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IN THE MATTER OF INVESTIGATION
INTO U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH CERTAIN
WHOLESALE PRICING REQUIREMENTS
FOR UNBUNDLED NETWORK ELEMENTS
AND RESALE DISCOUNTS.

Docket No. T-00000A-00-0194

**COX ARIZONA TELCOM, L.L.C.'S
POST-HEARING BRIEF**

****Public Version****

Cox Arizona Telcom, L.L.C. ("Cox") submits its opening post-hearing brief in this docket.

INTRODUCTION

Access to subloops is critical to creating competition for residential tenants in apartment complexes and other multi-dwelling units ("MDUs") and for business customers in high rise office buildings and other multi-tenant environments ("MTEs"). Close to 50% of residential customers in the Phoenix area are MDU tenants. If CLECs do not have access to subloops at just and reasonable rates, those customers may not enjoy the benefits of competition.

Subloop access has been complicated by a myriad of historical regulatory events and Qwest business practices and tariffs related to MDUs and MTEs. For example, Qwest's Cable, Wire and Service Termination Policy [Exchange and Network Services Tariff, Section 2.8 ("Qwest Cable Termination Tariff") (Cox Ex. 1)], provides four options for

1 Qwest network facilities to MDUs/MTEs, including situations involving campus
2 properties. As a result, the existing MDU/MTE configurations in Arizona – particularly
3 with respect to ownership of facilities such as campus wire – vary from site to site. Due to
4 the variety of configurations, loops (and subloops) to tenants in those complexes are not as
5 “TELRIC friendly” as a loop to a single family residence – it is difficult to pigeonhole all
6 MDU/MTE configurations into a single generic configuration to create a single TELRIC
7 rate. Unfortunately, Qwest has exacerbated this difficulty by providing only three subloop
8 pricing proposals: feeder subloop, distribution subloop and intrabuilding cable. Although
9 the FCC has required access at all technically feasible points along the loop, Qwest has
10 provided UNE pricing for subloops that addresses *only two* possible access points.
11 Moreover, Qwest proposes that a CLEC pay for the entire subloop even if it only uses a
12 small portion of that subloop.

13 Qwest’s subloop pricing proposals are anticompetitive and potentially deprive
14 MDU/MTE tenants of the benefits of competition. In its testimony and in this brief, Cox
15 proposes several solutions to subloop pricing that will encourage both competition and
16 CLEC investment in infrastructure.

17 ANALYSIS

18 **A. Access to Subloops is Critical to Competition**

19 As a technical matter, access to subloops is critical to competition – particularly the
20 facilities-based competition often encouraged by this Commission. The subloop is the
21 piece of the access puzzle that cannot be easily duplicated by CLECs. A subloop by
22 definition is only a portion of the loop itself – potentially a very small portion. Because the
23 subloop can be located on private property, duplication may require serious disruption of
24 that property – something the property owner is unlikely to allow.

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1 The FCC has defined subloops “as portions of the loop that can be accessed at
2 terminals in the incumbent’s outside plant.”¹ Under the FCC’s UNE Remand Order,
3 incumbent LECs such as Qwest are required to provide competitive carriers with access to
4 subloops. In that order, the FCC found that “lack of access to unbundled subloops
5 materially diminishes a requesting carrier’s ability to provide services that it seeks to
6 offer.”² In a general way, the FCC found that access to subloops is an important means to
7 implementing the goals of the Act:

8 Access to unbundled subloop elements allows competitive LECs to
9 self-provision part of the loop, and thus, over time, to deploy their
10 own loop facilities, and to eventually develop competitive loops. If
11 requesting carriers can reduce their reliance on the incumbent by
12 interconnecting their own facilities closer to the customer, their
13 ability to provide service using their own facilities will be greatly
14 enhanced, thereby furthering the goal of the 1996 Act to promote
15 facilities-based competition.³

16 Similarly, the FCC found that access to subloops is important for the development
17 of CLEC facilities – something this Commission has supported:

18 We also conclude that access to subloop elements is likely to be the
19 catalyst that will allow competitors, over time, to deploy their own
20 complimentary subloop facilities, and eventually to develop competi-
21 tive loops. Lack of access to subloops discourages competitive
22 LECs from attempting to combine their own feeder plant with the
23 incumbents’ distribution plant to minimize their reliance on the
24 incumbent’s facilities.⁴

25 More specifically, the FCC stated that greater efficiency will be promoted by required

26 ¹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (Nov. 5, 1999) (“UNE Remand Order”)* at ¶ 206.

