidential information would be relevant to any argument it reasonably could make before the Tenth Circuit, so it has no credible claim to a due process right to present Cox's confidential information to the court.

<sup>19</sup> Motion at 5-6.

access to confidential information will be limited to the purposes for which it was submitted. Qwest obtained access to Cox's confidential information in the 4-MSA and 6-MSA proceedings only because those cases were pending before the Commission and the courts. Qwest's and Verizon's decisions to voluntarily withdraw those petitions should terminate access to Cox's confidential data. Granting Qwest's motion will turn the Commission's forbearance protective orders into a perpetual writ for incumbent LECs to use confidential data from all earlier proceedings to make their case. Parties will be much less likely to cooperate with the Commission in future cases if that is the outcome here.

Moreover, experience shows that extension of protective orders is not a risk-free endeavor. While Qwest commits to observe the same conditions the Commission imposed on previous modifications of protective orders, those protections have not always worked. As Qwest and the Commission know, in the appeal of the *Omaha Forbearance Order*, the public version of one brief contained confidential Cox information, and was withdrawn and amended only after Cox discovered the breach of confidentiality and requested that the parties filing the brief amend it and that all parties destroy their copies of that brief. Every additional time that data is made available through amendment of a protective order, the risk of such inadvertent disclosure increases.

Finally, Qwest devotes much of its motion to attacks on Cox's supposed motives in opposing the motion. In particular, Qwest argues extensively that Cox is seeking to obstruct review of the *Phoenix Forbearance Order* to gain competitive advantage.<sup>20</sup> This argument ignores the conspicuous facts that Cox did not file any opposition to Qwest's Phoenix Forbearance Petition and did not submit confidential information that would have shown the

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<sup>20</sup> Motion at 3, 8-9.

need for continued regulation. Moreover, Cox has no intention of participating in Qwest's appeal. Qwest has failed to gain forbearance relief in Phoenix, but not because of any action by Cox. Cox opposes Qwest's motion solely to safeguard its sensitive competitive information.

### **III. CONCLUSION**

For the foregoing reasons, Cox requests that the Commission deny Qwest's motion to the extent that modification of the protective orders in the 6-MSA and 4-MSA proceeding would result in further disclosure of confidential information submitted by Cox in those proceedings.

Respectfully submitted,  
COX COMMUNICATIONS, INC.

\_\_\_\_\_/s/\_\_\_\_\_  
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September 28, 2010

**CERTIFICATE OF SERVICE**

I, Sandra Jeter, a legal secretary at Dow Lohnes PLLC, do hereby certify that on this 28th day of September, 2010, copies of the foregoing Opposition to Motion To Modify Protective Order were served via hand delivery to the following:

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\_\_\_\_\_  
/s/  
Sandra Jeter

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05-261	Petition of ACS of Anchorage, Inc. Pursuant to Section of the Communications Act of 1934 as amended for forbearance from Sections 251(c) (3 ) and 252 (d) (1) in the Anchorage LEC Study Area- SupplamenL...	
06-109	Comments on ACS'S petition for forbearance from certain dominant carrier regulation of its interstate access services and from Title II regulation of its broadband services in the Anchorage, Alaska local exchange carrier Area.	
06-172	Comments on Verizon's petitions for forbearance pursuant to 47 U.S.C. 160(C) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia metropolitan Statistical Area.	
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