EXHIBIT 18

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	CC Docket No. 95-116
	)	
Telephone Number Portability	)	RM 8535

Third Report and Order

Adopted: May 5, 1998 Released: May 12, 1998

By the Commission: Chairman Kennard and Commissioner Tristani issuing separate statements; Commissioners Ness and Furchtgott-Roth approving in part, concurring in part, and issuing statements.

Table of Contents

I. INTRODUCTION

1. Section 251(e)(2) of the Communications Act of 1934 (1934 Act), as amended, requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[1] In this *Third Report and Order*, we implement section 251(e)(2) with regard to the costs of providing long-term number portability.

2. The Telecommunications Act of 1996 (1996 Act) amends the 1934 Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2] In particular, section 251(b) of the amended 1934 Act imposes specific obligations on all local exchange carriers (LECs) to open their networks to competitors.[3]

3. Congress recognized that the inability of customers to retain their telephone numbers when changing local service providers hampers the development of local competition.[4] To address this

[1] 47 U.S.C. § 251(e)(2).

[2] S. CONF. REP. NO. 104-230, at 1 (1996). *See also* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997) (stating that Congress passed the 1996 Act, in part, "to erode the monopolistic nature of the local telephone service industry by obligating [incumbent LECs] to facilitate the entry of competing companies into local telephone service"), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

[3] *See* 47 U.S.C. § 251(b).

[4] *See, e.g.*, H. COMMERCE COMM. REP. NO. 104-204, pt. 1, at 72 (1995) (to accompany H.R. 1555) (stating that "[t]he ability to change service providers is only meaningful if a customer can retain his or her local telephone number"), *reprinted* in 1996 U.S.C.C.A.N. 10, 37. *See also In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8367-68 (1996) (Order & Further Notice) (citing evidence that business and residential customers are reluctant to switch carriers if they must change telephone numbers, and stating that "[t]o the extent that customers are reluctant to change service providers due to the absence of number portability, demand for services provided by new entrants will be depressed. This could well discourage entry by new service providers and thereby frustrate the pro-competitive goals of the 1996 Act."), *appeals pending on other grounds sub nom.* U S WEST v. FCC, No. 97-9518 (10th Cir. held in abeyance Sept. 12, 1997) and Bell Atlantic NYNEX Mobile v. FCC, No. 97-955 (10th Cir. filed

concern, Congress added section 251(b)(2) to the 1934 Act,[5] which requires all LECs, both incumbents and new entrants,[6] "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[7] The amended Communications Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[8] This "service provider portability" differs from "location portability," which is the ability to keep the same telephone number when moving to a new location, and from "service portability," which is the ability to keep the same telephone number when subscribing to new services. In light of the statutory definition, section 251(b)(2) requires service provider portability but not location or service portability.

4. Section 251(b)(2) removes a significant barrier to competition by ensuring that consumers can change carriers without forfeiting their existing telephone numbers.[9] The Commission has noted that the absence of number portability "likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers. Business customers, in particular, may be reluctant to incur the administrative, marketing, and goodwill costs

---

May 30, 1997).

[5] *See* Telecommunications Act of 1996, sec. 101(a), § 251(b)(2), Pub. L. No. 104-104, 110 Stat. 56 (1996).

[6] *See* S. CONF. REP. NO. 104-230, at 121 (stating that section 251(b) requires all local exchange carriers, "including the 'new entrants' into the local exchange market," to provide number portability).

[7] 47 U.S.C. § 251(b)(2). *See* 141 CONG. REC. H8269 (daily ed. Aug. 2, 1995) (statement of Rep. Hastert) (stating that requirements such as number portability would "allow real competition in the local loop"); *Communications Law Reform: Hearing on H.R. 1555 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Commerce*, 104th Cong. 18 (1995) (statement of Rep. Manton) (expressing "skeptic[ism] as to whether local competition can actually flourish without a number portability requirement"); S. COMMERCE COMM. REP. NO. 104-23, at 52 (1995) (to accompany S. 652) (stating that "Congress believes that the implementation of final number portability is an important element in the introduction of local competition"); H.R. COMMERCE COMM. REP. NO. 103-560, at 67 (1994) (to accompany H.R. 3636) (finding "number portability to be one of the fundamental building blocks upon which a competitive market for telephone exchange service will be built"). *See also Order & Further Notice*, 11 FCC Rcd. at 8354 (stating that "[n]umber portability is one of the obligations that Congress imposed on all local exchange carriers ... to promote the pro-competitive, deregulatory markets it envisioned. Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace.").

[8] 47 U.S.C. § 153(30).

[9] *See Order & Further Notice*, 11 FCC Rcd. at 8367 (stating that "number portability is essential to meaningful competition in the provision of local exchange services. ... [N]umber portability provides consumers flexibility in the way they use their telecommunications services and promotes the development of competition among alternative providers of telephone and other telecommunications services.").

associated with changing telephone numbers."[10] Although telecommunications carriers, both incumbents and new entrants, must incur costs to implement number portability, the long-term benefits that will follow as number portability gives consumers more competitive options outweighs these costs. As the Commission has stated:

> The ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase. Number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers. The resulting competition will benefit all users of telecommunications services. Indeed, competition should foster lower local telephone prices and, consequently, stimulate demand for telecommunications services and increase economic growth.[11]

To prevent the initial cost of providing number portability from itself becoming a barrier to local competition, section 251(e)(2) requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[12]

---

[10] *Id.* at 8368 (citations omitted).

[11] *Id.*

[12] 47 U.S.C. § 251(e)(2). The legislative history suggests that Congress was aware even in earlier legislative drafts that the cost of providing number portability could defeat the purpose of number portability in the first place. S. 652 as passed by the Senate provided that interconnection agreements should require LECs to provide number portability "in a manner that ... provides for a reasonable allocation of costs among the parties to the agreement." S. 652, 104th Cong., § 251(b)(6)(C) (1995) (as passed the Senate June 15, 1995), *reprinted in* 141 CONG. REC. H8570 (daily ed. June 16, 1995).

S. 652 as passed by the House would have required that "the costs that a carrier incurs in offering ... number portability ... be borne by the users of such ... number portability." S. 652, 104th Cong., § 242(b)(4)(D) (1995) (as passed by the House and sent to conference Oct. 12, 1995), *reprinted in* 141 CONG. REC. H9954 (daily ed. Oct. 12, 1995). *See* also S. CONF. REP. 104-230, at 120-21 (stating that section 242(b)(4) of the House amendment "directs the Commission to establish regulations requiring full compensation to the LEC for costs of providing services related to ... number portability").

H.R. 1555, as introduced, would have required LECs to provide number portability only "to the extent technically feasible and economically reasonable." H.R. 1555, 104th Cong., § 242(a)(4) (1995) (as introduced May 3, 1995). *See also Communications Law Reform: Hearing on H.R. 1555 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Commerce*, 104th Cong. at 18 (1995) (statement of Rep. Manton) (expressing concern that "economically reasonable" language might create a loophole that will delay competition); *Communications Law Reform: Hearing on H.R. 1555 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Commerce*, 104th Cong. at 203 (1995) (statement of Rep. Fields) (stating that the "economically reasonable" language was intended to ensure that "some demand was not made of someone that just honestly could not be met").

5. In light of Congress' number portability mandate, the Commission released a combined *First Report and Order* (Order) & *Further Notice of Proposed Rulemaking* (Further Notice) in July 1996 to begin implementing number portability.[13] In the *Order*, the Commission directed LECs to use currently available techniques such as call forwarding to offer an interim form of number portability (interim number portability).[14] Under call-forwarding techniques, a customer's former carrier forwards that customer's calls to the customer's new carrier, enabling people to continue reaching the customer at the original number.[15] Although this approach serves the pro-competitive goals of number portability, it requires two telephone numbers for each customer who changes carriers.[16] To ensure a more efficient use of telephone numbers, the *Order* required carriers to develop and implement a long-term solution that does not use two telephone numbers for each customer.[17]

6. Based on the record, the Commission concluded that "none of the currently supported methods [of providing long-term number portability] has been tested or described in sufficient detail to permit the Commission to select the particular architecture without further consultation with the industry."[18] The Commission also noted that prescribing a particular architecture at the time might hinder the efforts of the carriers, switch vendors, and state commissions that were in the process of developing long-term number portability solutions.[19] Consequently, the Commission promulgated performance criteria that the industry's long-term number portability solutions must meet,[20] required local exchange carriers to implement long-term number portability through a system of regional databases managed by neutral third party administrators,[21] and established a phased timetable for the implementation of long-term number portability.[22]

7. Because of the myriad questions regarding the design and deployment of a long-term number portability system, the *Order* could not and did not resolve how carriers would bear the costs

[13] *Order & Further Notice*, 11 FCC Rcd. at 8352.

[14] *Id.* at 8355-56.

[15] *See id.* at 8361-62.

[16] *See id.* at 8405 n.295.

[17] *Id.* at 8411-12.

[18] *See id.* at 8377. *See also id.* at 8359-62, 8494-8500 (describing variety of industry proposals for number portability).

[19] *See id.* at 8377.

[20] *See id.* at 8355, 8371-85.

[21] *Id.* at 8355-56, 8399-8404.

[22] *Id.* at 8355, 8393-96, 8501-02, *modified*, *In re Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, 7283, 7346-47 (1997).

of providing long-term number portability. Instead, the Commission sought comment in the *Further Notice* on the costs associated with implementing long-term number portability.[23] The Commission tentatively identified three categories of costs: (1) shared industry costs, such as the costs of third-party administrators to build and operate the regional databases;[24] (2) carrier-specific costs directly related to providing number portability, such as the cost of portability capable switch software;[25] and (3) carrier-specific costs not directly related to providing number portability, such as network upgrades that involve Advanced Intelligent Network (AIN) and Signaling System 7 (SS7) technologies.[26] The Commission also sought comment on the distribution of these costs among carriers, and possible carrier cost-recovery mechanisms.[27]

8. In this *Third Report and Order*, we conclude that section 251(e)(2) requires the Commission to ensure that all telecommunications carriers bear in a competitively neutral manner the costs of providing long-term number portability for interstate and intrastate calls.[28] We adopt as the governing principles for our determinations with respect to those costs the interpretations of competitive neutrality that the Commission developed in the *Order*.[29] We conclude that "the cost[s] of ... number portability" that carriers must bear on a competitively neutral basis include the costs that LECs incur to meet the obligations imposed by section 251(b)(2), as well as the costs other telecommunications carriers—such as interexchange carriers (IXCs) and commercial mobile radio service (CMRS) providers—incur for the industry-wide solution to providing local number portability.[30] We also conclude that carrier-specific costs not directly related to providing number portability are not costs of number portability and, consequently, are not subject to section 251(e)(2)

---

23 *See Order & Further Notice*, 11 FCC Rcd. at 8459-66.

24 *Id.* at 8459, 8461, 8463.

25 *Id.* at 8459, 8464.

26 *Id.* at 8459, 8465. AIN, a telecommunications network architecture that uses databases to facilitate call processing, call routing, and network management, allows carriers to change the routing of both inbound and outbound calls from moment to moment based on criteria they develop. *See* 47 C.F.R § 51.5 (defining "advanced intelligent network"); HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 32-33 (11th ed. 1996). SS7 is a digital, packet-switched, carrier-to-carrier signaling system used for call routing, billing, and management that occurs "out-of-band," which means the call routing information is transmitted in separate circuits from the conversation. *See* 47 C.F.R. § 64.1600(f) (defining "signaling system 7"); NEWTON, *supra*, at 545 This offers additional speed, control, and other advantages not available with "in-band" signalling systems. NEWTON, *supra*, at 545.

27 *Order & Further Notice*, 11 FCC Rcd. 8459-66.

28 *See infra* paragraph 28.

29 *See infra* paragraphs 52-60.

30 *See infra* paragraph 36.

and its competitive neutrality mandate.[31] Furthermore, we conclude that the costs of establishing number portability include not just the costs associated with the creation of the regional databases and the initial physical upgrading of the public switched telephone network for the provision of number portability, but also the continuing costs necessary to provide number portability.[32] We also conclude that section 251(e)(2) applies to any distribution of number portability costs among carriers as well as the recovery of those costs by carriers.[33]

9. We apply the Commission's competitive neutrality rules to distribute among telecommunications carriers the shared costs of each regional database based on carriers' intrastate, interstate, and international end-user telecommunications revenues for each region.[34] Once the shared regional database costs have been distributed among carriers, we treat each carrier's portion of the shared costs as another carrier-specific cost directly related to providing number portability.[35] We conclude that it is competitively neutral for carriers to bear their own carrier-specific costs directly related to providing number portability.[36] Beginning February 1, 1999, we will allow—but not require—rate-of-return and price-cap LECs to recover their carrier-specific costs directly related to providing long-term number portability through a federally tariffed, monthly number-portability charge that will apply to end users for no longer than five years, as well as through a federally tariffed intercarrier charge for long-term number portability query services they perform for other carriers; other telecommunications carriers may recover their carrier-specific costs directly related to providing long-term number portability in any lawful manner.[37]

10. We recognize consumers' sensitivity to end-user charges. As discussed below,[38] we conclude that allowing carriers to recover in this manner will best serve the goals of the statute. We anticipate that the benefits of number portability, namely the increased choice and lower prices that result from the competition that number portability helps make possible, will far outweigh the initial costs.

[31] *See infra* paragraph 37.

[32] *See infra* paragraph 38.

[33] *See infra* paragraph 39.

[34] *See infra* paragraphs 87-92, 105-110, 116-117.

[35] *See infra* paragraphs 69, 87.

[36] *See infra* paragraphs 135-141.

[37] *See infra* paragraphs 135-149.

[38] *Id.*

II. BACKGROUND

A. The Provision of Long-Term Number Portability

11. Without number portability, customers ordinarily cannot change their local telephone companies unless they change telephone numbers. Under the existing network architecture and the North American Numbering Plan (NANP), a telephone number functions like an address: every number is associated with an individual switch operated by a particular local telephone company in a specific geographic area.[39] The area code, also called the Numbering Plan Area (the NPA), identifies the general geographic area within which the switch provides service.[40] The next three digits of the telephone number (the NXX) identify the switch that serves the customer.[41] The last four digits identify the specific telephone line serving the customer's location.[42] Carriers use this ten-digit number to connect a telephone call to the called party.[43] Thus, if a customer changes local telephone companies and receives service at the same location from a different telephone company providing service from a different switch, the customer's new local telephone company typically must assign the customer a new seven-digit number (NXX code plus line number) associated with the new switch and new telephone line.

12. Number portability technology allows customers to retain their telephone numbers when changing local service providers. Although the Commission did not mandate a specific long-term number portability method, most carriers intend to provide long-term number portability through a location routing number (LRN) architecture.[44] Under an LRN architecture, each switch is assigned a unique ten-digit LRN, the first six digits of which identify the location of that switch.[45] Each customer's telephone number is matched in a regional database with the LRN for the switch that

---

[39] *See* AIN PROGRAM, NATIONAL COMMUNICATIONS SYSTEM, LOCAL NUMBER PORTABILITY: AIN AND NS/EP IMPLICATIONS, §§ 2.0-2.5 (July 1996) [hereinafter LOCAL NUMBER PORTABILITY REPORT].

[40] *See id.* at § 2.1.

[41] *See id.*

[42] *See id.*

[43] *See id.* at §§ 2.3, 5.

[44] *See In re Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12287-88 (1997) (Second Report and Order).

[45] NORTH AMERICAN NUMBERING COUNCIL, LOCAL NUMBER PORTABILITY ADMINISTRATION SELECTION WORKING GROUP REPORT [hereinafter NANC RECOMMENDATION] App. D (Architecture & Administrative Plan for Local Number Portability), ¶ 7.2, at 6 (April 25, 1997), *adopted*, *Second Report and Order*, 12 FCC Rcd. at 12283-84; LOCAL NUMBER PORTABILITY REPORT, *supra* note 39, at § 6.1. The industry has not yet decided a use for the last four digits. NANC RECOMMENDATION, *supra*, App. D (Architecture & Administrative Plan for Local Number Portability), ¶ 7.2, at 6.

currently serves that telephone number.[46] Each database serves an area that corresponds to one of the original regional Bell Operating Company (RBOC) service territories.[47]

13. Neutral third parties, called local number portability administrators (LNPAs), will administer these regional databases.[48] The telecommunications carriers within each particular region have formed a limited liability corporation (LLC) to negotiate service contracts with the LNPA for that region. Additional telecommunications carriers may join an LLC at any time. On the recommendation of the North American Numbering Council (NANC)—a federal advisory committee made up of industry, state regulatory, and consumer representatives—the Commission approved the LNPAs that the seven regional LLCs endorsed for each region.[49] The Commission also adopted the NANC's recommendation that the administrative functions of the LNPAs include all management tasks required to run the regional databases.[50] The Mid-Atlantic, Mid-West, Northeast, and Southwest LLCs each separately endorsed Lockheed-Martin IMS.[51] The Southeast, Western, and West Coast LLCs each separately endorsed Perot Systems Inc.[52] The LLCs for the Southeast, Western, and West Coast regions have since reported that performance problems prompted them to terminate their contracts with

---

[46] *See In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8359-60, 8399-8400, 8494-95 (1996) (Order & Further Notice); LOCAL NUMBER PORTABILITY REPORT, *supra* note 39, at § 6.1.

[47] *See* NANC RECOMMENDATION, *supra* note 45, App. D (Architecture & Administrative Plan for Local Number Portability), at 11-12, ¶ 9. U.S. states, possessions, and territories that are not served by RBOCs—such as Alaska, Guam, Hawaii, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands—have been incorporated into other regions' databases. Thus the Mid-Atlantic region is composed of Delaware, the District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia. *Id.* The Mid-West region is composed of Illinois, Indiana, Michigan, Ohio, and Wisconsin. *Id.* The Northeast region is composed of Connecticut, Maine, New Hampshire, Massachusetts, New York, Rhode Island, and Vermont. *Id.* The Southeast region is composed of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands. *Id.* The Southwest region is composed of Arkansas, Kansas, Missouri, Oklahoma, and Texas. *Id.* The West Coast region is composed of California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. *Id.* The Western region is composed of Alaska, Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.*

[48] *See Order & Further Notice*, 11 FCC Rcd. at 8400-02.

[49] *Second Report and Order*, 12 FCC Rcd. at 12303; NANC RECOMMENDATION, *supra* note 45, § 6.2, at 18-19.

[50] *Second Report and Order*, 12 FCC Rcd. at 12306-09.

[51] NANC RECOMMENDATION, *supra* note 45, § 6.2, at 18-19.

[52] *Id.*

Perot in favor of Lockheed.[53]

14. When a customer changes from one LEC to another, the carrier that wins the customer will "port" the customer's number from the former carrier by electronically transmitting (uploading) the new LRN to the administrator of the relevant regional database.[54] This will pair the customer's original telephone number with the LRN for the switch of the new carrier, allowing the customer to retain the original telephone number. The regional database administrators will then electronically transmit (download) LRN updates to carrier-operated local service management systems (LSMSs).[55] Each carrier will distribute this information to service control points (SCPs) or signal transfer points (STPs) that the carrier will use to store and process data for providing number portability.[56]

---

[53] *See* Letter from West Coast Portability Services, LLC, to A. Richard Metzger, Jr., Chief, Common Carrier Bureau, FCC (January 23, 1998); Letter from Alan C. Hasselwander, Chairman, North American Numbering Council, to A. Richard Metzger, Jr., Chief, Common Carrier Bureau, FCC (February 20, 1998); *Common Carrier Bureau Seeks Comment on Petitions For Extension of Time of the Local Number Portability Phase I Implementation Deadline*, CC Docket No. 95-116, Public Notice, DA 98-449 (rel. March 4, 1998); Public Notice, DA 98-451 (rel. March 5, 1998).

[54] *See id.* at App. E (LNPA Technical & Operational Requirements Task Force Report), app. a (Issues & Resolutions), p. 1, and app. b (Inter-Service Provider LNP Operations Flows), fig. 1 (Provisioning) & p. 2. The former carrier may, at its option, also transmit this information. *Id.*

[55] *See id.* at App. E (LNPA Technical & Operational Requirements Task Force Report), app. b (Inter-Service Provider LNP Operations Flows), fig. 2 (Provisioning Without Unconditional 10-Digit Trigger) & p. 1, step 4, and fig. 3 (Provisioning With Unconditional 10-Digit Trigger) & p. 1, step 5.

[56] *See id.* at App. E (LNPA Technical & Operational Requirements Task Force Report), app. b (Inter-Service Provider LNP Operations Flows), fig. 2 (Provisioning Without Unconditional 10-Digit Trigger) & p. 2, step 8, and fig. 3 (Provisioning With Unconditional 10-Digit Trigger) & p. 2, step 8.

An SCP is a computer-like device in the public switched network that contains a database of information and call processing instructions needed to process and complete a telephone call. *See* 47 C.F.R. §§ 51.5, 52.21(m) (defining "service control point"). An STP is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks *See* 47 C.F.R. § 51.5 (defining "signal transfer point").

Although carriers originally envisioned number portability as SCP-based, at least one manufacturer purports to be offering an STP-based network technology to implement LRN more efficiently than the SCP-based solution. *See Ex Parte* Letter from Sylvia Lesse, Attorney, Kraskin & Lesse, to William Caton, Acting Secretary, FCC (Feb. 19, 1997) (on file with Secretary of the FCC). At least one third-party provider says it plans to use this technology to provide number portability services. *See Ex Parte* Letter from Richard R. Wolf, Director of Legal & Regulatory Affairs, Illuminet, to Jeannie Su, Attorney, FCC, attach. (Oct. 16, 1997) (on file with Secretary of the FCC). GTE, Cincinnati Bell, Bell Atlantic, and NYNEX also appear to be considering an STP-based solution for at least part of their implementation of number portability. *See* Tekelec, GTE INS Chooses Eagle STP for LNP/LSMS Solution (Dec. 8, 1997), Cincinnati Bell Chooses Tekelec Local Number Portability Solution (Nov. 17, 1997), Tekelec and Bell Atlantic Conclude Agreement (May 30, 1997), Tekelec Details Recent Agreement with NYNEX (April 22, 1997) (press releases available at <http://www.tekelec.com/>).

15. For a carrier to route an interswitch telephone call to a location where number portability is available, the carrier must determine the LRN for the switch that serves the terminating telephone number of the call.[57] Once number portability is available for an NXX, carriers must "query" all interswitch calls to that NXX to determine whether the terminating customer has ported the telephone number.[58] Carriers will accomplish this by sending a signal over the SS7 network to retrieve from an SCP or STP the LRN associated with the called telephone number. The industry has proposed, and the Commission has endorsed, an "N minus one" (N-1) querying protocol.[59] Under this protocol, the N-1 carrier will be responsible for the query, "where 'N' is the entity terminating the call to the end user, or a network provider contracted by the entity to provide tandem access."[60] Thus the N-1 carrier (*i.e.* the last carrier before the terminating carrier) for a local call will usually be the calling customer's local service provider; the N-1 carrier for an interexchange call will usually be the calling customer's interexchange carrier (IXC).[61] An N-1 carrier may perform its own querying, or it may arrange for other carriers or third parties to provide querying services on its behalf.[62]

16. To route a local call under this system, the originating local service provider will examine the seven-digit number that its customer dialed, for example "456-7890." If the called telephone number is on the originating switch (*i.e.* an intraswitch call), the originating local service provider will simply complete the call. If the call is interswitch, the originating local service provider will compare the NXX, "456," with its table of NXXs for which number portability is available. If "456" is not such an NXX, the originating local service provider will treat the call the same as it did before the existence of long-term number portability. If it is an NXX for which portability is available, the originating local service provider will add the NPA, for instance "123," to the dialed number and query "(123) 456-7890" to an SCP containing the LRNs downloaded from the relevant regional database. The SCP will return the LRN for "(123) 456-7890" (which would be "(123) 456-XXXX" if the customer has not changed carriers, or something like "(123) 789-XXXX" if the customer has changed carriers), and use the LRN to route the call to the appropriate switch with an SS7 message indicating that it has performed the query. The terminating carrier will then complete the call. To route an interexchange call, the originating local service provider will hand the call off to

---

[57] *See Order & Further Notice*, 11 FCC Rcd. at 8359-60; LOCAL NUMBER PORTABILITY REPORT, *supra* note 39, at §§ 2.3, 5.

[58] *See Order & Further Notice*, 11 FCC Rcd. at 8463. Carriers need not query calls that originate and terminate on the same switch. *See* NANC RECOMMENDATION, *supra* note 45, App. D (Architecture & Administrative Plan for Local Number Portability), ¶ 8, at 10 & fig. 2, scenarios 1 & 2.

[59] *See Second Report and Order*, 12 FCC Rcd. at 12323.

[60] NANC RECOMMENDATION, *supra* note 45, app. D (Architecture & Administrative Plan for Local Number Portability), ¶ 7.8, at 8.

[61] *Id.* app. D (Architecture & Administrative Plan for Local Number Portability), attachment A (Example N-1 Call Scenarios); LOCAL NUMBER PORTABILITY REPORT, *supra* note 39, at § 9.1.3. & fig. 9-3 (N-1 Network Query).

[62] *See Order & Further Notice*, 11 FCC Rcd. at 8404.

the IXC and the IXC will undertake the same procedure.

B. Prior Commission Decisions

17. The *Order*, as modified by the *First Memorandum Opinion and Order on Reconsideration* (First Reconsideration Order), requires LECs to implement long-term number portability: (1) in Chicago, Philadelphia, Atlanta, New York, Los Angeles, Houston, and Minneapolis—the largest metropolitan statistical area (MSA) in each of the seven RBOC regions—between October 1, 1997, and March 31, 1998; (2) in the rest of the 100 largest MSAs in quarterly stages between January 1, 1998, and December 31, 1998; and (3) thereafter in switches outside the 100 largest MSAs, within six months of a request by a telecommunications carrier.[63] A number of carriers have received extensions of the March 31, 1998, implementation deadline for certain areas ranging from two to five months.[64]

18. The Commission explained that the statutory definition of number portability requires LECs to implement number portability in such a way that LEC customers can keep their telephone numbers when they switch to any other telecommunications carrier, including, therefore, when they switch to a commercial mobile radio services (CMRS) provider.[65] The Commission also required in the *Order* that certain types of CMRS providers be able by December 31, 1998, to route calls to any ported numbers and be able by June 30, 1999, to allow their own customers to take their telephone

[63] *See In re Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, 7283, 7326-27, 7346-47 (1997) (First Reconsideration Order), *modifying Order & Further Notice*, 11 FCC Rcd. at 8355, 8393-96, 8482-85. Section 251(f)(2), however, allows a LEC "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" to petition a State commission to suspend or modify its section 251(b)(2) obligation to provide number portability. 47 U.S.C. § 251(f)(2).

[64] *See In re Telephone Number Portability, Petition for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase I*, CC Docket No. 95-116, Order, DA 98-613 (Network Servs. Div. rel. March 31, 1998) (extending SBC Companies' deadline to implement long-term number portability in Houston from March 31, 1998, to May 26, 1998); Order, DA 98-614 (Network Servs. Div. rel. March 31, 1998) (granting carriers a time extension ranging from two to five months for Atlanta, Los Angeles, and Minneapolis because of the switch from Perot to Lockheed as the database administrator of the Southeast, Western, and West Coast regions); Order, DA 98-729 (Network Servs. Div. rel. April 16, 1998) (extending Sprint's deadline to implement long-term number portability in Houston from March 31, 1998, to May 26, 1998). *See also supra* note 52 and accompanying text.

[65] *See Order & Further Notice*, 11 FCC Rcd. at 8355, 8357 (citing 47 U.S.C. § 153(30) (defining number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience *when switching from one telecommunications carrier to another*") (emphasis added)). *See also* 47 U.S.C. §§ 153(43), (44), (46) (defining "telecommunications," "telecommunications carrier," and "telecommunications service," in such a way that includes CMRS providers).

numbers to other carriers.[66] By its language, section 251(b)(2) requires only that LECs provide number portability,[67] and the 1934 Act, as amended, excludes from the definition of "local exchange carrier" those entities "engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[68] Although the Commission declined in the *Order* to address whether CMRS providers are LECs,[69] the Commission exercised authority under sections 1, 2, 4(i), and 332 to require three categories of CMRS providers—cellular providers, broadband personal communications service (PCS) providers, and covered specialized mobile radio (SMR) providers[70]—to provide number portability.[71]

---

[66] *Order & Further Notice*, 11 FCC Rcd. at 8355, 8439-40. The Cellular Telecommunications Industry Association (CTIA) filed a petition November 24, 1997, asking the Wireless Telecommunications Bureau to delay until March 31, 2000, the requirement that wireless carriers be able to port their own numbers by June 30, 1999. *See Wireless Telecommunications Bureau Seeks Comment on CTIA Petition for Waiver to Extend the Implementation Deadlines of Wireless Number Portability*, CC Docket No. 95-116, Public Notice, DA 97-2579 (rel. Dec. 9, 1997). CTIA subsequently asked the Commission to delay wireless number portability until PCS carriers complete their 5-year build-out schedule. *See Petition for Forbearance of the Cellular Telecommunications Industry Association*, CC Docket No. 96-116 (filed Dec. 16, 1997).

[67] 47 U.S.C. § 152(b) (stating that "[e]ach *local exchange carrier* has the . . . duty to provide . . . number portability") (emphasis added).

[68] 47 U.S.C. § 251(26). *See also Order & Further Notice*, 11 FCC Rcd. at 8355 (stating that the statute excludes CMRS providers from the definition of local exchange carriers, and therefore from the section 251(b) obligations to provide number portability, unless the Commission takes action to include CMRS providers in the definition of local exchange carrier).

[69] *Order & Further Notice*, 11 FCC Rcd. at 8355, 8431.

[70] The Commission's rules states that:

> [t]he term "covered SMR" means either 800 MHz and 900 MHz SMR licensees that hold geographic area licenses or incumbent wide area SMR licensees that offer real-time, two-way switched voice service that is interconnected with the public switched network either on a stand-alone basis or packaged with other telecommunications services. This term does not include local SMR licensees offering mainly dispatch services to specialized customers in a non-cellular configuration, licensees offering only data, one-way, or stored voice services on an interconnected basis, or any SMR provider that is not interconnected to the public switched network.

47 C.F.R. § 52.21(c).

[71] *Order & Further Notice*, 11 FCC Rcd. at 8355, 8431-33. *See* 47 U.S.C. § 151 (creating the Commission to regulate "interstate and foreign commerce in communication by wire and radio so as to make available ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"), § 152(b) (excluding from Commission jurisdiction regulation of intrastate communication by wire or radio, except as provided in certain sections of the 1934 Act, including section 332 on mobile services), § 154(i) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its

The Commission concluded that requiring these CMRS providers to provide number portability would serve the public interest by promoting competition between and among local wireless and wireline carriers, as well as among providers of interstate access service.[72]

19. In the *Order*, the Commission exempted some CMRS providers from the obligation to provide number portability: paging and other messaging service providers, private paging service providers, business radio service providers, providers of land mobile service on 220-222 MHz, public coast stations, public land mobile service providers, 800 MHz air-ground radio-telephone service providers, offshore radio service providers, mobile satellite service providers, narrowband PCS service providers, local SMR licensees, and local multipoint distribution service (LMDS) providers.[73] The Commission reasoned that such carriers currently have little impact on competition for local service.[74]

20. In the *First Reconsideration Order*, the Commission concluded that within the 100 largest MSAs, LECs must provide number portability only in switches for which another carrier has specifically and reasonably requested the provision of number portability.[75] The Commission reasoned that such an approach allows carriers to focus their resources where competitors plan to enter, which is where number portability is likely to have the most impact in the short run on the development of competition for local services.[76] Structuring implementation in this fashion reduces costs, eases the demands on software vendors, and encourages efficient deployment, network planning, and testing.[77] The Commission emphasized, however, that all carriers, even those operating portability-incapable switches, are still responsible for properly routing calls to telephone numbers in locations where number portability is available.[78] Carriers can meet that responsibility either by routing the call to one of their switches that is capable of performing the necessary database query, or by arranging for another carrier or a third party to query the database or route the call.[79]

21. In the *Second Report and Order*, the Commission determined that if an N-1 carrier arranges with another entity to perform queries on the carrier's behalf, that other entity may charge the

functions"), and § 332(c)(1) (granting the Commission authority to regulate any entity "engaged in the provision of mobile service ... as a common carrier").

72 *Order & Further Notice*, 11 FCC Rcd. at 8431-38.

73 *Id.* at 8433-34.

74 *Id.* at 8433-34 & n. 451.

75 *First Reconsideration Order*, 12 FCC Rcd. at 7272-7277.

76 *Id.* at 7272-73.

77 *Id.*

78 *Id.* at 7277.

79 *Id.*

N-1 carrier in accordance with requirements to be established in this *Third Report and Order*.[80] The Commission also noted that when an N-1 carrier fails to ensure that a call is queried, the call might inadvertently be routed by default to the LEC that originally served the telephone number.[81] If the number was ported, the LEC incurs costs in redirecting the call. This could happen, for example, if there is a technical failure in the N-1 carrier's ability to query, or if the N-1 carrier fails to ensure that its calls are queried, either through its own query capability or through an arrangement with another carrier or third-party.[82] The Commission determined in the *Second Report and Order* that if a LEC performs queries on default-routed calls, the LEC may charge the N-1 carrier in accordance with requirements to be established in this *Third Report and Order*.[83] The Commission determined further that it would "allow LECs to block default-routed calls, but only in specific circumstances when failure to do so is likely to impair network reliability."[84] The Commission also said that it would "require LECs to apply this blocking standard to calls from all carriers on a nondiscriminatory basis."[85]

22. The Competitive Pricing Division (Division) of the Common Carrier Bureau issued two *Memorandum Opinions and Orders* on October 30, 1997, and December 30, 1997, granting petitions by Ameritech, Bell Atlantic, Southwestern Bell, and Pacific Bell to establish new service rate elements for the provision of long-term number portability query services to other carriers.[86] The Division required all four carriers, however, to conform their rates, rate structures, regulations, and services offered under these rate elements to any determinations made by the Commission in

[80] *Second Report and Order*, 12 FCC Rcd. at 12324.

[81] *Id.* at 12324-25.

[82] As noted, CMRS carriers are not required to have the capability to query calls before December 31, 1998. *See supra* paragraph 18. They will, nonetheless, be N-1 carriers once LECs begin providing number portability, even before December 31, 1998. For an explanation of the N-1 protocol, see paragraph 15, *supra*.

[83] *Second Report and Order*, 12 FCC Rcd. at 12325-26.

[84] *Id.* at 12324-25.

[85] *Id.* at 12325-26.

[86] *See In re Petition of Ameritech to Establish a New Access Tariff Service and Rate Elements Pursuant to Part 69 of the Commission's Rules*, CCB/CPD Docket No. 97-46, Memorandum Opinion and Order, DA 97-2294, at ¶¶ 1, 13-17 (Comp. Pricing Div. Comm. Car. Bur. rel. Oct. 30, 1997) (Ameritech and Bell Atlantic Order); *In re Petition of Southwestern Bell Telephone Company Under Section 69.4(g)(1)(ii) of the Commission's Rules for Establishment of New Service Rate Elements*, CCB/CPD Docket No. 97-64, Memorandum Opinion and Order, DA 97-2725 (Comp. Pricing Div. Comm. Car. Bur. rel. Dec. 30, 1997) (Southwestern Bell and Pacific Bell Order). The Division also suspended for one day and incorporated into the investigation Ameritech revisions to its long-term number portability query service purporting to clarify in certain circumstances Ameritech's right to block unqueried traffic that carriers deliver to Ameritech's network. *See In re Ameritech Revisions to Tariff F.C.C. No. 2*, CCB/CPD 97-46, Memorandum Opinion and Order, DA 97-2353 (rel. Nov. 7, 1997).

CC Docket No. 95-116.[87] The Division further concluded that the tariff revisions the carriers filed implementing the rate elements raised substantial questions of lawfulness.[88] Consequently, the Division suspended the tariff revisions for one day and set them for investigation.[89] The Division also imposed accounting orders, which remain pending, for the duration of the investigation.[90] The Division issued an order January 30, 1998, designating issues for investigation.[91]

23. On March 30, 1998, the Commission terminated as moot the investigation of the tariff revisions of Pacific Bell and Southwestern Bell because both carriers filed superseding tariff revisions and neither carrier had customers under the initial tariff revisions designated for investigation.[92] The Commission also terminated as moot the investigation of Bell Atlantic's tariff revisions because Bell Atlantic had also filed superseding tariff revisions, and because it planned to refund all charges imposed on customers under the initial tariff revisions.[93] The Commission found Ameritech's tariff revisions unlawful for lack of adequate cost support.[94] Because Ameritech had not provided query services to any customers under the tariff revisions, it was not necessary to require refunds.[95] The Commission has suspended and set for investigation all four carriers' refiled tariff revisions.[96]

---

[87] *Ameritech and Bell Atlantic Order* at ¶ 17; *Southwestern Bell and Pacific Bell Order* at ¶ 9.

[88] *Ameritech and Bell Atlantic Order* at ¶ 18; *Southwestern Bell and Pacific Bell Order* at ¶ 10.

[89] *Ameritech and Bell Atlantic Order* at ¶ 18; *Southwestern Bell and Pacific Bell Order* at ¶ 11.

[90] *Ameritech and Bell Atlantic Order* at ¶ 18; *Southwestern Bell and Pacific Bell Order* at ¶ 11.

[91] *In re Number Portability Query Services*, CC Docket No. 98-14, Designation Order, DA 98-182 (rel. Jan. 30, 1998).

[92] *In re Number Portability Query Services*, CC Docket No. 98-14, Tariff Investigation and Termination Order, FCC 98-50, at ¶¶ 1, 8-9, 16 (rel. March 30, 1998) (Tariff Investigation and Termination Order).

[93] *Id.* at ¶¶ 1, 10-11, 16.

[94] *Id.* at ¶¶ 1, 13, 16.

[95] *Id.* at ¶ 13.

[96] *See In re Southwestern Bell Tariff F.C.C. No. 73*, CCB/CPD 98-17, Memorandum Opinion and Order, DA 98-530 (Comp. Pricing Div. Comm. Car. Bur. rel. March 18, 1998); *In re Pacific Bell Tariff F.C.C. No. 128*, CCB/CPD 98-23, Memorandum Opinion and Order, DA 98-598 (Comp. Pricing Div. Comm. Car. Bur. rel. March 27, 1998); *In re Ameritech Long-Term Number Portability Query Services*, CCB/CPD 98-26, Memorandum Opinion and Order, DA 98-648 (Comp. Pricing Div. Comm. Car. Bur. rel. April 3, 1998); *In re Bell Atlantic Tariff F.C.C. No. 1*, CCB/CPD 98-25, Memorandum Opinion and Order, DA 98-686 (Comp. Pricing Div. Comm. Car. Bur. rel. April 9, 1998).

III. THE STATUTORY FRAMEWORK

A. Federal/State Jurisdiction

1. Background

24. In the *Further Notice*, the Commission sought comment on its role under section 251(e)(2) in determining the distribution and recovery of number portability costs.[97] The Commission also sought comment on whether portability costs should be recovered through a tariff filed at the federal or state level.[98]

2. Positions of the Parties[99]

25. Commenters disagree on the appropriate Commission role with respect to the distribution and recovery of the costs of providing number portability.[100] Ameritech, MCI, and NARUC, as well as the California, Colorado, Florida, Illinois, New York, Ohio, and Washington state utility commissions, ask us to establish general guidelines, but to allow local commissions to develop

---

[97] *In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8462, 8464-66 (1996) (Order & Further Notice) (seeking comment on whether the Commission should create mechanisms by which carriers recover from end users or other carriers the shared and carrier-specific costs of providing number portability, and if so, what form those mechanisms should take). In the Notice of Proposed Rulemaking that the Commission issued prior to the *Order & Further Notice*, the Commission also requested comment on how carriers should allocate the costs of long-term number portability between federal and state jurisdictions. *In re Telephone Number Portability*, Notice of Proposed Rulemaking, 10 FCC Rcd. 12350, 12368 (1995).

[98] *Order & Further Notice*, 11 FCC Rcd. at 8465.

[99] Appendix A of this *Third Report and Order* lists the commenters and reply commenters in this proceeding. The comment deadline was August 16, 1996. The reply deadline was September 16, 1996. The Illinois Commerce Commission and the Telecommunications Resellers Association filed late comments, and GST Telecom Inc. and WinStar Communications Inc. filed late replies. We grant these commenters' motions to accept their late-filed pleadings. *See* 47 C.F.R. § 1.3 (stating that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown").