² *UNE Remand Order* at ¶ 205.

³ *UNE Remand Order* at ¶ 219.

⁴ *UNE Remand Order* at ¶ 205.

1 unbundling of subloops because a requesting carrier “will not have to buy the entire loop in
2 order to connect its own facilities with wiring on the customer premises.”⁵

3 As a practical matter, access to subloops is critical to Cox’s ability to provide
4 competitive services to the multitude of residential and business tenants. Cox uses a hybrid
5 fiber-coaxial (“HFC”) network to provide competitive telephony service to end user
6 customers. The FCC has provided some additional specific guidance in its recent MTE
7 Order,⁶ which more explicitly described the importance of access to subloops at an MTE.
8 In that order, the FCC defined MTEs to include “apartment buildings (rental, condomi-
9 nium, or co-op), office buildings, office parks, shopping centers and manufactured housing
10 communities.”⁷ The FCC stressed just how significant access to MTEs is to assuring
11 robust competition:

12 Attention to the unique issues and challenges affecting access
13 to MTEs is important because a substantial proportion of both
14 residential and business customers nationwide are located in such
15 environments. Thus, an absence of widespread competition in MTEs
16 would insulate incumbent LECs from competitive pressures and
17 deny facilities-based competitive carriers the ability to offer their
18 services in a sizeable portion of local markets, thereby jeopardizing
19 full achievement of the benefits of competition.⁸

20 The FCC made a clear determination that incumbent LECs such as Qwest have used

21 ⁵ *UNE Remand Order* at ¶ 212.

22 ⁶ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT
23 Docket No. 99-217; *Implementation of the Local Competition Provisions of the Telecommunications Act of*
24 *1996*, CC Docket No. 96-98; *Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning*
25 *Connection of Simple Inside Wiring to the Telephone Network*, CC Docket 88-57; *First Report and Order*
26 *and Further Notice of Proposed Rulemaking* in WT Docket No. 99-217, Fifth Report and Order and
Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and
Memorandum Opinion and Order in CC Docket No. 88-57, FCC No. 00-366 (rel. October 25, 2000)
 (“MTE Order”).

⁷ *MTE Order* at ¶ 2.

⁸ *MTE Order* at ¶ 3.

1 the MTE chokepoint as a means to severely inhibit competition. In the MTE Order, the
2 FCC found that “incumbent LECs are using their control over on-premises wiring to
3 frustrate competitive access in multitenant buildings.”⁹ Further, FCC found “that incum-
4 bent LECs possess market power to the extent their facilities are important to the provision
5 of local telecommunications services in MTEs.”¹⁰ Finally, the FCC recognized that “[i]n
6 the absence of effective regulation, they therefore have the ability and incentive to deny
7 reasonable access to these facilities to competing carriers.”¹¹

8 The effectiveness of Cox’s HFC deployment – and Cox’s ability to serve tenants in
9 MDUs/MTE – is dependent upon access to Qwest’s subloop facilities. Specifically, Cox
10 often requires access to certain parts of the subloop referred to as “on-premises wiring,”
11 wiring on a customer premises, which may be owned or controlled by Qwest. However,
12 economic barriers to access, such as improper subloop pricing, can deter competition just
13 as much as physical barriers to access. The subloop pricing set in this docket must be
14 designed to bring competition to *all* end-users in Arizona, particularly tenants in
15 MDUs/MTEs.