[100] Many commenters use the phrase "cost recovery" in some contexts to refer to the distribution among carriers of the costs of providing number portability, and in other contexts to refer to the collection of funds by carriers to meet those costs. For purposes of clarity, we define "cost recovery" as the collection of funds by carriers to cover some or all of their costs of providing number portability. *Cf.* Ill. Commerce Comm'n Comments at 3-4. "Cost distribution" refers to the division among carriers of responsibility to recover number portability costs. "Cost allocation" is one method of distributing number portability costs, through the use of some allocator such as share of telecommunications revenues. Another distribution method might be to make carriers responsible for their own costs of providing number portability, *i.e.*, the costs that they themselves incur in the first instance.

detailed, state-specific mechanisms.[101] They argue that such an arrangement will balance the Commission's section 251(e)(2) responsibility of ensuring competitive neutrality, with the local commissions' needs for flexibility to address state-specific circumstances.[102]

26. NARUC, as well as the California, Colorado, Illinois, Missouri, New York, Ohio, and Washington state commissions, also argue that section 251(e)(2) gives the Commission authority over the distribution of number portability costs among carriers, but that the states still have local ratemaking authority over recovery of the intrastate costs from end users.[103] NARUC and the Missouri Public Service Commission explicitly argue that number portability costs should be subject to the FCC's separations rules, and that the states are responsible for designing rates to recover the intrastate portion.[104]

27. Bell Atlantic, NYNEX, PacTel, SBC, U S WEST, Time Warner, AirTouch Communications, and Omnipoint oppose allowing state commissions to establish state-specific number portability mechanisms, and argue that we should create an exclusively federal mechanism.[105] They

[101] Ameritech Reply at 3-5; Calif. Pub. Utils. Comm'n Reply at 1; Colo. Pub. Utils. Comm'n Comments at 5-11; Fla. Pub. Servs. Comm'n Comments at 3; Ill. Commerce Comm'n Comments at i-ii, 3-5; MCI Comments at 8-9; N.Y. Dep't Pub. Servs. Comments at 1-2; NARUC Reply at 2; Ohio Pub. Utils. Comm'n Comments at 1-3, 7, 10-11; Wash. Utils. Transp. Comm'n Reply at 3-8.

[102] Ameritech Reply at 3-5; Colo. Pub. Utils. Comm'n Comments at 7-10; Ill Commerce Comm'n Comments at 4-5; NARUC Reply at 2; Ohio Pub. Utils. Comm'n Comments at 10; Wash. Utils. Transp. Comm'n Reply at 4, 7.

[103] Calif. Pub. Utils. Comm'n Reply at 6-9; Colo. Pub. Utils. Comm'n Comments at 5-11; Ill. Commerce Comm'n Comments at 3-7; Mo. Pub. Servs. Comm'n Comments at 2, 5; NARUC Reply at 2; N.Y. Dep't Pub. Serv. Comments at 2; Ohio Pub. Utils. Comm'n Comments at 1, 3, 11; Wash. Utils. Transp. Comm'n Reply at 3-8. *See also* Calif. Dep't Consumer Affairs Comments at 10, 21-24 (arguing that section 251(e)(2) does not apply to recovery from end users, but nonetheless advocating an end-user charge for the costs of *establishing* number portability; arguing that carriers should recover the ongoing costs of number portability as they see fit); Fla. Pub. Servs. Comm'n Comments at 3, 5-6 (arguing that carriers should recover their costs as they see fit, subject to any state regulations, such as price caps).

[104] Mo. Pub. Servs. Comm'n Comments at 2, 5; NARUC Reply at 2. *Cf.* Colo. Pub. Utils. Comm'n Comments at 6 (arguing that "[i]t is inappropriate for the FCC to get into the business of ratemaking for local service"); Ill. Commerce Comm'n Comments at 5-7 & n.2 (arguing that "the Act did not remove or reduce state jurisdiction over intrastate rate design" and that "[t]he FCC should not impose requirements regarding intrastate consumer rates, except to the limited extent needed to ensure competitive neutrality among carriers"); N.Y. Dep't Pub. Serv. Comments at 2 (arguing that recovery of the intrastate portion of the number portability costs from customers through intrastate service rates is subject to state, not federal, jurisdiction).

[105] AirTouch Communications Reply at 10; Bell Atlantic Comments at 3-4; NYNEX Comments at 10-11 & n.22; Omnipoint Communications Reply at 8-9; PacTel Reply at 7-8; SBC Reply at 5-7 & nn.16, 18; Time Warner Reply at 16 & n.42; U S WEST Reply at 2-4.

BEST COPY AVAILABLE

argue that the Commission has exclusive jurisdiction over number portability,[106] that a uniform methodology is necessary to ensure that nationwide competition develops,[107] that state-by-state mechanisms would be administratively and financially burdensome, especially for smaller carriers and new entrants,[108] and that the Commission must ensure that carriers recover their portability costs.[109] AirTouch Paging asks us to preempt inconsistent state mechanisms.[110]

3. Discussion

28. We conclude that section 251(e)(2) requires the Commission to ensure that carriers bear the costs of providing long-term number portability on a competitively neutral basis for both interstate and intrastate calls. In reaching this conclusion, we note that section 251(e)(2) expressly and unconditionally grants the Commission authority to ensure that carriers bear the costs of providing number portability on a competitively neutral basis. We recognize that the United States Court of Appeals for the Eighth Circuit concluded that the Commission lacked jurisdiction under section 251 to

[106] AirTouch Communications Reply at 10 (arguing that although section 251(e)(1) permits the Commission to delegate its authority over number administration, section 251(e)(2) does not have a similar provision permitting the Commission to delegate authority over number portability); NYNEX Comments at 10-11 & n.22 (pointing to sections 1, 251(b)(2), and 251(e) to argue that the Commission has "exclusive" jurisdiction over long-term number portability and cost support); PacTel Reply at 7-8 (arguing that section 251(e) gives the Commission exclusive authority to make rules for portability cost recovery); SBC Reply at 5-7 & nn. 16, 18 (arguing that sections 251(b)(2) and 251(e) give the Commission exclusive jurisdiction over number portability and that number portability affects both state and federal jurisdictions); U S WEST Reply at 2-4 (arguing that number portability falls under an exclusively federal jurisdiction because carriers must provide it pursuant to a federal mandate and federal requirements, as well as in accordance with federal interests in network interoperability, conservation of numbers, and the promotion of competition). *Cf.* Omnipoint Communications Reply at 8-9 (arguing that for control over the way costs are allocated among competing carriers, the Commission rather than the states should create a comprehensive allocation mechanism).

[107] AirTouch Communications Reply at 10; Omnipoint Communications Reply at 8-9; PacTel Reply at 7-8; Time Warner Reply at 16 & n.42. *Cf.* Bell Atlantic Comments at 3-4 (arguing that separate cost recovery mechanisms in every state would needlessly complicate matters and serve no public good).

[108] AirTouch Communications Reply at 10 (arguing that the transaction costs of dealing with as many as 51 different locally designed allocation mechanisms would burden smaller carriers and new entrants). *Cf.* Bell Atlantic Comments at 3-4 (arguing that the Commission should create a simple national cost allocation mechanism); Omnipoint Communications Reply at 8-9 (arguing that for expeditious deployment, the Commission rather than each state should create the allocation mechanism); SBC Reply at 5-7 & n.18 (arguing that state-specific allocation mechanisms would prove problematic).

[109] U S WEST Reply at 2-4 (arguing that the Commission may not rely on state mechanisms to make up any recovery shortfall).

[110] AirTouch Paging Comments at 6-9.

promulgate pricing rules for interconnection, unbundled access, and resale.[111] The Eighth Circuit distinguished, however, the Commission's authority governing number portability, noting that section 251(e) contains a specific grant of authority to the Commission.[112] Section 251(e)(2) states that carriers shall bear the costs of number portability "as determined by the Commission," and does not distinguish between costs incurred in connection with intrastate calls and costs incurred in connection with interstate calls. Thus, we conclude that section 251(e)(2) addresses both interstate and intrastate matters and overrides section 2(b)'s reservation of authority to the states over intrastate matters.

29. Consequently, we find that section 251(e)(2) authorizes the Commission to provide the distribution and recovery mechanism for all the costs of providing long-term number portability. We conclude that an exclusively federal recovery mechanism for long-term number portability will enable the Commission to satisfy most directly its competitive neutrality mandate, and will minimize the administrative and enforcement difficulties that might arise were jurisdiction over long-term number portability divided. Further, such an approach obviates the need for state allocation of the shared costs of the regional databases, a task that would likely be complicated by the databases' multistate nature. Under the exclusively federal number portability cost recovery mechanism, incumbent LECs' number portability costs will not be subject to jurisdictional separations. Instead, we will allow incumbent LECs to recover their costs pursuant to requirements we establish in this *Third Report and Order*.

B. Scope of Section 251(e)(2)

1. Background

30. Section 251(e)(2) states that "[t]he cost of establishing ... number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[113] The Commission tentatively concluded in the *Further Notice* that the competitive neutrality requirements of section 251(e)(2) apply to shared costs and carrier-specific costs directly related to providing number portability, but not to costs not directly related to providing number portability.[114] The Commission tentatively concluded that it would not create a particular recovery mechanism for carrier-specific costs not directly related to providing number portability.[115] Instead,

---

[111] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792-800 & n. 21 (8th Cir. 1997), *cert. granted sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

[112] *See* Iowa Utils. Bd. v. FCC, 120 F.3d at 792, 794 & n.10, 795 & n.12, 802 & n.23, 806 (stating that "the FCC is specifically authorized to issue regulations under subsections 251(b)(2) [and] ... 251(e)"). *See also Order & Further Notice*, 11 FCC Rcd. at 8417 (explaining that unlike the interconnection order, the number portability proceeding need not reach the issue whether section 251 gives the Commission general pricing authority because the statute grants the Commission the express authority to set competitively neutral pricing principles for number portability).

[113] 47 U.S.C. § 251(e)(2).

[114] *Order & Further Notice*, 11 FCC Rcd. at 8460, 8465-66.

[115] *Id.* at 8465.

the Commission tentatively concluded that carriers would bear such costs as network upgrades.[116] The Commission also tentatively concluded that section 251(e)(2) governs the distribution of costs among carriers, but not the recovery of those costs from end-users.[117] The Commission reasoned that "[t]his interpretation is borne out by the plain language of the statute, which only requires that telecommunications carriers bear the costs of number portability."[118] The Commission sought comment on these tentative conclusions.[119]

2. Positions of the Parties

31. Bell Atlantic argues that section 251(e)(2) applies to only the costs that LECs incur to meet their number portability obligations under section 251(b)(2), and does not govern number portability costs of other telecommunications carriers because such carriers are not subject to 251(b)(2).[120]

32. Bell Atlantic, PacTel, SBC, AT&T, MCI, and GSA, as well as a number of competitive LECs, CMRS providers, and state commissions, agree with the Commission's tentative conclusion that section 251(e)(2) does not apply to costs not directly related to number portability. They argue that because network upgrade costs are associated with the provision of a wide range of services, such expenditures are not costs of establishing number portability.[121] These parties further argue that identifying costs for section 251(e)(2) treatment other than those necessary to implement number portability would artificially raise the costs not only of number portability, but of local competition in general,[122] that carriers should not be required to subsidize nonportability-related

[116] *Id.*

[117] *Id.* at 8460.

[118] *Id.*

[119] *Id.* at 8460, 8465-66.

[120] Bell Atlantic Comments at 2-3.

[121] ALTS Comments at 2; Bell Atlantic Comments at 2; Calif. Pub. Utils. Comm'n Comments at 15; Colo. Pub. Utils. Comm'n Comments at 5; Florida Pub. Servs. Comm'n Comments at 5-6; Frontier Comments at 3; GSA Comments at 2-3; MCI Comments at 10-11; Ohio Pub. Utils. Comm'n Comments at 3; PacTel Comments at 11-12; SBC Comments at 9 n.15; TRA Comments at 4, 12-13; Time Warner Comments at 2-3; Wash. Utils. Transp. Comm'n Reply at 3. *Cf.* AirTouch Paging Reply at 2 (arguing that carriers should bear their own costs not directly related to number portability, and should treat them as network upgrade costs, because these costs would have been incurred even absent the number portability requirement); AT&T Comments at 17 (arguing that even absent a number portability requirement carriers regularly undertake network modifications, such as the installation of SS7 capability, that allow carriers to offer new services or improve existing ones); Mo. Pub. Servs. Comm'n Comments at 5 (arguing that carriers should bear their own upgrade costs because such upgrades permit carriers to provide advanced services unrelated to number portability).

[122] AT&T Comments at 4-5, 17; Scherers Communications Group Comments at 2.

improvements of other carriers' networks,[123] and that excluding such costs encourages carriers to upgrade their networks efficiently based on market forces and customer demand.[124] The California Department of Consumer Affairs agrees that section 251(e)(2) does not apply to indirect costs,[125] but also argues that section 251(e)(2) governs only the implementation costs of establishing number portability, and not the ongoing costs of portability once it is in place.[126]

33. A number of small LECs, competitive LECs, and state commissions, as well as MCI and the TRA, argue that section 251(e)(2) applies only to the distribution of number portability costs among telecommunications carriers, and not to the recovery of those costs from end-users, because the statute discusses how carriers should bear costs but makes no mention of end-user customers.[127] AirTouch Communications, USTA, and a number of incumbent LECs, on the other hand, argue that section 251(e)(2) applies to recovery, as well.[128]

34. Most commenters that address the issue argue that we should apply to section

[123] AT&T Comments at 17; GSA Comments at 2-3; Omnipoint Comments at 4-6; Scherers Communications Group Comments at 2; TRA Comments at 4, 12-13; WinStar Comments at 6-8. *Cf.* Time Warner Reply at 12-13 (arguing that carriers should bear their own costs not directly related to number portability because the industry should not be required to pay for basic network upgrades that can be used for revenue-generating services).

[124] AT&T Comments at 17; NCTA Reply at 4; Omnipoint Comments at 4-6; PCIA Comments at 8; WinStar Comments at 6-8. *Cf.* Time Warner Reply at 12-13 (arguing that carriers would overstate their costs not directly related to number portability if they could recover some of them from other carriers).

[125] Calif. Dep't Consumer Affairs Comments at 9-10, 25.

[126] *Id.* at 3 & n.1, 14, 17-18.

[127] ALTS Comments at 2; Calif. Pub. Utils. Comm'n Comments at 4; Colo. Pub. Utils. Comm'n Comments at 5; Ill. Commerce Comm'n Comments at 3-4; MCI Reply at 12-13; Ohio Pub. Utils. Comm'n Comments at 3; Time Warner Comments at 5-6; TRA Comments at 4; Wash. Utils. Transp. Comm'n Reply at 3. *Cf.* NTCA/OPASTCO Comments at 11-12 (arguing that by referring only to carriers in section 251(e)(2), Congress intended service providers, and not subscribers directly, to bear the costs of number portability).

[128] AirTouch Communications Reply at 13-14 (arguing that to be competitively neutral the Commission must neither mandate nor prohibit any particular recovery mechanism); Ameritech Reply at 6-8 & nn.10-11 (arguing that competitive neutrality requires a uniform end-user surcharge); Bell Atlantic Comments at 7-8 (arguing that to be competitively neutral, the Commission must require all telecommunications carriers to recover their costs in proportion to the revenues they bill); GTE Comments at 8-9, 11 (arguing that competitive neutrality requires that carriers recover all their number portability costs through a uniform, explicit, mandatory end-user charge); NYNEX Comments at 10-11 (arguing that distribution and recovery are inseparable, and that competitive neutrality requires a fair and reasonable recovery mechanism); USTA Comments at 16 n.12 (arguing that competitive neutrality should apply to distribution and recovery).

251(e)(2) the definition of "telecommunications carrier" found in section 3 of the Act.[129] The California Public Utilities Commission, on the other hand, argues that the definition of telecommunications carriers should be different for different cost categories and, at least for shared costs, should include carriers that appear on end-user's bills because all such carriers will need to obtain access to the regional databases to terminate calls.[130]

3. Discussion

35. The language and legislative history of section 251(e)(2) provides only limited guidance concerning the meaning of section 251(e)(2).[131] Accordingly, we interpret the terms of section 251(e)(2) in ways that will best implement its goals. The 1996 Act amended the 1934 Act "to provide for a pro-competitive, de-regulatory national policy framework [and to open] all telecommunications markets to competition."[132] Section 251(b)(2) furthers those congressional goals by requiring all LECs to provide number portability so that subscribers of local telephone service can retain their telephone numbers when changing carriers.[133] At the same time, by requiring the Commission to ensure that all telecommunications carriers bear on a competitively neutral basis the costs of providing number portability, section 251(e)(2) seeks to prevent those costs from themselves undermining competition.[134]

36. We conclude that "the cost[s] of establishing ... number portability" to be borne on a competitively neutral basis include the costs that LECs incur to meet the obligations imposed by section 251(b)(2), as well as the costs other telecommunications carriers—such as IXCs and CMRS

---

[129] ALTS Comments at 2; Calif. Dep't Consumer Affairs Comments at 3 & n.2; Colo. Pub. Utils. Comm'n Comments at 5; NYNEX Comments at 5 (citing paragraph in *Order & Further Notice* that references definitions in 1934 Act); Ohio Pub. Utils. Comm'n Comments at 4; SBC Comments at 3-4; Time Warner Comments at 5; U S WEST Reply at 12-13; USTA Reply at 3; Wash. Utils. Transp. Comm'n at 3. *See also Order & Further Notice*, 11 FCC Rcd. at 8357, 8419 (1996) (using definitions in section 3 to interpret the meaning of the "all telecommunications carriers" language of section 251(e)(2) for purposes of the interim portability cost recovery mechanism).

[130] Calif. Pub. Utils. Comm'n Comments at 1-2, 5.

[131] With respect to number portability, the conference agreement states only that "[t]he costs for numbering administration and number portability shall be borne by all providers on a competitively neutral basis." S. CONF. REP. NO. 104-230, at 122 (1996). Investigation of the bills in which these terms originate, and the floor debate surrounding them, does not resolve the issue.

[132] *Id.* at 1.

[133] *See* 47 U.S.C. § 251(b)(2). For further discussion of the goals of section 251(b)(2), see notes 2-12, *supra*, and accompanying text.

[134] *See* 47 U.S.C. § 251(e)(2). For further discussion of the goals of section 251(e)(2), see notes 2-12, *supra*, and accompanying text.

providers—incur for the industry-wide solution to local number portability.[135] The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[136] Thus, "the costs of number portability" are the costs of enabling telecommunications users to keep their telephone numbers without degradation of service when they switch carriers. Such costs include the costs a carrier incurs to make it possible to transfer a telephone number to another carrier, as well as the costs involved in making it possible to route calls to customers who have switched carriers (*i.e.*, the costs involved in making the N-1 querying protocol possible). IXCs and CMRS providers, as well as LECs, incur these costs. Consequently, requiring the number portability costs of all carriers to be borne on a competitively neutral basis is a more reasonable reading of the statute than the narrower reading advocated by Bell Atlantic.[137] Furthermore, if Congress had intended the costs that were to be borne on a competitively neutral basis to be the costs of a subset of carriers, we believe it would have done so explicitly.[138]

37. We also adopt the tentative conclusion in the *Further Notice* that costs not directly related to providing number portability, as defined further below,[139] are not costs of providing number portability.[140] Consequently, such costs need not "be borne by all telecommunications carriers on a competitively neutral basis" under section 251(e)(2). Section 251(e)(2) requires that the costs of providing number portability be borne on a competitively neutral basis. Costs not directly related to providing number portability encompass a wide range of costs that carriers incur to provide telecommunications functions unrelated to number portability. We find no indication that Congress intended to place such costs within the scope of the competitive neutrality requirement of section 251(e)(2). Because costs not directly related to providing number portability are not subject to 251(e)(2), the Commission is not obligated under that section to create special provisions to ensure that they are borne on a competitively neutral basis.

38. The California Department of Consumer Affairs interprets "the costs of establishing ... number portability" in section 251(e)(2) narrowly, limiting it to mean only the costs that carriers

[135] Under the N-1 protocol recommended by the industry under the auspices of the NANC, and the Commission's requirements for the provision of long-term number portability, almost all telecommunications carriers—including LECs, IXCs, and CMRS providers—will incur costs of number portability. *See supra* paragraphs 15 and 18.

[136] 47 U.S.C. § 153(30).

[137] *See supra* text accompanying note 120 for Bell Atlantic's argument.

[138] *Compare* 47 U.S.C. § 251(b)(2) (explicitly limiting to LECs the statutory obligation to provide number portability).

[139] *See infra* Part IV.

[140] *See supra* note 114 and accompanying text.

initially incur to upgrade the public switched telephone network and create the databases.[141] This interpretation is overly restrictive. Transferring numbers and querying calls is what "establishes," *i.e.* "creates" or "brings into existence," long-term number portability for each successive end-user who wishes to switch carriers.[142] Although the majority of the costs of providing number portability are initial, one-time costs of reconfiguring carrier networks, carriers will incur other costs—such as upload, download, and query costs—on an ongoing basis. As discussed above, the Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[143] We conclude, therefore, that "the costs of establishing number portability" include not just the costs associated with the creation of the regional databases and the initial physical upgrading of the public switched telephone network, but also the ongoing costs, such as the costs involved in transferring a telephone number to another carrier and routing calls under the N-1 protocol.[144]

39. We also conclude that section 251(e)(2) requires the Commission to ensure that number portability costs are distributed among, as well as recovered by, carriers on a competitively neutral basis. Despite the Commission's tentative conclusion that section 251(e)(2) only applies to the distribution of number portability costs,[145] we now find ambiguous the scope of the language requiring that costs "be borne ... on a competitively neutral basis." We find further that reading section 251(e)(2) as applying to both distribution and recovery best achieves the congressional goal of ensuring that the costs of providing number portability do not restrict the local competition that number portability is intended to encourage. Because the manner in which carriers recover the costs of providing number portability could affect their ability to compete, we cannot ensure that number portability costs are "borne by all telecommunications carriers on a competitively neutral basis" unless we address both distribution and recovery.[146] If the Commission ensured the competitive neutrality of only the distribution of costs, carriers could effectively undo this competitively neutral distribution by

[141] *See supra* text accompanying note 126 for the argument of the California Department of Consumer Affairs.

[142] Common dictionary definitions define the term "establish" as "to found or create" or "to bring into existence." *See* The American Heritage Dictionary of the English Language 246 (1980). *See also* Webster's Ninth New Collegiate Dictionary 425 (1984).

[143] *See supra* text accompanying note 8.

[144] *Cf. Order & Further Notice*, 11 FCC Rcd. at 8415 (arguing that the "statutory mandate that local exchange carriers provide number portability through [remote call forwarding, direct inward dialing], or other comparable arrangements until a long-term number portability approach is implemented" requires the Commission to "adopt cost recovery principles for currently available number portability that satisfy the 1996 Act").

[145] *See supra* note 117 and accompanying text.

[146] We note that commenters that urge the Commission to require certain types of recovery, such as end-user charges, apparently assume that recovery falls within the scope of section 251(e)(2).

recovering from other carriers. For example, an incumbent LEC could redistribute its number portability costs to other carriers by seeking to recover them in increased access charges to IXCs. Therefore, we find that section 251(e)(2) requires the Commission to ensure that both the distribution and recovery of intrastate and interstate number portability costs occur on a competitively neutral basis.

40. The provisions of section 3 of the Act, when read together, define "all telecommunications carriers" as all persons or entities other than aggregators that charge to transmit information for the public without changing the form or content of the information, regardless of the facilities they use.[147] Thus, we reject the California commission's definition of "all telecommunications carriers" as carriers of record on an end-user's bill, as well as with its contention that the definition should be different for different categories of costs.[148] Applying the statutory definition to section 251(e)(2), we conclude that the way all telecommunications carriers bear the costs of providing number portability—including incumbent LECs, competitive LECs, CMRS providers, IXCs, and resellers—must be competitively neutral as determined by the Commission.

C. Competitive Neutrality

1. Background

41. The Commission noted in the *Order* that, in evaluating the costs and rates of telecommunications services, the Commission ordinarily applies principles of cost causation, under which the purchaser of a service pays at least the incremental cost of providing that service.[149] The Commission also recognized, however, that Congress intended number portability to remove the barrier to local competition created by end-user reluctance to change carriers when such a change requires obtaining a new telephone number.[150] Pricing number portability on a cost-causative basis could defeat this purpose because the nature of the costs involved with some number portability solutions might make it economically infeasible for some carriers to compete for a customer served by

[147] *See* 47 U.S.C. § 153(44) (defining "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services"), § 153(46) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"), § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received") The Act defines "aggregator" as any person or entity "that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

[148] *See supra* text accompanying note 130 for the California commission's argument.

[149] *Order & Further Notice*, 11 FCC Rcd. at 8419-20.

[150] *See id.* (stating that "Congress mandated the use of number portability so that customers could change carriers with as little difficulty as possible").

another carrier.[151] Consequently, the Commission interpreted Congress's competitive neutrality mandate to require the Commission to depart from cost-causation principles when doing so is necessary to ensure "that the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[152]

42. The Commission observed in the *Order* that interim number portability costs arise only when an end-user calls a customer who has changed from a local service provider using one switch to another local service provider using another switch.[153] These interim costs are initially incurred primarily by the local carrier that loses the customer, because that carrier must provide services such as call-forwarding to route calls to the customer on the acquiring carrier's switch.[154] Observing that some states had already adopted cost recovery mechanisms for interim number portability,[155] the Commission specified that to be competitively neutral any state-designed allocators for sharing the incremental costs of interim number portability: (1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return.[156]

43. The Commission explained in discussing the first of these two requirements that, if a facilities-based LEC wins another facility-based LEC's customer, an incremental cost of interim number portability is created that equals the cost of forwarding calls to that customer in the future.[157] At the outset, these incremental, interim number-portability costs will fall predominantly on incumbent LECs that lose customers to facilities-based entrants.[158] Shifting all these incremental costs to the competitive LEC would not be competitively neutral, however, because the competitive LEC could suffer a competitive disadvantage when competing with the incumbent LEC for that subscriber.[159] Thus, the Commission concluded that the first prong of the test should require that the costs of interim number portability not place any one carrier at an appreciable, incremental cost disadvantage when

[151] *See id*

[152] *Id.*

[153] *Id.* at 8420.

[154] *Id.* at 8415-16.

[155] *Id.* at 8417.

[156] *Id.* at 8420-21. The Commission is currently considering a number of reconsideration petitions on this issue. *See, e.g., Bell South Petition for Reconsideration* (filed Aug. 26, 1996); *Cincinnati Bell Petition for Reconsideration* (filed Aug. 26, 1996); *MCI Petition for Clarification* (filed Aug. 26, 1996).

[157] *Order & Further Notice*, 11 FCC Rcd. at 8418-20.

[158] *Id.* at 8415-16.

[159] *Id.* at 8420-21.

competing for a subscriber.[160]

44. The Commission stated in discussing the second prong of the test that, if a carrier's cost of providing number portability were too large in relation to its expected profits, it might choose not to participate in the local service market.[161] For example, if an incumbent LEC and a new entrant were to be assessed the same amount of number portability costs, the small entrant's costs might be sufficiently large when compared to its projected profit to drive the entrant out of the market or even prevent it from entering in the first place. Thus, the Commission concluded that the second prong should require that the costs of interim number portability not disparately affect the ability of competing carriers to earn a normal return.[162]

45. The Commission stated in the *Order* that, with regard to recovery of the incremental costs of interim portability, at least four allocation mechanisms would meet the two-part test: (a) assessing an annual charge based upon each carrier's number of ported telephone numbers, (b) allocating number portability costs based upon number of lines, (c) assessing a uniform percentage of carriers' gross revenues that do not include charges they pay to other carriers, and (d) requiring each carrier to pay its own costs.[163]

46. The *Order* indicated that long-term number portability costs appear fundamentally different than interim number portability costs.[164] First, long-term number portability involves the cost of redesigning current networks to handle the database query system (*e.g.*, the cost of creating the databases, upgrading switch software, and purchasing SCPs), as well as the incremental cost of winning a subscriber (*e.g.*, the cost of uploading that customer's new LRN to the regional database and querying future calls from that customer to NXXs where number portability is available).[165] By contrast, because interim number portability solutions already exist in today's networks, the *Order* observed that they only give rise to the incremental cost of porting the next customer (*i.e.*, the cost of forwarding future calls to the ported customer's new switch).[166] Second, long-term number portability requires large infrastructure investments.[167] The *Order* noted that interim number portability, on the

160 *Id.* at 8420.

161 *Id.* at 8421.

162 *Id.*

163 *Id.* at 8422.

164 *Id.* at 8415-16.

165 *Id.*

166 *Id.*

167 *Id.*

other hand, requires little infrastructure investment and involves relatively small costs.[168] Third, long-term number portability requires almost all carriers to incur porting and querying costs.[169] The *Order* pointed out that the costs of interim number portability will fall solely on carriers that lose local customers: such carriers must provide services such as call forwarding to route traffic to customers they lose to facilities-based competitors.[170] At the outset, the carriers losing customers will most often be incumbent LECs.[171] In addition, long-term number portability requires N-1 carriers to incur query costs for all interswitch calls to an NXX once number portability is available for that NXX, whether or not the terminating customer has ported a number.[172] By contrast, the *Order* indicated that the costs of interim number portability arise only when one customer calls another customer who has taken a number to a new carrier.[173]

47. Because of the different nature of interim and long-term number portability costs, the *Order* applied the cost recovery principles only to interim number portability.[174] The Commission sought comment in the *Further Notice* on whether to apply the same principles to long-term number portability, and tentatively concluded that the same principles should apply.[175]

48. The Commission chose in the *Order* to adopt uniform national rules regarding the implementation of number portability to ensure efficient and consistent nationwide use of number portability methods and numbering resources.[176] The Commission did, nonetheless, allow states to implement state-specific databases and "opt out" of the regional database plan for long-term number portability within sixty days from the release of a Public Notice by the Common Carrier Bureau identifying the LNPAs.[177] The Commission tentatively concluded in the *Further Notice* that the

---

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *See id.* at 8463. Carriers need not query calls that originate and terminate on the same switch. *See* NANC RECOMMENDATION, *supra* note 45, App. D (Architecture & Administrative Plan for Local Number Portability), ¶ 8 at 10 & fig. 2, scenarios 1 & 2.

[173] *See id.* at 8361-62, 8418-19.

[174] *See id.* at 8415-16.

[175] *Id.* at 8460.

[176] *Id.* at 8370-71.

[177] *Id.* at 8402-03.

competitive neutrality principles would still apply to states that opt out.[178]

2. Positions of the Parties

49. MobileMedia Communications and PCIA explicitly agree with the Commission's tentative conclusion to apply to long-term number portability the interpretation that competitive neutrality requires that the costs of number portability not affect significantly any carrier's ability to compete for subscribers.[179] Although no commenters disagree with this definition. Cincinnati Bell and GTE argue that competitive neutrality also requires the Commission to provide carriers with an explicit mechanism to recover all their portability costs. They argue that leaving recovery of portability costs to rate increases would place incumbent LECs at a significant competitive disadvantage because competition and state regulation constrain the ability of incumbent LECs to raise their end-user rates.[180] and that failure to allow full cost recovery may result in an unconstitutional taking of property.[181]

50. Most commenters that address the issue also advocate applying to long-term number portability costs the Commission's two-part competitive neutrality test.[182] A few commenters. however, propose additional criteria. AT&T argues that any allocation must also not shift one carrier's number portability costs to another carrier,[183] and must encourage carriers to minimize portability costs.[184] The California Department of Consumer Affairs, Cincinnati Bell, and GTE argue that any allocation must also not influence customer choice of service provider.[185]

---

[178] *Id.* at 8460.

[179] MobileMedia Communications Reply at 3; PCIA Comments at 4.

[180] GTE Comments at 8-9.

[181] Cincinnati Bell Comments at 6; GTE Comments 9-10.

[182] AirTouch Communications Comments at 1. 2; ALTS Comments at 3; Ameritech Reply at 5; AT&T Comments at 6 n.5; Calif. Dep't Consumer Affairs Comments at 11; Calif. Pub. Utils. Comm'n Comments at 4-5; Cincinnati Bell Comments at 6; Colo. Pub. Utils. Comm'n Comments at 5-6; Fla Pub. Servs. Comm'n Comments at 2; GST Reply at 3-4; GTE Comments at 7; MCI Comments at 2; MFS Reply at 9-10; MobileMedia Reply at 3; NCTA Reply at 3-4; Ohio Pub. Utils. Comm'n Comments at 5; PCIA Comments at 4-5; Sprint Comments at 4; TRA Comments at 6; Teleport Comments at 3; Time Warner Comments at 6; Wash. Utils. Transp. Comm'n Reply at 3-4; WinStar Reply at 2-4.

[183] AT&T Comments at 6 n.5.

[184] *Id. Cf.* Ameritech Reply at 5-8 (arguing competitive neutrality requires minimizing pooling).

[185] Calif. Dep't Consumer Affairs Comments at i. 11-12 (arguing competitive neutrality from a consumer standpoint means that the amount of portability costs for one LEC's customers is not disproportionately higher than for another LEC's customers. and no customers can avoid their portion by changing providers); Cincinnati Bell Comments at 6; GTE Comments at 7.

51. BellSouth argues that the two-part test is inapplicable to the costs of long-term number portability because the Commission developed the test for the substantially different costs of interim number portability.[186] BellSouth also maintains that the "competing for a customer" part of the first prong does not coincide with the language of section 251(e)(2), which speaks of all telecommunications carriers, not just carriers that compete for customers.[187] Further, BellSouth contends that the "normal rate of return" language of the second prong "smacks of protectionist, rate of return regulation."[188] Instead, BellSouth argues that a competitively neutral mechanism must (1) equitably distribute among all carriers the shared costs and carrier-specific direct costs caused by the federal mandate, and not impose a disproportionately greater burden on any one telecommunications carrier relative to another; (2) not distort service prices so as to influence customer choice among alternative carriers; and (3) be characterized by administrative simplicity.[189] The United States Telephone Association (USTA) argues that the first prong should ensure that no service provider has an advantage based on *any* number portability costs, not just based on the incremental costs of serving a porting subscriber.[190]

3. Discussion

52. We adopt the Commission's tentative conclusion to apply to long-term number portability the Order's definition of competitive neutrality as requiring that "the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[191] Applying this definition will ensure that the cost of implementing number portability does not undermine the goal of the 1996 Act to promote a competitive environment for the provision of local communications services.

53. We also adopt the Commission's tentative conclusion[192] to apply to long-term number portability the two-part test the Commission developed to determine whether carriers will bear the interim costs of number portability on a competitively neutral basis. Under this test, the way carriers bear the costs of number portability: (1) must not give one service provider an appreciable. incremental cost advantage over another service provider when competing for a specific subscriber,

---

[186] BellSouth Comments at 2-3; BellSouth Reply at 2-4.

[187] BellSouth Comments at 3.

[188] *Id.* at 3-4. *Cf.* Fla. Pub. Servs. Comm'n Comments at 2 (arguing that a competitively neutral allocator could still affect the ability of less efficient carriers to earn a normal return).

[189] BellSouth Reply at 2-4; BellSouth Comments at 2-4.

[190] USTA Comments at 14-15.

[191] *See supra* note 152 and accompanying text.

[192] *See supra* text accompanying note 175.

and (2) must not disparately affect the ability of competing service providers to earn a normal return.[193]

54. We find no merit in BellSouth's argument that the different nature of long-term number portability costs makes the two-part test inapplicable.[194] We see no reason why we should not use such a test to implement the single statutory competitive neutrality standard. Although the nature of the costs of long-term number portability differs from the nature of the costs of interim number portability, these differences do not alter Congress' competitive neutrality mandate. Thus, the analysis the Commission employed in the *Order & Further Notice* to develop the two-part test[195] is equally valid here, and we adopt the same competitive neutrality standards for the costs of long-term number portability as for the costs of interim number portability.

55. We disagree with USTA's proposal that the first prong of the competitive neutrality test should focus on all number portability costs, rather than just the incremental number portability costs of winning the next subscriber that ports a telephone number.[196] The second prong, which ensures that all portability costs do not disparately affect a carrier's ability to earn a normal return, addresses USTA's concern that the overall costs of number portability do not handicap certain carriers. The first prong ensures that the way costs are allocated does not disadvantage carriers when competing for a subscriber. Consequently, it appropriately focuses on the incremental cost of serving the next subscriber that ports a number.

56. We also disagree with BellSouth that the "normal return" prong of the two-part test somehow constitutes rate-of-return regulation.[197] The second prong does not guarantee any particular rate of return, but merely states that an allocator should not disparately affect a carrier's ability to earn a normal return. We further reject BellSouth's view that the "competing for a subscriber" part of the competitive neutrality test is invalid because section 251(e)(2) speaks of "all telecommunications carriers," rather than just carriers that compete for a subscriber.[198] Section 251(e)(2) requires the Commission to ensure that "[t]he costs of establishing ... number portability are borne by all telecommunications carriers on a competitively neutral basis." Thus, the statute requires us to ensure that the costs of number portability do not affect the ability of carriers to compete. Because the ability of a carrier to compete is measured largely by its ability to attract subscribers, we believe that the "competing for a customer" part of the competitive neutrality test is valid. Furthermore, we apply the "normal return" prong of the test to all carriers, not just carriers that compete for end-user customers.

---

[193] *See supra* text accompanying note 156.

[194] *See supra* text accompanying note 186 for BellSouth's argument.

[195] *See supra* text accompanying notes 157-162.

[196] *See supra* note 190 and accompanying text for USTA's argument.

[197] *See supra* text accompanying note 188 for BellSouth's argument.

[198] *See supra* text accompanying note 187 for BellSouth's argument.

57. We decline to adopt BellSouth's three-prong competitive neutrality test.[199] First, although we agree with BellSouth that number portability costs should not disproportionately burden one carrier over another, our test already ensures this by evaluating the effect on a carrier's abilities to compete and earn a normal return.[200] Second, we agree with BellSouth that an allocator should not encourage or discourage end-users to change service providers, but this criterion is effectively embodied in the first prong of the test. Third, we agree with BellSouth that administrative simplicity is a valid objective, but not in derogation of the competitive neutrality requirement of the statute.

58. We disagree with AT&T that section 251(e)(2) prohibits a distribution mechanism that shifts costs among carriers.[201] To the contrary, section 251(e)(2) requires the distribution of number portability costs among carriers if necessary to ensure competitive neutrality. We also disagree with AT&T's contention that section 251(e)(2) requires that any allocator encourage carriers to minimize costs.[202] Although minimizing costs is preferable, it is not a goal that stems from, or takes precedence over, the statutory mandate of competitive neutrality. We agree with the California Department of Consumer Affairs, Cincinnati Bell, and GTE that any allocation should not influence customer choice of service provider.[203] This is simply a restatement of the first prong of the test: that an allocator must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber.

59. We disagree with Cincinnati Bell and GTE that the "competitive neutrality" mandate requires the Commission to ensure that carriers recover all their number portability costs.[204] Nothing in section 251(e)(2) states that the Commission must guarantee recovery of such costs.[205] Instead, section 251(e)(2) requires that the Commission ensure that the way all carriers bear the costs of providing number portability is competitively neutral. Even if a carrier does not recover all its costs,

199 *See supra* note 189 and accompanying text for BellSouth's test.

200 *See* GST Reply at 4-5 (arguing that the Commission's principles already address BellSouth's concerns); WinStar Reply at 3-4 (arguing that the Commission's principles already address the incumbent LECs' concerns).

201 *See supra* text accompanying note 183 for BellSouth's argument.

202 *See supra* text accompanying note 184 for AT&T's argument.

203 *See supra* text accompanying note 185 for their arguments.

204 *See supra* text accompanying notes 180-181 for their arguments.

205 A House amendment to S. 652 not adopted in conference would have required the Commission to establish regulations ensuring that LECs receive full compensation for the cost of providing number portability. *See* S. CONF. REP. 104-230, at 120-21 (1996) (stating that section 242(b)(4) of the House amendment "directs the Commission to establish regulations requiring full compensation to the LEC for costs of providing services related to ... number portability"); S. 652, 104th Cong., § 242(b)(4)(D) (1995) (as passed by the House and sent to conference Oct. 12, 1995), *reprinted in* 141 CONG. REC. H9954 (daily ed. Oct. 12, 1995) (requiring "that the costs that a carrier incurs in offering ... number portability ... shall be borne by the users of such ... number portability").

the Commission's rules will satisfy section 251(e)(2) so long as that carrier's ability to compete for subscribers is not significantly affected. Some parties have also raised Fifth Amendment concerns in connection with the inability of carriers to recover their costs.[206] We address recovery of number portability costs and the Fifth Amendment in Part VI.

60. Accordingly, we adopt for purposes of long-term number portability the Order's definition of competitive neutrality as requiring "that the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[207] We also adopt the two-part test for determining whether this definition is met.[208] We apply this interpretation of competitive neutrality to the shared costs of providing number portability in Part V. We find it unnecessary to address whether to apply our competitive neutrality principles to states that opt out of the regional database plan[209] because no state elected to opt out by the July 1, 1997, deadline.[210] We apply the interpretation of competitive neutrality to the carrier-specific costs directly related to providing number portability in Part VI.

IV. CATEGORIZATION OF COSTS

A. Background

61. In the *Further Notice*, the Commission tentatively divided the costs raised in this proceeding into three categories: "costs incurred by the industry as a whole" (*i.e.* shared costs), "carrier-specific costs directly related to providing number portability," and "carrier-specific costs not directly related to number portability."[211] The Commission tentatively defined shared costs as "costs incurred by the industry as a whole, such as those incurred by the third-party administrator to build, operate, and maintain the databases needed to provide number portability."[212] The Commission subcategorized the number portability costs of facilities shared by all carriers into: "(a) non-recurring costs, including the development and implementation of the hardware and software for the database; (b) recurring (monthly or annually) costs, such as the maintenance, operation, security, administration,

---

[206] *See* notes 181, 425, and accompanying text.

[207] *See supra* note 152 and accompanying text.

[208] *See supra* paragraph 42 for the two-part test.

[209] *See supra* text accompanying notes 176-178 for discussion of opting out.

[210] *See 60 Day Time Period During Which States May Elect To Opt Out of Regional Database System Commences*, CC Docket No. 95-116, Public Notice, DA 97-916 (rel. May 2, 1997) (NANC Recommendations Phase Public Notice). A copy of the NANC Recommendations Phase Public Notice was published in the Federal Register on May 8, 1997. *See* 62 Fed. Reg. 25157 (1997).

[211] *In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8459 (1996) (Order & Further Notice).

[212] *Id.* at 8459, 8461.

and physical property associated with the database: and (c) costs for uploading, downloading, and querying number portability database information."[213]

62. The Commission tentatively defined carrier-specific costs directly related to providing number portability as costs such as "the costs of purchasing the switch software necessary to implement a long-term number portability solution."[214] The Commission tentatively defined carrier-specific costs not directly related to providing number portability as costs such as "the costs of network upgrades necessary to implement a database method."[215] The Commission listed as examples of costs not directly related to providing number portability "the costs of upgrading SS7 capabilities or adding intelligent network (IN) or advanced intelligent network (AIN) capabilities," and explained that "[t]hese costs are associated with the provision of a wide variety of services unrelated to the provision of number portability, such as custom local area signaling service (CLASS) features."[216] The Commission sought comment on all of its tentative definitions.[217]

B. Positions of the Parties

63. Most incumbent LECs, competitive LECs, IXCs, and state commissions agree that the Commission should categorize the costs raised in this proceeding as shared costs, carrier-specific costs directly related to number portability, and carrier-specific costs not directly related to number portability, which they often designate as Type 1, Type 2, and Type 3 costs, respectively.[218] CTIA and CommNet Cellular, however, argue that determining whether the tripartite division of long-term number portability costs will work in the wireless context is difficult because the wireless industry is

---

213 *Id.* at 8463.

214 *Id.* at 8459, 8464.

215 *Id.* at 8459.

216 *Id.* at 8465. CLASS services take advantage of interoffice signalling to offer advanced features such as call forwarding, caller identification (caller ID), call waiting, and callback. *See generally* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 130-31 (11th ed. 1996).

217 *Order & Further Notice*, 11 FCC Rcd. at 8459, 8463.

218 Ameritech Comments at 3; AT&T Comments at 4-5; Bell Atlantic Comments at 2 & n.2; BellSouth Comments at 5-7; Calif. Dep't Consumer Affairs Comments at 8-9; Calif. Pub. Utils. Comm'n Comments at 4; Cincinnati Bell Comments at 1-2; Colo. Pub. Utils. Comm'n Comments at 4-5; Frontier Comments at 1; GSA Comments at 2; GTE Comments at 3-4; Iowa Network Servs. Reply at 3-4; MCI Comments at 2; NYNEX Comments at 3; Ohio Pub. Utils. Comm'n Comments at 3; PacTel Comments at 4; PCIA Comments at 7; SBC Comments at 9 n.15; Scherers Communications Group Comments at 1; Sprint Comments at 1-2; Time Warner Comments at 2; TRA Comments at 3-4; U S WEST Comments at 3.

still in the early stages of developing a number portability solution.[219]

64. Most commenters that address the issue also agree with the Commission's tentative definition of shared costs,[220] as well as with the Commission's proposed subcategorization of shared costs into nonrecurring costs and recurring costs, as well as upload, download, and query costs.[221] The Public Utilities Commission of Ohio, however, argues that the Commission should reclassify upload, download, and query costs as recurring shared costs because allocating the actual costs of carriers' uploads, downloads, and queries for a particular database does not appear necessary.[222] Other commenters argue that the costs of uploading, downloading, and querying are more appropriately considered carrier-specific costs directly related to number portability because these functions involve interaction with a carrier's network.[223]

65. U S WEST agrees with the Commission's tentative definition of shared costs, but argues that once portions of the shared costs are allocated to individual carriers, those portions should be treated as carrier-specific costs directly related to number portability. U S WEST reasons that once allocated, those costs become associated with specific carriers, and are no longer unattributable costs of the industry as a whole.[224]

66. Many commenters agree with the Commission's tentative definitions of carrier-specific

---

[219] CTIA Comments at 4-5 (arguing that the additional complexity of the wireless network is likely to blur the distinctions among categories, and that number portability may require CMRS providers to modify their existing network infrastructure in ways that will not enable them to provide additional service); CommNet Cellular Reply at 2-5.

[220] Ameritech Comments at 3; ALTS Comments at 1-2; AT&T Comments at i-ii, 4-7; Bell Atlantic Comments at 2 & n.2; BellSouth Comments at 5-6; Calif. Dep't Consumer Affairs Comments at 8-9; Calif. Pub. Utils. Comm'n Comments at 1, 4; Cincinnati Bell Comments at i, 1-2; Colo. Pub. Utils. Comm'n Comments at 4-5; Frontier Comments at 1; GSA Comments at 2; GTE Comments at 4; Iowa Net. Servs. Reply at 3-4; MCI Comments at 2; Nextel Comments at 1-2; NYNEX Comments at 3-4 & n.4; Ohio Pub. Utils. Comm'n Comments at 3; PacTel Comments at 4-5; SBC Comments at 1, 9 n.14; Scherers Communications Group Comments at 1; Sprint Comments at iii, 1-2; TRA Comments at 3-4, 6; Teleport Comments at i, 1; Time Warner Comments at 1 n.2, 2; U S WEST Comments at 3-4, 9-10; USTA Comments at iii, 1-2, 10.

[221] ALTS Comments at 5; BellSouth Comments at 5-6; Cincinnati Bell Comments at 2; GST Reply at 8; Iowa Network Servs. Reply at 6-7; MCI Comments at 3; PacTel Comments at 4-5; PCIA Comments at 7; TRA Comments at 10; WinStar Reply at 10.

[222] Ohio Pub. Utils. Comm'n Comments at 7-8.

[223] Ameritech Comments at 10; Calif. Dep't Consumer Affairs Comments at 16-17; Calif. Pub. Utils. Comm'n Comments at 8; Mo. Pub. Servs. Comm'n Comments at 3; Time Warner Comments at 10.

[224] U S WEST Comments at 3-4, 10 n.19. *Cf.* Ameritech Reply at 6 (arguing that once the shared costs are allocated to specific carriers the carriers can recover them on the same basis as the carrier-specific costs directly related to number portability).

costs directly and not directly related to number portability.[225] The California Department of Consumer Affairs, the California Public Utilities Commission, and Nextel, on the other hand, assert that the Commission should develop more precise definitions.[226] Ameritech argues that carrier-specific costs directly related to number portability should include the costs of network upgrades that are necessary to implement number portability.[227] Several incumbent LECs and Iowa Network Services contend that carrier-specific costs directly related to number portability should include both the costs of unplanned network upgrades that carriers would not have deployed but for number portability[228] as well as the costs associated with portability-related acceleration of planned upgrades that carriers would not have deployed *as early* but for the Commission's schedule for deploying number portability.[229] U S WEST and USTA would exclude the value of any nonportability-related benefits

[225] AT&T Reply at 4-8 & n.9 (arguing that in the 800 number portability proceeding, the Commission defined SS7 upgrades as network upgrades not related to 800 number portability); Bell Atlantic Comments at 2 & n.2; Colo. Pub. Utils. Comm'n Comments at 4-5; GSA Comments at 2-3; MCI Comments at 2; Ohio Pub. Utils. Comm'n Comments at 3; SBC Comments at 9 n.15; Sprint Comments at 1-4; Teleport Comments at 7, 9; TRA Comments at 3-4 (but noting that it is difficult to draw a distinction between carrier-specific costs directly and not directly related to number portability).

[226] Calif. Dep't Consumer Affairs Comments at 9 (suggesting that the Commission confer with technology experts to determine which, if any, technology upgrades should be treated as carrier-specific costs directly related to number portability); Calif. Pub. Utils. Comm'n Reply at 3-4 (cautioning that the Commission needs to scrutinize portability costs further before determining which are directly and not directly related to number portability); Nextel Communications Comments at 2 (requesting that the Commission develop more precise definitions of carrier-specific costs directly and not directly related to number portability so that carriers know how their various costs will be treated).

[227] Ameritech Reply at 9-10 (characterizing as carrier-specific costs directly related to number portability any costs a carrier incurs to increase the capacity or enhance the capabilities of existing equipment, facilities, systems, and software to meet the demands of number portability).

[228] Cincinnati Bell Reply at 2-3; GTE Reply at 9-12 (arguing that any cost to modify an existing network function that a LEC can demonstrate was not part of its historical planning horizon either should be considered direct, or the carrier should be granted a waiver of the section 251(b)(2) portability requirement on the grounds that portability is not technically feasible for the carrier absent the upgrade); Iowa Network Servs. Reply at 4-5; PacTel Comments at 8-9; U S WEST Comments at 10-11. *Cf.* USTA Comments at 2-3 (advocating creation of a Type 2a category for carrier-specific costs incurred solely because of portability by carriers with universal service obligations and less than two percent of the nation's access lines). *But see* Time Warner Reply at 13 n.34 (arguing that the "but for" position essentially advocates recovering carrier-specific costs not directly related to number portability from the industry as a whole).

[229] BellSouth Comments at 6 (defining as a carrier-specific cost directly related to number portability the lost time-value of money associated with number portability-related advancements of planned network modifications); Cincinnati Bell Reply at 2-3 (defining as a carrier-specific cost directly related to number portability the opportunity cost or increase in net present value attributable to making an investment sooner than otherwise would have occurred); PacTel Comments at 8-9; U S WEST Comments at 10-11. *But see* Time Warner Reply at 9 (arguing that even if a carrier must make an upgrade sooner than planned, the fact that a carrier had planned the upgrade demonstrates that it would support functionalities other than number portability,

from the planned or accelerated upgrades.[230]

67. USTA also asks us to create a separate category for carrier-specific costs that carriers with universal service obligations and less than two percent of the nation's access lines incur solely because of the number portability mandate and for which no business case can be made.[231] USTA argues that creating such a category would recognize the expense that number portability will impose on many small and rural LECs in the 100 largest MSAs that would not deploy advanced intelligent network technology if they were not required to provide number portability.[232] USTA further suggests that we create a category for portability-related costs carriers incur to continue certain services—such as Extended Area Service into a metropolitan area—near areas where portability has been implemented.[233] USTA argues that such a category would accommodate rural carriers not required to provide long-term number portability under the Commission's implementation schedule that may still incur "number portability costs" to continue services such as direct trunking to nearby areas where the Commission's implementation schedule does require long-term number portability.[234]

C. Discussion

68. We adopt the Commission's tentative conclusion to divide the costs raised by this proceeding into three categories: (1) shared costs; (2) carrier-specific costs directly related to providing number portability; and (3) carrier-specific costs not directly related to providing number portability. Most commenters support this categorization.[235] The division of costs between shared costs and carrier-specific costs directly related to providing number portability recognizes that some costs of providing number portability are incurred by regional database administrators, while others are incurred by carriers in the first instance. The division between carrier-specific costs directly related to providing number portability and carrier-specific costs not directly related to providing number portability recognizes that some component of the costs carriers incur will provide carriers with benefits unrelated to number portability.

69. We adopt the Commission's tentative definition of shared costs as "costs incurred by the industry as a whole, such as those incurred by the third-party administrator to build, operate, and

---

and thus should be considered a carrier-specific cost not directly related to number portability).

230 U S WEST Comments at 10-11; USTA Comments at 5.

231 USTA Comments at 2-3.

232 *Id.* at 3-5.

233 *Id.* at 2, 6.

234 *Id.* at 6.

235 *See supra* text accompanying note 218 for the carriers' arguments.

maintain the databases needed to provide number portability."[236] Almost all commenters agree that this is a workable definition that properly distinguishes costs that carriers incur individually in the first instance from costs that the third-party administrators incur. We also conclude that once the shared costs are allocated they are attributable to specific carriers, at which point we will treat them as carrier-specific costs directly related to providing number portability.

70. We also adopt the Commission's tentative subcategorization of the shared costs into nonrecurring costs, recurring costs, upload costs, and download costs.[237] We clarify, however, that the shared upload and download costs include only the costs that the database administrators incur to process uploads and downloads; the costs that the carriers incur individually to process uploads and downloads are carrier-specific costs directly related to providing number portability. We disagree with the Public Utilities Commission of Ohio that the Commission should subsume upload and download costs into the recurring shared costs category.[238] Although the Public Utilities Commission of Ohio is correct that upload and download costs recur in the sense that the database administrators incur them on an ongoing basis, we intend the recurring shared cost subcategory to refer to those periodic costs such as rent, utilities, payroll, repair, and replacement that the database administrators will incur to facilitate their provision of database services, rather than the costs of the actual uploading and downloading services themselves.[239] We believe that maintaining this distinction is useful in conceptualizing and discussing the various types of costs associated with the shared databases.

71. We further conclude that query costs are not shared costs initially incurred by the regional database administrators, but are carrier-specific costs directly related to providing number portability. At the time of the *Further Notice*, the Commission's understanding had been that the regional administrators might perform queries for carriers.[240] In that case, query costs might have constituted shared costs because the database administrators would have incurred costs for the industry as a whole, and the costs would need to be allocated among individual carriers. The industry has chosen, however, not to adopt this approach to number portability. Instead, the N-1 carrier will incur all querying costs individually in the first instance, either by querying its own copy of data downloaded from the regional databases, or by arranging for the querying of such a database copy maintained by another carrier or other third party. Because the regional database administrators will not perform queries on behalf of carriers, query costs are more appropriately considered carrier-specific costs directly related to providing number portability.

---

[236] *See Order & Further Notice*, 11 FCC Rcd. at 8459, 8461.

[237] *See supra* notes 211-213 and accompanying text for discussion of the tentative conclusions.

[238] *See supra* text accompanying note 222 for the Ohio commission's argument.

[239] *See Order & Further Notice*, 11 FCC Rcd. at 8463 (defining recurring costs as "recurring (monthly or annually) costs, such as maintenance, operation, security, administration, and physical property associated with the database").

[240] *See id.* at 8461 (noting that if the industry uses an SMS/SCP pair, the regional database administrators might process carrier queries to provide routing instructions to carriers for individual calls).

72. We conclude that carrier-specific costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the porting of telephone numbers from one carrier to another. Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability.

73. We reject the requests of some commenters that we classify the entire cost of an upgrade as a carrier-specific cost directly related to providing number portability just because some aspect of the upgrade relates to the provision of number portability. Carriers incur costs for software generics, switch hardware, and OSS, SS7 or AIN upgrades to provide a wide range of services and features. Consequently, only a portion of such joint costs are carrier-specific costs directly related to providing number portability. Thus, we will consider as subject to the competitive neutrality mandate of section 251(e)(2) all of a carrier's dedicated number portability costs, such as for number portability software and for the SCPs and STPs reserved exclusively for number portability. We will also consider as carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability. Apportioning costs in this way will further the goals of section 251(e)(2) by recognizing that providing number portability will cause some carriers, including small and rural LECs, to incur costs that they would not ordinarily have incurred in providing telecommunications service. At the same time, this approach recognizes that some upgrades will enhance carriers' services generally, and that at least some portion of such upgrade costs are not directly related to providing number portability.

74. Because carrier-specific costs directly related to providing number portability only include costs carriers incur specifically in the provision of number portability, carriers may not use general overhead loading factors in calculating such costs. Carriers already allocate general overhead costs to their rates for other services, and allowing general overhead loading factors for long-term number portability might lead to double recovery.[241] Instead, carriers may identify as carrier-specific costs directly related to providing long-term number portability only those incremental overheads that they can demonstrate they incurred specifically in the provision of long-term number portability.

75. As discussed below in Part VI, we are permitting incumbent LECs to recover their number portability costs in federally tariffed end-user charges and query services. To facilitate determination of the portion of joint costs carriers shall treat as carrier-specific costs directly related to providing number portability, and to facilitate evaluation of the cost support that carriers will file in their federal tariffs, we are requesting that carriers and interested parties file comments by August 3, 1998 proposing ways to apportion the different types of joint costs. Carriers and interested parties may file reply comments by September 16, 1998. We will delegate authority to the Chief, Common Carrier Bureau, to determine appropriate methods for apportioning joint costs among portability and nonportability services, and to issue any orders to provide guidance to carriers before they file their tariffs, which are to take effect no earlier than February 1, 1999.

76. We disagree with USTA that we should create special cost categories for the number

[241] *See In re 800 Database Access Tariffs*, Report and Order, 11 FCC Rcd. 15227, 15255-56 (1996).

portability costs of small and rural carriers.[242] The Commission's definitions of carrier-specific costs directly and not directly related to providing number portability will enable all carriers, including small and rural carriers, as well as carriers providing Extended Area Service, to identify the costs subject to section 251(e)(2). The three cost categories the Commission has created account for all potential number portability costs and provide workable distinctions for the purposes of implementing section 251(e)(2).

77. Creating unique cost categories for wireless carriers is also unnecessary at this time. The Commission's definitions are not tied to unique technological constraints of wireline communications, and nothing in the record leads us to conclude that the three cost categories are too narrow to apply to the number portability costs of wireless carriers. Wireless carriers, like wireline carriers, will depend upon the regional databases, and the record does not suggest that the costs of the regional databases are disproportionately affected by any one industry segment.

V. COSTS OF THE REGIONAL DATABASES

A. Background

78. The Commission sought comment in the *Further Notice* on whether the nonrecurring and recurring shared costs should be collected through monthly charges assessed only on carriers using the databases, or on all carriers.[243] The Commission noted that the nonrecurring costs could be collected through a one-time payment or amortized.[244] The Commission also asked whether the shared costs should be collected on a national basis or by region.[245] If the costs are collected nationwide, the Commission asked whether one of the LNPAs or a separate entity should allocate the costs.[246]

79. The Commission sought comment on the appropriate method of distributing these costs, and tentatively concluded that they should be allocated in proportion to each telecommunications carrier's gross telecommunications revenues, less any charges that carrier pays to other carriers.[247] The Commission explained that subtracting charges carriers pay to other carriers, such as for access and wholesale services, avoids counting those charges as revenues twice: once when the charging carrier collects from the charged carrier, and again when the charged carrier recovers these costs from its end-

[242] *See supra* notes 233-234 and accompanying text for USTA's argument.

[243] *In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8461, 8463 (1996) (Order & Further Notice).

[244] *Id.* at 8463.

[245] *Id.* at 8461.

[246] *Id.*

[247] *Id.* at 8461-62.

user.[248] The Commission also sought comment on whether the upload, download, and query costs should be collected through usage-based charges, or allocated among carriers in the same manner as the nonrecurring and recurring costs.[249]

80. The Commission also asked whether it may exclude certain carriers from these mechanisms,[250] and whether it should create an enforcement mechanism, such as requiring tariffs or periodic reports, to ensure that carriers bear on a competitively neutral basis the shared costs of providing number portability.[251] The Commission also sought comment on whether incumbent LECs should be allowed to recover their portion of the shared costs from end-users or other carriers, whether the Commission should prescribe the recovery mechanism, and if so, what that mechanism should be.[252] If such costs are recovered from other carriers, the Commission sought comment on whether they should be recovered from all telecommunications carriers or just those that receive ported numbers.[253] In addition, the Commission sought comment on whether price-cap carriers should be permitted to treat their portions of the shared costs as exogenous.[254]

B. Distribution of Shared Costs: Allocation v. Usage-Based Rates

1. Positions of the Parties

81. A number of incumbent LECs, competitive LECs, state commissions, and CMRS providers favor allocating all regional database costs, including the nonrecurring, recurring, upload, and download costs.[255] These commenters contend that usage-based charges would impermissibly exclude those carriers that do not use the databases from having to pay some regional database costs.

---

[248] *Id.*

[249] *Id.* at 8463.

[250] *Id.* at 8460.

[251] *Id.* at 8463-64.

[252] *Id.* at 8462.

[253] *Id.*

[254] *Id.* at 8466.

[255] Ameritech Comments at 1-2, 4-5; Bell Atlantic Reply at 1, 4; BellSouth Reply at 5; Calif. Pub. Utils. Comm'n Comments at 4-6; Colo. Pub. Utils. Comm'n Comments at 5; Frontier Comments at 3-4 & n.8; GST Reply at 8; Iowa Network Servs. Reply at 3; MFS Comments at 6; NARUC Reply at 1; NCTA Reply at 6; NYNEX Comments at 5-6; Ohio Pub. Utils. Comm'n Comments at 1, 3-5; Omnipoint Comments at 3; PacTel Comments at 3, 6-7; SBC Comments at 4-6; Teleport Comments at 2-4; U S WEST Reply at 12-14 & nn.33-35; USTA Reply at 4-5; Wash. Utils. Transp. Comm'n Reply at 3; WinStar Comments at 2-5.

in violation of the "all telecommunications carriers" language of section 251(e)(2),[256] that the database costs are not discretionary, but necessary costs of doing business,[257] and that the database costs are not demonstrably usage-sensitive.[258]

82. Other commenters advocate employing usage-based charges for some of the regional database costs and allocating the rest. Ameritech, the Association for Local Telephone Communications Services, the California Public Utilities Commission, Iowa Network Services, ITCs, the Missouri Public Service Commission, Pacific Telesis, TRA, and Time Warner, for example, favor allocating the nonrecurring and recurring costs, but prefer usage-based charges for upload, download, and query costs. They argue that upload, download, and query costs are usage sensitive because uploads, downloads, and queries will be transmitted to and from carriers' individual networks, and so should be collected through usage-based rates to encourage efficient use.[259]

83. AT&T, MCI, and Sprint advocate a series of rate elements similar to those the Commission adopted for the 800 number database.[260] Thus, they suggest a one-time, service-establishment charge for carriers that upload or download database information, a monthly database access charge that varies with the type and speed of each database connection carriers maintain to upload or download information, and a charge for discretionary services such as customized reports that carriers might request.[261] AT&T and Sprint argue that because these services are attributable to a specific database subscriber, they should be charged to that subscriber to encourage efficiency and to avoid unfairly shifting costs to other carriers.[262] AT&T and Sprint also recommend a download charge, but would allocate the costs of uploads among all carriers that provide local service to avoid

---

256 *See, e.g.*, Bell Atlantic Reply at 3-4; GST Reply at 10-11, MFS Comments at 6; NYNEX Reply at 7-8; U S WEST Reply at 12-14 & nn.33-35; USTA Reply at 4-5; WinStar Reply at 4-6.

257 Fla. Pub. Servs. Comm'n Comments at 3-4; GSA Comments at 4-6.

258 Ohio Pub. Utils. Comm'n Comments at 7-10 (advocating allocating all regional database costs absent a credible method for determining carriers' usage-based costs and an indication that those costs vary significantly among carriers).

259 Ameritech Comments at 9-11; ALTS Comments at 3-6 (preferring usage-based rates unless the transaction costs of such a mechanism are "unduly high"); Calif. Pub. Utils. Comm'n Comments at 6-9; Iowa Network Servs. Reply at 7; ITC Comments at 2-3; Mo. Pub. Servs. Comm'n Comments at 3-4; PacTel Comments at 2, 7; TRA Comments at 10-11; Time Warner Comments at 7-12.

260 *See In re Provision of Access for 800 Service*, Second Report and Order, 8 FCC Rcd. 907 (1993), *aff'd*, *Memorandum Opinion and Order on Reconsideration*, 11 FCC Rcd. 2014 (1995). *Cf.* Scherers Communications Group Comments at 2-3 (suggesting that the Commission tariff nonrecurring, recurring, and query charges because this was found to be the most efficient means of recovering the costs of the 800 number database).

261 AT&T Comments at 6-9; MCI Comments at 3-5; Sprint Comments at 5-6.

262 AT&T Comments at 6-9; Sprint Comments at 5-6.

penalizing carriers for porting.[263] MCI favors allocating upload, download, and any remaining costs to carriers that port numbers.[264]

84. The California Department of Consumer Affairs argues that nonrecurring costs should be allocated because, as costs of establishing number portability, these costs must be distributed in a competitively neutral fashion.[265] It argues that usage-based charges should be assessed, on the other hand, for recurring, upload, download, and query costs because as "ongoing" rather than "establishing" costs, they should be distributed to the specific carrier using the database rather than allocated among carriers.[266] It also argues that some of the recurring costs should be distributed through a flat, minimum charge on all carriers serving the region because the database must be available to all carriers, regardless whether an individual carrier actually uses it.[267]

85. Another group of carriers advocates distributing all regional database costs through usage-based charges. The Colorado Public Utilities Commission prefers charging carriers the incremental costs of their downloads, but recommends collecting from carriers that upload information the costs of receiving, storing, and processing that information, as well as the administrators' common and overhead costs.[268] Omnipoint advocates per-query fees that would incorporate the nonrecurring, recurring, and database information costs.[269] Omnipoint argues that this is a more appropriate approach than allocation mechanisms, such as those based on revenues, because all calls require the same query and so all carriers should pay the same amount of shared costs per call.[270]

86. The Cellular Telecommunications Industry Association (CTIA) asks for additional time to analyze the implication of allocation- and usage-based mechanisms for wireless number portability. CTIA argues that wireless carriers do not yet know the amount and type of costs they will incur to deploy number portability because, pursuant to the Commission's later implementation schedule for wireless carriers, the industry is in the early stages of planning.[271]

---

263 AT&T Comments at 8 & n.11; Sprint Comments at 5-6.

264 MCI Comments at 5-6.

265 Calif. Dep't Consumer Affairs Comments at ii, 14-16.

266 *Id.* at ii, 17-19.

267 *Id.* at ii, 17.

268 Colo. Pub. Utils. Comm'n Comments at 7.

269 Omnipoint Communications Reply at 2.

270 *Id.*

271 CTIA Comments at 3-4.

2. Discussion

87. We require telecommunications carriers to pay for the database administrators' nonrecurring, recurring, upload, and download costs pursuant to an allocator, which we select in Part V.D, below, rather than on a usage-sensitive basis. We have used the two-prong competitive neutrality test to ensure that the allocator we choose distributes these costs on a competitively neutral basis. Once these shared costs are distributed to telecommunications carriers, we treat each carrier's portion of the costs as a carrier-specific cost directly related to providing number portability.[272] Because telecommunications carriers will recover these costs as carrier-specific costs directly related to providing number portability, which we discuss below in Part VI, we need not address their recovery here.

88. Distributing the shared costs among telecommunications carriers in proportion to database use would shift these costs to telecommunications carriers that win more customers because such carriers will perform more uploads.[273] At the outset of number portability, these carriers are more likely to be competitive LECs. Consequently, usage-sensitive distribution of the shared costs could "give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber," as well as "disparately affect the ability of competing service providers to earn a normal return." Although the record does not show conclusively that usage-based charges would hamper materially a carrier's ability to compete for subscribers, we believe it prudent at this early stage in the deployment of number portability to minimize such risk.

89. Moreover, assessing shared costs on a usage-sensitive basis could discourage carriers from performing uploads and downloads, or at least penalize those carriers that do so more frequently. The entire industry benefits from the maintenance of reliable regional databases for providing number portability: unless carriers download data, they will be unable to terminate traffic to the appropriate end-user; unless carriers upload ported numbers to the databases, the databases will be inaccurate, making downloads useless for current and future database participants alike. Thus, all carriers that port telephone numbers and all carriers that terminate calls to portability-capable NXXs depend on the timely uploading and downloading of information to and from the regional databases to ensure an accurate database and the proper routing of telephone calls. Furthermore, all telecommunications carriers that depend on the availability of telephone numbers will benefit from number portability because it allows subscribers to retain their telephone numbers when changing local service providers, and because it facilitates the conservation of telephone numbers through number pooling.[274]

90. Because we conclude that allocation better ensures that carriers will bear the shared costs on a competitively neutral basis, we disagree with the California Department of Consumer Affairs that we should distribute the "ongoing" shared costs of providing number portability through

[272] *See supra* paragraphs 69, 87.

[273] *See supra* text accompanying note 54.

[274] For a brief discussion of number pooling, see note 472, *infra*.

BEST COPY AVAILABLE

usage-sensitive rates.[275] We also disagree with AT&T, MCI, and Sprint that we should adopt rate elements similar to those used for the 800 number database.[276] Provision of the 800 number database is not subject to a statutory competitive neutrality mandate. Consequently, the competitive neutrality concerns that usage-sensitive rates raise were not at issue.

91. We will not adopt a separate distribution methodology for wireless carriers. The record indicates that wireless carriers will use the regional databases in the same manner as wireline carriers. Consequently, we see no reason to treat wireless carriers differently than wireline carriers with respect to the distribution of the shared costs.

92. Notwithstanding that other costs of the regional databases will be allocated, we determine that regional database administrators may assess individual carriers and non-carrier third parties reasonable usage-based charges for discretionary services such as audits and reports. Because these services are elective to the parties requesting them, and not necessary for the provision of number portability, usage-based charges should not have a competitive impact.

C. The Allocator

1. Positions of the Parties

93. Commenters advocate two types of allocators for the shared costs: revenue-based, and nonrevenue-based. Among the revenue-based allocators, Bell Atlantic supports the use of gross telecommunications service revenues.[277] TRA, the Florida Public Services Commission, small LECs, competitive LECs, and CMRS providers support share of gross telecommunications service revenues less charges carriers pay to other carriers.[278] A number of incumbent LECs and USTA support share

[275] *See supra* text accompanying notes 265-267 for the argument of the California Department of Consumer Affairs. Furthermore, as we explained in Part III.B. above, we disagree with the California Department of Consumer Affairs that the "ongoing" costs of number portability are not subject to the competitive neutrality mandate. *See supra* paragraph 38.

[276] *See supra* paragraph 83 for their arguments.

[277] Bell Atlantic Comments at 4-5 (preferring share of gross retail telecommunications service revenues, but supporting share of gross telecommunications revenues as well).

[278] ALTS Comments at 4; Fla. Pub. Servs. Comm'n Comments at 3; Frontier Comments at 3-4; GST Reply at 12-13; Iowa Network Servs. Reply at 5; ITCs Comments at 2-3; MFS Comments at 7; NCTA Reply at 7; NTCA/OPASTCO Comments at 9; Nextel Comments at 2-3; TRA Comments at 7-8; Teleport Comments at 4-5; Time Warner Comments at 7-8; WinStar Comments at 5. *Cf.* Ohio Pub. Utils. Comm'n Comments at 6 (preferring allocation by share of access lines, but advocating gross revenues less charges carriers pay to other carriers if the Commission chooses a revenue-based allocator).

of gross retail telecommunications service revenues.[279] BellSouth supports share of gross telecommunications service revenues less charges carriers pay to and receive from other carriers.[280] Among the nonrevenue-based allocators, Arch Communications, BellSouth, MCI, MobileMedia Communications, the Public Utilities Commission of Ohio, SBC, and Sprint support line-derived allocators.[281] AirTouch Communications, AT&T, the California Public Utilities Commission, GSA, MCI, and Sprint also support number-based allocators.[282] AirTouch Communications further supports share of retail minutes of use.[283]

---

[279] Ameritech Comments at 4-7; Bell Atlantic Comments at 4-5 (supporting share of gross telecommunications service revenues, but preferring share of gross retail telecommunications service revenues): NYNEX Comments at 8-9; U S WEST Reply at 14-15; USTA Reply at 7. *Cf.* BellSouth Reply at 7-9 (preferring share of elemental access lines over revenue-based allocators generally, but criticizing gross revenues less charges carriers pay to other carriers in favor of share of gross retail telecommunications service revenues or share of gross revenues less charges carriers pay to and receive from other carriers). For an explanation of elemental access lines, see *infra* text at notes 327-332.

[280] BellSouth Reply at 7-9 (preferring share of elemental access lines over revenue-based allocators generally, but criticizing gross revenues less charges carriers pay to other carriers in favor of share of gross retail telecommunications service revenues or share of gross revenues less charges carriers pay to and receive from other carriers). For an explanation of elemental access lines, see *infra* text at notes 327-332.

[281] MCI Reply at 15 (advocating allocation by share of presubscribed lines, active telephone numbers, or local access lines); Ohio Pub. Utils. Comm'n Comments at 6 (supporting share of local access lines, less private lines, plus a trunk equivalency); Sprint Comments at 6 (advocating allocation by share of presubscribed local service lines). *Cf.* AirTouch Communications Reply at 4-6 (preferring share of retail minutes of use, but mentioning share of total access lines, share of total presubscribed lines, and share of end-user assigned numbers as reasonable alternatives because of their simpler calculation).

Arch Communications, BellSouth, MobileMedia Communications, and SBC support share of "elemental" access lines. Arch Communications Group Reply at 7; BellSouth Reply at 7; MobileMedia Communications Reply at 5; SBC Comments at 7. For an explanation of elemental access lines, see *infra* text at notes 327-332. *See also* SBC Comments at 7-9; SBC Reply at 12-13.

[282] AirTouch Communications Reply at 4-6 (preferring share of retail minutes of use, but mentioning share of total access lines, share of total presubscribed lines, and share of total end-user assigned numbers as reasonable alternatives because of their simpler calculation); AT&T Comments at 8 n.11 (arguing that if the master databases only include the telephone numbers of customers who have ported, carriers should bear upload costs by share of working telephone numbers in portability-capable NXXs); Calif. Pub. Utils. Comm'n Comments at 7 & n.3 (advocating allocation by share of active end-user assigned numbers); GSA Comments at i, 7; MCI Comments at 4-5 (advocating share of portable NXXs, or share of working telephone numbers in portable NXXs); Sprint Reply at 4 (advocating allocation by lines or working telephone numbers). *See also* MCI Reply at 15 (advocating allocation by share of presubscribed lines, active telephone numbers, or local access lines).

[283] AirTouch Communications Reply at 4-6 (preferring share of retail minutes of use, but mentioning share of total access lines, share of total presubscribed lines, and share of total end-user assigned numbers as reasonable alternatives because of their simpler calculation).

i. Revenue-based allocators

94. Proponents of revenue-based allocators argue that a carrier's revenues approximate the benefit that the carrier and its subscribers derive from the increased competition that number portability creates,[284] that such allocators assess costs on all carriers,[285] that such allocators are relatively easy to administer,[286] and that revenues most accurately reflect market share.[287] Several commenters stress, however, that we must define precisely the telecommunications revenues that should be used to determine the allocator and create a mechanism to ensure that carriers do not shift or hide revenues through techniques such as attributing revenue to unregulated services.[288]

95. Some critics of revenue-based allocators contend that the costs and benefits of number portability are not directly related to revenues.[289] Others contend that revenue-based allocators are

---

284 Timer Warner Comments at 7-9.

285 MFS Comments at 7; Time Warner Comments at 7-9. *Cf.* Frontier Comments at 3-4 (arguing that an allocator based on gross revenues less charges carriers pay to other carriers recognizes that number portability benefits all carriers). *See also* AirTouch Communications Reply at 2-3 (criticizing revenue-based allocators but acknowledging that they reach all carriers).

286 NCTA Reply at 7.

287 Fla. Pub. Servs. Comm'n Comments at 3 (arguing that an allocator based on gross revenues less charges carriers pay to other carriers accounts for both customer number and value); NCTA Reply at 7 (arguing that an allocator based on gross revenues less charges carriers pay to other carriers equitably distributes portability costs in proportion to carrier size); WinStar Comments at 5 (arguing that gross revenues are an appropriate starting point to calculate recoverable costs because gross-revenue-based allocators are least distortionary in that each carrier's revenues will approximate the amount of traffic that travels over its network).

288 NTCA/OPASTCO Comments at 9-10. *Cf.* Nextel Comments at 2-4 (arguing that the Commission must exclude revenues not relevant to number portability, such as funds generated by non-covered SMS service); TRA Comments at 7-8 (stressing that only revenues from local exchange service are relevant).

289 AirTouch Communications Reply at 2-3 (arguing that the costs and benefits of number portability are related to number of customers, not revenues); Calif. Dep't Consumer Affairs Comments at 15 n.10 (arguing that allocating by gross revenues imposes costs on carriers that are most efficient and successful, rather than by some factor related to the costs of long-term number portability); Calif. Pub. Utils. Comm'n Comments at 7 (arguing that carriers with high revenues do not necessarily use the databases more frequently than other carriers); GSA Comments at 7 (arguing that a gross revenue-based allocator distributes number portability costs to a carrier without regard to the amount of benefit that carrier receives from number portability); MCI Comments at 7-8 (arguing that customers benefit from number portability in proportion to the number of telephone numbers they use, not in proportion to the amount of money they spend on all telephone services); Sprint Reply at 3-4 (arguing that revenues-based allocators make no effort to identify the cost causers and do not necessarily reflect market share or use of the database).

administratively burdensome. They argue that determining the relevant revenues is difficult,[290] that revenue shares would need continual updating,[291] that monitoring carriers' calculation and reporting methods would be necessary and expensive,[292] and that revenue figures are competitively sensitive, raising confidentiality concerns.[293] Still other critics contend that revenue-based allocators discriminate against certain types of carriers. They argue that such allocators disadvantage carriers with higher revenues per customer, such as CMRS providers,[294] carriers with lower profits per customer,[295] regulated carriers as compared to unregulated entities, such as private branch exchange (PBX) providers, whose revenues are beyond the Commission's purview,[296] and carriers that operate in multiple regions, particularly if some of those regions are high-cost.[297] Other parties contend that revenue-based allocators send the wrong market signals. They argue that such allocators give carriers less incentive to use the database efficiently, because revenues would determine portability costs, rather than database use,[298] that such allocators distort the market,[299] and

[290] AirTouch Communications Comments at 1-2, 6-7 (pointing to difficulties in segregating international and multi-regional carriers' revenues); AT&T Comments at 9-10 n 13 (pointing to difficulties in determining whether revenues from pure competitive access services, unswitched private-line services, and enhanced services should all count as telecommunications revenues for purposes of allocation); Cincinnati Bell Comments at 7 (arguing the Commission would have to determine what constitutes "telecommunications revenue"); GSA Comments at 6-7 & n.3 (arguing, for example, that whether the allocator would include revenues from deregulated Centrex loops is not clear); MCI Reply at 14 (arguing that the Commission would have to determine what constitutes "revenue"); SBC Reply at 11-12 (arguing that the Commission would have to address treatment of local and long-distance revenue, domestic and international revenue, as well as in-region and out-of-region revenue); Sprint Comments at 7 (arguing that regional revenue data, especially for national carriers, may be difficult to obtain).

[291] Cincinnati Bell Comments at 7-8; MCI Reply at 14.

[292] AirTouch Communications Comments at 1-2; BellSouth Reply at 8; MCI Reply at 14; Ohio Pub. Utils. Comm'n Comments at 6; Omnipoint Communications Comments at 4; SBC Reply at 9; Sprint Reply at 4-5.