16 **B. Qwest’s Subloop Pricing Proposal Discourages Competition for Tenants in**
17 **MDU/MTEs**

18 Qwest has set forth subloop pricing for only three things: feeder subloop, distribu-
19 tion subloop and “intra-building cable” subloop. The feeder subloop runs from the central
20 office to the Feeder/Distribution Interface (“FDI”) [Qwest Ex. 1 (Buckley Direct) at 4-5]
21 The distribution subloop includes the FDI and runs to the end-user, including intra-building
22 cable and the network interface device (NID). [Id.; Qwest Ex. 2 (Buckley Rebuttal) at 28-
23 29] Qwest also has separated out two parts of the distribution subloop for discrete pricing –

25 ⁹ *MTE Order* at ¶ 6.

26 ¹⁰ *MTE Order* at ¶ 11.

¹¹ *Id.*

1 the intrabuilding cable and the NID. Intrabuilding cable is located on a customer premises
2 and may traverse riser and conduit on its journey to the end user's telephone equipment.
3 Qwest testified that, in its UNE pricing proposal, "intrabuilding cable" covers only wiring
4 within a single building (apparently regardless of how large the building is or how many
5 tenants reside in the building). [See TR 332:5 to 333:15] Intrabuilding cable excludes
6 facilities on a customer's premises that extend from or between buildings in a campus
7 setting (which is often referred to as "campus wire"). [TR 445:7-10] Instead, Qwest
8 considers such campus wiring merely as a type of distribution subloop – no different than
9 the cable from an FDI through a neighborhood to a customer's single-family home.

10 **1. Barrier to Competition**

11 Qwest proposes to charge approximately 70% of the loop rate for any distribution
12 subloop, regardless of how much of that subloop a CLEC actually uses. If a CLEC uses
13 the whole distribution subloop (which could be thousands of feet of wire), Qwest proposes
14 charging \$12.12 (for Zone 1). If a CLEC uses only the campus wire portion of the subloop
15 (which could be less than 100 feet of wire), Qwest proposes charging \$12.12 (again, for
16 Zone 1). That rate for the last hundred feet of the subloop acts as an economic barrier to
17 serving tenants in MDUs/MTEs, particularly residential tenants. [See Cox Ex. 3 (Collins
18 Direct) at 7] That rate also may be higher than CLEC's basic residential service charge.
19 [Id.] Moreover, it is added to the costs that the CLEC has incurred to extend its facilities
20 up to the edge of the MDU/MTE property. If Qwest's distribution subloop rate proposal is
21 adopted, this Commission will be isolating hundreds of thousands of apartment tenants
22 from the benefits of competition.

23 **2. Discourages CLEC Investment**

24 Qwest's subloop pricing proposal also discourages CLECs from extending their
25 networks. If the subloop is going to cost the same regardless of whether the CLEC
26 facilities extend only to an FDI or all the way to the MDU/MTE, a CLEC can reduce its

1 cost of service by limiting its network. That result will perpetrate the bottleneck facilities
2 controlled by Qwest and limit competition in the long run.

3 3. Over Recovery of Costs by Qwest

4 If Qwest is allowed to recover the entire subloop rate even for campus wire, Qwest
5 will be over recovering its costs. Two examples shed some light on this over recovery.
6 First, the cost to Qwest for running campus wire is approximately ****proprietary****. [See
7 Qwest Ex. 1 (Buckley Direct), Exhibit 3 at p. 8 of 18; *see also* TR at 161:12 to 163:22]
8 Thus, Qwest's cost for a 1,000 ft of a campus wire pair is in the range of ****proprietary****
9 Yet, Qwest wants to charge \$12.12 *per month* for that wire. That discrepancy should be
10 enough to create a separate "campus wiring" subloop price. Indeed, Qwest has
11 acknowledged that it could provide a "campus wire" subloop price. It simply chose not to.

12 Second, under Qwest's Cable Termination Tariff (Cox Ex. 1), the MDU/MTE
13 owner could own all campus wire on its property with a demarcation point at the edge of
14 the property. For a large enough MDU/MTE, that demarcation point could be an FDI.
15 Therefore, all of the "distribution subloop" except for the FDI is actually owned by the
16 MDU/MTE owner. However, if the CLEC used only the FDI portion of the subloop to
17 connect to the MDU/MTE inside wire, it would have to pay the entire \$12.12 subloop
18 price. Again, Qwest would charge the CLEC the entire \$12.12 subloop price even though
19 the MDU/MTE owner owns all the wire to the end-user tenant. Qwest admitted that its
20 model did not reflect this configuration, which is available under Option 4 of its Cable
21 Termination Tariff. [TR 172:17-21] Qwest apparently assumed that it would own both the
22 distribution wire and the FDI for every subloop. Again, that discrepancy confirms the need
23 to separate the subloop into more appropriate pieces, such as campus wire.

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1 **C. Subloop Pricing to Foster Competition**

2 **1. Campus Wire UNE Pricing Should Match the Intrabuilding Cable**
3 **UNE Pricing**

4 CLECs need a proper UNE price for campus wire because there are many existing
5 MDU/MTE configurations where Qwest owns the campus wire. To reach the tenants –
6 and to create competition for those tenants – a CLEC will need to use that wire. Qwest has
7 proposed subloop pricing for intrabuilding cable but not for campus wire. Qwest’s
8 distinction is wholly arbitrary and not supported at law. Both are facilities that are located
9 on private property that could be owned in whole or in part by the property owner. Both
10 could be considered “inside wire.” In fact, the FCC reflects a more commonsense
11 approach when it defines “inside-wire” in the UNE Remand order:

12 Although inside wire typically consists of junction and utility
13 boxes, riser cable and horizontal distribution wiring within and
14 apartment building, it can also include the loop facility within a
15 campus, a commercial park, or a garden apartment complex. We
16 note that Teligent prefers the term “intrabuilding wiring,” to
17 emphasize that the plant in question is not always inside the
18 customer premises, but may, especially in multiunit buildings, exist
19 primarily within the landlord’s, rather than the subscriber’s premises.
20 Yet even the term “intrabuilding wire may suggest limitations that do
21 not apply in some situations *because “inside” wire is often out of*
22 *doors, as in the case in garden apartments and campuses, among*
23 *other places.”*¹² (emphasis added)

24 The actual distinction between “intrabuilding cable” and “campus wire” appears to
25 be one of semantics. Intrabuilding cable may, in fact, be much more extensive than
26 campus wire. A twenty-story office building with multiple tenants probably has signifi-
cantly more “intrabuilding cable” than a small garden apartment with 40 units has “campus
wire.”

To provide CLECs appropriate access to campus wire at a reasonable rate – and to

¹² UNE Remand Order at ¶ 170.

1 allow them to serve tenants in an economic manner -- the Commission should define both
2 campus wire and intrabuilding cable as “on premises wire” for purposes of UNE pricing.
3 “On premises wire” would be priced at the rate proposed for intrabuilding cable – a type of
4 on premises wire. Therefore, a “campus wire “ subloop would be priced the same as the
5 “intrabuilding cable” subloop.

6 **2. Property Owner Purchase of Campus Wire**

7 This docket also presents an opportunity for the Commission to address a related
8 pricing issue regarding MDU/MTE wiring. The Commission should make clear that, *upon*
9 *request of the MDU/MTE owner*, Qwest must create a single demarcation point at the
10 MPOE and relinquish ownership of the wire on the customer side of the demarcation point.
11 This requirement incorporates the FCC’s recent clarification of this ILEC obligation. In
12 the *MTE Order*, the FCC stated:

13 [I]n all multiunit premises, the incumbent carrier must move the
14 demarcation point to the MPOE upon the premises owner’s
15 request We believe that it would impede the development of
16 facilities-based competition if a carrier could refuse a premises
17 owner’s request to move the demarcation point to the property line in
18 order to prevent the connection of inside wiring to a competitive
19 carrier.¹³