[293] Omnipoint Communications Comments at 4.

[294] AirTouch Communications Comments at 2-3; Calif. Pub. Utils. Comm'n Comments at 7; GTE Reply at 4; Omnipoint Communications Comments at 2-3.

[295] Arch Communications Group Reply at 6-7 (arguing that revenue-based allocators would make earning a normal return difficult for low-margin, high-volume carriers such as paging providers, which operate in a highly competitive market with significant economic pressures on price); MobileMedia Communications Reply at 5; PCIA Comments at 7.

[296] GSA Comments at 6-7.

[297] SBC Reply at 11-12.

[298] AT&T Comments at 9-10; MCI Reply at 14.

that because revenue shares fluctuate, carriers would be uncertain of their share of the costs from month to month or year to year.[300]

96. Commenters that specifically support a gross telecommunications revenue allocator argue that the Commission adopted such an allocator to distribute the costs of telecommunications relay services, and that no one has suggested that doing so was competitively biased.[301] Opponents argue that such an allocator double counts revenues,[302] and that allocating the same portability costs to carriers with identical gross revenues disadvantages carriers with lower capital costs and higher operating costs, such as resellers, because their "normal return" on investment would be lower.[303]

97. Commenters that support an allocator based on share of gross revenues, less charges carriers paid to other carriers, argue that this method is necessary to avoid double counting,[304] and that such an allocator takes into account carriers' ability to pay.[305] Opponents argue that this approach discourages facilities-based investment by allocating facilities-based carriers more costs per dollar of retail sales than their nonfacilities-based competitors, which can subtract the rates they pay other carriers,[306] that such an allocator disadvantages LECs as compared to IXCs,[307] that the Commission rejected the double-counting argument in its 1993 consideration of telecommunications relay service

[299] MCI Comments at 6-7 (arguing that the demand for telecommunications services is more elastic than the demand for telephone numbers, which are used mostly in fixed proportions with dial tone); MobileMedia Communications Reply at 5 (arguing that distortions are inherent in revenue-based allocation methods).

[300] Cincinnati Bell Comments at 7-8 (arguing, also, that using current revenues would require incumbent LECs to bear the majority of costs even if their share of market revenues declines); MCI Reply at 14.

[301] Bell Atlantic Comments at 4-5 (preferring share of gross retail telecommunications service revenues, but supporting share of gross telecommunications revenues as well).

[302] Sprint Reply at 4; TRA Reply at 5-8; Time Warner Reply at 4-5.

[303] AirTouch Communications Comments at 3-5, 7; SBC Reply at 10.

[304] TRA Reply at 5-8; Teleport Comments at 6; Time Warner Comments at 8-9. *Cf.* WinStar Comments at 5-6 (arguing that charges for interconnection and access will be reflected in the underlying carrier's revenues, and that subtracting intercarrier charges ensures that carriers' are responsible for costs in proportion only to the traffic they carry, not to revenues from transfers between carriers).

[305] Teleport Comments at 6.

[306] Ameritech Comments at 5-6; Bell Atlantic Comments at 6-7; Cincinnati Bell Comments at 8; SBC Reply at 10-1; Sprint Reply at 4; U S WEST Reply at 15; USTA Reply at 7.

[307] NYNEX Comments at 7-8 (arguing that such an allocator would place a disproportionate share of costs on incumbent LECs, and place them at a competitive disadvantage as IXCs enter the local and intraLATA toll markets); SBC Comments at 6; U S WEST Reply at 15 (arguing that such an allocator undercounts the retail customers of carriers that pay access charges, and understates their ability to spread number portability costs).

costs,[308] and that such an allocator unduly penalizes carriers with high capital costs or high operating costs other than payments to other carriers.[309]

98. Commenters that support an allocator based on gross-revenue shares less charges carriers paid to and received from other carriers argue that failure to deduct revenues received from other carriers also raises the double-counting problem by counting revenue once when collected from the end-user and again when collected from the intermediary carrier.[310] Time Warner argues that to avoid the double counting problem, carriers should deduct charges they pay to other carriers, or deduct charges they collect from other carriers, but not both: doing both is not necessary and only distorts any assessment of market share.[311] Similarly, the California Public Utilities Commission argues that deducting charges carriers receive from other carriers ignores revenue from access charges and defeats the purpose of subtracting payments to other carriers in the first place.[312]

99. Commenters that support a gross-retail-revenues allocator argue that it reflects the fact that number portability primarily benefits users of retail services,[313] that it places competing retail carriers in the same relative position based solely upon their position in the retail marketplace,[314] that it best focuses on what carriers collect from services to end-users and so best measures carriers' abilities to bear portability costs,[315] and that it still avoids the double-counting problem.[316] Opponents argue that such an allocator inappropriately allocates regional database costs to competitive LECs and IXCs based on revenue from end users that the competitive LECs and IXCs do not keep but pass on to

---

308 Bell Atlantic Comments at 5-6. *See In re* Telecommunications Relay Services, *Third Report and Order*, 8 FCC Rcd. 5300, 5302 (1993).

309 AirTouch Communications Comments at 5 (noting, however, that such an allocator would ameliorate disparate treatment of facilities-based carriers and resellers caused by an unadjusted gross revenues allocator). *See also* CTIA Comments at 3-4 (arguing that although an allocator based on gross revenues less charges carriers pay to other carriers may be appropriate for a mature, static industry, additional time is necessary to determine the applicability of such an allocator to wireless carriers because the wireless industry is characterized by new entry and rapid build-out, and new PCS providers may have allocable costs but little revenue).

310 PacTel Comments at 6.

311 Time Warner Reply at 5.

312 Calif. Pub. Utils. Comm'n Reply at 2.

313 NYNEX Comments at 8-9; U S WEST Reply at ii, 14-15.

314 Ameritech Comments at 6.

315 USTA Reply at 7.

316 Ameritech Comments at 6-7; NYNEX Comments at 8-9.

incumbent LECs in rates for access, wholesale services, and unbundled network elements.[317]

ii. Nonrevenue-based allocators

100. Advocates of line-based allocators argue that such allocators are less subject to manipulation than revenue-based allocators.[318] Opponents contend that line-based allocators fail to recognize that a PBX system may serve multiple end-user numbers from one line,[319] that such allocators disadvantage carriers that serve low-volume customers by counting such customers the same as the usually more valuable high-volume customers,[320] and that it unfairly advantages new entrants, who initially will have little or no customer base.[321]

101. Commenters that support allocators based on share of access or presubscribed lines argue that the benefits of number portability are related to the number of active lines a carrier serves;[322] that when a customer changes carriers, the additional shared cost that the acquiring carrier incurs will equal the shared cost that the former carrier avoids;[323] and that such allocators are less subject to manipulation and should be easy to calculate.[324] Opponents argue that such allocators would be difficult to calculate,[325] and, rather than reach all carriers, would disproportionately burden LECs.[326]

---

[317] AT&T Reply at 10; WinStar Reply at 6-7. *Cf.* Time Warner Reply at 4-5 (arguing that failure to subtract intercarrier charges inappropriately attributes to one carrier revenue that it passes on to the other, and so does not accurately reflect either carrier's relative market share).

[318] Sprint Reply at 4-5.

[319] Calif. Pub. Utils. Comm'n Comments at 7 n.3.

[320] AirTouch Communications Comments at 9-10. *Cf.* Fla. Pub. Servs. Comm'n Comments at 3 (arguing that unlike access-line based allocators, gross revenues less charges paid to other carriers accounts for both customer number and value).

[321] Calif. Dep't Consumer Affairs Comments at 15.

[322] AirTouch Communications Reply at 1, 4-6 & n.7 (preferring retail minutes of use, but advocating total lines a carrier serves as a reasonable alternative because of its simpler calculation); MCI Reply at 15 (arguing that share of access lines or active telephone numbers reflects the level of local exchange competition more accurately than gross revenues); Sprint Comments at 6-8 (arguing that an allocator based on presubscribed local service lines more accurately reflects the level of local exchange competition and a carrier's market share).

[323] AirTouch Communications Reply at 4-5 (preferring retail minutes of use, but advocating total lines a carrier serves as a reasonable alternative because of its simpler calculation); Sprint Comments at 6 (arguing that the unit charge would be the same for each new subscriber gained by any service provider).

[324] MCI Reply at 15; Sprint Reply at 4-5.

[325] Time Warner Reply at 3-4 (noting the difficulty in applying such an allocator to competitive access providers that provide transport solely to the central office or tandem, and to customers who switch carriers between line-calculations).

102. SBC Communications proposes allocating regional database costs in proportion to each carrier's share of something the company calls "elemental access lines (EALs)." [327] SBC divides the wireline access line into three presubscribed "elements" that account for the customer-perceived uses of telecommunications service: local exchange service, intraLATA toll service, and interLATA toll service.[328] A wireless access line would have two EALs: local and interexchange.[329] A paging access line would have just one local EAL.[330] Carriers that do not have access lines would be assigned EALs based on their number of serving arrangements.[331] A carrier's total number of EALs equals the sum of local exchange access lines, intraLATA toll presubscribed access lines, and interLATA toll presubscribed access lines it provides to customers.[332] Commenters that support an EAL-based allocator argue that it is the least market distorting,[333] and that it equitably distributes portability costs across all carriers.[334] At least one of these commenters, however, concedes that the allocator is "arbitrary, as evidenced by SBC's subdivision of markets into neat 'thirds,'" and uses "fictional" nomenclature.[335]

103. Supporters of number-based allocators argue that the use, benefits, and costs of number portability are most closely related the number of telephone numbers a carrier serves,[336] and that the demand for telephone numbers is more inelastic than the demand for telecommunications services as a whole.[337] Commenters that specifically support allocation by proportion of active, end-user assigned numbers note that it was one of the allocators noted in the *Order* as competitively

---

[326] GST Reply at 12-13; MFS Comments at 6; NCTA Reply at 8; NYNEX Reply at 7; SBC Reply at i; Teleport Comments at 5-6; Time Warner Reply at 3-4; USTA Reply at ii; WinStar Comments at 5.

[327] SBC Comments at 7.

[328] *Id.*

[329] *Id.* at 8 n.13.

[330] SBC Reply at 12.

[331] *Id.* at 12 n.34 (arguing, for example, that a competitive access provider that serves a customer with 500 telephone numbers would have 500 intraLATA EALs and 500 interLATA EALs).

[332] SBC Comments at 8.

[333] BellSouth Reply at 7-8.

[334] *Id.*; SBC Reply at 3.

[335] BellSouth Reply at 7-8.

[336] Calif. Pub. Utils. Comm'n Comments at 8; GSA Comments at 7; MCI Comments at 7.

[337] MCI Comments at 6-7.

neutral for the costs of interim number portability.[338] Critics of number-based allocators argue that rather than reach all carriers, such allocators disproportionately burden LECs,[339] make it harder for low-margin. high-volume carriers to earn a normal return,[340] and unfairly advantage new entrants, who initially will have little or no customer base.[341]

104. In support of an allocator based upon share of retail minutes of use, AirTouch Communications argues that such an allocator is competitively neutral because a carrier that acquires a customer incurs the same number portability cost that the former carrier avoids.[342] AirTouch also argues that each minute of use provides a revenue opportunity, whether or not the carrier charges per-minute, and the allocator reduces each carrier's return by the same percentage regardless of how much the carrier earned per minute of use.[343] Critics argue that such an allocator needlessly encourages carriers to reduce minutes of use,[344] and would present difficulties for providers of flat-rate services that do not ordinarily charge by or track minutes of use.[345] Even AirTouch Communications describes the calculation of a minutes-of-use allocator as involving "somewhat greater complexity."[346]

2. Discussion

105. As part of its management duties under section 52.26 of the Commission's Rules,[347] the LNPA of each regional database must collect sufficient revenues to fund that database. We will require the LNPA of each regional database to do this by allocating the costs of each regional database among carriers in proportion to each carrier's intrastate, interstate, and international end-user telecommunications revenues attributable to that region. The Commission adopted end-user telecommunications revenues in the *Universal Service Order* as the assessment base for determining

---

[338] Calif. Pub. Utils. Comm'n Comments at 8.

[339] BellSouth Comments at 9; GST Reply at 12-13; MFS Reply at 4-5; NYNEX Reply at 7 & n.25; PacTel Reply at 5-6; U S WEST Reply at 15-16; USTA Reply at ii; WinStar Reply at 7-8.

[340] Arch Communications Group Reply at 7

[341] Calif. Dep't Consumer Affairs Comments at 15.

[342] AirTouch Communications Comments at 8.

[343] *Id.*

[344] Mo. Pub. Servs. Comm'n Comments at 4.

[345] *Id. Cf.* U S WEST Reply at 15 (arguing that such an allocator would not reach flat-rated services); PCIA Comments at 7 (arguing that an allocator based on minutes of use may discriminate against carriers with certain network designs or customer calling patterns).

[346] AirTouch Communications Comments at 2, 9.

[347] 47 C.F.R. § 52.26.

contributions to universal support mechanisms.[348] We will require carriers to include intrastate, interstate, and international[349] revenues in calculating end-user revenues because number portability will affect all such services. An end-user telecommunications revenue allocator is similar to a retail-revenues allocator in that both are based on telecommunications revenues that carriers collect from end-users. Unlike retail-revenues, however, end-user telecommunications revenues includes revenues derived from subscriber line charges (SLCs).[350] End-user telecommunications revenues also include revenues collected from carriers that purchase telecommunications services for their own internal use.[351]

106. The end-user telecommunications revenue allocator meets the two-prong competitive neutrality test. First, the allocator will not give one service provider an appreciable, incremental cost advantage when competing for a subscriber. Because the end-user telecommunications revenue allocator will distribute the shared costs of the regional databases to each carrier in proportion to that carrier's end-user revenues, it will cost carriers approximately the same increase in shared costs to win a specific subscriber. For example, if one of two LECs wins a third LEC's subscriber, whichever of the two LECs wins the subscriber will win the end-user revenue that subscriber generates, which will increase its allocated portion of the shared costs. Because the subscriber is likely to use approximately the same amount of local service regardless which of the two competing LECs provides service to the subscriber, the incremental shared cost one of the two LECs would experience if it had won the subscriber would be about the same as the incremental shared cost the other would experience if it won the subscriber. This increase would also approximately equal the decrease in shared costs the third carrier would experience, having lost the subscriber. These amounts may not be exactly the same because each of the three carriers may have different rates and may not collect exactly the same revenue from that subscriber. The difference, however, will not be significant enough to create an appreciable, incremental cost disadvantage. Furthermore, any difference will not be caused by providing number portability, but by differences in the underlying efficiency, services, and rates of each of the carriers. Thus we believe the allocator will not itself create an appreciable, incremental cost advantage that was not already present even absent number portability.

107. Second, allocating shared costs in proportion to end-user revenues will prevent the shared costs from disparately affecting the ability of carriers to earn a normal return. Because carriers' allocations of the shared costs will vary directly with their end-user revenues, their share of the regional database costs will increase in proportion to their customer base. Thus, no carrier's portion of

[348] *See In re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9206-07 (1997) (Universal Service Order), *appeal pending sub nom.* Texas Office of Public Util. Counsel, No. 97-60421 (5th Cir. filed June 25, 1997).

[349] This differs from the assessment base for determining universal service contributions, which, in accord with section 254(d) of the Act, includes only those international end-user revenues earned by carriers that provide interstate telecommunications services. *See Universal Service Order*, 12 FCC Rcd. at 9173-75.

[350] *Id.* at 9206-07. The SLC is a flat monthly per-line rate that the end user pays. *See* 47 C.F.R. § 69.104.

[351] *See Universal Service Order*, 12 FCC Rcd. at 9206-07.

the shared costs will be excessive in relation to its expected revenues, and its allocated share will only increase as it increases its revenue stream. Consequently, the end-user revenues allocator will not disparately affect competing carriers' abilities to earn a normal return. An end-user revenues allocator will also be easy to administer because carriers already track their sales to end-users for billing purposes, and will be familiar with the end-user revenues allocator from its use for universal service support contributions.[352] Although an end-user revenues allocator will relieve pure wholesalers, which have no end-user revenue, from directly bearing shared costs, the end-user method does not exclude wholesale revenues from the revenue base that determines carriers' shared costs. As the Commission explained in the *Universal Service Order*, wholesale charges are built into retail rates, and thus the allocator still reflects wholesale revenue.[353] This is competitively neutral because it avoids double-counting revenues, and because wholesale carriers are not competing with retail carriers for end users in the marketplace.

108. Based on the current record, it appears that other allocators that commenters have proposed could also meet the two-prong test. We choose an end-user revenues allocator over those other proposals because each of the alternatives has distinct disadvantages. Because section 251(e)(2) requires that we select a competitively neutral allocator but specifies no other criteria that must be used in that selection, we conclude that we have discretion under the statute to choose among several competitively neutral allocation mechanisms based upon other valid regulatory goals, such as administrative efficiency.

109. We decline to adopt an allocator based on gross telecommunications revenues less charges carriers paid to other carriers, despite the Commission's tentative conclusion in the *Further Notice*.[354] As the Commission explained in the *Universal Service Order*, an end-user revenues allocator is more administratively efficient than an allocator based on gross revenues less charges carriers pay to other carriers.[355] Under an end-user revenues allocator, IXCs would be directly allocated shared costs attributable to the revenues they collect from their end users to pay incumbent LECs' access charges. Under the allocator based on gross revenues less charges carriers pay to other carriers, on the other hand, IXCs would not be directly allocated shared costs attributable to access charges: although they would collect revenue from their end users to pay the incumbent LECs for these charges, they would be entitled to subtract charges they pay to other carriers for the purpose of determining the amount of shared costs allocated to them. Incumbent LECs would be allocated the

---

[352] *See id.* at 9208.

[353] *See id.* at 9207.

[354] *See supra* paragraph 79. We recognize that the Commission adopted under section 251(e)(2) an allocator based on gross revenues less charges carriers pay to other carriers to allocate the costs of numbering administration. *See In re Administration of the North American Numbering Plan*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, 19405, 19541 (1996). As we explain in the text, we believe that a number of allocators may be competitively neutral, but conclude that for the allocation of number-portability costs, share of end-user revenues is preferable to an allocator based on gross revenues less charges carriers pay to other carriers.

[355] *See Universal Service Order*, 12 FCC Rcd. at 9206.

shared costs attributable to access charge revenue they collect from IXCs. As at least one IXC pointed out in the *Universal Service* proceeding, however, the incumbent LECs would likely pass these shared costs on to the IXCs through exogenous treatment in their access rates.[356] Thus, IXCs would incur shared costs attributable to access revenues under both an allocator based on gross revenues less charges carriers pay to other carriers and an end-user revenues allocator. Because the end-user revenue allocator reaches the same result as an allocator based on gross revenues less charges carriers pay to other carriers, but without the inefficiency and added complication of the pass-through step, we prefer the end-user revenues allocator. As the Commission also explained in the *Universal Service Order*, some wholesale carriers—particularly those with long-term contracts—might be unable to recover their shared costs from their customers under an allocator based on gross revenues less charges carriers pay to other carriers.[357] We also decline to adopt a gross telecommunications revenue allocator because it would double-count revenue. When a wholesale or access carrier is involved in providing service, for example, such an allocator assigns shared costs to each unit of revenue twice: once when the wholesale carrier collects revenue from the retail carrier, and again when the retail carrier collects revenue from its customer.[358]

110. We also decline to adopt an allocator based on gross telecommunications revenues less charges carriers pay to *and receive from* other carriers because such an allocator fails to count certain revenue—such as from access charges—at all. Finally, we decline to adopt non-revenues-based allocators—such as those tied to minutes of use, telephone numbers, or lines—because such allocators would be difficult to calculate for carriers that do not offer service on a per-line or per-minute basis.[359] Furthermore, line-based allocators count low-volume customers the same as high-volume customers, and could advantage new entrants who initially have little or no customer base. We also reject SBC's EAL allocator because it has not offered a convincing reason why local, intraLATA toll, and interLATA toll service should count equally in allocating costs.

D. Carriers Required to Share the Costs of the Regional Databases

1. Positions of the Parties

111. Incumbent LECs, state commissions, competitive LECs, and CMRS providers argue that all telecommunications carriers must share the regional database costs. They contend that the "all telecommunications carriers" language of section 251(e)(2) does not leave the Commission authority to

[356] *See Id.* at 9602-03 & n.1901 (citing Sprint Comments at 9-10 and Bell Atlantic/NYNEX Reply at 3-4).

[357] *Id.* at 9208-09.

[358] *See id.* at 9207.

[359] *Cf id.* at 9210.

exclude any carriers from sharing these costs.[360] Some of these commenters, however, support distribution mechanisms that have the effect of excluding carriers from incurring at least some regional database number portability costs.[361]

112. IXCs, some small LECs, GSA, the Telecommunications Resellers Association (TRA), some CMRS providers, and some state commissions, on the other hand, contend that we should exclude some carriers from sharing any regional database portability costs.[362] These commenters suggest that we exclude: 1) carriers that do not participate in number portability;[363] 2) carriers that provide paging and one-way messaging services;[364] 3) carriers that do not appear on end-user bills;[365]

---

[360] Ameritech Comments at 1-2, 4-5; Bell Atlantic Reply at 1, 4; BellSouth Reply at 5; Colo. Pub. Utils. Comm'n Comments at 5; Frontier Comments at 3-4 & n.8; GST Reply at 10-11; Iowa Network Servs. Reply at 3; MFS Comments at 6; NARUC Reply at 1; NCTA Reply at 6; NYNEX Comments at 5-6; Ohio Pub. Utils. Comm'n Comments at 1, 3-5; Omnipoint Comments at 3; PacTel Comments at 3, 6-7; SBC Comments at 4-6; Teleport Comments at 2-4; U S WEST Reply at 12-14 & nn.33-35; USTA Reply at 4-5; WinStar Comments at 2-5; Wash. Utils. Transp. Comm'n Reply at 3.

[361] Ameritech Comments at 9-11 (arguing that only carriers that use the databases should bear upload and download costs); Colo. Pub. Utils. Comm'n Comments at 6-8 (arguing that only carriers using the databases should bear download costs, and that only carriers that upload data to the databases should bear nonrecurring, recurring, and upload costs); Iowa Network Servs. Reply at 5-7 (arguing that only carriers providing portability at any given time should bear nonrecurring and recurring costs, and that only carriers using the databases should bear database information costs); Ohio Pub. Utils. Comm'n Comments at 1, 6-10 (advocating distribution of nonrecurring and recurring costs by share of local access lines—which would exclude carriers not providing local exchange service—and upload, download, and query costs on a usage-sensitive basis—which would exclude carriers that do not use the databases—if usage variance is significant and determinable); Omnipoint Comments at 1-2 (excluding carriers that do not use the databases by advocating per-query charges consisting of ratable portions of the nonrecurring, recurring, and database information costs); PacTel Comments at 2, 7 (arguing that only carriers using the databases should bear upload, download, and query costs); Wash. Utils. Transp. Comm'n Reply at 4-6 (arguing that only carriers that upload or download data should bear regional database costs).

[362] MobileMedia Reply at 3; Paging Network Reply at 2-5; PCIA Comments at 4; Time Warner Comments at 4-5 & n.9; TRA Comments at 4-6. *Cf.* AirTouch Communications Reply at 5-6 (arguing that the 1996 Act requires competitively neutral cost recovery to prevent certain classes of carriers from bearing a disproportionate burden, and number portability does not benefit paging companies).

[363] AirTouch Communications Reply at 8-9; AT&T Comments at 7-9 & n.11; ALTS Comments at 2; Calif. Dep't Consumer Affairs Comments at 13, 15-18; Colo. Pub. Utils. Comm'n Comments at 6-7; Fla. Pub. Servs. Comm'n. Comments at 3-4; GSA Reply at 9-10; Iowa Network Servs. Reply at 5-7; ITCs Comments at 1-3; MCI Comments at 3-6; NTCA/OPASTCO Comments at 7-11; Ohio Pub. Utils. Comm'n Comments at 8-9; Omnipoint Communications Comments at 1-3; PCIA Reply at 2-3; Sprint Comments at 5-6; Wash. Utils. Transp. Comm'n Reply at 4-6.

[364] AirTouch Paging Reply at 5-8; Arch Communications Group Reply at 3-5; GSA Reply at 9-10; MobileMedia Communications Reply at 3-4; Paging Network Reply at 1-4; PCIA Comments at 5; Time Warner Comments at 4-5 & n.9. *Cf.* Nextel Comments at 3-4 (excluding carriers whose revenue is irrelevant to number portability, such as non-covered SMR providers, which are exempt from number portability obligations).

4) carriers that do not provide local exchange service;[366] and 5) resellers.[367]

2. Discussion

113. We will require allocation of the shared costs among all telecommunications carriers because section 251(e)(2) states that "[t]he cost of establishing ... number portability shall be borne by all telecommunications carriers on a competitively neutral basis." Our end-user revenues allocator, by its nature, does not reach carriers, such as pure wholesalers, that do not have end-user revenues. Because section 251(e)(2) requires all carriers to bear the costs of number portability on a competitively neutral basis, we will require carriers that do not have end-user revenues to pay $100 per year per region as their statutory share of the shared costs. We believe that $100 represents a fair contribution for carriers that do not have end-user revenues, but can revisit this issue should it become necessary. This fee will not give any such carriers an appreciable, incremental cost advantage when competing for a subscriber because such carriers do not compete for end-user customers. Moreover, this charge will be the same for all such carriers. Thus, it will not create any disadvantage to the extent these carriers are competing with each other. This fee is also not likely to disparately affect the ability of competing carriers to earn a normal return because such a nominal charge is unlikely to affect a carrier's return and, again, because all such carriers will face the same charge. Consequently, such a fee is competitively neutral.

114. We believe that assessing this sum will discharge our statutory duty and at the same time represents a reasonable contribution for carriers that do not have end-user revenues. In addition, it will be equitable for all telecommunications carriers, even those without end-user revenues and those not directly involved in number portability, to contribute toward the costs of the regional databases because all telecommunications carriers will benefit from number portability. Number portability will remove barriers to entry into the market for local service and increase local competition. Number portability will also ameliorate number exhaust concerns by making possible number pooling.[368]

[365] Calif. Pub. Utils. Comm'n Comments at 5-6 & n. 2 (arguing that for allocation of regional database costs, "all telecommunications carriers" should include only carriers of record on an end user's bill that operate in a given region or state, because all such carriers must access the database to terminate calls; expressing no opinion whether the definition should include resellers because of uncertainty how such carriers would interface with the database).

[366] TRA Comments at 5-6. *Cf.* GSA Reply at 9-10 (distributing costs by share of telephone numbers, which would exclude "pure" IXCs, among other carriers); Ohio Pub. Utils. Comm'n Comments at 1, 6 (distributing costs by share of local access lines less private lines plus a trunk equivalency); Scherers Communications Group Comments at 3 (distributing costs only among carriers whose services require a telephone number and that use the databases for their numbers).

[367] Scherers Communications Group Comments at 3. *Cf.* ALTS Comments at 2 (excluding carriers as needed to avoid double recovery).

[368] For a brief discussion of number pooling, see note 472, *infra*.

E. Regional v. National Allocation of Regional Database Costs

1. Positions of the Parties

115. Some commenters argue that the costs of the regional databases should be allocated on a regional basis.[369] These commenters argue that each region may have unique costs and carriers should only pay for databases that serve areas where they terminate calls,[370] that allowing the regional administrators to collect costs applicable to their own regions is simpler than aggregating costs and selecting a national administrator,[371] and that national allocation would create regional cross-subsidies and reduce efficiency incentives.[372] Other commenters argue that costs should be allocated on a nationwide basis.[373] These commenters argue that a national system would avoid complications regarding the calculation of regional end-user revenues,[374] that a national system ensures uniformity of treatment and administrative efficiency,[375] that carriers often operate over multiple regions and completing calls will require carriers to use multiple databases,[376] and that such a system would avoid discriminating against carriers that happen to serve regions with more expensive databases.[377] NECA ,

---

[369] AirTouch Communications Comments at 6-7; Ameritech Comments at 5; Calif. Dep't Consumer Affairs Comments at 14; Calif. Pub. Utils. Comm'n Comments at 6; Ill. Commerce Comm'n Comments at 5; Iowa Network Servs. Reply at 5; ITCs Comments at 2-3; NARUC Reply at 1; NCTA Reply at 8; Sprint Comments at 7 n.9; Time Warner Comments at 8; USTA Reply at ii.

[370] Calif. Dep't Consumer Affairs at 14; Calif. Pub. Utils. Comm'n Comments at 6-7; Iowa Network Servs. Reply at 5; ITCs Comments at 2-3. *Cf.* Sprint Comments at 7 n.9 (arguing that to allocate costs of a regional database by national revenues or revenues from services other than local service would make little sense).

[371] Time Warner Comments at 8.

[372] Ill. Commerce Comm'n Comments at 5.

[373] Bell Atlantic Comments at 3-4; BellSouth Reply at 9 (abandoning regional allocation position in comment in favor of national allocation); CTIA Comments at 2-3; MobileMedia Communications Reply at 5; SBC Reply at 9-10; Scherers Communications Group Comments at 4; TRA Comments at 7; U S WEST Reply at i-ii. *Cf.* GTE Comments at 12-14 (proposing a national pool funded through end-user surcharges from which carriers would seek reimbursement of number portability costs); PCIA Comments at 6-7 (arguing that the portability fund should be collected and disbursed on a centralized basis).

[374] BellSouth Reply at 9; SBC Reply at 7 n.18; U S WEST Reply at 16-19. *Cf.* Sprint Comments at 7 (advocating regional allocation but acknowledging that calculating regional revenue may be difficult).

[375] BellSouth Reply at 9; PCIA Reply at 2; SBC Reply at 10; U S WEST Reply at 16-19.

[376] CTIA Comments at 2-3 (arguing that wireless subscribers use their telephones nationwide and that CMRS service areas may span multiple regions); SBC Reply at 7 n.18, 9.

[377] SBC Reply at 10.

volunteers to administer the allocation process if we choose a nationwide mechanism.[378]

2. Discussion

116. We will require telecommunications carriers to bear the shared costs on a regional basis because such a plan is most consistent with the regional nature of the databases, and because a national approach would require designation of a national administrator. As part of its duties established in section 52.26 of the Commission's Rules,[379] each local number portability administrator[380] of a regional database[381] shall collect sufficient revenues from all telecommunications carriers providing telecommunications service in areas that regional database serves to fund the operation of that regional database. Thus, after subtracting the charges it collects from telecommunications carriers with no end-user revenues, each database administrator shall distribute the remaining shared costs based upon each remaining telecommunications carrier's proportion of the end-user revenues collected by all telecommunications carriers in that region. To apply the end-user revenues allocator, administrators may request regional end-user revenues data from telecommunications carriers once a year. We direct telecommunications carriers to comply with such requests. One of the objectives of the biennial review of our regulations required under the Communications Act is to consider ways to reduce filing burdens on carriers. The Commission may further consider in the biennial review or other proceedings how best to administer the allocation of the shared costs.

117. We are aware that some carriers have already begun paying their regional database administrators based on temporary agreements negotiated by the regional LLCs. We will permit, but not require, each regional administrator and LLC to adjust prospectively through a reasonable true-up mechanism the future bills of those carriers that participated in such agreements so that the shared costs each such carrier will have contributed approaches what those carriers would have paid had an end-user telecommunications revenue allocator been in place when carriers started paying the regional administrators. Permitting the regional administrators and LLCs to perform such true-ups ensures that costs are recovered from carriers in a manner consistent with our rules, while accounting for the period prior to the effective date of our rules and recognizing that agreements may have been reasonable mechanisms to recover regional database costs on a temporary basis pending this *Third Report and Order*.

---

[378] NECA Reply at 2-3.

[379] 47 C.F.R. § 52.26. As explained in the *Second Report and Order*, these duties include all management tasks required to run the regional databases. *In re Telephone Number Portability*, Second Report and Order, 12 FCC Rcd. 12281,12307-09 (Second Report and Order).

[380] The term "local number portability administrator" (LNPA) is defined at 47 C.F.R. § 52.21(h).

[381] The term "regional database is defined at 47 C.F.R. § 52.21(l).

F. Amortization

1. Positions of the Parties

118. Parties that address the issue of the time period for amortization of nonrecurring regional database costs almost uniformly advocate a five-year period.[382] These commenters argue that amortization will equitably distribute these costs among current carriers and later entrants,[383] accommodate changes in market volume and market share,[384] and avoid the adverse impact that a large, one-time payment may cause.[385] Omnipoint advocates an adjustment mechanism to account for changes in nonrecurring and administrative expenses and the costs of improvements to the database facilities.[386] Other commenters argue that the data used for allocation—whether revenues, lines, or some other factor—must be regularly updated to account for changes in market share.[387] Some commenters also advocate that we establish a settlement period or true-up mechanism by which later

[382] Ameritech Reply at 8 (advocating amortizing over no more than five years the costs of establishing long term number portability, and after five years treating the ongoing regional database costs associated with database administration as costs of doing business); Calif. Dep't Consumer Affairs Comments at 15-16 (advocating amortizing the implementation costs of number portability annually at an exponentially increasing pace over a period long enough to reflect changes in market volume and market share that portability-spurred competition is likely to create); Cincinnati Bell Comments at 10 & n.13 (advocating amortizing nonrecurring costs over five years); Colo. Pub. Utils. Comm'n Comments at 8 (advocating amortizing nonrecurring costs over the life of the database administrators' contracts); NCTA Reply at 9 (advocating amortizing nonrecurring costs through monthly charges over five years); PacTel Comments at 5 (advocating amortizing database start-up costs over a period in the range of five years); Time Warner Comments at 9 (advocating amortizing nonrecurring costs over three to five years); USTA Comments at iv (advocating amortizing nonrecurring costs over five years).

[383] NCTA Reply at 2; Time Warner Comments at 9.

[384] Calif. Dep't Consumer Affairs Comments at 15-16.

[385] Cincinnati Bell Comments at 10 & n.13; NCTA Reply at 2; Time Warner Comments at 9; USTA Comments at iv.

[386] Omnipoint Communications Comments at 4.

[387] Cincinnati Bell Reply at 4 (arguing that any allocation method would require annual adjustments); SBC Comments at 11 (arguing that the number portability administrators should periodically update the EAL-count); Sprint Comments at 7 (advocating quarterly allocator-related updates of each local service provider's number of presubscribed lines). *Cf.* Cincinnati Bell Comments at 7-8 (criticizing revenue-based allocators because they would require continual updating as companies enter the market and their revenue share grows; arguing that to fix shares based on current revenues would require incumbent LECs to bear the majority of costs even if their share of market revenues declines); MCI Reply at 14 (criticizing revenues-based allocators because they would require continuous updating as companies enter and exit the market and as revenue shares change).

entrants would reimburse previous participants.[388]

2. Discussion

119. As part of its management duties under section 52.26 of our Rules, the administrator of each regional database must collect sufficient revenues to fund its regional database. In this regard, the nonrecurring shared costs attributable to that database must be amortized over a reasonable period. This approach will avoid potentially large, one-time charges on carriers, and ameliorate carriers' concerns that later participants might avoid nonrecurring database costs. We decline to implement a true-up mechanism under which later entrants reimburse previous participants.[389] Requiring amortization of nonrecurring costs will adequately address concerns that later entrants will avoid nonrecurring costs. Furthermore, carriers have not demonstrated that the absence of a true-up mechanism would significantly affect carriers' abilities to compete for customers.

G. Enforcement

1. Positions of the Parties

120. Commenting parties suggest various enforcement mechanisms to ensure that all telecommunications carriers are assessed on a competitively neutral basis the regional database costs of number portability, such as a cost-audit process that a neutral party such as the NANC, NANPA, or Commission would administer.[390]

2. Discussion

121. Commenters have failed to show the need for any special enforcement mechanisms to ensure that carriers bear the costs of the regional databases on a competitively neutral basis in accordance with our requirements. If carriers find that other carriers or the LNPAs are not meeting

---

[388] Cincinnati Bell Reply at 4 (arguing that to do otherwise would encourage entrants to delay entry until other carriers have borne the nonrecurring costs); Iowa Network Servs. Reply at 7 (arguing that as carriers implement number portability their allocated share of nonrecurring and recurring shared costs could be applied as a credit to carriers that have already contributed); ITCs Comments at 3 (arguing that beneficiaries of number portability should bear nonrecurring costs through a one-time assessment, with future beneficiaries providing credits to previous contributors); Ohio Pub. Utils. Comm'n Comments at 9 (advocating a true-up based on projected gross revenues over a seven-year period to ensure that entrants bear their fair share of nonrecurring costs and have no incentive to delay entry until all nonrecurring costs are distributed among other carriers).

[389] We distinguish, however, this type of true-up mechanism from the one we are allowing, but not requiring, regional database administrators to implement to ensure that carriers which began paying for regional database costs before the release of this *Third Report and Order* will eventually pay for those costs in accordance with our end-user telecommunications revenues allocator. *See supra* paragraph 117.

[390] SBC Comments at 11 (advocating that the NANC or its designee oversee the activities and responsibilities of the fund administrator); Time Warner Comments at 12-13 (suggesting that the NANC or the Commission periodically may need to review the regional administrators' billing procedures).

our requirements, they may file a complaint under section 208 of the Act.[391] In the event experience shows that the Commission needs to amend its rules to ensure that all carriers bear their fair share of the cost of the regional databases, the Commission may reconsider our finding that no special enforcement mechanism is necessary. The Commission may also audit the costs of the regional database administrators. Furthermore, both the Commission and any collections administrator the Commission appoints may audit revenue data that carriers submit as the basis for allocation and take action as warranted.

VI. CARRIER-SPECIFIC COSTS DIRECTLY RELATED TO PROVIDING NUMBER PORTABILITY

A. Background

122. In the *Further Notice*, the Commission identified two approaches to the distribution among carriers of carrier-specific costs directly related to providing number portability: 1) making individual carriers responsible for their own carrier-specific costs directly related to providing number portability; or 2) pooling carrier-specific costs directly related to providing number portability and distributing them among carriers based on some allocator.[392] The Commission sought comment on the application of section 251(e)(2) to these distribution methods, and on any alternative ways of distributing those costs.[393]

123. The Commission also sought comment on whether it should create a mechanism for carriers to recover carrier-specific costs directly related to providing number portability from end-users or other carriers, and if so, under what authority the Commission could do so and what form the mechanism should take.[394] If carriers recover number portability costs from end users, the Commission sought comment on whether they should be allowed to do so in any manner they choose, or whether the Commission should require an end-user number portability charge.[395] The Commission also sought comment on whether any such charge should vary among carriers within regions, among carriers across regions, or over time.[396] The Commission also asked whether carriers should charge their end users a one-time charge, a monthly fee, or a percentage of the monthly bill, and whether any charge should appear as a line-item on the bill.[397] The Commission sought comment on the

---

391 *See* 47 U.S.C. § 208.

392 *See In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8464 (1996) (Order & Further Notice).

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.* at 8465.

397 *Id.*

application of section 251(e)(2) to the recovery from end users of carrier-specific costs directly related to providing number portability.[398] If carriers recover number portability costs from other carriers, the Commission sought comment on whether regulated carriers should be allowed to do so through increases in charges for regulated services, and under what authority the Commission can permit such increases.[399]

124. The Commission tentatively concluded that price-cap LECs should be permitted to treat as exogenous carrier-specific costs directly related to providing number portability, but should not be allowed to treat as exogenous carrier-specific costs not directly related to providing number portability.[400] The Commission sought comment on this tentative conclusion, as well as whether price-cap LECs should place number portability costs into a new or existing price-cap basket.[401]

B. Positions of the Parties

125. PacTel, U S WEST, AT&T, MCI, Sprint, Frontier, MFS, NCTA, Teleport, Time Warner, AirTouch Communications, AirTouch Paging, Omnipoint, and PCIA argue that we should require carriers to recover their own carrier-specific costs directly related to number portability, rather than pool such costs.[402] They argue that requiring each carrier to "bear its own costs," unlike pooling, encourages efficiency because each carrier is responsible for every dollar it spends.[403] They also argue that making each carrier responsible for its own costs is more consistent with a competitive

---

[398] *Id.* at 8464.

[399] *Id.* at 8465.

[400] *Id.* at 8466.