20 The key issue here is the charge to the MDU/MTE owner for Qwest’s relinquish-
21 ment of the wire. Cox believes that when an MDU/MTE owner exercises its option to
22 have Qwest move the demarcation point to the MPOE at the property line, the wiring and
23 facilities to be relinquished to Qwest should be priced at residual value. Residual value
24 should be defined as the initial cost born by Qwest (assuming it claims and proves
25 ownership of the wire/facilities) less accounted depreciation up to the time of conveyance.
26 In some instances, where the entrance facilities run more than 300 feet, the MTE owner
may have already paid for some or all the costs. [See Qwest Cable Termination Tariff

¹³ *MTE Order* at ¶ 54.

1 (Cox Ex. 1) at Section 2.8.B.8] Moreover, under the Qwest tariff, the MDU/MTE owner
2 also paid for the provision, maintenance and repair of adequate space and supporting
3 structure for the wire/cable facilities. [Id. at Sections 2.8.B.3, .4] These charges include
4 such costs as trenching, replacing concrete/asphalt/landscape, conduit and the like. In such
5 instances, Qwest arguably may owe the MTE owner if Qwest depreciated those assets
6 because Qwest never paid for them. Moreover, to the extent Qwest believes it should
7 recover its historic costs for maintenance of those facilities, Qwest has already done so as
8 operating expenses.

9 Under this proposal, a property owner is not obligated to reconfigure its MPOE and
10 purchase the campus wire. However, this proposal gives a property owner some certainty
11 about the cost of such action and puts a property owner on a level playing field for
12 negotiations with Qwest over the price to pay for campus wire (or any “on premises” wire).
13 It also will help eliminate the potential for “bad faith” bargaining by Qwest over such
14 purchases. [*See MTE Order* at ¶ 55] As the FCC has stated, fair negotiations leading to
15 purchase of such facilities will “facilitate competition, while protecting the valid property
16 interests of the parties.” [Id.] Moreover, the cost of the reconfiguration – under this
17 proposal – often could be covered by CLECs that are interested in serving tenants,
18 therefore creating no burden to property owners. Finally, the ultimate beneficiaries of this
19 proposal are the tenants who will now be able to enjoy the benefits of competition.

20 Moreover, to ensure continuing competition for MDU/MTE tenants – and to
21 eliminate future potential for anticompetitive MDU/MTE configurations – the Commission
22 should require Qwest to modify its Cable Termination Policy Tariff to eliminate any option
23 that would allow an MDU/MTE – either a new MDU/MTE or an existing MDU/MTE
24 undergoing a significant reconfiguration/upgrade of entrance facilities – to have a
25 demarcation point anywhere other than at the MPOE. The Qwest tariff also should require
26 that the MPOE be placed at the edge of the MDU/MTE property to allow easy and non-

1 disruptive access by CLECs wanting to serve the MDU/MTE tenants. The existing tariff
2 does not comport with the goals and policies of the 1996 Act and can effectively prohibit
3 competition to a large number of Arizona consumers.

4 **SECTION 271 IMPLICATIONS**

5 If Qwest's position on subloop pricing is adopted, Cox does not believe Qwest
6 meets its Section 271 obligations for subloop access. Section 271(c)(2)(B)(ii) (Checklist
7 Item 2) requires that Qwest meet the requirements of Section 251(c)(3), which provides
8 that access to UNEs, such as subloops, "on rates, terms and conditions that are just,
9 reasonable and non-discriminatory." It is not reasonable for a CLEC to pay the full
10 distribution loop price for a small portion of that distribution loop. UNE pricing should be
11 related to the TELRIC of actual subloop being used. If not, then the subloop is not
12 available at a just and reasonable rate and Qwest has not satisfied its obligations under
13 Section 271.

14 **CONCLUSION**

15 The Commission should adopt Cox's recommendations for (i) campus wire subloop
16 pricing, (ii) a methodology for property owner purchase of campus wire and (iii)
17 modification of Qwest's Cable Termination Tariff.

18
19 Dated: August 31, 2001.

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