[401] *Id.*

[402] AirTouch Communications Reply at 6-8; AirTouch Paging Reply at 2-5; AT&T Comments at 12-14; Frontier Comments at 2-3; MCI Reply at 6-10; MFS Comments at 2-4; NCTA Reply at 3-5; Omnipoint Reply at 3-8; PacTel Comments at 10-11; PCIA Reply at 6-8; Sprint Reply at 5-6; Teleport Comments at 7-8; Time Warner Reply at 5-12; U S WEST Reply at 19-20. *See also* Ameritech Comments at 8, Reply at 6-8 & nn.9-10 (arguing that national pooling is inefficient and expensive but that carrier-specific costs directly related to number portability can be pooled at the regional or state level and allocated among all LECs; arguing alternatively that carriers can recover their costs from their own end users without pooling if a uniform, mandatory, regional or state surcharge based on the average or median cost of all carriers in the area can fairly compensate reasonably efficient LECs).

[403] AirTouch Communications Reply at 6-7; AirTouch Paging Reply at 4-5; AT&T Reply at 11-12; MCI Reply at 9; MFS Reply at 6-7; NCTA Reply at 4-5; Omnipoint Reply at 5-6; PacTel Comments at 10-11; PCIA Comments at 7-8; Sprint Reply at 5-6; Teleport Comments at 8; Time Warner Reply at 5-6, 10; U S WEST Reply at 19-20. *Cf.* Ameritech Comments at 7 (arguing that more efficient options are available than pooling, which is administratively expensive and may reward inefficiency).

marketplace,[404] and requires carriers to pay for the benefits they receive from number portability instead of forcing some carriers to subsidize other carriers' network improvements.[405] In addition, they argue that making each carrier responsible for its own costs is less administratively expensive and cumbersome than pooling because it avoids the need for the Commission or the states to distribute costs, collect funds, and police abuses.[406]

126. Bell Atlantic, BellSouth, NYNEX, SBC, USTA, Nextel, the Florida Public Service Commission, and the GSA argue that an administrator should pool the carrier-specific costs directly related to number portability and then allocate them among carriers.[407] They argue that such costs are not discretionary, but incurred for the statutorily mandated, industry-wide goal of porting numbers to the benefit of all end-users.[408] They also argue that section 251(e)(2) requires all carriers to bear the costs of number portability,[409] and that Congress would not have adopted section 251(e)(2) had it intended carriers to incur and recover their own costs under competitive market forces.[410] In response to commenters that argue pooling is inefficient, they argue that incumbent LECs would still have

---

404 AirTouch Communication Reply at 6-7; MCI Reply at 9; MFS Reply at 6-7; Omnipoint Reply at 6; PacTel Comments at 10-11; PCIA Comments at 7-8; Sprint Reply at 5-6; Time Warner Reply at 10-12.

405 AirTouch Communications Reply at 6-7; AirTouch Paging Reply at 4-5; Frontier Comments at 2-3; MCI Comments at 9-10; MFS Reply at 6; NCTA Reply at 4; Omnipoint Reply at 4-5; PacTel Comments at 10-11, Sprint Reply at 5-6; Time Warner Reply at 7-9.

406 Ameritech Comments at 7; MCI Reply at 9-10; Omnipoint Reply at 5-8; PacTel Comments at 10-11; PCIA Reply at 3-4; Sprint Reply at 5-6; U S WEST Reply at 19-20. *Cf.* Ameritech Comments at 7 (arguing that more efficient options are available than pooling, which is administratively expensive and may reward inefficiency); Teleport Comments at 8 (arguing that pooling would subject the previously unregulated competitive LECs to burdensome reporting requirements). *See also* Calif. Dep't Consumer Affairs Comments at 19-21 (arguing that requiring carriers to bear their own costs directly related to number portability would likely burden incumbent LECs disproportionately, but that the Commission must assess whether such costs warrant the bureaucratic expense and regulation involved in pooling).

407 Bell Atlantic Comments at 1-4; BellSouth Reply at 9-11; Fla. Pub. Servs. Comm'n Comments at 4-5; GSA Reply at 5-7; NYNEX Reply at 4-6, 8-11; Nextel Comments at 4; SBC Comments at 9-11; USTA Comments at 11-16. *See also* Cincinnati Bell Comments at 7-13 (arguing that rather than allocate costs an administrator should pool carrier cost-estimates and set a charge for carriers to collect from end users); GTE Comments at 12-14 (arguing that rather than allocate costs an administrator should reimburse carriers from a pool of charges the administrator collects from end users based on carriers' cost estimates).

408 BellSouth Reply at 5-6; GSA Reply at 6-7; NYNEX Reply at 5; USTA Reply at 12-13.

409 Bell Atlantic Reply at 5-6; BellSouth Reply at 5; NYNEX Reply at 5-6; SBC Reply at 3-5; USTA Reply at 8-11.

410 Bell Atlantic Reply at 5-6; USTA Reply at 12-13.

efficiency incentives because they would pay a large percentage of the pooled costs.[411] They also argue that administrators could subject carriers to cost reporting requirements and audits,[412] and that the economic burdens of administering a cost pool would be small compared to LEC portability costs.[413] They further argue that making carriers responsible for their own costs would violate competitive neutrality by disproportionately burdening incumbent LECs, which will have higher number portability costs.[414] Some commenters, including Cincinnati Bell, disagree that incumbent LECs will have disproportionately higher costs, however. They note that incumbent LECs benefit from economies of scale and larger customer bases over which to spread their portability costs.[415]

127. To recover carrier-specific costs directly related to number portability, Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, GTE, NYNEX, SBC, USTA, the California Department of Consumer Affairs, Arch Communications, and MobileMedia support an explicit, uniform, mandatory charge set as a flat rate or a percentage of each end-user's bill.[416] Although some of these commenters apparently would impose such a charge only on incumbent LEC customers, others appear to suggest

---

[411] BellSouth Reply at 10; Florida Pub. Servs. Comm'n Comments at 5. *Cf.* USTA Reply at 12-14 (arguing that under a pooling mechanism no carrier can impose costs on its competitors without increasing its own costs).

[412] GSA Reply at 7; SBC Reply at 13-14 n.38.

[413] Bell Atlantic Reply at 7.

[414] BellSouth Reply at 6-7, 12; Florida Pub. Servs. Comm'n Comments at 4-5; GSA Reply at 6; NYNEX Reply at 5-6; USTA Reply at 9-10. *Cf. Ex Parte* Letter from Link Brown, Director-Federal Regulatory Affairs, SBC Communications Inc., to William F. Caton, Acting Secretary, FCC (April 25, 1997) (claiming based on a hypothetical situation in the Houston market that a competitive LEC's portability costs per access line would be one-third to one-half of an incumbent LEC's costs); *Ex Parte* Letter from F.G. Maxson, Director-Regulatory Affairs, GTE Service Corporation, to William F. Caton, Acting Secretary, FCC (June 12, 1997) (claiming that carrier-specific portability switching costs per line will be more than three times those of competitive LECs). *See also* Calif. Dep't Consumer Affairs Comments at 19-21 (arguing that requiring carriers to bear their own costs directly related to number portability would likely burden incumbent LECs disproportionately, but that the Commission must assess whether such costs warrant the bureaucratic expense and regulation involved in pooling); Calif. Pub. Utils. Comm'n Comments at 11-13 (suggesting that the Commission make carriers responsible for a portion of their own costs directly related to number portability and pool the rest as a way to balance interests in competitive neutrality and efficiency).

[415] *See* AT&T Comments at 13-14; Cincinnati Bell Comments at 4 (noting that larger carriers will have greater absolute costs but are more likely to be able to negotiate discounts from manufacturers and may have less costs per line); MCI Reply at 7-9; Time Warner Reply at 9.

[416] Ameritech Comments at 8; Arch Communications Reply at 7; Bell Atlantic Comments at 8; BellSouth Reply at 12-13; Calif. Dep't Consumer Affairs Comments at 21-24; Cincinnati Bell Comments at 8-12, Reply at 6-8; GTE Comments at 9-14; MobileMedia Communications Reply at 5; NYNEX Comments at 11-12; SBC Comments at 10-14; USTA Comments at 18-19. *See also* PacTel Reply at 2-5 (advocating an explicit, mandatory end-user surcharge but arguing that instead of uniform it should be set for each carrier based on that carrier's number portability costs).

such a charge for customers of all local service. including CMRS customers,[417] all LEC customers.[418] or all end users.[419] Advocates argue that an explicit, uniform, mandatory surcharge would be competitively neutral because it would ensure that all carriers would charge customers in the same way[420] and would provide a straightforward mechanism to recover portability costs from those who benefit—consumers.[421] They also argue that this mechanism avoids market distortions that embedding the costs in carrier rates would create.[422] increases carrier accountability, and informs customers of the costs of number portability.[423] In addition, they argue that any other mechanism would not be competitively neutral because. unlike unregulated carriers. the ability of regulated carriers to recover their costs is limited by regulatory constraints.[424] GTE also argues that a uniform. mandatory end-user charge is necessary to avoid a taking in violation of the Fifth Amendment.[425] GTE supports a mechanism that would reimburse carriers for all their costs directly related to number portability.[426] Ameritech. on the other hand. would give carriers a fixed amount of revenue from the collected charges. regardless of their actual costs. and argues that this encourages efficiency.[427] GTE argues. however. that such a mechanism would discriminate against high-cost carriers and that pooling is

---

[417] *See. e.g.*, Cincinnati Bell Comments at 8-12, Reply at 6-8.

[418] *See. e.g.*. Ameritech Comments at 8.

[419] *See. e.g*. Bell Atlantic Comments at 8; NYNEX Comments at 11-12; SBC Comments at 10-14.

[420] Ameritech Comments at 7. 8; Arch Communications Group Reply at 7; Bell Atlantic Comments at 7-8; BellSouth Reply at 9. 12-13; Calif. Dep't Consumer Affairs Comments at 24; Cincinnati Bell Reply at 6-7; GTE Comments at 11-13; MobileMedia Reply at 5; NYNEX Comments at 11-14; SBC Comments at 12-14; USTA Comments at 18-19.

[421] Cincinnati Bell Comments at 6-11; GTE Comments at 10-13; NYNEX Comments at 11-14; USTA Comments at 18-19.

[422] NYNEX Comments at 11-14.

[423] Calif. Dep't Consumer Affairs Comments at 24; NYNEX Comments at 11-14; PacTel Reply at 2-5; SBC Reply at 15; USTA Reply at 18-19.

[424] BellSouth Reply at 9. 12-13; Cincinnati Bell Comments at 8-11; GTE Comments at 8-13; NYNEX Comments at 11-14.

[425] GTE Comments at 8-11. *Cf.* Cincinnati Bell Comments at 6 (arguing that the Commission must ensure that carriers recover all their number portability costs to avoid an unconstitutional taking). *See also* U S WEST Comments at 8-9. 19-22 (arguing that a federally mandated surcharge is necessary to avoid an unconstitutional taking, but arguing that carriers should be allowed flexibility in setting that surcharge).

[426] *See. e.g.*, GTE Comments at 12-14 (arguing that rather than allocate carrier-specific costs directly related to number portability an administrator should reimburse carriers from a pool of surcharges the administrator collects from end users based on carriers' cost estimates).

[427] Ameritech Comments at 8.

necessary to prevent disproportionate cost recovery.[428] The California Department of Consumer Affairs and the General Services Administration argue that any end-user charges should be limited to areas where number portability is available, and thus to customers that receive the benefits of number portability.[429]

128. The California Department of Consumer Affairs advocates an end-user charge that remains constant among carriers within a given geographic region.[430] PacTel and Teleport, on the other hand, argue that end-user charges should vary within a given geographic region to account for carriers' different portability costs.[431] Cincinnati Bell, GTE, and SBC envision recalculating the end-user charge annually based on each year's portability cost estimates.[432] Ameritech, Bell South, Cincinnati Bell, NYNEX, SBC, and U S WEST argue that once carriers recover the implementation costs of number portability, which is likely to take between three to five years, the end-user charge should either decrease[433] or discontinue.[434]

129. Bell Atlantic, the California Department of Consumer Affairs, NYNEX, and USTA argue for an end-user charge calculated as a percentage of each bill,[435] arguing that a flat charge on each customer would not reach carriers that do not have presubscribed customers.[436] Ameritech, Arch

---

[428] GTE Reply at 5-7.

[429] Calif. Dep't Consumer Affairs Comments at 23; GSA Comments at 10 (advocating direct recovery from end users with a per-number charge).

[430] Calif. Dep't Consumer Affairs Comments at 24 (arguing that a constant charge within a geographic region would comport with competitive neutrality).

[431] PacTel Reply at 4; Teleport Comments at 11.

[432] Cincinnati Bell Comments at 9; GTE Comments at 12-13; SBC Comments at 12. *Cf.* Ameritech Comments at 8 (advocating an optional review midway through the recovery period if costs change substantially).

[433] SBC Comments at 12 n.17 (arguing that NANC should determine the recovery period); U S WEST Comments at 21 (arguing carriers should recover costs over the same period that they incur them). *But cf.* Calif. Dep't Consumer Affairs Comments at 24 (arguing carriers should prorate the portability end-user charge over several years to reflect the increased costs of implementing portability as it develops over time).

[434] Ameritech Reply at 8 (arguing carriers should recover costs over no more than five years); Bell South Reply at 9, 12 (arguing carriers should recover costs over three to five years); Cincinnati Bell Comments at 10, 11 (arguing carriers should recover costs over five years); NYNEX Comments at 14.

[435] Bell Atlantic Comments at 8; Calif. Dep't Consumer Affairs Comments at 24; NYNEX Reply at 9; USTA Reply at 19. *Cf.* Teleport Comments at 11-12 (arguing that recovery from consumers should be limited to their proportionate share of carriers' net revenues to remove any incumbent LEC incentive to shift portability costs to consumers in areas with lower competition).

[436] USTA Reply at 19.

Communications Group, Bell South, Cincinnati Bell, GTE, MobileMedia, PacTel, SBC, and U S WEST prefer a flat end-user charge,[437] arguing that such a charge provides predictability for consumers,[438] and that neither number portability costs nor the value consumers place on number portability depend on how much a customer spends on telephone service.[439] They argue also that a charge calculated as a percentage of the bill would disproportionately burden higher priced services such as cellular and PCS,[440] and would encourage high revenue customers to port to a carrier with a lower charge.[441] They also argue that it would be difficult to determine the appropriate base against which a percentage could be applied in the case of bundled service packages that include optional extended area calling plans and vertical services.[442]

130. U S WEST, AT&T, MCI, Sprint, GST, Teleport, ALTS, Scherers Communications Group, AirTouch Communications, WinStar, PCIA, the California Public Utilities Commission and the Public Utilities Commission of Ohio argue that carriers should be allowed flexibility in deciding whether and how to recover from end users their carrier-specific costs directly related to number portability.[443] They argue that allowing carriers to recover their portability costs from end users as they see fit in light of market forces is consistent with competitive markets,[444] and that permitting rather than requiring recovery from end users encourages carriers to minimize number portability costs and charges.[445] They argue that a uniform, mandatory, end-user charge is inappropriate because not all

437 Ameritech Comments at 2, 8; Arch Communications Reply at 7; Bell South Reply at 12; Cincinnati Bell Reply at 7-8; GTE Reply at 4; MobileMedia Reply at 5; PacTel Reply at 4-5; SBC Comments at 14; U S WEST Comments at 7.

438 Cincinnati Bell Reply at 7.

439 *Id.*

440 GTE Reply at 4.

441 PacTel Reply at 4.

442 GTE Reply at 4.

443 U S WEST Comments at 19-22, Reply at 5-10 (arguing that the Commission should allow incumbent LECs the discretion to collect a flat end-user surcharge).

444 AirTouch Communications Reply at 13-14 (concluding, therefore, that for the Commission to restrict the manner in which carriers may recover their number portability costs would not be competitively neutral); AT&T Reply at 12-13; Calif. Pub. Utils. Comm'n Comments at 14 (arguing, also, that such determination concerning recovery from end users should be left to the states); Ohio Pub. Utils. Comm'n Comments at 7, 10; PCIA Comments at 8; Scherers Communications Group Comments at 4-5; Sprint Reply at 6-7; U S WEST Comments at 8-9, 13-15, 19-22 (arguing that incumbent LECs should be allowed enough flexibility to compete on price).

445 Calif. Pub. Utils. Comm'n Reply at 6 (arguing, also, that such determination concerning recovery from end users should be left to the states); GST Reply at 8-9; Teleport Comments at 10-11; WinStar Reply at 11-12.

carriers will have the same number portability costs,[446] that an end-user charge would be difficult to administer,[447] and that the Commission should not overload customer bills with line-item charges.[448] They also argue that an end-user charge would foster hostility toward number portability and competitors,[449] that such a charge would interfere with state regulators' cost recovery authority,[450] and that section 251(e)(2) states that carriers, not customers, shall bear the costs of number portability.[451]

131. Iowa Network Services, NTCA & OPASTCO, PacTel, and U S WEST argue that the Commission should allow carriers to recover their carrier-specific costs directly related to number portability through their interconnection charges to other carriers. They argue that interconnection rates should include the incumbent LECs' costs of providing number-portability-capable service because such capability benefits the carriers that interconnect.[452] They also argue that without intercarrier charges, facilities-based carriers will be forced to raise their rates, which would put them at a competitive disadvantage.[453] Finally, they argue that allowing intercarrier charges would avoid the administrative burdens of a cost pool.[454]

132. SBC, USTA, AT&T, MCI, TRA, Time Warner, Teleport, MFS, GST, the California Public Utilities Commission, AirTouch Communications, and WinStar argue that the Commission should forbid carriers from recovering their carrier-specific costs directly related to number portability from other carriers through interconnection charges. They argue that allowing carriers to recover their number portability costs by raising rates for intercarrier services would defeat the purpose of

---

[446] MCI Comments at 8-9.

[447] Calif. Pub. Utils. Comm'n Comments at 14 (arguing, also, that such determination concerning recovery from end users should be left to the states); MCI Reply at 11-12.

[448] Calif. Pub. Utils. Comm'n Comments at 14 (arguing, also, that such determination concerning recovery from end users should be left to the states). *Cf.* ALTS Comments at 4, 6 (arguing that a line-item charge would mislead customers); Sprint Comments at 11-12 (arguing that line-item number portability charges would likely cause customer confusion).

[449] ALTS Comments at 4, 6; MCI Reply at 11-12; Teleport Comments at 10-11.

[450] Calif. Pub. Utils. Comm'n Reply at 6; MCI Reply at 11-12.

[451] NTCA & OPASTCO Comments at 11-12.

[452] Iowa Network Servs. Reply at 7-10; NTCA & OPASTCO Comments at 3-5; PacTel Reply at 3-4 (arguing that a purchaser of unbundled switching is purchasing all the functionality of the switch, including number portability). *See also* U S WEST Reply at 20 (arguing that carriers should recover number portability costs from resellers and purchasers of unbundled switching to the extent that number portability costs are not reflected in the rates for those services).

[453] Iowa Network Servs. Reply at 7-10; NTCA & OPASTCO Comments at 3-5.

[454] Iowa Network Servs. Reply at 7-10.

establishing a competitively neutral distribution of costs among carriers in the first place,[455] and would make intercarrier services less cost-based and constitute an implicit subsidy.[456] They also argue that intercarrier recovery would not be competitively neutral because incumbent LECs would be able to use their market power and control over bottleneck services such as interconnection or access to shift their number portability costs onto other carriers.[457] In addition, they argue that intercarrier recovery would reduce carriers' incentives to implement number portability efficiently because they would be less accountable for their own costs.[458] Finally, they argue that intercarrier recovery could confuse and delay the negotiated agreement process,[459] and would be inappropriate because all carriers will have number portability costs.[460] Commenters generally support, however, allowing intercarrier charges for number portability services one carrier provides to another, such as performing the N-1 query, whether by arrangement or default.[461]

133. ALTS, BellSouth, the California Public Utilities Commission, Frontier, GTE, ITCs, PacTel, Sprint, and TRA advocate treating incumbent LECs' carrier-specific costs directly related to number portability as exogenous. They argue that such costs are beyond the carriers' control because number portability was mandated by Congress.[462] PacTel argues that the Commission should include a new number portability rate element in the current Common Line basket, updating the rates annually to ensure that LECs would be able to recover portability costs as subscribers change providers.[463] MCI argues, on the other hand, that placing number portability in a basket with other services would allow LECs to institute a price squeeze on potential competitors by raising the number portability charges and lowering other charges to their end-user customers.[464] If the Commission treats number portability

---

455 Calif. Pub. Utils. Comm'n Comments at 13-14; GST Reply at 8-9; Teleport Comments at 12; WinStar Comments at 8.

456 MFS Comments at 4; USTA Reply at 17-18; WinStar Comments at 8.

457 AirTouch Communications Reply at 12-13; AT&T Comments at 10-11, 15-16; MCI Comments at 8-10; TRA Comments at 9-10, 11-12; Time Warner Reply at 15-16.

458 AT&T Comments at 12-13; MFS Reply at 8.

459 USTA Reply at 17-18.

460 SBC Comments at 16; TRA Comments at 9-10.

461 Ameritech Reply at 8; Calif. Dep't Consumer Affairs Comments at 24-25; NYNEX Comments at 13; Teleport Comments at 12. *See also* U S WEST Reply at 20 (arguing that carriers should recover portability costs from carriers that use unbundled network switching to provide number portability).

462 ALTS Comments at 4, 6; Bell South Comments at 8; Calif. Pub. Utils. Comm'n Reply at 8; Frontier Comments at 4-5; GTE Reply at 10 n.28; ITCs Comments at 4; PacTel Comments at 12; Sprint Comments at 11-12; TRA Comments at 13-14.

463 PacTel Comments at 12.

464 MCI Comments at 13.

as a price cap service. MCI advocates treating number portability as a new service, and creating new rate elements.[465] Carriers would base the number portability rates on the cost of the service, and the rates would be included in the price cap index the following year.[466]

134. AT&T, MCI, MFS, NCTA, Time Warner, and WinStar object to allowing price-cap carriers to recover their number portability costs through exogenous adjustments to their access charges.[467] The Ad Hoc Telecommunications Users Committee argues that exogenous treatment is inappropriate because incumbent LECs have control over their own number portability costs,[468] because exogenous treatment would lower the "X" factor and thus raise access rates,[469] and because exogenous treatment could lead to double recovery.[470]

C. Discussion

135 We will allow but not require incumbent LECs subject to rate-of-return or price-cap regulation to recover their carrier-specific costs directly related to providing number portability through a federal charge assessed on end-users. As noted, we recognize consumers' sensitivity to end-user charges. Under the circumstances before us, however, we conclude that allowing carriers to recover number portability costs in this manner will best serve the goals of the statute. The Commission has only two sources from which it may allow carriers to recover costs in the federal jurisdiction: charges IXCs pay LECs for exchange access, and end-user charges. Because number portability is not an access-related service and IXCs will incur their own costs for the querying of long-distance calls,[471] we will not allow LECs to recover long-term number portability costs in interstate access charges. Nor would it likely be competitively neutral to do so. We note further that, like long-term number portability, the advent of equal access and 800 number portability required carriers to incur significant costs to modify their networks, although these costs were not recovered in

---

[465] *Id.*

[466] *Id.*

[467] AT&T Reply at 7 n.18, 12-13; MCI Comments at 12-13; MFS Reply at 9; NCTA Reply at 9-10; Time Warner Reply at 15-16 & n.41; WinStar Reply at 10. *See also* Bell Atlantic Comments at 7 (arguing that simply allowing incumbent LECs to treat their number portability costs as exogenous is an inadequate recovery mechanism if IXCs can buy unbundled network elements instead of access, and that treating number portability costs as exogenous is inconsistent with the goal of removing implicit subsidies); U S WEST Reply at 5-6 (arguing that exogenous cost treatment is an inadequate means for incumbent LEC recovery if IXCs can buy unbundled network elements instead of access); USTA Reply at 17-18 (arguing that exogenous adjustments are ineffective when carriers can bypass rates through the purchase of unbundled elements).

[468] Ad Hoc Comments at 1-2.

[469] *Id.* at 2-3.

[470] *Id.*

[471] *See supra* paragraph 15.

federal end-user charges. These improvements led to increased competition and substantial long-term benefits to consumers. We anticipate a similarly positive effect for consumers with respect to the impact of number portability, namely the increased choice and lower prices that result from the competition that number portability helps make possible. We also note that number portability will facilitate number pooling, which will help forestall telephone-number exhaust.[472]

136. Carriers not subject to rate regulation—such as competitive LECs, CMRS providers, and non-dominant IXCs—may recover their carrier-specific costs directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act.[473] Requiring incumbent LECs to bear their own carrier-specific costs of providing number portability and allowing them to recover those costs from their own customers, while leaving other carriers unregulated, meets our competitive neutrality standard that number portability cost distribution and recovery mechanisms: (1) not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) not disparately affect the ability of competing service providers to earn a normal return.[474]

137. Requiring incumbent LECs to bear their own carrier-specific costs directly related to providing number portability will not disadvantage any telecommunications carrier because under an LRN implementation of long-term number portability a carrier's costs should vary directly with the number of customers that carrier serves. Our examination of the present record and cost data that some carriers have provided indicates that incumbent LECs, competitive LECs, and CMRS providers competing in the local service market are likely to have approximately the same long-run incremental number portability cost of winning a subscriber.[475] Incumbent LECs will likely have large absolute costs because of their large networks, but they also will have a large customer base over which to spread those costs; competitive LECs and CMRS providers will likely incur fewer absolute costs because of their smaller networks, but they will also likely have smaller customer bases over which to spread those costs. We are not persuaded by arguments by SBC and GTE that incumbent LECs will

[472] Until now, local service providers had to be assigned entire NXXs, even if they did not need all 10,000 of the NXX's telephone numbers. With the advent of number portability, carriers can share NXXs and pool unused telephone numbers, which results in more efficient allocation of telephone numbers and reduces the need for measures such as area-code overlays to combat telephone number exhaust. *See generally* INDUSTRY NUMBERING COMMITTEE, ALLIANCE FOR TELECOMMUNICATIONS INDUSTRY SOLUTIONS, INITIAL REPORT TO THE NORTH AMERICAN NUMBERING COUNCIL ON NUMBER POOLING, VERSION 3 (INC97-1017-019 Jan. 16, 1998).

[473] Although generally not rate regulated, competitive LECs, CMRS providers, and IXCs—as telecommunications carriers—remain subject to the Communications Act and Commission rules.

[474] For an explanation of the competitive neutrality standard, see Part III.C.

[475] *Cf.* Mo. Pub. Servs. Comm'n Comments at 4-5 (stating that "[a]bsent evidence to the contrary, it is reasonable to expect the individual carriers to bear their direct specific costs of providing number portability. Given that new competitors will also be required to bear similar costs for their own networks, no particular competitive disadvantage to either incumbent or new entrant is apparent.").

incur disproportionately higher costs than competitive LECs.[476] SBC considered only switch-specific software costs and ignored other significant portability costs that an entrant would incur, such as for signalling and operational support systems. SBC further assumes that the entrant will quickly "fill" its switch with customers to enjoy the lower per-line costs SBC projects. Similarly, GTE assumes that competitive LECs will serve forty-five thousand lines per switch. Furthermore, GTE treats all its switch upgrade costs as direct portability costs, and does not distinguish its costs directly related to providing number portability from those not directly related to providing number portability, such as its general network upgrades.

138. Some small LECs and CMRS providers may find that their smaller customer bases make adding number portability capability in their own networks uneconomical. Such carriers can benefit from economies of scale similar to those of incumbent LECs, however, by arranging for another carrier or third-party provider to provide number portability functionality for them, as it appears that a market for number portability services may develop. Similarly, they may enter into cooperative agreements with other small carriers. Conversely, such carriers might install number portability in their networks and sell any excess number portability capacity to other carriers. Because resellers will simply be reselling the number portability capability of a facilities-based carrier, we would expect that resellers will also have comparable incremental number portability costs. Similarly, we would expect that carriers competing for interexchange customers will bear the costs of providing number portability associated with N-1 queries in rough proportion to the number of interexchange customers they serve; the more customers they win, the more queries they must perform to terminate those customers' calls. IXCs and CMRS providers can either query interexchange calls themselves or arrange for other carriers or third-party providers to provide querying service for them.

139. Regulating the recovery of number portability costs by incumbent LECs, but not by competitive LECs, CMRS providers, and IXCs, also will not place any carrier at a competitive disadvantage. Creating an optional end-user charge for incumbent LECs ensures that such carriers have a reasonable opportunity to recover their costs and at the same time allows carriers to forego some or all of such charges if they deem it necessary to compete in the local service market. Similarly, unregulated carriers may recover their costs in end-user charges if they choose to do so. Regulating incumbent LEC recovery should not disadvantage incumbent LECs as compared to competitive LECs because competitive LECs also have number portability costs under LRN. If a customer does switch to a competitive LEC, that customer may have to pay end-user charges or service rates that recover the competitive LEC's portability costs. Thus, the customer's incentive to leave the incumbent LEC is offset by the fact that the customer would then have to pay charges that recover the competitive LEC's number portability costs. Therefore, incumbent LECs are unlikely to have a material disadvantage in competing for subscribers under our recovery mechanism.

140. We reject requests that we pool number portability costs. Because we expect that carriers' costs directly related to providing long-term number portability under LRN will vary directly with the number of customers the carriers serve, pooling carrier-specific number portability costs is not necessary to achieve competitive neutrality. In addition, pooling has significant disadvantages. Carriers participating in a pool would have less incentive to minimize costs because they would not

[476] *See supra* note 414 and accompanying text for their arguments.

realize all the savings achieved by providing number portability more efficiently, and would not be fully responsible for any cost-increasing inefficiencies. Instituting a cost pool would also require the Commission to impose significant cost accounting and distribution mechanisms on both regulated and previously unregulated carriers.

141. We also observe that under LRN-based long-term number portability the LEC serving the customer who places a local call will generally be responsible for the query. Thus, winning a customer shifts responsibility for the queries needed to complete that customer's local calls from the original carrier to the acquiring carrier. Similarly, the IXC serving the customer who places an interexchange call will be responsible for any query needed. Consequently, under the LRN approach to number portability, query costs follow customers, and requiring each carrier to bear its own carrier-specific costs directly related to providing number portability is competitively neutral.

142. Under the requirements we adopt today, an incumbent LEC may recover its carrier-specific costs directly related to providing long-term number portability to end users by establishing a monthly, number portability charge in tariffs filed with the Commission. We determine, however, that recovery from end users should be designed so that end users generally receive the charges only when and where they are reasonably able to begin receiving the direct benefits of long-term number portability. To achieve this, we will allow the monthly number-portability charge to begin no earlier than February 1, 1999, on a date the incumbent LEC carrier selects, and to last no longer than five years. We choose this start date for the federal end-user charge because by the end of 1998, under the implementation schedule the Commission has mandated for number portability, a large proportion of customers will reside in areas where number portability is available: the largest 100 MSAs.[477] In contrast, if the end-user charge were permitted to start immediately, substantially fewer customers would be in areas where number portability is available. Thus, the February 1, 1999, start date will better tailor recovery to areas where customers can receive number portability than would an earlier start date for recovery. We choose February 1, 1999, rather than January 1, 1999, to provide a brief additional time-period to ensure that number portability has been implemented before customers incur charges, and because carriers will also be filing tariff revisions to take effect January 1, 1999, to implement PICC and SLC adjustments.

143. In addition, we will allow an incumbent LEC to assess the monthly charge only on end users it serves in the 100 largest MSAs, and end users it serves outside the 100 largest metropolitan statistical areas from a number-portability-capable switch. Because carriers may make any switch number-portability capable, this approach will encourage carriers to install number portability and help ensure that end-users are assessed number portability charges only where they are reasonably likely to be benefitting from number portability. If a carrier receives an extension past February 1, 1999, for one of the 100 largest MSAs, the carrier may not assess the monthly charge in that MSA until it begins providing long-term number portability in the MSA. The incumbent local

[477] The top 100 MSAs comprise approximately 61.1% of all subscriber lines, a conservative estimate, based on our calculation that approximately 61.1% of the United States population resides in the 100 largest MSAs. We calculated this percentage from population estimates of the United States Census Bureau. *See* MA-96-5 Estimates of the Population of Metropolitan Areas: Annual Time Series, July 1, 1991 to July 1, 1996 (Internet release date: December 1997) (available at http://www.census.gov/population/estimates/metro-city/ma96-05.txt).

exchange carrier shall levelize[478] the monthly number-portability charge over five years by setting a rate for each charge at which the present value of the revenue recovered by the charge equals the present value of the cost being recovered. The carriers shall use a discount rate equal to the rate of return on investment which the Commission has authorized for regulated interstate access services pursuant to Part 65 of the Commission's Rules. Currently, this rate is 11.25 percent.[479] We require levelization of the monthly charge to protect consumers from varying rates. Incumbent LECs may collect less than the maximum allowable charge, or decline to collect the charge, from some or all of their customers so long as they do so in a reasonable and nondiscriminatory manner. Thus we will not, for example, allow incumbent LECs to offset such lower charges by collecting higher charges in areas where no competitive carriers are present.[480]

144. We choose the five-year period for the end-user charge because it will enable incumbent LECs to recover their portability costs in a timely fashion, but will also help produce reasonable charges for customers and avoid imposing those charges for an unduly long period. A longer period would increase the total charges consumers pay because, as discussed, carriers' unrecovered capital investment will be subject to an 11.25 percent return, while a shorter period would increase the monthly charge to consumers. We find that a five-year period effectively balances these concerns. After a carrier establishes its levelized end-user charge in the tariff review process we do not anticipate that it may raise the charge during the five-year period unless it can show that the end-user charge was not reasonable based on the information available at the time it was initially set. Furthermore, once incumbent LECs have recovered their initial implementation costs, number portability will be a normal network feature, and a special end-user charge will no longer be necessary to ensure that incumbent LECs recover their number portability costs on a competitively neutral basis. Carriers can recover any remaining costs through existing mechanisms available for recovery of general costs of providing service.

145. We will allow incumbent LECs to assess one monthly number-portability charge per line, except that one PBX trunk shall receive nine monthly number-portability charges and one primary rate interface integrated services digital network line (PRI ISDN line) shall receive five monthly number-portability charges. As the Commission observed in the access charge reform proceeding, a PBX trunk provides on average the equivalent service capacity of nine Centrex lines.[481] We set the PBX charge at nine times the level of the ordinary charge because Centrex and PBX arrangements are functionally equivalent. To do otherwise could encourage a large customer to

---

[478] A levelized rate is one that is calculated to remain constant over a recovery period and is set at the level at which the discounted present value of the stream of payments is equal to the discounted present value of the stream of costs over the period.

[479] *See generally In re Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd. 7507 (1990).

[480] *Cf.* Teleport Comments at 12 (expressing concern that incumbent LECs might shift number portability costs to customers in areas with less competition).

[481] *In re Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd. 16606, 16615-18 (1997) (Second Access Reform Reconsideration Order).

choose one of these arrangements over the other because of the number portability charge, and thus would not be competitively neutral.[482] Similarly, the access charge reform proceeding set a five to one equivalency ratio for PRI ISDN lines,[483] and we apply that equivalency ratio here. To further our goals for the Lifeline Assistance Program, carriers may not impose the monthly number-portability charge on customers in that program.

146. The incumbent LEC may assess the monthly charge on resellers of the incumbent LEC's local service, as well as on purchasers of switching ports as unbundled network elements under section 251 of the Communications Act, because the incumbent LEC will be providing the underlying number portability functionality even though the incumbent LEC will no longer have a direct relationship with the end user. Thus, it appears that the reseller and the purchaser of the unbundled switch port will receive all their number portability functionality through these arrangements. Consequently, allowing the incumbent LEC to assess the charge will be competitively neutral because the reseller and the purchaser of the switch port will incur the charge in lieu of costs they would otherwise incur in obtaining long-term number portability functionality elsewhere. The unregulated reseller and purchaser of the switch port may recover in any lawful manner the charges the incumbent LEC assesses on them. The incumbent local exchange carrier may not assess the monthly number-portability charge on carriers that purchase the incumbent local exchange carrier's local loops as unbundled network elements under section 251. We do not allow the incumbent LEC to assess such a charge because the unbundled loop does not contain the number portability functionality. The purchaser of the unbundled loop will still be responsible for providing such functionality, and thus incurring elsewhere the corresponding cost. Congress has directed the Commission to provide for the recovery of number portability costs.[484] Because we have so provided in this proceeding, we presume that state commissions will not include the costs of number portability when pricing unbundled network elements.

147. As noted above, local service providers may query calls for other carriers by arrangement,[485] or may receive unqueried, default-routed traffic when the N-1 carrier has not performed the query.[486] Thus we also will allow incumbent LECs to recover from N-1 carriers in a federally tariffed query-service charge their carrier-specific costs directly related to providing prearranged and default query services. Other carriers required or permitted to file federal tariffs may also tariff query services. Carriers shall indicate in the cost support section of their tariffs the portion of their carrier-specific costs directly related to providing number portability attributable to the number

[482] *Cf. id.* at 16616 (setting equivalency factors to prevent the PICC from affecting consumer choice between Centrex and PBX).

[483] *See id.* at 16618.

[484] *See* 47 U.S.C. § 251(e)(2) (stating that all telecommunications carriers shall bear the costs of number portability "as determined by the Commission"). For further discussion of the Commission's jurisdiction over number portability and the scope of its mandate, see parts III.A and III.B, *supra*.

[485] *See supra* paragraph 15.

[486] *See supra* paragraph 21.

portability services they provide end users, and that portion attributable to the number portability query services they provide on behalf of other carriers.

148. All the RBOCs and GTE have submitted, and periodically revised, estimates of the costs they will incur in implementing LRN number portability. In reviewing the record, we observe a wide variation among companies' estimated costs and their categorization of those costs as directly related or not directly related to providing number portability. We remind the incumbent LECs that only costs directly related to providing number portability are recoverable through the long-term number portability cost recovery mechanism we establish in this *Third Report and Order*. As discussed above in Part IV, the Chief, Common Carrier Bureau, will further consider methods of identifying the portion of joint costs that incumbent LECs should treat as carrier-specific costs directly related to providing number portability.

149. We disagree with GTE's argument that we must create a uniform, mandatory end-user charge for recovery of number portability costs to avoid a violation of the Fifth Amendment.[487] A violation of the takings clause of the Fifth Amendment requires a taking of private property without just compensation. The rules we adopt here do not create a *per se* taking because they do not involve governmental action that physically invades or permanently appropriates any carrier's property; rather, they require members of a regulated industry to incur costs in furtherance of valid regulatory and statutory goals mandated by Congress.[488] Even if costs are incurred as a result of these rules, the rules do not constitute a regulatory taking because their net effect or end result is not confiscatory.[489] Furthermore, even if deemed a regulatory taking, our rules do not violate the Fifth Amendment because just compensation is available. Under prevailing standards, a rate regulation of the type

[487] *See supra* text accompanying note 425.

[488] *See, e.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222, 225-27 (1986) (concluding that provisions of 1980 federal pension act amendments that required employer withdrawing from multiemployer pension plan to fund its share of the plan obligations incurred during its association with the plan did not constitute a taking: governmental action did not physically invade or permanently appropriate any of the employer's assets, but instead adjusted benefits and burdens of economic life to promote common good; legislature may require one party to use own assets to the benefit of another without violating the takings clause; fact that employer must pay money to comply with act was but necessary consequence of Act's regulatory mechanism); Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (stating that even though taxes or special municipal assessments indisputably "take" money from individuals or businesses, they are not treated as *per se* takings under the Fifth Amendment because of government's high degree of control over commercial dealings); Atlas Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990) (concluding that requiring uranium producer to spend large sums of money for reclamation and decommissioning of uranium tailings and mill upon termination of license was not a taking because requiring expenditures of funds is not a taking).

[489] *See* Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896) (stating that government rate regulation may effect a taking of property without due process of law when the permitted rate is so unjust as to destroy the value of the property for all purpose for which it was acquired); Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989) (stating that whether a particular rate is so low as to be confiscatory will depend to some extent on what is a fair rate of return given the risks under a rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return).

adopted here will violate the Fifth Amendment only if it "threatens the financial integrity of the regulated carrier or otherwise impedes its ability to attract capital."[490] Our recovery mechanism allows incumbent LECs a reasonable opportunity to receive just compensation for their carrier-specific costs directly related to long-term number portability through monthly number-portability charges and intercarrier charges for query services. Other carriers not subject to economic rate regulation may recover their costs in any lawful manner. Because providing this opportunity for recovery of costs is sufficient to avoid a taking, we need not mandate a uniform end-user charge for all carriers. We also note that when the government provides an adequate procedure for obtaining compensation, a takings claim is not ripe for review until the litigant has used the procedure and been denied just compensation.[491]

VII. REGULATORY FLEXIBILITY ACT ANALYSIS

150. As required by Section 603 of the Regulatory Flexibility Act (RFA),[492] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice*. The Commission sought written public comments on the proposals in the *Further Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA)[493] in this *Third Report and Order* is as follows:

151. Need for and Objectives of Rules: The Commission, in compliance with sections 251(b)(2), 251(d)(1), and 251(e)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, adopts rules and procedures intended to ensure the implementation of telephone number portability with the minimum regulatory and administrative burden on telecommunications carriers. In implementing the statute, the Commission has the responsibility to adopt rules that will implement most quickly and effectively the national telecommunications policy embodied in the Act and to promote the pro-competitive, deregulatory markets envisioned by Congress. Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace. To prevent the cost of number portability from itself becoming a barrier to local competition, however, section 251(e)(2) requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."

---

[490] Illinois Bell Telephone Co., 988 F.2d 1254, 1263 (D.C. Cir. 1993).

[491] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 818 (8th Cir. July 18, 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

[492] *See* 5 U.S.C. § 603.

[493] Our analysis conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, P.L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Subtitle II of CWAAA is the "Small Business Regulatory Fairness Act of 1996" (SBREFA).

152. Summary of Significant Issues Raised by the Public in Response to the IRFA: There were no comments submitted specifically in response to the IRFA. However, in their general comments, some commenters assert that if competition is to emerge in the local exchange market the regulatory standards adopted by the Commission to recover the cost of implementing long-term number portability should not disproportionately burden small entities, especially new entrants. In the *Third Report and Order*, we adopt rules and regulations to ensure that the way all telecommunications carriers, including small entities, bear the costs of number portability does not significantly affect any carrier's ability to compete with other carriers for customers in the marketplace.

153. Description and Estimate of Number of Small Businesses to Which Rules Will Apply: The Regulatory Flexibility Act generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.[494] A small business concern is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[495] According to the SBA's regulations, entities engaged in the provision of telephone service may have a maximum of 1,500 employees in order to qualify as a small business concern.[496] This standard also applies in determining whether an entity is a small business for purposes of the RFA.

154. Our rules governing long-term number portability cost recovery apply to all telecommunications carriers, including incumbent LECs, new LEC entrants, and IXCs, as well as cellular, broadband PCS, and covered SMR providers. Small incumbent LECs subject to these rules are either dominant in their field of operations or are independently owned and operated, and, consistent with the Commission's prior practice, are excluded from the definition of "small entities" and "small business concerns."[497] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.[498] Out of an abundance of caution, however, for regulatory flexibility analysis purposes,[499] we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."

155. Insofar as our rules apply to all telecommunications carriers, they may have an economic impact on a substantial number of small businesses, as well as on small incumbent LECs.

---

494 *See* 15 U.S.C. § 632.

495 *Id.*

496 *See* 13 C.F.R. § 121.201.

497 *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16144-45, 16149-50 (1996) (Local Competition Order), *vacated in part, aff'd in part*, Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792-800 & n. 21 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

498 *Local Competition Order*, 11 FCC Rcd. at 16150.

499 *See* 13 C.F.R. § 121.902(b)(4).

The rules may have an impact upon new entrant LECs and small incumbent LECs, as well as cellular, broadband PCS, and covered SMR providers. Based upon data contained in the most recent census and a report by the Commission's Common Carrier Bureau, we estimate that 2,100 small entities could be affected. We have derived this estimate based on the following analysis:

156. According to the 1992 Census of Transportation, Communications, and Utilities, there were approximately 3,469 firms with under 1,000 employees operating under the Standard Industrial Classification (SIC) category 481 -- Telephone. See U.S. Dept. of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities (issued May 1995). Many of these firms are the incumbent LECs and, as noted above, would not satisfy the SBA definition of a small business because of their market dominance. There were approximately 1,350 LECs in 1995. Industry Analysis Division, FCC, Carrier Locator: Interstate Service Providers at Table 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (December 1995). Subtracting this number from the total number of firms leaves approximately 2,119 entities which potentially are small businesses which may be affected. This number contains various categories of carriers, including small incumbent LECs, competitive access providers, cellular carriers, interexchange carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. Some of these carriers—although not dominant—may not meet the other requirement of the definition of a small business because they are not "independently owned and operated." See 15 U.S.C. Section 632(a)(1). For example, a PCS provider which is affiliated with a long distance company with more than 1,500 employees would not meet the definition of a small business. Another example would be if a cellular provider is affiliated with a dominant LEC. Thus, a reasonable estimate of the number of "small businesses" affected by this Order would be approximately 2,100.

157. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules: The *Third Report and Order* concludes that the costs raised in this proceeding should be divided into three categories: shared costs, carrier-specific costs directly related to number portability, and carrier-specific costs not directly related to number portability. Shared costs are those costs incurred on behalf of the industry as a whole, such as the costs of the regional database administrator to build, operate, and maintain the databases needed to provide number portability. The *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for that region. While carriers already track their sales to end-users for billing purposes, they will need to identify their regional end-user revenues. That information, along with periodic updates, must be provided to the regional database administrator for the appropriate allocation of shared costs.

158. The *Third Report and Order* requires incumbent LECs to maintain records that detail both the nature and specific amount of those carrier-specific costs that are directly related to number portability, and those carrier-specific costs that are not directly related to number portability. The *Third Report and Order* directs carriers and interested parties to file comments by August 3, 1998, and reply comments by September 16, 1998, proposing ways to apportion the different types of joint costs between portability and nonportability services. The *Third Report and Order* requires incumbent LECs that choose to recover their carrier-specific costs directly related to providing number portability

to use federally-tariffed end-user charges.

159. Steps Taken to Minimize Impact on Small Entities Consistent with Stated Objectives: The record in this proceeding indicates that the need for customers to change their telephone numbers when changing local service providers is a barrier to local competition. Requiring number portability, and ensuring that all telecommunications carriers bear the costs of number portability on a competitively neutral basis, will make it easier for competitive providers, many of which may be small entities, to enter the market. We have attempted to keep regulatory burdens on all local exchange carriers to a minimum to ensure that the public receives the benefits of the expeditious provision of service provider number portability in accordance with the statutory requirements. For example, the *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for the region. Apportioning shared costs in this way will further the statutory purpose of ensuring that carriers bear the costs of number portability on a competitively neutral basis. Furthermore, the *Third Report and Order* concludes that regulated carriers may identify that portion of their joint costs that is demonstrably an incremental cost that they incurred in the provision of long-term number portability. Allowing such identification recognizes that number portability will cause some carriers, including small entities, to incur costs that they would not ordinarily have incurred in providing telecommunications services. The *Third Report and Order* also concludes that non-dominant carriers, such as competitive LECs, CMRS providers, and IXCs—some of which will be small entities—are not subject to extensive regulation and may recover their number portability costs in any manner otherwise consistent with Commission rules and the Communications Act.

160. Report to Congress: The Commission shall send a copy of this FRFA, along with this *Third Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[500] A copy of the *Third Report and Order* and this FRFA (or summaries thereof) will also be published in the Federal Register and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.[501]

VIII. PAPERWORK REDUCTION ACT

161. This *Third Report and Order* concludes that the costs raised in this proceeding should be divided into three categories: shared costs, carrier-specific costs directly related to number portability, and carrier-specific costs not directly related to number portability. Shared costs are those costs incurred on behalf of the industry as a whole, such as the costs of the regional database administrator to build, operate, and maintain the databases needed to provide number portability. The *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for the region. While carriers already track their sales to end-users for billing purposes, they

---

[500] *See* 5 U.S.C. § 801(a)(1)(A).

[501] *See* 5 U.S.C. § 604(b).

will need to identify their regional end-user revenues. That information, along with periodic updates, must be provided to the regional database administrator for the appropriate allocation of shared costs. The *Third Report and Order* also requires incumbent LECs to maintain records that detail both the nature and specific amount of those carrier-specific costs that are directly related to number portability, and those carrier-specific costs that are not directly related to number portability. The *Third Report and Order* requires incumbent LECs that choose to recover their carrier-specific costs directly related to providing number portability to use federally-tariffed end-user charges. These information collection requirements are contingent upon approval of the Office of Management and Budget (OMB).

IX. ORDERING CLAUSES

162. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 2, 4(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332, Part 52 of the Commission's rules IS AMENDED as set forth in Appendix B hereto.

163. IT IS FURTHER ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

164. IT IS FURTHER ORDERED that the policies, rules and requirements adopted herein SHALL BE EFFECTIVE 30 days after publication in the Federal Register, except for the collections of information that are contingent upon approval of the Office of Management and Budget (OMB).

165. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, References Operations Division, SHALL SEND a copy of this Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

166. IT IS FURTHER ORDERED that incumbent local exchange carriers MAY FILE tariffs to take effect no earlier than February 1, 1999, setting out the monthly number portability charge they intend to collect from their end users, in accordance with this Order.

167. IT IS FURTHER ORDERED that pursuant to authority contained in section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), the Chief, Common Carrier Bureau, IS DELEGATED authority to determine appropriate methods for apportioning joint costs among portability and nonportability services, and to issue any orders to provide guidance to incumbent LECs before they file their tariffs, which are to take effect no earlier than February 1, 1999. To facilitate determination of the portion of joint costs carriers shall treat as carrier-specific costs directly related to providing number portability, and to facilitate evaluation of the cost support that carriers will file in their federal tariffs, carriers and interested parties may file comments by August 3, 1998 proposing ways to apportion the different types of joint costs. Carriers and interested

parties may file reply comments by September 16, 1998.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A—List of Commenters

Comments

1. Ad Hoc Telecommunications Users Committee
2. AirTouch Communications Inc.
3. AirTouch Paging, Cal-Autofone and Radio Electronic Products Corp. (Airtouch Paging)
4. Ameritech
5. Association for Local Telecommunications Services (ALTS)
6. AT&T
7. Bell Atlantic
8. BellSouth Corp.
9. California Department of Consumer Affairs (Calif. Dep't Consumer Affairs)
10. California Public Utilities Commission (Calif. Pub. Utils. Comm'n)
11. Cellular Telecommunications Industry Association (CTIA)
12. Cincinnati Bell Telephone Co.
13. Colorado Public Utilities Commission Staff and Office of Consumer Counsel (Colo. Pub. Utils. Comm'n)
14. Florida Public Service Commission (Fla. Pub. Servs. Comm'n)
15. Frontier Corp.
16. General Services Administration (GSA)
17. GTE
18. Illinois Commerce Commission (Ill. Commerce Comm'n) (late-filed Aug. 19, 1996)
19. ITCs Inc.
20. MCI
21. MFS Communications Co.
22. Missouri Public Service Commission (Mo. Pub. Servs. Comm'n)
23. National Telephone Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Cos. (NTCA & OPASTCO)
24. New York Department of Public Service (N.Y. Dep't Pub. Serv.)
25. Nextel Communications Inc.
26. NYNEX
27. Omnipoint Communications
28. Pacific Telesis Group (PacTel)
29. Personal Communications Industry Association (PCIA)
30. Public Utilities Commission of Ohio (Ohio Pub. Utils. Comm'n)
31. SBC Communications
32. Scherers Communications Group
33. Sprint
34. Telecommunications Resellers Association (TRA) (late-filed Aug. 19, 1996)
35. Teleport Communications Group
36. Time Warner Communications Holdings Inc.
37. U S WEST Inc.
38. United States Telephone Association (USTA)
39. WinStar Communications Inc.

Replies

1. AirTouch Communications Inc.
2. AirTouch Paging, Cal-Autofone and Radio Electronic Products Corp. (Airtouch Paging)
3. Ameritech
4. Arch Communications Group
5. AT&T
6. Bell Atlantic
7. BellSouth Corp.
8. California Public Utilities Commission (Calif. Pub. Utils. Comm'n)
9. Cincinnati Bell Telephone Co.
10. CommNet Cellular Inc.
11. General Services Administration (GSA)
12. GST Telecom Inc. (late-filed Sept. 18, 1996)
13. GTE
14. Iowa Network Services Inc. (Iowa Net. Servs.)
15. MCI
16. MFS Communications Co.
17. MobileMedia Communications
18. National Association of Regulatory Utilities Commissioners (NARUC)
19. National Cable Television Association (NCTA)
20. National Exchange Carriers Association Inc. (NECA)
21. NYNEX
22. Omnipoint Communications
23. Pacific Telesis Group (PacTel)
24. Paging Network Inc.
25. Personal Communications Industry Association (PCIA)
26. SBC Communications
27. Sprint
28. Telecommunications Resellers Association (TRA)
29. Time Warner Communications Holdings Inc.
30. U S WEST Inc.
31. United States Telephone Association (USTA)
32. Washington Utilities and Transportation Commission (Wash. Utils. Transp. Comm'n)
33. WinStar Communications Inc. (late-filed Sept. 17, 1996)

Appendix B—Final Rules

Part 52, subpart C, of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority for Part 52 continues to read as follows:

AUTHORITY: Sec. 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. § 151, 152, 154, 155, 251 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-27, 251-52, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 153, 154, 201-05, 207-09, 218, 225-27, 251-52, 271 and 332 unless otherwise noted.

§ 52.32 Allocation of the shared costs of long-term number portability

(a) The local number portability administrator, as defined in section 52.21(h), of each regional database, as defined in section 52.21(1), shall recover the shared costs of long-term number portability attributable to that regional database from all telecommunications carriers providing telecommunications service in areas that regional database serves. Pursuant to its duties under section 52.26, the local number portability administrator shall collect sufficient revenues to fund the operation of the regional database by:

(1) assessing a $100 yearly contribution on each telecommunications carrier identified in paragraph (a) that has no intrastate, interstate, or international end-user telecommunications revenue derived from providing telecommunications service in the areas that regional database serves, and

(2) assessing on each of the other telecommunications carriers providing telecommunications service in areas that regional database serves, a charge that recovers the remaining shared costs of long-term number portability attributable to that regional database in proportion to the ratio of:

(A) the sum of the intrastate, interstate, and international end-user telecommunications revenues that such telecommunications carrier derives from providing telecommunications service in the areas that regional database serves,

(B) to the sum of the intrastate, interstate, and international end-user telecommunications revenues that all telecommunications carriers derive from providing telecommunications service in the areas that regional database serves.

(b) The local number portability administrator for a particular regional database may require the telecommunications carriers providing telecommunications service in the areas served by the regional database to provide once a year that data necessary to calculate, pursuant to subparagraph (a)(1) or (a)(2) of this section, those carriers' portions of the shared costs of long-term number portability attributable to that regional database. All such telecommunications carriers shall comply with any such requests.

(c) Once a telecommunications carrier has been allocated, pursuant to subparagraph (a)(1) or (a)(2) of this section, its portion of the shared costs of long-term number portability attributable to a regional database, the carrier shall treat that portion as a carrier-specific cost directly related to providing number portability.

§ 52.33 Recovery of carrier-specific costs directly related to providing long-term number portability

(a) Incumbent local exchange carriers may recover their carrier-specific costs directly related to providing long-term number portability by establishing in tariffs filed with the Federal Communications Commission a monthly number-portability charge, as specified in subparagraph (a)(1), and a number portability query-service charge, as specified in subparagraph (a)(2).

(1) The monthly number-portability charge may take effect no earlier than February 1, 1999, on a date the incumbent local exchange carrier selects, and may end no later than five years after that date.

(A) An incumbent local exchange carrier may assess each end user it serves in the 100 largest metropolitan statistical areas, and each end user it serves from a number-portability-capable switch outside the 100 largest metropolitan statistical areas, one monthly number-portability charge per line except that:

(i) One PBX trunk shall receive nine monthly number-portability charges.

(ii) One PRI ISDN line shall receive five monthly number-portability charges.

(iii) Lifeline Assistance Program customers shall not receive the monthly number-portability charge.

(B) An incumbent local exchange carrier may assess on carriers that purchase the incumbent local exchange carrier's switching ports as unbundled network elements under section 251 of the Communications Act, and resellers of the incumbent local exchange carrier's local service, the same charges as described in subparagraph (a)(1)(A), as if the incumbent local exchange carrier were serving those carriers' end users.

(C) An incumbent local exchange carrier may not assess a monthly number-portability charge for local loops carriers purchase as unbundled network elements under section 251.

(D) The incumbent local exchange carrier shall levelize the monthly number-portability charge over five years by setting a rate for the charge at which the present value of the revenue recovered by the charge does not exceed the present value of the cost being recovered, using a discount rate equal to the rate of return on investment which the Commission has prescribed for interstate access services pursuant to Part 65 of the Commission's Rules.

(2) The number portability query-service charge may recover only carrier-specific costs directly related to providing long-term number portability that the incumbent local exchange carrier incurs to provide long-term number portability query service to carriers on a prearranged and default basis.

(b) All telecommunications carriers other than incumbent local exchange carriers may recover their number portability costs in any manner consistent with applicable state and federal laws and regulations.

Separate Statement
of Chairman William E. Kennard

Re: Telephone Number Portability, Third Report and Order, CC Docket No. 95-116.

Local number portability is crucial to the development of competition in local telephone markets because it means that consumers need not give up their phone numbers when changing carriers. As today's order recognizes, the cost of implementing local number portability throughout the nation is not insignificant. That's because the provisions governing local number portability, like other requirements of the Telecommunications Act of 1996, call for converting a network that was designed for use by a single carrier into a network capable of accommodating multiple competitors. Congress had the wisdom to mandate this conversion, however, because it perceived the attendant costs to be an investment in competition that ultimately will bring more choice and lower prices to consumers. Time and again we have seen these investments pay off for consumers, and I am confident that the investment in local number portability that the Act mandates will reap rewards for the American consumer.

Congress specifically directed that the costs of number portability "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[1] I believe today's order implements a cost recovery mechanism that meets this standard.

While I support our decision today, I believe we must carefully monitor the rollout of local number portability and the pace of local telephone competition, particularly for residential customers. Unless a consumer has competitive choice for local phone service, the availability of local number portability is meaningless. We should not ask consumers to pay for number portability before they are able to enjoy the benefits of the competitive options that number portability is designed to facilitate.

The Commission should revisit today's decision if it appears that consumers will end up paying for number portability before they have a competitive choice in local phone service. For now, I am satisfied that the rules we adopt today fulfill Congress's directive that the costs of number portability be borne by all telecommunications carriers in a competitively neutral manner, and therefore I support today's order.

[1] 47 U.S.C. § 251(e)(2).

Concurring Statement
of Commissioner Susan Ness

Re: *Local number portability cost recovery*

I respectfully concur, in part, because of reservations about that portion of the order that concerns the ability of incumbent local exchange carriers (ILECs) to recover their costs from residential consumers.

The Telecommunications Act of 1996 requires local number portability. There will be real costs of deploying number portability, but Congress concluded -- wisely, I believe -- that the benefits to competition exceed the costs. It's just common sense that consumers will be reluctant to change carriers if to do so they must also change their telephone number.

The costs of deploying number portability will be borne by all carriers -- ILECs, competitive local exchange carriers (CLECs), wireless carriers, and interexchange carriers (IXC). There are shared costs, which will be pooled, and the costs each carrier must incur to perform its own "look-up" responsibilities. In an interstate long distance call, for example, the look-up requirement falls on the IXC (which is the "n minus one" carrier), and it must either perform the requisite look-up itself or pay someone else to do so. In a local call from one subscriber to her neighbor, the caller's LEC (whether ILEC or CLEC) will bear the look-up responsibility.

All of these carriers are entitled to an opportunity to recover their costs. All of these carriers, except ILECs, will have an opportunity to recover these costs *only from customers who have a choice of service provider*; generally speaking, any customer of a CLEC, IXC, or wireless carrier can obtain local exchange service, long distance service, or wireless service, respectively, from at least one additional supplier. In contrast, the ILEC will, in most instances, be able to seek to recover its costs from subscribers who do *not* have a choice of local exchange service provider. This is of special concern in the case of residential consumers, who -- notwithstanding long distance rate reductions and substantial decreases in the prices for wireless services -- thus far have seen few direct benefits from the Telecommunications Act of 1996.

The deployment of number portability will be of significant help in establishing conditions conducive to local competition, thereby speeding the day when more residential consumers will be able to choose their local carrier. Nonetheless, I am troubled by the decision to permit a single class of carriers -- the ILECs -- to recover their costs from consumers who do not yet have a choice. I would have preferred that residential consumers be shielded from these charges until they actually experience the benefits of competition. There are a variety of ways in which this could have been done, consistent with the objective -- reflected in a variety of other Commission decisions -- of attempting to ensure that consumers reap the benefits of the changing telecommunications environment at the same time they experience the costs of the transition. But I am pleased that the Commission has decided that these costs should be borne only by consumers who reside in areas where local number portability is available, since these consumers at least have a greater prospect -- if not the current reality -- of experiencing the benefits of local competition.

I also want to note that I would have been willing to support a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. This approach would have enabled state commissions to make

judgments about the appropriate manner and timing of cost recovery on the part of ILECs.

There is no one "right" answer to the questions with which the Commission has been wrestling in this proceeding. But this order represents a workable approach to the matter, and, as we all recognize, a final order is long overdue. I particularly want to salute the carriers for not permitting the Commission's delay in the cost recovery rulemaking from distracting them from their responsibility to proceed apace in deploying LNP capabilities in the telephone network.

Separate Statement
of Commissioner Harold Furchtgott-Roth

Re: *Telephone Number Portability, Third Report and Order, CC Docket No. 95-116.*

Despite my concurrence with today's order, I remain deeply troubled by the steps that this Commission has taken on local number portability over the past two years.

For decades, compensation for telecommunications services has been dominated by a rate-of-return framework. Carriers without competitive pressures would "incur costs," and regulators were left to find funding mechanisms to "recover" those costs with an appropriate return on investment. It all seemed a very convenient process, at least for the regulators and the regulated.

In practice, however, this system of cost reimbursement was fatally flawed. It harmed carriers because they were spared the efficiency-inducing incentives to keep costs as low as possible. It harmed regulators because they were forced to review and to monitor countless and tedious records of costs. It harmed consumers because they ended up paying for this inefficient system of regulation.

"Cost recovery for local number portability" has turned into a replay of the same old cost-based, rate-of-return regulation. Rates are not based on a price cap but on reimbursement of actual costs. Consumers will again be faced with bills for services based not on market conditions but on regulatory fiat. Paradoxically, consumers will be paying a federally determined fee for a service that is by definition local.

A better approach would have been, from the outset and before any costs were incurred, to have established a maximum amount that could have been recovered from a federal fee. If through prudent management, company costs were less than the federal cap, the company would be rewarded for its efficiency. If costs were greater than the federal cap, the company could still seek recovery from appropriate state authorities. In either case, companies would have had a strong incentive to keep costs as low as possible to the benefit of consumers.

As Commissioner Ness noted, I also would have supported a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. Such an approach would have ensured that state commissions were involved in the method and timing of cost recovery.

Hindsight is, of course, 20-20. Yesterday's Commission decisions, and the subsequent reaction of businesses, cannot be changed. Today's decision is perhaps the best that can be made of a compromised situation.

Separate Statement
of Commissioner Gloria Tristani

Re: *Telephone Number Portability*

Telecommunications carriers, including many incumbent local exchange carriers, have expended significant sums of money to comply with the requirement that they deploy local number portability technology. They are entitled to a fair opportunity to recover that money. At the same time, I support allowing incumbent LECs to seek recovery of those costs only from customers who are most likely to see the real and direct benefits of local number portability. Today's Order appropriately balances these concerns.

As the Order candidly acknowledges, giving incumbent local carriers the option of recovering number portability costs from consumers through a monthly charge is a sensitive matter and is not undertaken lightly. However, this is neither the first nor the last time we will need to make a difficult decision to achieve sound public policy. Congress made the right decision when it required carriers to deploy number portability, and I believe we have made the right decision on how carriers will recover the costs associated with that deployment.

I have little doubt that those consumers who have number portability capability deployed on their lines will see significant benefits. For example, they will not have to change phone numbers to take advantage of a better offer from a competitor. Even if those consumers do not change carriers, the mere presence of number portability will make competition more effective in that serving area, thereby bringing those same customers the fruits of competition -- better service and lower prices. Thus, while I recognize the potential for consumer dissatisfaction associated with any line item charge, I am convinced that the short-term cost of number portability will be outweighed by the tangible long term benefits for those consumers served by number portability technology.

# # #

EXHIBIT 19

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)	)	MB Docket No. 10-148
	)	
Amendments to Section 340 of the Communications Act	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: July 22, 2010 **Released: July 23, 2010**

Comment Date: [20 days after date of publication in the Federal Register]
Reply Comment Date: [30 days after date of publication in the Federal Register]

By the Commission:

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we propose changes to our satellite television "significantly viewed" rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA).[1] Section 203 of the STELA amends Section 340 of the Communications Act of 1934 ("Communications Act" or "Act"), which gives satellite carriers the authority to offer out-of-market but "significantly viewed" broadcast television network stations as part of their local service to subscribers.[2] The STELA requires the Commission to issue final rules in this proceeding on or before Wednesday, November 24, 2010.[3]

2. Significantly viewed ("SV") stations are television broadcast stations that the Commission has determined have sufficient over-the-air (*i.e.*, non-cable or non-satellite) viewing[4] to be considered local for certain purposes and so are not constrained by the boundary of that station's local market or Designated Market Area ("DMA"). The individual TV station, or cable operator or satellite carrier that seeks to carry the station, may petition the Commission to obtain "significantly viewed" status for the station,[5] and placement on the SV List.[6] The designation of "significantly viewed" status allows a

---

[1] The Satellite Television Extension and Localism Act of 2010 (STELA) § 203, Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010) (§ 203 codified as amended at 47 U.S.C. § 340, other STELA amendments codified in scattered sections of 17 and 47 U.S.C.). The STELA was enacted on May 27, 2010 (S. 3333, 111th Cong.). This proceeding to implement STELA § 203 (titled "Significantly Viewed Stations"), 124 Stat. at 1245, and the related statutory copyright license provisions in STELA § 103 (titled "Modifications to Statutory License for Satellite Carriers in Local Markets"), 124 Stat. at 1227-28, is one of a number of Commission proceedings that are required to implement the STELA.

[2] 47 U.S.C. § 340. We note that the nature of SV carriage under Section 340 is permissive (and not mandatory), meaning the statute applies when a satellite carrier chooses to carry an SV station and has obtained retransmission consent from such SV station. *Id*. at § 340(d).

[3] The STELA requires the Commission to take all actions necessary to promulgate a rule to implement the amendments within 270 days after the date of the enactment. STELA § 203(b). The STELA establishes February 27, 2010 as its effective date or "date of enactment," even though the law was enacted by Presidential signature on May 27, 2010. STELA § 307. Congress backdated the STELA's effective date to protect the satellite carriers that continued to provide distant signals (which, at that time, included significantly viewed signals) during a two-day gap in coverage of the distant signal statutory copyright license, which expired on February 28 and was not extended until March 2, 2010. Congress passed four short-term extensions of the distant signal statutory copyright license (December 19, 2009, March 2, March 25 and April 15, 2010) before finally passing STELA to reauthorize the license for five years.

[4] To qualify for significantly viewed status (*i.e.*, for placement on the significantly viewed list or "SV List," *see* note 6, *infra*), an SV station can be either a "network" station or an "independent" station, with network stations requiring a higher share of viewing hours. 47 C.F.R. § 76.5(i)(1)-(2). The Commission's rules define network station as one of the "three major national television networks" (*i.e.*, ABC, CBS or NBC). 47 C.F.R. § 76.5(j) and (k). Parties may demonstrate that stations are significantly viewed either on a community basis or on a county-wide basis. 47 C.F.R. § 76.54(b), (d).

[5] *See* 47 C.F.R. §§ 76.5, 76.7, 76.54. A TV station, cable operator or satellite carrier that wishes to have a station designated significantly viewed must file a petition pursuant to the pleading requirements in 47 C.F.R. § 76.7(a)(1) and use the method described in 47 C.F.R. § 76.54 to demonstrate that the station is significantly viewed as defined in 47 C.F.R. § 76.5(i). *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17290, ¶ 25. *See also* ¶ 7, *infra*.

[6] The significantly viewed list or "SV List" identifies the list of stations the Commission has determined to be significantly viewed in specified counties and communities. The list applies to both cable and satellite providers. The Commission updates this list as necessary upon the appropriate demonstrations by stations or cable or satellite providers. The current SV List is available on the Media Bureau's website at http://www.fcc.gov/mb/.

station assigned to one market to be treated as a "local" station with respect to a particular cable or satellite community[7] in another market, and, thus, enables its cable or satellite carriage into said community in that other market.[8] Whereas cable operators have had carriage rights for SV stations since 1972,[9] satellite carriers have had such authority only since 2004[10] and may only retransmit SV network stations to "eligible" satellite subscribers.[11] These satellite subscriber eligibility restrictions are intended to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network.[12]

3. Section 203 of the STELA eliminates two statutory limitations on subscriber eligibility to receive SV network stations from satellite carriers.[13] To implement the STELA, we propose the following changes to our satellite subscriber eligibility rules:

- We propose to eliminate the requirement that satellite carriers offer "equivalent bandwidth" to the local and SV network station pair, and to require instead carriage of the local network affiliate in high definition (HD) as a precondition to satellite carriage of the HD programming of an SV station affiliated with the same network.
- We propose to eliminate the requirement that a subscriber receive the specific local network station (as part of the satellite carrier's "local-into-local" service) in order for that subscriber to also receive an SV station affiliated with the same network and to require instead that the subscriber receive local-into-local satellite service.

[7] We note that the SV station can only be carried in the cable or satellite community in which it is significantly viewed. *See* 47 C.F.R. §§ 76.5(dd) (defining cable "community unit") and 76.5(gg) (defining a "satellite community").

[8] For copyright purposes, significantly viewed status means that cable and satellite providers may carry the distant but SV station with the reduced copyright payment obligations applicable to local (in-market) stations. *See* 17 U.S.C. §§ 111(a), (c), (d), and (f), as amended by STELA § 104 (relating to cable statutory copyright license) and 122(a)(2), as amended by STELA § 103 (relating to satellite statutory copyright license).

[9] *See Cable Television Report and Order*, 36 FCC 2d 143, 174, ¶ 83 (1972) ("*1972 Cable R&O*") (adopting the concept of "significantly viewed" signals to differentiate between otherwise out-of-market television stations "that have sufficient audience to be considered local and those that do not").

[10] Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) created Section 340 of the Communications Act, which authorized satellite carriage of Commission-determined SV stations. *See* SHVERA § 202, Pub. L. No. 108-447, 118 Stat 2809, 3393 (2004) (codified in 47 U.S.C. § 340). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) ("*SHVERA Significantly Viewed Report and Order*").

[11] *See* 47 U.S.C. § 340(b) and 47 C.F.R. § 76.54(g)-(h). *See also* ¶ 8, *infra* (for background).

[12] 47 U.S.C. § 340(b)(1)-(2). *See*, *e.g.*, SHVERA Significantly Viewed Report and Order, 20 FCC Rcd at 17314, ¶ 94. The Copyright Act's definitions of "network station" and "non-network station" will apply for purposes of determining subscriber eligibility to receive an SV network station. *See* 47 U.S.C. § 339(d) and 47 U.S.C § 122(j)(4), as amended, applying the definitions of such terms in 47 U.S.C § 119(d)(2) and (9). Unlike the definition in the Commission's rules, which specifically include only ABC, CBS and NBC (*see* note 4, *supra*), the Copyright Act definition of "network station" may include other stations. *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17294, ¶¶ 35-36 and note 102.

[13] 47 U.S.C. § 340(b)(1)-(2).

II. BACKGROUND

4. In May 2010, Congress passed and the President signed the STELA, which amends the 1988 copyright laws[14] and the Communications Act of 1934[15] to "modernize, improve and simplify the compulsory copyright licenses governing the retransmission of distant and local television signals by cable and satellite television operators."[16] Congress intended for the STELA to increase competition and service to satellite and cable consumers and update the law to reflect the completion of the digital television (DTV) transition.[17] Notably, Congress reauthorizes the statutory copyright license for satellite carriage of SV stations and moves that license from the distant signal statutory copyright license provisions to the local signal statutory copyright license provisions.[18] The STELA is the fourth in a series of statutes that addresses satellite carriage of television broadcast stations.

5. In the 1988 Satellite Home Viewer Act ("1988 SHVA"), Congress established a statutory copyright license to enable satellite carriers to offer subscribers who could not receive the over-the-air signal of a broadcast station access to broadcast programming via satellite.[19] The 1988 SHVA was intended to protect the role of local broadcasters in providing over-the-air television by limiting satellite delivery of network broadcast programming to subscribers who were "unserved" by over-the-air signals. The 1988 SHVA also permitted satellite carriers to offer distant "superstations" to subscribers.[20]

---

[14] *See* 17 U.S.C. §§ 119 and 122. 17 U.S.C. § 119 contains the statutory copyright license for satellite carriage of "distant" network stations (limited to "unserved households") and 17 U.S.C. § 122 contains the statutory copyright license for satellite carriage of "local" stations (generally defined as stations and subscribers in the same DMA but which now also includes SV stations that are treated as "local" for copyright purposes, even though such stations are not in the same DMA as the subscribers). The STELA also amended 17 U.S.C. § 111, the statutory copyright license for cable carriage of broadcast stations.

[15] *See* 47 U.S.C. §§ 325, 338, 339 and 340.

[16] *See* House Judiciary Committee Report dated Oct. 28, 2009, accompanying House Bill, H.R. 3570, 111th Cong. (2009), H.R. REP. NO. 111-319, at 4 ("*H.R. 3570 Report*"). There was no final Report issued to accompany the final version of the STELA bill (S. 3333) as it was enacted. *See* Senate Bill, S. 3333, 111th Cong. (2010) (enacted). Therefore, for the relevant legislative history, we look to the Reports accompanying the various predecessor bills (*e.g.*, H.R. 3570, H.R. 2994, and S. 1670). These Reports remain relevant with respect to those provisions that were unchanged, which is the case for the amendments to the "significantly viewed" provisions (*see* STELA §§ 203, 103). Finally, also relevant are certain remarks made in floor statements in passing the bill (S. 3333). *See* "House of Representatives Proceedings and Debates of the 111st Congress, Second Session," 156 Cong. Rec. H3317, H3328-3330 (daily ed. May 12, 2010) (statements of Reps. Conyers and Smith) ("*House Floor Debate*") and "Senate Proceedings and Debates of the 111st Congress, Second Session," 156 Cong. Rec. S3435, (daily ed. May 7, 2010) (statement of Sen. Leahy) ("*Senate Floor Debate*").

[17] *See H.R. 3570 Report* at 5. As of the June 12, 2009 statutory DTV transition deadline, all full-power television stations stopped broadcasting in analog and are broadcasting only digital signals. 47 U.S.C. § 309(j)(14)(A).

[18] STELA § 103 (moving the SV signal statutory copyright license from § 119(a)(3) to § 122 (a)(2) of title 17). In doing so, Congress now defines SV signals as another type of local signal, rather than as an exception to distant signals. The move also means that Congress won't need to reauthorize the SV signal license in five years, when the distant signal license will expire.

[19] The Satellite Home Viewer Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119). The 1988 SHVA was enacted on November 16, 1988, as an amendment to the copyright laws. The 1988 SHVA gave satellite carriers a statutory copyright license to offer distant signals to "unserved" households. 17 U.S.C. § 119(a).

[20] *See id*. § 119(a)(1) (2009). The STELA § 102(g) replaces the term "superstation" with the term "non-network station." This change in wording has no substantive impact on our rules. A non-network station (previously superstation) is defined as a television station, other than a network station, licensed by the Commission that is (continued….)

6. In the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress expanded satellite carriers' ability to retransmit local broadcast television signals directly to subscribers.[21] A key element of the SHVIA was the grant to satellite carriers of a statutory copyright license to retransmit local broadcast programming, or "local-into-local" service, to subscribers. A satellite carrier provides "local-into-local" service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.[22] Generally, a television station's "local market" is the DMA in which it is located.[23] Each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA or the station does not provide a good quality signal to the carrier's local receive facility.[24] This is commonly referred to as the "carry one, carry all" requirement. The Commission implemented the SHVIA by adopting rules for satellite carriers with regard to carriage of broadcast signals, retransmission consent, and program exclusivity that paralleled the requirements for cable service.[25]

7. In the 2004 Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Congress established the framework for satellite carriage of "significantly viewed" stations.[26]

(Continued from previous page)
retransmitted by a satellite carrier. Non-network stations are still not considered "network stations" for copyright purposes. *See* 17 U.S.C. § 119(d)(9); *see also* note 12, *supra*.

[21] The Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999). The SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers). In the SHVIA, Congress amended both the copyright laws, 17 U.S.C. §§ 119 and 122, and the Communications Act, 47 U.S.C. §§ 325, 338 and 339.

[22] 47 C.F.R. § 76.66(a)(6).

[23] *See* 17 U.S.C. §122(j)(2)(A); 47 U.S.C. § 340(i)(1). DMAs, which describe each television market in terms of a unique geographic area, are established by Nielsen Media Research based on measured viewing patterns. *See* 17 U.S.C. § 122(j)(2)(A)-(C).

[24] *See* 47 U.S.C. § 338.

[25] *See* Implementation of the Satellite Home Viewer Improvement Act 1999: Broadcast Signal Carriage Issues, CS Docket No. 00-96, Retransmission Consent Issues, CS Docket No. 99-363, Report and Order, 16 FCC Rcd 1918 (2000) ("*SHVIA Signal Carriage Order*"); Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act, ET Docket No. 00-90, Report, 15 FCC Rcd 24321 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, CS Docket No. 00-2, Report and Order, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"); Implementation of the Satellite Home Viewer Improvement Act of 1999, Enforcement Procedures for Retransmission Consent Violations, Order, 15 FCC Rcd 2522 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445 (2000).

[26] The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, 118 Stat 2809 (2004) (codified in scattered sections of 17 and 47 U.S.C.). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005." The SHVERA contained additional mandates requiring Commission action, but not relevant to this proceeding, which concerns the carriage of SV stations. *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, 20 FCC Rcd 10339 (2005) ("*Reciprocal Bargaining Order"*) (imposing a reciprocal good faith retransmission consent bargaining obligation on multichannel video programming distributors); *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, Report and Order, 20 FCC Rcd 14242 (2005) (requiring satellite carriers to carry local TV broadcast stations in Alaska and (continued….)

Specifically, the SHVERA expanded the statutory copyright license to allow satellite carriers to retransmit a distant (out-of-market) network station as part of their local service to subscribers in a local market where the Commission determined that distant station to be "significantly viewed" (based on over-the-air viewing).[27] In providing this authority to satellite carriers, Congress sought to create parity with cable operators, who had already had such authority to offer SV stations to subscribers for more than 38 years.[28] The Commission implemented the SHVERA's significantly viewed provisions by publishing a list of SV stations[29] and adopting rules for stations to attain eligibility for significantly viewed status and for subscribers to receive SV stations from satellite carriers. The SHVERA mandated that the Commission apply the same station eligibility requirements (*i.e.*, rules and procedures for parties to show that a station qualifies for significantly viewed status) to satellite carriers that already applied to cable operators.[30] However, to prevent a satellite carrier from favoring SV stations over traditional local market stations, the SHVERA also imposed subscriber eligibility requirements that applied only to satellite carriers.[31]

8. The SHVERA limited subscribers' eligibility to receive SV digital television stations from satellite carriers in two key ways. First, the SHVERA allowed a satellite carrier to offer SV stations only to subscribers that received the carrier's "local-into-local" service.[32] The Commission interpreted

(Continued from previous page)
Hawaii); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Procedural Rules*, Order, 20 FCC Rcd 7780 (2005) ("*Procedural Rules Order*") (adopting procedural rules concerning satellite carriers' notifications to TV broadcast stations and obligations to conduct signal testing); *Public Notice*, "Media Bureau Seeks Comment For Inquiry Required By the on Rules Affecting Competition In the Television Marketplace," MB Docket No. 05-28, 20 FCC Rcd 1572 (2005) (opening inquiry concerning the impact of certain rules and statutory provisions on competition in the television marketplace).

[27] In the SHVERA, Congress again amended both the Communications Act, 47 U.S.C. §§ 325, 338, 339 and 340, and the copyright laws, 17 U.S.C. §§ 119 and 122. In creating a statutory copyright license for satellite carriers to offer significantly viewed stations as part of their local service to subscribers, Congress distinguished between out-of-market stations that had significant over-the-air viewership in a local market (*i.e.*, significantly viewed stations) and truly "distant" stations.

[28] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17280-1, ¶ 2 (2005). In 1972, the Commission adopted the concept of "significantly viewed" stations for cable television to differentiate between out-of-market television stations "that have sufficient audience to be considered local and those that do not." *1972 Cable R&O*, 36 FCC 2d at 174, ¶ 83. The Commission concluded at that time that it would not be reasonable if choices on cable were more limited than choices over the air, and gave cable carriage rights to stations in communities where they had significant over-the-air (non-cable) viewing. *Id.*

[29] *See* note 6, *supra*.

[30] *See* 47 C.F.R. § 76.5, 76.7 and 76.54(a)-(d). As mandated by the SHVERA, the Commission required satellite carriers or broadcast stations seeking significantly viewed status for satellite carriage to follow the same petition process now in place for cable carriage.

[31] 47 U.S.C. § 340(b) (2004). The eligibility requirements also addressed the different carriage requirements that apply to cable (*i.e.*, "must carry" for all cable systems) as compared with satellite (*i.e.*, "carry one, carry all"). *See* ¶ 6, *supra*.

[32] *See id*. at §§ 340(b)(1) (analog service limitations) and (b)(2)(A) (digital service limitations) (2004). The Commission found that "subscriber receipt of 'local-into-local' service [was] unambiguously required by the statute." *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17304-5, ¶ 68. The SHVERA provided for two exceptions to the local service limitations, contained in 47 U.S.C. § 340(b)(3) and (4), respectively. Section 340(b)(3) allows satellite carriage of an SV network station to a subscriber when there is no local station affiliated with the same television network as the SV station present in the local market. Section 340(b)(4) allows a satellite carrier to privately negotiate with the local network station to obtain a waiver of the subscriber eligibility restrictions in Sections 340(b)(1) and 340(b)(2). While revising the eligibility limitations, the STELA retains these exceptions unchanged. *See* discussion in ¶ 19, *infra*.

this provision to further require that the subscriber receive the specific local network station (as part of the carrier's "local-into-local" service) in order for that subscriber to also receive an SV station affiliated with the same network (called the receipt of the "same network affiliate" requirement).[33] Second, the SHVERA allowed a satellite carrier to offer an SV digital station to a subscriber only if the carrier also provided to that subscriber the affiliated local network station in a format that used either (1) an "equivalent" amount of bandwidth for the local and SV network station pair, or (2) the "entire" bandwidth of the local station (called the "equivalent or entire bandwidth" requirement).[34] The Commission interpreted this provision to require an objective comparison of each station's use of its bandwidth in terms of megabits per second (mbps) or bit rate.[35]

III. DISCUSSION

9. STELA simplifies the significantly viewed provisions in Section 340(b) of the Communications Act to make it easier for satellite carriers to offer SV stations to subscribers.[36] The STELA makes two key changes to the significantly viewed provisions in Section 340(b) to ease the limitations on satellite subscriber eligibility to receive SV stations.[37] First, the STELA eliminates the equivalent or entire bandwidth requirement in Section 340(b)(2)(B).[38] In its place, the STELA permits a satellite carrier to carry in high definition (HD) format an SV network station, provided the satellite carrier also carries in HD format the local station in the market that is affiliated with the same network whenever the local station is available in HD format.[39] Second, the STELA strikes Section 340(b)(2)(A), the former digital service limitation which contained the "same network affiliate" limitation language, choosing, instead, to apply Section 340(b)(1), the former analog service limitation which contained only the "local-into-local" service limitation language, to digital stations.[40] Accordingly, we propose rules to implement the changes made to Section 340(b) of the Act and seek comment on them. Our discussion

---

[33] *Id*. at 17308, ¶ 76 (discussing digital service limitations). The SHVERA's language differed with respect to the analog and digital service limitations. The Commission noted that, "[u]nlike the ambiguity in its sister analog provision [of 47 U.S.C. § 340(b)(1) (2004)], Section 340(b)(2)(A) of the Act, 47 U.S.C. § 340(b)(2)(A) (2004), is clear in requiring a subscriber to receive "the digital signal of a network station in the subscriber's local market that is affiliated with the same television network." *Id*. *See also id*. at 17305, ¶ 70 (discussing analog service limitations).

[34] 47 U.S.C. § 340(b)(2)(B) (2004). Congress sought to prevent satellite carriers from offering the local network station's digital signal "in a less robust format" than the significantly viewed affiliate station's digital signal). *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94.

[35] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17315, ¶ 96.

[36] *See H.R. 3570 Report* at 4-5.

[37] STELA § 203(a) (amendments to be codified at 47 U.S.C. § 340(b)(1) and (2)). We note that the subscriber eligibility limitations in 47 U.S.C. § 340(b)(1)-(2), which are amended by the STELA § 203, do not apply to cable subscribers and that we do not propose to substantively amend our significantly viewed rules and procedures that satellite carriers share with cable operators. *See* 47 C.F.R. §§ 76.54(a)-(d); *see also* note 30, *supra*. Furthermore, we note that the STELA § 203 does not amend the "significantly viewed" provisions in the Communications Act governing the eligibility of a television broadcast station to qualify for "significantly viewed" status. *See* 47 U.S.C. §§ 340(a), (c)-(g). Therefore, we do not propose here any substantive (non-"housecleaning") changes to our rules and procedures implementing the significantly viewed station eligibility requirements. *See* 47 C.F.R. §§ 76.54(a)-(f), (j)-(k).

[38] The STELA § 203(a) removes the equivalent or entire bandwidth requirement in 47 U.S.C. § 340(b)(2)(B) and the STELA § 204(c) strikes the definition of equivalent or entire bandwidth in 47 U.S.C. § 340(i)(4).

[39] *See* 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

[40] *See Id*. § 340(b)(1) (2010), as amended by the STELA § 203(a).

below addresses these two key changes to Section 340(b), and also considers the impact of these changes on the statutory exceptions to this section. We also propose some non-substantive, "housecleaning" rule changes. We seek comment on our proposals and tentative conclusions set forth herein, and also invite comment on any other issues that may be relevant to our implementation of the STELA's amendments to the significantly viewed provisions.

A. Proposed Elimination of "Equivalent or Entire Bandwidth" Requirement

10. In the 2004 SHVERA, Congress enacted the "equivalent" or "entire" bandwidth requirements to prevent a satellite carrier from using technological means to discriminate against a local network station in favor of the SV network affiliate.[41] The Commission codified these requirements in Section 76.54(h) of the rules, which tracks the language of the statute.[42] In implementing this provision, the Commission strictly interpreted the statutory requirement for "equivalent bandwidth." As a result, satellite carriers must ensure virtually minute-by-minute comparisons between the satellite bandwidth allocated to carriage of the local station and the SV stations, making carriage of SV stations so burdensome that they are rarely carried.[43]

11. STELA eliminates the "equivalent or entire bandwidth" requirement from the statute,[44] changing the focus of the provision from "equivalent bandwidth" to "HD format." The STELA amends Section 340(b)(2) of the Act to read as follows:[45]

> SERVICE LIMITATIONS.—A satellite carrier may retransmit to a subscriber in high definition format the signal of a station determined by the Commission to be significantly viewed under subsection (a) only if such carrier also retransmits in high definition format the signal of a

[41] 47 U.S.C. § 340(b)(2)(B) (2004). The law reflects Congress' intent to prevent a satellite carrier from offering the local digital station "in a less robust format" than the SV digital station). *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94.

[42] 47 C.F.R. § 76.54(h) states: "Signals of significantly viewed network stations that originate as digital signals may not be retransmitted to subscribers unless the satellite carrier retransmits the digital signal of the local network station, which is affiliated with the same television network as the network station whose signal is significantly viewed, in either (1) at least the equivalent bandwidth of the significantly viewed station or (2) the entire bandwidth of the digital signal broadcast by such local station."

[43] In a House Energy and Commerce Committee Report, Congress noted that the "equivalent bandwidth" requirement "has generally served to discourage satellite carriers from using Section 340 to provide significantly viewed signals to qualified households." *See* House Energy and Commerce Committee Report dated Dec. 12, 2009, accompanying House Bill, H.R. 2994, 111th Cong. (2009), H.R. REP. NO. 111-349, at 16 ("*H.R. 2994 Report*"). *See also* Testimony of Bob Gabrielli, Senior Vice President, Broadcasting Operations and Distribution, DIRECTV, Inc., before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet, Hearing on Reauthorization of the of the Satellite Home Viewer Extension and Reauthorization Act, at 9 (Feb. 24, 2009) (asserting that it is "infeasible" for DIRECTV to "carry local stations in the same format as SV stations every moment of the day").

[44] We note that DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite LLC ("EchoStar") filed a joint petition, which remains pending, seeking reconsideration of two decisions in the 2005 *SHVERA Significantly Viewed Report and Order*. The first decision challenged by the petition is the Commission's interpretation of the "equivalent bandwidth" requirement. *See* DIRECTV and EchoStar Joint Petition for Reconsideration in MB Docket No. 05-49 (filed Jan. 26, 2006) ("*DIRECTV/ EchoStar Joint Petition*"). As a result of the STELA's elimination of this requirement, we believe the petition on this first issue is now moot. The second issue relates to the receipt of the local analog station affiliate requirement, which we also believe is moot. *See* note 63, *infra*. We expect to dismiss the petition soon after we issue final rules in this proceeding.

[45] 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

> station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station.

In doing so, Congress intended to facilitate satellite carriage of SV stations, which Congress thought was thwarted by the Commission's implementation of the predecessor provision.[46] The legislative history also indicates an intent by Congress to simplify the law and increase service to satellite consumers.[47] Additionally, in reauthorizing the SHVERA and mostly retaining its framework for the carriage of SV stations, the STELA retains the key goals of its predecessor statute – those being to foster localism and promote parity between cable and satellite service.[48] The principal concern of Congress was simply to clarify that a satellite carrier may provide an SV station in HD format when the local network affiliate is broadcasting only in Standard Definition (SD) format, as long as the carrier provides the local station in HD format whenever such format is available.[49] Moreover, in moving the statutory copyright license into the "local" license, we believe Congress recognized the "local" nature of an SV station,[50] and that carriage of an SV network station, in itself, promotes localism, as long as such station is not favored over the in-market (local) affiliate. Therefore, we tentatively conclude that, in revising the law, Congress intended for the Commission to create a workable framework that would generally provide for the satellite carriage of SV stations, while ensuring that the SV network station is not retransmitted in HD format unless the in-market affiliate is also retransmitted in HD format when so broadcast.

12. Accordingly, we propose to revise our rule in Section 76.54(h), which we now move to Section 76.54(g)(2), to eliminate the "equivalent or entire bandwidth" requirement and to provide that a satellite carrier may retransmit the HD signal of an SV station to a subscriber only if such carrier also retransmits the HD signal of the local station affiliated with the same network whenever that signal is available in HD format.[51] Our proposed rule tracks the revised language in Section 340(b)(2).[52] We also tentatively conclude that Section 340(b)(2), by its terms, only limits satellite carriage of an SV station with respect to HD format; it does not apply if the satellite carrier only carries the SV station in SD format.[53] Finally, we note that the Advanced Television Systems Committee ("ATSC"), a non-profit organization that develops voluntary standards for digital television, including HDTV, defines "high definition" television as having a screen resolution of 720p, 1080i, or higher, and believe that no further definition of "HD format" is needed to implement the statute.[54] We seek comment on our statutory

---

[46] *See* note 43, *supra*.

[47] *See H.R. 3570 Report* at 4-5. Congress wanted to clarify that a satellite carrier may provide an SV station in HD format, when the local network affiliate is broadcasting only in Standard Definition (SD) format, as long as the carrier provides the local station in HD format whenever such format is available. *H.R. 2994 Report* at 16.

[48] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94.

[49] *H.R. 2994 Report* at 16. The Commission interpreted the "equivalent bandwidth" requirement to include multicast signals. *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17315-16, ¶ 97 (concluding that "if the SV station transmits in HD and the local station transmits multiplexed (multicast) signal, then a satellite carrier may carry the SV station's HD signal, provided it also carries as many of the local station's multicast channels as necessary to match the bandwidth provided to the SV station."). However, the STELA's change to 47 U.S.C. § 340(b)(2) appears to refocus the comparison of the local and SV network station pair on HD format.

[50] *See* notes 14 and 18, *supra*.

[51] *See* Appendix A proposed rule 47 C.F.R. § 76.54(g)(2).

[52] *Id.*

[53] We propose including a sentence in our proposed rule to clarify this point. *See* Appendix A proposed rule 47 C.F.R. § 76.54(g)(2).

interpretation, proposed rule and tentative conclusions. We also seek comment on whether satellite carriers will face any technical problems in order to comply with our proposed rule.

13. Section 340(b)(2) permits retransmission of an SV network station in HD "only if such carrier also retransmits in high definition format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station."[55] We seek comment on the significance of this requirement. What is required by this language in the event a satellite carrier wants to retransmit an SV network affiliate and there is an in-market (local) station that is multicasting in HD format and airing programming affiliated with the same network in HD on a secondary stream? Is the satellite carrier required to carry this secondary stream in HD in order to be permitted to retransmit the SV station in HD even if the in-market station's primary stream is affiliated with another network? We also seek information on the extent to which stations are broadcasting HD programming from two different networks, and whether this is sufficiently rare that it can be addressed on a case-by-case basis, rather than in a rule or order.

B. Proposed Elimination of Requirement to Receive Specific Local Affiliate of the Same Network

14. We propose to amend our rules regarding subscriber eligibility to address STELA's change to Sections 340(b)(1) and 340(b)(2)(A) that eliminates the reference to receiving a specific local station affiliated with the same network as the SV station.[56] In the 2004 SHVERA, Congress authorized satellite carriers to offer SV stations to subscribers, but crafted Sections 340(b)(1) and 340(b)(2)(A) of the Act to protect localism by requiring that these subscribers also receive the carrier's local service.[57] These two provisions, however, contained different language. Whereas Section 340(b)(1),[58] the provision related to analog service, required only that the analog subscriber receive local service "pursuant to Section 338" – referring to the "carry one, carry all" carriage requirements that pertain to local stations,[59]

(Continued from previous page)

[54] *See, e.g., Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999*; CS Docket No. 98-120, Local Broadcast Signal Carriage Issues, CS Docket No. 00-96, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2628, ¶ 71 and n 204 (2001) (discussing several formats that are considered "high definition"). *See also Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999*; Local Broadcast Signal Carriage Issues, CS Docket No. 00-96, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 5351, 5354, ¶ 5 (2008). *See also*, *e.g.*, Newton's Telecom Dictionary definition of HDTV at 389 (20th ed. 2004) and the Commission's "DTV Shopping Guide" for consumers at http://www.dtv.gov/shopgde.html.

[55] *See* 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

[56] *See* 47 U.S.C. § 340(b)(1) (2010), as amended by the STELA § 203(a).

[57] 47 U.S.C. §§ 340(b)(1) and (b)(2)(A) (2004). Congress intended for these provisions to protect localism "by helping ensure that the satellite operator cannot retransmit into a market a significantly viewed digital signal of a network broadcast station from a distant market without also retransmitting into the market a digital signal of any local affiliate from the same network." *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-2.

[58] 47 U.S.C. § 340(b)(1) (2004), as established in 2004, stated: "With respect to a signal that originates as an analog signal of a network station, this section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338."

[59] 47 U.S.C. § 338. *See also* ¶ 6, *supra* (discussing the "carry one, carry all" requirement).

Section 340(b)(2)(A),[60] the provision related to digital service, contained additional language that expressly required the digital subscriber to receive the local station that was specifically "affiliated with the same television network" as the SV station (hereinafter referred to as the "same network affiliate" language). Thus, while each of these provisions clearly required a subscriber to at least receive the satellite carrier's local-into-local service before that subscriber could receive an SV station, it was unclear whether Section 340(b)(1) also required an analog subscriber to receive the specific local network station before that subscriber could receive the SV station affiliated with the same network.[61] For example, the statute did not address the situation where there is a local network station in the local market, but such station fails to request local carriage, refuses to grant retransmission consent, or is otherwise ineligible for local carriage.[62]

15. Ultimately, in the 2005 *SHVERA Significantly Viewed Report and Order*, the Commission interpreted both Sections 340(b)(1) and 340(b)(2)(A) to require that the subscriber receive the specific local station that is affiliated with the same network as the SV station.[63] Although Section 340(b)(1) lacked the express "same network affiliate" language as contained in Section 340(b)(2)(A), the Commission read the two provisions together and interpreted Section 340(b)(1) to also contain the "same network affiliate" requirement, based largely on the notion that Congress intended the two provisions to achieve similar ends.[64] Accordingly, the Commission adopted Section 76.54(g) of the rules, based on the "same network affiliate" language in Section 340(b)(2)(A).[65]

16. In the STELA, Congress strikes Section 340(b)(2)(A), which governed digital stations and included the "same network affiliate" language,[66] and removes the references to analog in Section

---

[60] 47 U.S.C. § 340(b)(2)(A) (2004), as established in 2004, stated: "With respect to a signal that originates as a digital signal of a network station, this section shall apply only if – (A) the subscriber receives from the satellite carrier pursuant to section 338 the retransmission of the digital signal of a network station in the subscriber's local market that is affiliated with the same television network ….."

[61] *Id*. at 17304-8, ¶¶ 68, 70-73.

[62] *See id*. at 17304, ¶ 67.

[63] *Id*. at 17305 and 17308, ¶¶ 70 and 76. This is the second decision challenged by the pending 2006 *DIRECTV/ EchoStar Joint Petition*. *See* note 44, *supra*. The petition challenged only the Commission's interpretation of the *analog* service limitation provision in 47 U.S.C. § 340(b)(1), essentially conceding the meaning of the plain language in the digital provision in 47 U.S.C. § 340(b)(2)(A). With the end of analog full-power broadcasting (due to the completion of DTV transition), we believe this second issue in the petition is also moot, and we expect to dismiss the petition soon after we issue final rules in this proceeding.

[64] *See id*. at 17307, ¶ 72. We note that the Commission also stated that its interpretation of Section 340(b)(1) was necessary to give meaning to the statutory exceptions in Sections 340(b)(3)-(4) (*see* note 32, *supra*). As discussed, *infra*, in paragraph 18 and note 75, we believe the statutory exceptions remain meaningful to, and are consistent with, our proposed interpretation of Section 340(b)(1) as amended by STELA.

[65] 47 C.F.R. § 76.54(g) states: "(g) Signals of analog or digital significantly viewed television broadcast stations may not be retransmitted by satellite carriers to subscribers who do not receive local-into-local service, including a station affiliated with the same network as the significantly viewed station, pursuant to §76.66 of this chapter; except that a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber who receives local-into-local service but does not receive a local station affiliated with the same network as the significantly viewed station, if: (1) There is no station affiliated with the same television network as the station whose signal is significantly viewed; or (2) The station affiliated with the same television network as the station whose signal is significantly viewed has granted a waiver in accordance with 47 U.S.C. 340(b)(4)."

[66] 47 U.S.C § 340(b)(2)(A) (2004). The digital local service provision provided: "With respect to a signal that originates as a digital signal of a network station, this section shall apply only if—(A) the subscriber receives from the satellite carrier pursuant to section 338 of this title the retransmission of the digital signal of a network station in (continued….)

340(b)(1) because of the completion of the DTV transition.[67] Specifically, the STELA amends Section 340(b)(1) of the Act to read as follows:[68]

> SERVICE LIMITED TO SUBSCRIBERS TAKING LOCAL-INTO-LOCAL SERVICE.—This section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal from that satellite carrier pursuant to section 338.

This provision, as amended, still contains the local-into-local service requirement,[69] but no longer requires carriage of the local affiliate of the same network. We presume that Congress acted intentionally and purposely when it chose to discard the "same network affiliate" language in Section 340(b)(2)(A), which language the Commission had relied upon for its more restrictive interpretation of Section 340(b)(1).[70]

17. Accordingly, we propose to revise our rule in Section 76.54(g) to reflect the amended statutory language in Section 340(b)(1).[71] We tentatively conclude that, by striking Section 340(b)(2)(A), Congress intended to eliminate the requirement that a subscriber receive the specific local station that is affiliated with the same network as the SV station. Therefore, our proposed rule requires only that a subscriber receive the satellite carrier's local-into-local service as a pre-condition for the subscriber to receive SV stations. We note that this interpretation would allow a satellite carrier to carry an SV station affiliated with a particular network if the local in-market station affiliated with the same network does not grant retransmission consent. We seek comment on our proposed rule and tentative conclusions.

C. Statutory Exceptions to the Subscriber Eligibility Limitations

18. While revising the subscriber eligibility limitations in Sections 340(b)(1) and 340(b)(2), the STELA retains without change the statutory exceptions in Sections 340(b)(3) and 340(b)(4) to these restrictions.[72] As noted above, the Section 340(b)(3) exception to the subscriber eligibility limitations

(Continued from previous page)
the subscriber's local market *that is affiliated with the same television network*; and" (B) the retransmission complies with either the (i) equivalent or (ii) entire bandwidth requirement. (Emphasis added.)

[67] 47 U.S.C § 340(b)(1) (2004). The analog local service provision provided: "With respect to a signal that originates as an analog signal of a network station, this section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338 of this title."

[68] 47 U.S.C. § 340(b)(1) (2010), as amended by the STELA § 203(a).

[69] The provision limits subscriber eligibility for SV stations to those subscribers that receive retransmissions from their satellite carrier pursuant to the "carry one, carry all" requirement in 47 U.S.C. § 338. *See* ¶ 6, *supra* (explaining that each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage).

[70] *See*, *e.g.*, *Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal citations omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another."); *Arizona Elec. Power Co-op. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987) ("When Congress includes a specific term in one section of a statute but omits in another section of the same Act, it should not be implied where it is excluded.").

[71] *See* Appendix A proposed rule 47 C.F.R. § 76.54(g)(1).

[72] 47 U.S.C. § 340(b)(3) and (4). We note that the STELA § 103 does amend the waiver provision in the corresponding satellite statutory copyright license in 17 U.S.C. § 122(a)(2) to eliminate the "sunset" provision and replace the term "superstation" with "non-network station" (*see* note 20, *supra*).

permits a satellite carrier to offer an SV network station to a subscriber when there is no local network affiliate present in the local market.[73] The Section 340(b)(4) exception permits a satellite carrier to privately negotiate with the local network station to obtain a waiver of the eligibility restrictions.[74] These two exceptions provide as follows:

> (b)(3) The limitations in paragraphs (1) and (2) shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the station whose signal is being retransmitted pursuant to this section.
>
> (b)(4) Paragraphs (1) and (2) shall not prohibit a retransmission of a network station to a subscriber if and to the extent that the network station in the local market in which the subscriber is located, and that is affiliated with the same television network, has privately negotiated and affirmatively granted a waiver from the requirements of paragraph (1) and (2) to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.

We tentatively conclude that these statutory exceptions will continue to apply as they have before and are consistent with our proposed interpretations of the amended subscriber limitation provisions in Sections 340(b)(1)-(2). We believe the statutory exceptions in Sections 340(b)(3)-(4) will continue to have meaning, and would not be superfluous, to our proposed interpretation of Section 340(b)(1).[75] For example, the statutory exceptions in Sections 340(b)(3)-(4) would still apply where local-into-local service is not available to a subscriber for technical reasons (such as the spot beam does not cover the DMA or its reception is blocked for an individual subscriber by terrain or foliage) or if local-into-local service is not yet offered by the satellite carrier to a subscriber's market. We seek comment on our tentative conclusions. We also invite comment on whether application of these unchanged statutory exceptions to the amended subscriber limitation provisions raise any issues that may be relevant to our implementation of the Section 340(b) significantly viewed provisions as a whole.

D. Housecleaning Rule Changes

19. In this section, we propose non-substantive changes to update our significantly viewed rules. We seek comment on these proposed rule changes.

20. <u>Section 76.5(i)</u>. We propose to amend Section 76.5(i) of the rules to replace its references to the term "non-cable" with the term "over-the-air."[76] In the 2005 *SHVERA Significantly Viewed Report and Order*, the Commission made this change to Section 76.54 to reflect the rule's true meaning, that being to indicate over-the-air viewing.[77] The Commission explained that, in the *1972 Order*, the concept of significant viewing was adopted to apply to over-the-air households, which at the time essentially meant households without cable (*i.e.*, non-cable households).[78] Thus, amending Section

---

[73] *Id*. at § 340(b)(3). *See* note 32, *supra*.

[74] *Id*. at § 340(b)(4).

[75] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶ 71. The Commission stated that if Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving an SV network affiliate, as opposed to receiving the specific local affiliate of the same network as the SV station, then there would be no need for the statutory exceptions in Sections 340(b)(3)-(4) to apply to Section 340(b)(1). *Id*.

[76] *See* Appendix A proposed rule change to 47 C.F.R. § 76.5(i).

[77] *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292-3, ¶ 32.

[78] *Id*. (citing to *1972 Cable R&O,* 36 FCC 2d at 175-6, ¶¶ 83-6).

76.5(i) to change “non-cable” to “over-the-air” reflects the true intent of the rule as it was in 1976, and is more consistent with the statute’s intent to establish parity between cable and satellite.

21. Section 76.54(c). We propose to amend Section 76.54(c) of the rules to strike the outdated reference to the analog Grade B contour.[79] In the 2004 *SHVERA Significantly Viewed Report and Order*, the Commission revised this rule to add the appropriate service contour relevant for a station’s digital signal – that being the noise limited service contour (“NLSC”).[80] With the completion of the transition, we now propose to eliminate this reference to Grade B contour.

IV. CONCLUSION

22. In conclusion, in this NPRM, we propose to simplify our satellite TV significantly viewed rules, as mandated by Congress. To implement Section 203 of the STELA, we propose changes to Section 76.54 of our rules. Our proposed rule changes – shown in Appendix A of this document – are modeled on the amended language in the statute. Specifically, we propose to eliminate both the “equivalent or entire bandwidth” requirement and the requirement for a subscriber to receive the specific local affiliate of the SV station.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

23. As required by the Regulatory Flexibility Act of 1980 (“RFA”),[81] the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this NPRM. The IRFA is attached to this NPRM as Appendix B.

B. Initial Paperwork Reduction Act of 1995 Analysis

24. This NPRM has been analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”),[82] and does not propose any new or modified information collection requirements.[83] In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002.[84]

C. Ex Parte Rules

25. Permit-But-Disclose. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules.[85] *Ex parte* presentations are permissible if disclosed in accordance with

[79] *See* Appendix A proposed rule change to 47 C.F.R. § 76.54(c).

[80] *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292, ¶ 31. (The digital NLSC is defined in 47 C.F.R. § 73.622(e).)

[81] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

[82] The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[83] The Commission does not propose to modify the existing information collections that relate to the Commission’s significantly viewed rules and procedures: OMB Control Nos. 3060-0311 (47 C.F.R. § 76.54), 3060-0960 (47 C.F.R. §§ 76.122, 76.123, 76.124, 76.127), and 3060-0888 (47 C.F.R. § 76.7). The Commission will continue to maintain these collections and seek extensions at the appropriate time.

[84] The Small Business Paperwork Relief Act of 2002 (“SBPRA”), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

[85] *See* 47 C.F.R. § 1.1206(b); *see also id.* §§ 1.1202, 1.1203.

Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[86] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

26. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[87] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[88]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

27. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

28. Accessibility Information. To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's

---

[86] *See id.* § 1.1206(b)(2).

[87] *See id*. §§ 1.415, 1419.

[88] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

29. Additional Information. For additional information on this proceeding, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VI. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that pursuant to Section 203 of the Satellite Television Extension and Localism Act of 2010, and Sections 1, 4(i) and (j), and 340 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 340, NOTICE IS HEREBY GIVEN of the proposals and tentative conclusions described in this Notice of Proposed Rulemaking.

31. IT IS FURTHER ORDERED that the Reference Information Center, Consumer Information Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rule Changes

The Federal Communications Commission proposes to amend Part 76 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

PART 76 – Multichannel Video and Cable Television Service.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.5 by revising paragraph (i) and the Note to paragraph (i) to read as follows:

   a. In § 76.5, paragraph (i), remove the words “other than cable television” and add, in their place, the words “over-the-air”.

   b. In § 76.5, Note to paragraph (i), in each place, remove the word “noncable” and add, in their place, the words “over-the-air”.

3. Amend § 76.54 by revising paragraphs (c), (g) and (h) to read as follows:

<u>§ 76.54 Significantly viewed signals; method to be followed for special showings.</u>

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted noise limited service contour, as defined in §73.622(e) of this chapter, the cable or satellite community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. * * *

* * * * *

(g) <u>Limitations on satellite subscriber eligibility</u>. A satellite carrier may retransmit a significantly viewed network station to a subscriber, provided the subscriber satisfies the conditions in paragraphs (1) and (2) of this section or qualifies for one of the two exceptions to these conditions provided in paragraphs (3) and (4) of this section.

(1) <u>Receipt of local-into-local service</u>. A satellite carrier may retransmit to a subscriber the signal of a significantly viewed station only if that subscriber receives local-into-local service, pursuant to §76.66 of this chapter.

(2) <u>Receipt in HD format</u>. A satellite carrier may retransmit to a subscriber in high definition (HD) format the signal of a significantly viewed station only if such carrier also retransmits in HD format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station. This condition does not apply to, nor prohibit, the retransmission to a subscriber of a significantly viewed station in standard definition (SD) format.

(3) <u>Exception if no network affiliate in local market</u>. The limitations in paragraphs (1) and (2) of this section will not prohibit a satellite carrier from retransmitting a significantly viewed network station to a

subscriber located in a local market in which there are no network stations affiliated with the same television network as the significantly viewed station.

(4) <u>Exception if waiver granted by local station</u>. The limitations in paragraphs (1) and (2) of this section will not apply if, and to the extent that, the local network station affiliated with the same television network as the significantly viewed station has granted a waiver in accordance with 47 U.S.C. § 340(b)(4).

(h) [reserved]

* * * * *

Proposed Rule Changes Showing Changes

For ease of review, the proposed rule changes are repeated here showing changes in bold/underline (for additions) or strikethrough/underline (for deletions) text.

1. Section 76.5 is amended by revising paragraph (i) and the Note to paragraph (i) to read as follows:

§ 76.5 Definitions.

* * * * *

(i) Significantly viewed. Viewed in ~~other than cable television~~**over-the-air** households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See §76.54.

Note: As used in this paragraph, "share of viewing hours" means the total hours that ~~noncable~~**over-the-air** television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of ~~noncable~~**over-the-air** television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total ~~noncable~~**over-the-air** television households in the survey area.

* * * * *

2. Section 76.54 is amended by revising paragraphs (c), (g) and (h) as set forth below:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted ~~Grade B contour (and, with respect to a survey pertaining to a station broadcasting only a digital signal, the~~ noise limited service contour, as defined in §73.622(e)~~)~~ of this chapter**,** the cable or satellite community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. * * *

* * * * *

(g) Limitations on satellite subscriber eligibility. A satellite carrier may retransmit a significantly viewed network station to a subscriber, provided the subscriber satisfies the conditions in paragraphs (1) and (2) of this section or qualifies for one of the two exceptions to these conditions provided in paragraphs (3) and (4) of this section.

(1) Receipt of local-into-local service. A satellite carrier may retransmit to a subscriber the signal of a significantly viewed station only if that subscriber receives local-into-local service, pursuant to §76.66 of this chapter. ~~(g) Signals of analog or digital significantly viewed television broadcast stations may not be retransmitted by satellite carriers to subscribers who do not receive local-into-local service, including a station affiliated with the same network as the significantly viewed station, pursuant to section 76.66; except that a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber who receives local-into-local service but does not receive a local station affiliated with the same network as the significantly viewed station, if~~

(2) <u>Receipt in HD format</u>. A satellite carrier may retransmit to a subscriber in high definition (HD) format the signal of a significantly viewed station only if such carrier also retransmits in HD format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station. This condition does not apply to, nor prohibit, the retransmission to a subscriber of a significantly viewed station in standard definition (SD) format. ~~(h) Signals of significantly viewed network stations that originate as digital signals may not be retransmitted to subscribers unless the satellite carrier retransmits the digital signal of the local network station, which is affiliated with the same television network as the network station whose signal is significantly viewed, in either (1) at least the equivalent bandwidth of the significantly viewed station or (2) the entire bandwidth of the digital signal broadcast by such local station.~~

(3) <u>Exception if no network affiliate in market</u>. The limitations in paragraphs (1) and (2) of this section will not prohibit a satellite carrier from retransmitting a significantly viewed network station to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the significantly viewed station. ~~(1) there is no station affiliated with the same television network as the station whose signal is significantly viewed; or~~

(4) <u>Waiver granted by local station</u>. The limitations in paragraphs (1) and (2) of this section will not apply if, and to the extent that, the local network station affiliated with the same television network as the significantly viewed station has granted a waiver in accordance with 47 U.S.C. § 340(b)(4). ~~(2) the station affiliated with the same television network as the station whose signal is significantly viewed has granted a waiver in accordance with 47 U.S.C. § 340(b)(4).~~

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* ("*NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in Section V.D. of the *NPRM*. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. This document proposes changes to the Commission's satellite television "significantly viewed" rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA).[4] The STELA requires the Commission to issue final rules in this proceeding on or before Wednesday, November 24, 2010.[5]

3. Section 203 of the STELA amends Section 340 of the Communications Act, which gives satellite carriers the authority to offer out-of-market but "significantly viewed" broadcast television network stations as part of their local service to subscribers.[6] The designation of "significantly viewed" status allows a station assigned to one DMA to be treated as a "local" station with respect to a particular cable or satellite community in another DMA, and, thus, enables cable or satellite carriage into said community in that other DMA. Whereas cable operators have had carriage rights for "significantly viewed" ("SV") stations since 1972, satellite carriers have had such authority only since the 2004 Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) and may only retransmit SV network stations to "eligible" satellite subscribers. The satellite subscriber eligibility rules impose conditions on when satellite carriers may retransmit SV stations to subscribers. These conditions are intended to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network. We note that the nature of SV carriage under Section 340 is permissive (and not mandatory), meaning the statute applies when a satellite carrier chooses to carry an SV station and has obtained retransmission consent from such SV station.[7]

4. Section 203 of the STELA amends the SHVERA's Section 340(b) satellite subscriber eligibility rules in two ways. First, it eliminates the former requirement that satellite carriers devote "equivalent bandwidth" to the carriage of the in-market (local) station as compared with the bandwidth

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] The Satellite Television Extension and Localism Act of 2010 (STELA) § 203, Pub. L. No. 111-175, 124 Stat 1218, 1245 (2010) (§ 203 codified as amended at 47 U.S.C. § 340, other STELA amendments codified in scattered sections of 17 and 47 U.S.C.).

[5] STELA § 203(b).

[6] 47 U.S.C. § 340.

[7] *Id*. at § 340(d).

devoted to carriage of the out-of-market SV station.[8] In its place, the STELA requires a satellite carrier to retransmit "in high definition format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station."[9] Second, STELA revises the subscriber eligibility requirements by eliminating the SHVERA requirement that the subscriber receive the local station affiliated with the same network as the SV station and requires only that the subscriber receive the local-into-local package from the satellite carrier.[10] The STELA does not amend the SHVERA's Section 340(a) station eligibility requirements, which govern the eligibility of a television broadcast station to qualify for "significantly viewed" status.[11]

5. To implement the STELA's two amendments to Section 340(b), the NPRM proposes the following changes to our satellite subscriber eligibility rules:

- The document proposes to eliminate the requirement that satellite carriers offer "equivalent bandwidth" to the local and SV network station pair, and to require instead carriage of the local network affiliate in high definition (HD) as a precondition to satellite carriage of the HD programming of an SV station affiliated with the same network.
- The document proposes to eliminate the requirement that a subscriber receive the specific local network station (as part of the satellite carrier's "local-into-local" service) in order for that subscriber to also receive an SV station affiliated with the same network and to require instead that the subscriber receive local-into-local satellite service.

Finally, the document also seeks comment on the proposals and tentative conclusions set forth in the NPRM, and invites comment on any other issues that may be relevant to the Commission's implementation of the STELA's amendments to the significantly viewed provisions.

B. Legal Basis

6. The proposed action is authorized pursuant to Section 203 of the Satellite Television Extension and Localism Act of 2010, and Sections 1, 4(i) and (j), and 340 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 340.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business

[8] 47 U.S.C. § 340(b)(2)(B) (2004). *See* NPRM note 34, *supra*.

[9] 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

[10] *Id*. § 340(b)(1) (2010), as amended by the STELA § 203(a). *See* NPRM ¶ 6, *supra* (explaining that "a satellite carrier provides 'local-into-local' service when it retransmits a local television signal back into the local market of that television station for reception by subscribers").

[11] 47 U.S.C. § 340(a). Accordingly, the NPRM does not propose any changes to such station eligibility requirements; *see* 47 C.F.R. § 76.54(a)-(f), (j)-(k). *See also* NPRM note 37.

[12] 5 U.S.C. § 603(b)(3).

[13] 5 U.S.C. § 601(6).

[14] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after (continued….)

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[15] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. Satellite Carriers. The term "satellite carrier" means an entity that uses the facilities of a satellite or satellite service licensed under Part 25 of the Commission's rules to operate in the Direct Broadcast Satellite (DBS) service or Fixed-Satellite Service (FSS) frequencies.[16] As a general practice (not mandated by any regulation), DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.[17] In the *SHVERA Significantly Viewed Report and Order*, the Commission concluded that the definition of "satellite carrier" includes all three of these types of entities.[18]

9. Direct Broadcast Satellite ("DBS") Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[19] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[20]

(Continued from previous page)
consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[16] The Communications Act defines the term "satellite carrier" by reference to the definition in the copyright laws in title 17. *See* 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. §119(d)(6). Part 100 of the Commission's rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed under Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

[17] *See, e.g., Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite; Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location,* 19 FCC Rcd. 15529 (Sat. Div. 2004).

[18] *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17302-3, ¶¶ 59-60.

[19] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 North American Industry Classification System ("NAICS") defines the category of "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.*" (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM.

[20] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[21] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[22] Each currently offer subscription services. DIRECTV[23] and EchoStar[24] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider. We seek comments that have data on the annual revenues and number of employees of DBS service providers.

10. Fixed-Satellite Service ("FSS"). The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.[25] The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. FSS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[26] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[27] However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[28] Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. The two DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

11. Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[29] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[30] The

---

[21] 13 C.F.R. § 121.201, NAICS code 517510 (2002).

[22] See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) ("13th Annual Report"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[23] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See id*. at 687, Table B-3.

[24] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id*. As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id*. at 581, ¶ 76.

[25] *See* 47 C.F.R. § 2.1(c).

[26] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[27] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[28] 13 C.F.R. § 121.201, NAICS code 517510 (2002).

[29] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

[30] *Id*. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or (continued….)

Commission has estimated the number of licensed commercial television stations to be 1,392.[31] According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations[32] (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.[33] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[34] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

12. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

13. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[35] which was developed for small wireline firms.[36] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[37] However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other

(Continued from previous page)
from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[31] *See* News Release, "Broadcast Station Totals as of December 31, 2009," 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) ("*Broadcast Station Totals*"); also available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf.

[32] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 33; however, we are using BIA's estimate for purposes of this revenue comparison.

[33] *See Broadcast Station Totals*, *supra*, note 33.

[34] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[35] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[36] Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340's definition of "satellite carrier." *See* 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. §119(d)(6).

[37] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[38] As of June 2004, there were approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[39] The IMCC indicates that, as of June 2006, PCOs serve about 1 to 2 percent of the multichannel video programming distributors (MVPD) marketplace.[40] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, as of June 2006, PCOs serve approximately 900,000 subscribers.[41] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest 10 PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.[42]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

14. The NPRM's proposed rules do not impose any new reporting, recordkeeping or other compliance requirements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[43]

16. We invite comment on whether there are any alternatives we should consider to our proposed implementation of the statutory amendments to Section 340(b) that would minimize any adverse impact on small businesses, but which are consistent with the statute and its goals and also maintain the benefits of our proposals. As discussed in the NPRM, STELA's amendments to Section 340(b) intend to facilitate satellite carriage of SV stations, with the expectation that this will increase satellite TV service to consumers and promote regulatory parity between cable and satellite service.[44] We believe our proposed rule changes implement the statute in the way that is most consistent with the plain language of

---

[38] 13 C.F.R. § 121.201, NAICS code 517510 (2002).

[39] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, FCC 05-13, ¶ 110 (rel. Feb. 4, 2005) ("*2005 Cable Competition Report*").

[40] *See 13th Annual Report*, 24 FCC Rcd at 684, Table B-1.

[41] *Id*.

[42] 13 C.F.R. § 121.201, NAICS code 517510 (2002).

[43] 5 U.S.C. § 603(c)(1)-(c)(4)

[44] *See H.R. 3570 Report* at 4-5; *H.R. 2994 Report* at 16. *See also* NPRM ¶ 11. In the NPRM, we stated that, in revising the law, Congress intended for the Commission to create a framework that would generally provide for the satellite carriage of SV stations. *Id*.

the statute.[45] We also note that the plain language of the statute does not appear to give us discretion to treat small entities differently from larger ones, but seek comment on this question.

17. As was the intent of Congress, we believe our proposed rules will benefit satellite carriers and the SV stations which they would carry,[46] as well as consumers of satellite TV service.[47] We believe that adverse impact to these entities is unlikely because SV carriage under Section 340 is permissive (and not mandatory); that is, the satellite carrier chooses to carry an SV station and the SV station must grant its consent to be carried.[48] We do not have data to measure whether small TV stations on the whole, including in-market network affiliates, are more or less likely to benefit from satellite carriage of SV stations, so we invite small stations to comment on this issue.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

18. None.

[45] Our proposed rules are based on, and largely track, the amended language of the statute.

[46] For example, small broadcast stations will benefit from the opportunity to be delivered as an SV station to more viewers.

[47] *See H.R. 3570 Report* at 4-5.

[48] *See* 47 U.S.C. § 340(d).

EXHIBIT 20

332 U. S. Reports 194

67 S.Ct. 1575

91 L.Ed. 1995

SECURITIES AND EXCHANGE COMMISSION

v.

CHENERY CORPORATION et al. SAME v. FEDERAL WATER & GAS CORPORATION.

Nos. 81 and 82.

Argued Dec. 13—16, 1946.

Decided June 23, 1947.

Rehearing Denied Oct. 13, 1947. See 68 S.Ct. 26 .

Page 195

Mr. Roger S. Foster, of Philadelphia, Pa., for petitioner.

[Argument of Counsel from page 195 intentionally omitted]

Page 196

Mr. Spencer Gordon, of Washington, D.C., for Chenery Corporation and others.

Mr. Allen S. Hubbard, of New York City, for Federal Water & Gas Corporation.

Mr. Justice MURPHY delivered the opinion of the Court.

This case is here for the second time. In S.E.C. v. Chenery Corporation, **318 U. S. Reports 80** , 63 S.Ct. 454 , 87 L.Ed. 626 , we held that an order of the Scurities a nd Exchange Commission could not be sustained on the grounds upon which that agency acted. We therefore directed that the case be remanded to the Commission for such further proceedings as might be appropriate. On remand, the Commission reexamined the problem, recast its rationale and reached the same result. The issue now is whether the Commission's action is proper in light of the principles established in our prior decision.

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be com-

Page 197

pelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other

words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, M., St. P. & P.R. Co., **294 U. S. Reports 499** , 511, 55 S.Ct. 462 , 467, 79 L.Ed. 1023 .

Applying this rule and its corollary, the Court was unable to sustain the Commission's original action. The Commission had been dealing with the reorganization of the Federal Water Service Corporation (Federal), a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C.A. § 79 et seq. During the period when successive reorganization plans proposed by the management were before the Commission, the officers, directors and controlling stockholders of Federal purchased a substantial amount of Federal's preferred stock on the over-the-counter market. Under the fourth reorganization plan, this preferred stock was to be converted into common stock of a new corporation; on the basis of the purchases of preferred stock, the management would have received more than 10% of this new common stock. It was frankly admitted that the management's purpose in buying the preferred stock was to protect its interest in the new company. It was also plain that there was no fraud or lack of disclosure in making these purchases.

But the Commission would not approve the fourth plan so long as the preferred stock purchased by the management was to be treated on a parity with the other preferred stock. It felt that the officers and directors of a holding company in process of reorganization under the Act were fiduciaries and were under a duty not to trade in the securities of that company during the reorganization period. 8 S.E.C. 893, 915-921. And so the plan was amended to provide that the preferred stock acquired by the management, unlike that held by others, was not to be con-

Page 198

verted into the new common stock; instead, it was to be surrendered at cost plus dividends accumulated since the purchase dates. As amended, the plan was approved by the Commission over the management's objections. **10 S.E.C. 200** .

The Court interpreted the Commission's order approving this amended plan as grounded solely upon judicial authority. The Commission appeared to have treated the preferred stock acquired by the management in accordance with what it thought were standards theretofore recognized by courts. If it intended to create new standards growing out of its experience in effectuating the legislative poliy, it fail ed to express itself with sufficient clarity and precision to be so understood. Hence the order was judged by the only standards clearly invoked by the Commission. On that basis, the order could not stand. The opinion pointed out that courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them merely because they are officers and directors, from buying and selling the corporation's stock. Nor was it felt that the cases upon which the Commission relied established any principles of law or equity which in themselves would be sufficient to justify this order.

The opinion further noted that neither Congress nor the Commission had promulgated any general rule proscribing such action as the purchase of preferred stock by Federal's management. And the only judge-made rule of equity which might have justified the Commission's order related to fraud or mismanagement of the reorganization by the officers and directors, matters which were admittedly absent in this situation.

After the case was remanded to the Commission, Federal Water and Gas Corp. (Federal Water), the surviving corporation under the reorganization plan, made an application for approval of an amendment to the plan to provide

Page 199

for the issuance of now common stock of the reorganized company. This stock was to be distributed to the members of Federal's management on the basis of the shares of the old preferred stock which they had acquired during the period of reorganization, thereby placing

them in the same position as the public holders of the old preferred stock. The intervening members of Federal's management joined in this request. The Commission denied the application in an order issued on February 7, 1945. Holding Company Act Release No. 5584. That order was reversed by the Court of Appeals, 154 F.2d 6 , which felt that our prior decision precluded such action by the Commission.

The latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. This time, after a thorough reexamination of the problem in light of the purposes and standards of the Holding Company Act, the Commission has concluded that the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act. It has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.

The argument is pressed upon us, however, that the Commission was foreclosed from taking such a step following our prior decision. It is said that, in the absence of findings of conscious wrongdoing on the part of Federal's management, the Commission could not determine by an order in this particular case that it was inconsistent with the statutory standards to permit Federal's management to realize a profit through the reorganization purchases. All that it could do was to enter an order allowing an amendment to the plan so that the proposed transaction could be consummated. Under this view, the Commission would be free only to promulgate a general rule

Page 200

outlawing such profits in future utility reorganizations; but such a rule would have to be prospective in nature and have no retroactive effect upon the instant situation.

We reject this contention, for it grows out of a misapprehension of our prior decision and of the Commission's statutory duties. We held no more and no less than that the Commission's first order was unsupportable for the reasons supplied by that agency. But when the case left this Court, the problem whether Federal's management should be treated equally with other preferred stockholders still lacked a final and complete answer. It was clear that the Commission could not give a negative answer by resort to prior judicial declarations. And it was also clear that the Commission was not bound by settled judicial precedents in asituation of this nature. 318 U.S. at page 89 , 63 S.Ct. at page 460 , 87 L.Ed. 626 . Still unsettled, however, was the answer the Commission might give were it to bring to bear on the facts the proper administrative and statutory considerations, a function which belongs exclusively to the Commission in the first instance. The administrative process had taken an erroneous rather than a final turn. Hence we carefully refrained from expressing any views as to the propriety of an order rooted in the proper and relevant considerations. See Siegel v. Federal Trade Commission, **327 U. S. Reports 608** , 613, 614, 66 S.Ct. 758 , 760, 761, 90 L.Ed. 888 .

When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate, it was with the thought that the Commission would give full effect to its duties in harmony with the views we had expressed. Ford Motor Co. v. National Labor Relations Board, **305 U. S. Reports 364** , 374, 59 S.Ct. 301 , 307, 83 L.Ed. 221 ; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., **289 U. S. Reports 266** , 278, 53 S.Ct. 627 , 633, 77 L.Ed. 1166 , 89 A.L.R. 406 . This obviously meant something more than the entry of a perfunctory order giving parity treatment to the management holdings of preferred stock. The fact that the Commission had committed a legal error in its first disposition of the case certainly gave Federal's

Page 201

management no vested right to receive the benefits of such an order. See Federal Communications Commission v. Pottsville Broadcasting Co., **309 U. S. Reports 134** , 145, 60

S.Ct. 437 , 442, 84 L.Ed. 656 . After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. It was again charged with the duty of measuring the proposed treatment of the management's preferred stock holdings by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated.

The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it. The Commission was asked to grant or deny effectiveness to a proposed amendment to Federal's reorganization plan whereby the management would be accorded parity treatment on its holdings. It could do that only in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards. That was true regardless of whether those standards previously had been spelled out in a general rule or regulation. Indeed, if the Commission rightly felt that the proposed amendment was inconsistent with those standards, an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified.

It is true that our prior decision explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers, in which case the issue for our consideration would have been entirely different from that which did confront us. 318 U.S. at pages 92 , 93, 63 S.Ct. at pages 461 , 462, 87 L.Ed. 626 . But we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to per-

Page 202

form its statutory duty in this case. To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstics of the A ct should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. See Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or

Page 203

the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made

between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. See Columbia Broadcasting System v. United States, **316 U. S. Reports 407** , 421, 62 S.Ct. 1194 1202, 86 L.Ed. 1563 .

Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. Cf. Federal Trade Commission v. R. F. Keppel & Bro., **291 U. S. Reports 304** , 54 S.Ct. 423 , 78 L.Ed. 814 . That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See Addison v. Holly Hill Co., **322 U. S. Reports 607** , 620, 64 S.Ct. 1215 1222, 88 L.Ed. 1488 , 153 A.L.R. 1007 .

And so in this case, the fact that the Commission's order might retroactively prevent Federal's management from securing the profits and control which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint. If that is true, the argument of retroactivity becomes nothing more than a claim that the Commission lacks power to enforce the standards of

Page 204

the Act in this proceeding. Such a claim deserves rejection.

The problem in this case thus resolves itself into a determination of whether the Commission's action in denying effectiveness to the proposed amendment to the Federal reorganization plan can be justified on the basis upon which it clearly rests. As we have noted, the Commission avoided placing its sole reliance on inapplicable judicial precedents. Rather it has derived its conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements. It is hose matters which are the guide for our review.

The Commission concluded that it could not find that the reorganization plan, if amended as proposed, would be 'fair and equitable to the persons affected (thereby)' within the meaning of § 11(e) of the Act, under which the reorganization was taking place. Its view was that the amended plan would involve the issuance of securities on terms 'detrimental to the public interest or the interest of investors' contrary to §§ 7(d)(6) and 7(e), and would result in an 'unfair or inequitable distribution of voting power' among the Federal security holders within the meaning of § 7(e). It was led to this result 'not by proof that the interveners (Federal's management) committed acts of conscious wrongdoing but by the character of the conflicting interests created by the interveners' program of stock purchases carried out while plans for reorganization were under consideration.'

The Commission noted that Federal's management controlled a large multi-state utility system and that its influence permeated down to the lowest tier of operating companies. The financial, operational and accounting policies of the parent and its subsidiaries were therefore under the management's strict control. The broad range of business judgments vested in Federal's management

Page 205

multiplied opportunities for affecting the market price of Federal's outstanding securities and made the exercise of judgment on any matter a subject of greatest significance to investors. Added to these normal managerial powers, the Commission pointed out that a holding company management obtains special powers in the course of a voluntary reorganization under § 11(e) of

the Holding Company Act. The management represents the stockholders in such a reorganization, initiates the proceeding, draws up and files the plan, and can file amendments thereto at any time. These additional powers may introduce conflicts between the management's normal interests and its responsibilities to the various classes of stockholders which it represents in the reorganization. Moreover, because of its representative status, the management has special opportunities to obtain advance information of the attitude of the Commission.

Drawing upon its experience, the Commission indicated that all these normal and special powers of the holding company management during the course of a § 11(e) reorganization placed in the management's command 'a formidable battery of devices that would enable it, if it should choose to use them selfishly, to affect in material degree the ultimate allocation of new securities among the various existing classes, to influence the market for its own gain and to manipulate or obstruct the reorganization required by the mandate of the statute.' In that setting, the Commission felt that a management program of stock purchase would give rise to the temptation and the opportunity to shape the reorganization proceeding so as to encourage public selling on the market at low prices. No management could engage in such a program without raising serious questions as to whether its personal interests had not opposed its duties 'to exercise disinterested judgment in matters pertaining to subsidiaries' accounting, budgetary and dividend policies, to present

Page 206

publicly an unprejudiced financial picture of the enterprise, and to effectuate a fair and feasible plan expeditiously.'

The Commission further felt that its answer should be the same even where proof of intentional wrongdoing on the management's part is lacking. Assuming a conflict of interests, the Commission thought that the absence of actual misconduct is immaterial; injury to the public investors and to the corporation may result just as readily. 'Questionable transactions may be explained away, and an abuse of investors and the administrative process may be perpetrated without evil intent, yet the injury will remain.' Moreover, the Commission was of the view that the delays and the difficulties involved in pobing the mental processes and personal integrity of corporate officials do not warrant any distinction on the basis of evil intent, the plain fact being 'that an absence of unfairness or detriment in cases of this sort would be practically impossible to establish by proof.'

Turning to the facts in this case, the Commission noted the salient fact that the primary object of Federal's management in buying the preferred stock was admittedly to obtain the voting power that was accruing to that stock through the reorganization and to profit from the investment therein. That stock had been purchased in the market at prices that were depressed in relation to what the management anticipated would be, and what in fact was, the earning and asset value of its reorganization equivalent. The Commission admitted that the good faith and personal integrity of this management were not in question; but as to the management's justification of its motives, the Commission concluded that it was merely trying to 'deny that they made selfish use of their powers during the period when their conflict of interest, vis-a-vis public investors was in existence owing to their purchase program.' Federal's management had

Page 207

thus placed itself in a position where it was 'peculiarly susceptible to temptation to conduct the reorganization for personal gain rather than the public good' and where its desire to make advantageous purchases of stock could have an important influence, even though subconsciously, upon many of the decisions to be made in the course of the reorganization. Accordingly, the Commission felt that all of its general considerations of the problem were applicable to this case.

The scope of our review of an administrative order wherein a new principle is announced

and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. See Board of Trade of Kansas City, Mo. v. United States, **314 U. S. Reports 534** , 548, 62 S.Ct. 366 , 373, 86 L.Ed. 432 . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. See National Broadcasting Co. v. United States, **319 U. S. Reports 190** , 224, 63 S.Ct. 997 1013, 87 L.Ed. 1344 .

We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation. In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. In essence, it has made what we indicated in our prior opinion would be an informed, expert judgment on the problem. It has taken into account 'those more subtle factors in the marketing of utility company securities that gave rise to the very grave evils which the Public Utility Holding Company Act of 1935 was designed to correct' and has relied upon the fact that 'Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohi-

Page 208

bitions not concerned with the fairness of a particular transaction.' 318 U.S. at page 92 , 63 S.Ct. at page 461 , 87 L.Ed. 626 .

Such factors may properly be considered by the Commission in determining whether to approve a plan of reorganization of a utility holding company, or an amendment to such a plan. The 'fair and equitable' rule of § 11(e) and the standard of what is 'detrimental to the public interest or the interest of investors or consumers' under § 7(d)(6) and § 7(e) were inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. 318 U.S. at pages 90 , 91, 63 S.Ct. at pages 460 , 461, 87 L.Ed. 626 . The application of those critera, whether in the form of a particular order or a general regulaton, necess arily requires the use of informal discretion by the Commission. The very breath of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See United States v. Lowden, **308 U. S. Reports 225** , 60 S.Ct. 248 , 84 L.Ed. 208 ; I.C.C. v. Railway Labor Executives Ass'n, **315 U. S. Reports 373** , 62 S.Ct. 717 , 86 L.Ed. 904 . Such an abuse is not present in this case.

The purchase by a holding company management of that company's securities during the course of a reorganization may well be thought to be so fraught with danger as to warrant a denial of the benefits and profits accruing to the management. The possibility that such a stock purchase program will result in detriment to the public investors is not a fanciful one. The influence that program may have upon the important decisions to be made by the management during reorganization is not inconsequential. Since the officers and directors occupy fiduciary positions during this period, their actions are to be held to a higher standard than that imposed upon the general investing public. There is thus a reasonable basis for a value judgment that the benefits and profits accruing to the management from the stock purchases should be prohibited, regardless of the good faith involved. And

Page 209

it is a judgment that can justifiably be reached in terms of fairness and equitableness, to the end that the interests of the public, the investors and the consumers might be protected. But it is a judgment based upon public policy, a judgment which Congress has indicated is of the type for the Commission to make.

The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the

statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See Republic Aviation Corporation v. National Labor Relations Board, **324 U. S. Reports 793**, 800, 65 S.Ct. 982, 986, 89 L.Ed. 1372, 157 A.L.R. 1081. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

Reversed.

Mr. Justice BURTON concurs in the result.

The CHIEF JUSTICE and Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON dissent, but there is not now opportunity for a response adequate to the issues raised by the Court's opinion. These concern the rule of law in its application to the administrative process and the function of this Court in reviewing administrative action. Accordingly, the detailed grounds for dissent will be filed in due course.

For dissenting opinion of Mr. Justice JACKSON, see **332 U. S. Reports 194**, 67 S.Ct. 1760.

Mr. Justice JACKSON, dissenting.

The Court by this present decision sustains the identical administrative order which only recently it held invalid.

Page 210

Securities and Exchange Commission v. Chenery Corp., **318 U. S. Reports 80**, 63 S.Ct. 454, 87 L.Ed. 626. As the Court correctly notes, the Commission has only 'recast its rationale and reached the same result.' (Par. 1.) [1] There being no change in the order, no additional evidence in the record and no amendment of relevant legislation, it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review.

Mr. Justice JACKSON announced that he has filed an opinion, in which Mr. Justice FRANKFURTER joins, setting forth the detailed grounds for his dissent from the opinion and judgment of the Court entered June 23, 1947, in these cases.

I feel constrained to disagree with the reasoning offered to rationalize this shift. It makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint. While the opinion does not have the adherence of a majority of the full Court, if its pronouncements should become governing principles they would, in practice, put most administrative orders over and above the law.

I.

The essential facts are few and are not in dispute. [2] This corporation filed with the Securities and Exchange Commission a voluntary plan of reorganization. While the reorganization proceedings were pending sixteen officers and directors bought on the open market about 7 1/2% of the corporation's preferred stock. Both the Commission and the Court admit that these purchases were not forbidden by any law, judicial precedent, regulation or rule of the Commission. Nevertheless, the Commission has

Page 211

ordered these individuals to surrender their shares to the corporation at cost, plus 4% interest, and the Court now approves that order.

It is helpful, before considering whether this order is authorized by law, to reflect on what it is and what it is not. It is not conceivably a discharge of the Commission's duty to determine whether a proposed plan of reorganization would be 'fair and equitable.' It has nothing to do with the corporate structure, or the classes and amounts of stock, or voting rights or dividend preferences. It does not remotely affect the impersonal financial or legal factors of the plan. It is a personal deprivation denying particular persons the right to cntinue to own their stock and to exercise its privileges. Other persons who bought at the same time and price in the open market would be allowed to keep and convert their stock. Thus, the order is in no sense an exercise of the function of control over the terms and relations of the corporate securities.

Neither is the order one merely to regulate the future use of property. It literally takes valuable property away from its lawful owners for the benefit of other private parties without full compensation and the Court expressly approves the taking. It says that the stock owned by these persons is denied conversion along with similar stock owned by others; 'instead, it was to be surrendered at cost plus dividends accumulated since the purchase dates.' (Par. 5.) It should be noted that this formula was subsequently altered to read 'cost plus 4% interest.' That this basis was less than its value is recognized, for the Court says 'That stock had been purchased in the market at prices that were depressed in relation to what the management anticipated would be, and what in fact was, the earning and asset value of its reorganization equivalent.' (Par. 24.) Admittedly, the value above cost, and interest on it, simply is taken from the owners,

Page 212

without compensation. No such power has ever been confirmed in any administrative body.

It should also be noted that neither the Court nor the Commission purports to adjudge a forfeiture of this property as a consequence of sharp dealing or breach of trust. The Court says, 'The Commission admitted that the good faith and personal integrity of this management were not in question; * * *.' (Par. 24.) And again, 'It was frankly admitted that the management's purpose in buying the preferred stock was to protect its interest in the new company. It was also plain that there was no fraud or lack of disclosure in making these purchases.' (Par. 4.)

II.

The reversal of the position of this Court is due to a fundamental change in prevailing philosophy. The basic assumption of the earlier opinion as therein stated was, 'But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards.' Securities and Exchange Commission v. Chenery Corp., **318 U. S. Reports 80** , 92, 93, 63 S.Ct. 454 , 461, 87 L.Ed. 626 . The basic assumption of the present opinion is stated thus: 'The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it.' (Par. 13.) This puts in juxtaposition the two conflicting philosophies which produce opposite results in the same case and on the same facts. The difference between the first and the latest decision of the Court is thus simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which courts may annul them.

As there admittedly is no law or regulation to support this order we peruse the Court's opinion diligently to find

Page 213

on what grounds it is now held that the Court of Appeals, on pain of being reversed for error, was

required to stamp this order with its approval. We find but one. That is the principle of judicial deference to administrative experience. That argument is five times stressed in as many different contexts, and I quote just enough to identify the instances: 'The Commission,' it says, 'has drawn heavily upon its accumulated experience in dealing with utility reorganizations.' (Par. 9.) 'Rather it has derived its conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements.' (Par. 19.) 'Drawing upon its experience, the Commission indicated * * *,' etc. (Par. 22.) '* * * the Commission has made a thorough examination of the problem, utilzing statu tory standards and its own accumulated experience with reorganization matters.' (Par. 26.) And finally, of the order the Court says, 'It is the product of administrative experience,' etc. (Par. 29.)

What are we to make of this reiterated deference to 'administrative experience' when in another context the Court says, 'Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct.'? (Par. 17.) (Emphasis supplied.)

The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!

Of course, thus to uphold the Commission by professing to find that it has enunciated a 'new standard of conduct,' brings the Court squarely against the invalidity of retroactive law-making. But the Court does not falter. 'That such action might have a retroactive effect

Page 214

was not necessarily fatal to its validity.' (Par. 17.) 'But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' (Par. 17.) Of course, if what these parties did really was condemned by 'statutory design' or 'legal and equitable principles,' it could be stopped without resort to a new rule and there would be no retroactivity to condone. But if it had been the Court's view that some law already prohibited the purchases, it would hardly have been necessary three sentences earlier to hold that the Commission was not prohibited 'from utilizing this particular proceeding for announcing and applying a new standard of conduct.' (Par. 17.) (Emphasis supplied.)

I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'

III.

But one does not need to comprehend the processes by which other minds reach a given result in order to estimate the practical consequences of their pronouncement upon judicial review of administrative orders.

If it is of no consequence that no rule of law be existent to support an administrative order, and the Court of Appeals is obliged to defer to administrative experience and to sustain a Commission's power merely because it has been asserted and exercised, of what use is it to print a record or briefs in the case, or to hear argument? Administrative experience always is present, at least to the degree that it is here, and would always dictate a like deference by this Court to an assertion of administrative power. Must the reviewing court, as this Court does in this opinion, support the order on a presumptive or imputed experience even though the Court is obliged to discredit such experience in the very same opinion? Is

Page 215

fictitious experience to be conclusive in matters of law and particularly in the interpretation of statutes, as the Court's opinion now intimates, or just in fact finding which has been the function which the Court has heretofore sustained upon the argument of administrative experience?

I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for sustaining the Commission action.

Even if the Commission had, as the Court says, utilized this case to announce a new legal standard of conduct, there would be hurdles to be cleared, but we need not dwell on them now. Because to promulgate a general rule of law, either by regulation or by case law, is something the Commission expressly declined to do. It did not previously promulgate, and it does not by this order profess to promulgate, any rule or regulation to prohibit such purchases absolutely or under stated conditions. On the other hand, its position is that no such rule or standard would be fair and equitable in all cases. [3]

Page 216

IV.

Whether, as matter of policy, corporate managers during reorganization should be prohibited from buying or selling its stock, is not a question for us to decide. But it is for us to decide whether, so long as no law or regulation prohibits them from buying, their purchases may be forfeited, or not, in the discretion of the Commission. If such a power exists in words of the statute or in their implication, it would be possible to point it out and thus end the case. Instead, the Court admits that there was no law prohibiting these purchases when they were made, or at any time thereafter. And, except for this decision, there is none now.

The truth is that in this decision the Court approves the Commission's assertion of power to govern the matter without law, power to force surrender of stock so purchased whenever it will, and power also to overlook such acquisitions if it so chooses. The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words: 'The absence of a general rule or regulation

Page 217

governing management trading during reorganization did not affect the Commission's duties * * *' (Par. 13). This seems to me to undervalue and to belittle the place of law, even in the system of administrative justice. It calls to mind Mr. Justice Cardozo's statement that 'Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.' [4]

V.

The Court's averment concerning this order that 'It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process,' (Par. 29) is the first instance in which the administrative process is sustained by reliance on that disregard of law which enemies of the process have always alleged to be its principal evil. It is the first encouragement this Court has given to conscious lawlessness as a permissible rule of administrative action. This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authoity as wel l as of those who are subject to authority. [5]

I have long urged, and still believe, that the administrative process deserves fostering in our system as an expeditious and nontechnical method of applying law in special-

ized fields. [6] I can not agree that it be used, and I think its continued effectiveness is endangered when it is used, as a method of dispensing with law in those fields.

Mr. Justice FRANKFURTER joins in this opinion.

[1] For convenience of reference, I have numbered consecutively the paragraphs of the Court's opinion (67 S.Ct. 1575), and cite quotations accordingly.

[2] The facts and the law of the case generally are fully set forth in the first opinion of Mr. Chief Justice Groner of the Court of Appeals which reversed the Commission's order (75 U.S.App.D.C. 374 , 128 F.2d 303) and in his second opinion (80 U.S.App.D.C. 365 , 154 F.2d 6) again reversing the Commission's order after it had 'recast its rationale.'

[3] The Commission, speaking of such a rule appends the following note to its opinion:

'Without flexibility the rule might itself operate unfairly. Limitation to cost appears appropriate here, but would be inappropriate in a case where the cost of the security purchased was in excess of its reorganization value, and in some instances cash payment by the company would not be feasible. In addition, special treatment of any sort might be inappropriate for incidental purchases not made as part of a program in contemplation of reorganization benefits. In this connection, we wish to emphasize that our concern here is not primarily with the normal corporate powers which make it possible for officers and directors to influence the market for their own gain, in the absence of reorganization, by a choice of dividend policies, accounting practices, published reports, and the like. The questions of fairness and detriment here presented arise before us in the context of a capital readjustment. At that point our scrutiny is called for, and that our scrutiny is to be vigilant cannot be doubted. See Appendix to Sen. Rep. No. 621 (74th Cong., 1st Sess.) on S. 2796, at p. 58, quoted supra.'

[4] The Growth of the Law, P. 3.

[5] On the same day the Court denied its own authority to recognize and enforce without Congressional action, an unlegislated liability much less novel than the one imposed here, and that in the field of tort law which traditionally has developed by decisional rather than by legislative process. The result is to confirm in an executive agency a discretion to act outside of established law that goes beyond any judicial discretion as well as beyond any legislative delegation. Compare United States v. Standard Oil Co., **332 U. S. Reports 301** , 67 S.Ct. 1604 .

[6] See statement before House of Delegates, American Bar Association, 1939. (1939 Proceedings, House of Delegates, XXXV A.B.A. Journal 95.) Also see Report as Attorney General to President Roosevelt recommending veto of Walter-Logan Bill—made part of veto message, Vol. 86, Part 12, Congressional Record, 76th Congress, 3d Session, p. 13943.

EXHIBIT 21

464 U. S. Reports 16

104 S.Ct. 296

78 L.Ed.2d 17

Joseph C. RUSSELLO, Petitioner

v.

UNITED STATES.

No. 82-472.

Argued Oct. 5, 1983.

Decided Nov. 1, 1983.

Syllabus

Petitioner was convicted in Federal District Court, under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, of violating 18 U.S.C. §§ 1962(c) and (d) by being involved in an arson ring that resulted in his fraudulently receiving insurance proceeds in payment for the fire loss of a building he owned. The District Court also entered a judgment of forfeiture against petitioner for the amount of the insurance proceeds pursuant to 18 U.S.C. § 1963(a)(1), which provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of § 1962." The Court of Appeals affirmed.

Held: The insurance proceeds petitioner received as a result of his arson activities constitute an "interest" within the meaning of § 1963(a)(1) and are therefore subject to forfeiture. Pp. 20 -29.

(a) Section 1963(a)(1) does not reach only "interests in an enterprise." Where the term "interest" is not specifically defined in the RICO statute, it is assumed that the legislative purpose is expressed by the term's ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. Congress apparently selected the broad term "interest" because it did not wish the forfeiture provision to be limited by rigid and technical definitions drawn from other areas of law and because the term was fully consistent with the RICO statute's pattern in utilizing broad terms and concepts. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains, and after distribution each has a possessory interest in currency or other items so distributed. Pp. 20 -22.

(b) Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in § 1963(a)(2). To construe § 1963(a)(1) to reach only interests in an enterprise would blunt the section's effectiveness in combating illegitimate enterprises and would mean that whole areas of organized crime activity would be placed beyond the reach of the RICO statute. Pp. 22-24.

(c) The fact that the Controlled Substances Act specifically authorizes the forfeiture of "profits" obtained in illegal drug enterprises cannot be read as imposing a limitation upon § 1963(a)(1)'s broader language, par-

Page 17

ticularly where the RICO statute was aimed at organized crime's economic power in all its forms, whereas the narcotics activity proscribed by the Controlled Substances Act usually generates

only monetary profits. Pp. 24-25.

(d) Nor is a limiting construction of § 1963(a)(1) supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering, since those States presumably used such language so as to avoid narrow interpretations of their laws such as was given the federal statute in certain Federal District Court opinions. P. 26.

(e) The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots, and thus was intended to authorize forfeiture of racketeering profits. The rule of lenity does not apply here, where § 1963(a)(1)'s language is clear. Pp. 26-29.

681 F.2d 952 (5th Cir. 1982) , affirmed.

Ronald A. Dion, Miami, Fla., for petitioner.

Samuel A. Alito, Jr., Newark, N.J., for respondent.

Justice BLACKMUN delivered the opinion of the Court.

This is yet another case concerning the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970. Pub.L. 91-452, Title IX, **84 Stat. 941** , as amended, 18 U.S.C. §§ 1961-1968. At issue here is the interpretation of the chapter's forfeiture provision, § 1963(a)(1), and, specifically, the meaning of the words "any interest [the defendant] has acquired . . . in violation of section 1962."

I

On June 8, 1977, petitioner Joseph C. Russello and others were indicted for racketeering, conspiracy, and mail fraud, in violation of 18 U.S.C. §§ 1341, 1962(c) and (d), and 2. App. 5. After a jury trial in the United States District Court for

Page 18

the Middle District of Florida, petitioner was convicted as charged in four counts of the indictment. The jury then returned special verdicts for the forfeiture to the United States, under 18 U.S.C. § 1963(a), of four payments, aggregating $340,048.09, made to petitioner by a fire insurance company. App. 54-57. These verdicts related to the racketeering activities charged in the second count of the indictment under which petitioner had been convicted. The District Court, accordingly, entered a judgment of forfeiture against petitioner in that amount. *Id.,* at 58.

Petitioner took an appeal to the former United States Court of Appeals for the Fifth Circuit. A panel of that court affirmed petitioner's criminal conviction, *United States v. Martino,* 648 F.2d 367 , 406 (1981), and this Court denied certiorari, **456 U. S. Reports 943** , 102 S.Ct. 2006 , 72 L.Ed.2d 465 (1982) , as to that aspect of the case. The panel, however, reversed the judgment of forfeiture. App. 64-69. The full court granted rehearing en banc on the forfeiture issue and, by a vote of 16-7, vacated that portion of the panel opinion, and then affirmed the forfeiture judgment entered by the District Court. 681 F.2d 952 (1982) . Because of this significant division among the judges of the Court of Appeals, and because the Fifth Circuit majority, *id.,* at 959, stated that its holding "squarely conflict[ed]" with that of the Ninth Circuit in *United States v. Marubeni America Corp.,* 611 F.2d 763 (1980) , we granted certiorari. --- U.S. ----, 104 S.Ct. ---- , 77 L.Ed.2d ---- (1983) . [1] Since then, the Seventh Circuit has issued an opinion agreeing with the Ninth Circuit. *United States v. McManigal,* 708 F.2d 276 , 283-287 (1983).

Page 19

II

So far as the case in its present posture is concerned, the basic facts are not in dispute. The majority opinion of the en banc court described them succinctly:

"Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows:

'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted)." 681 F.2d, at 953.

Specifically, petitioner was the owner of the Central Professional Building in Tampa. This structure had two parts, an original smaller section in front and a newer addition at the rear. The latter contained apartments, offices, and parking facilities. Petitioner arranged for arsonists to set fire to the front portion. He intended to use the insurance proceeds to rebuild that section. The fire, however, spread to the rear. Joseph Carter, another member of the arson ring, was the adjuster for petitioner's insurance claim and helped him to obtain the highest payments possible. The resulting payments made up the aggregate sum of $340,043.09

mentioned above. From those proceeds, petitioner paid Carter $30,000 for his assistance.

III

Title 18 U.S.C. § 1962(c) states that it shall be unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) makes it unlawful to conspire to violate § 1962(c). Section 1963(a)(1) provides that a person convicted under § 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of section 1962."

The sole issue in this case is whether profits and proceeds derived from racketeering constitute an "interest" within the meaning of this statute and are therefore subject to forfeiture. Petitioner contends that § 1963(a)(1) reaches only "interests in an enterprise" and does not authorize the forfeiture of mere "profits and proceeds." He rests his argument upon the propositions that criminal forfeitures are disfavored in law and that forfeiture statutes, as a consequence, must be strictly construed.

In a RICO case recently decided, this Court observed: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette,* **452 U. S. Reports 576** , 580, 101 S.Ct. 2524 2527, 69 L.Ed.2d 246 (1981) , quoting from *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* **447 U. S. Reports 102** , 108, 100 S.Ct. 2051 2056, 64 L.Ed.2d 766 (1980) . See, also, *Dickerson v. New Banner Institute, Inc.,* --- U.S. ----, ----, 103 S.Ct. 986 , 990, 74 L.Ed.2d 845 ; *Lewis v. United States,* **445 U. S. Reports 55** , 60, 100 S.Ct. 915 , 918, 63 L.Ed.2d 198 (1980) .

Here, 18 U.S.C. § 1963(a)(1) calls for the forfeiture to the United States of "any interest . . . acquired . . . in violation

of section 1962." There is no question that petitioner Russello acquired the insurance proceeds at issue in violation of § 1962(c); that much has been definitely and finally settled. Accordingly, if those proceeds qualify as an "interest," they are forfeitable.

The term "interest" is not specifically defined in the RICO statute. This silence compels us to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States,* **369 U. S. Reports 1** , 9, 82 S.Ct. 585 , 591, 7 L.Ed.2d 492 (1962) . The ordinary meaning of "interest" surely encompasses a right to profits or proceeds. See Webster's Third New International Dictionary 1178 (1976), broadly defining "interest," among other things, as a "good," "benefit," or "profit." Random House Dictionary of the English Language (1979) defines interest to include "profit," "welfare," or "benefit." Black's Law Dictionary 729 (5th ed., 1979) provides a significant definition of "interest": "The most general term that can be employed to denote a right, claim, title or legal share in something." It is thus apparent that the term "interest" comprehends all forms of real and personal property, including profits and proceeds.

This Court repeatedly has relied upon the term "interest" in defining the meaning of "property" in the Due Process Clause of the Fourteenth Amendment of the Constitution. See *Perry v. Sindermann,* **408 U. S. Reports 593** , 601, 92 S.Ct. 2694 2699, 33 L.Ed.2d 570 (1972) (" 'property' denotes a broad range of interests"); *Logan v. Zimmerman Brush Co.,* **455 U. S. Reports 422** , 430, 102 S.Ct. 1148 1155, 71 L.Ed.2d 265 (1982) ; *Jago v. Van Curen,* **454 U. S. Reports 14** , 17-18, 102 S.Ct. 31 , 33-34, 70 L.Ed.2d 13 (1981) . It undoubtedly was because Congress did not wish the forfeiture provision of § 1963(a) to be limited by rigid and technical definitions drawn from other areas of the law that it selected the broad term "interest" to describe those things that are subject to forfeiture under the statute. Congress selected this general term apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are "enterprise" in § 1961(4); "rack-

Page 22

eteering activity" in § 1961(1) (1976 ed., Supp. V); and "participate" in § 1962(c).

Petitioner himself has not attempted to define the term "interest" as used in § 1963(a)(1). He insists, however, that the term does not reach money or profits because, he says: " 'Interest,' by definition, includes of necessity an interest in something." Brief for Petitioner 9. Petitioner then asserts that the "something" emerges from the wording of § 1963(a)(1) itself, that is, an interest "acquired . . . in violation of section 1962," and thus derives its meaning from the very activities barred by the statute. In other words, a direct relationship exists between that which is subject to forfeiture as a result of racketeering activity and that which constitutes racketeering. This relationship, it is said, means that forfeiture is confined to an interest in an "enterprise" itself. Petitioner derives support for this approach from *United States v. Marubeni America Corp., supra,* and from language contained in two federal district court opinions, *United States v. Meyers,* 432 F.Supp. 456 , 461 (WD Pa.1977), and *United States v. Thevis,* 474 F.Supp. 134 , 142 (ND Ga.1979), aff'd on other grounds, 665 F.2d 616 (CA5 1982) . He also now relies on the *McManigal* case, *supra,* recently decided by the Seventh Circuit. Tr. of Oral Arg. 4.

We do not agree. Every property interest, including a right to profits or proceeds, may be described as an interest in something. Before profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed. We therefore conclude that the language of the statute plainly covers the insurance proceeds petitioner received as a result of his arson activities.

IV

We are fortified in this conclusion by our examination of the structure of the RICO statute. We disagree with those

Page 23

courts that have felt that a broad construction of the word "interest" is necessarily undermined by the statute's other forfeiture provisions. The argument for a narrow construction of § 1963(a)(1) is refuted by the language of the succeeding subsection (a)(2). The former speaks broadly of "any interest . . . acquired," while the latter reaches only "any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Similar less expansive language appears in §§ 1962(b) and 1964(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo,* 472 F.2d 720 , 722 (CA5 1972). See *United States v. Wooten,* 688 F.2d 941 , 950 (CA4 1982). Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2). See *North Haven Board of Education v. Bell,* **456 U. S. Reports 512** , 521, 102 S.Ct. 1912 1917, 72 L.Ed.2d 299 (1982) ; *United States v. Naftalin,* **441 U. S. Reports 768** , 773-774, 99 S.Ct. 2077 , 2081-2082, 60 L.Ed.2d 624 (1979) . In the latter case, *id.,* at 773, 99 S.Ct., at 2082 , the Court said: "The short answer is that Congress did not write the statute that way." We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

The evolution of these statutory provisions supplies further evidence that Congress intended § 1963(a)(1) to extend beyond an interest in an enterprise. An early proposed version of RICO, S. 1861, 91st Cong., 1st Sess. (1969), had a single forfeiture provision for § 1963(a) that was limited to "all interest in the enterprise." This provision, however, later was divided into the present two subsections and the phrase "in the enterprise" was excluded from the first. Where Congress includes limiting language in an earlier version of a bill

Page 24

but deletes it prior to enactment, it may be presumed that the limitation was not intended. See *Arizona v. California,* **373 U. S. Reports 546** , 580-581, 83 S.Ct. 1468 , 1487-1488, 10 L.Ed.2d 542 (1963) . See Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1981 N.Ill.U.L.Rev. 225, 238 and n. 49. It is no answer to say, as petitioner does, Brief for Petitioner 17-18, that if the term "interest" were as all-encompassing as suggested by the majority opinion of the Court of Appeals, § 1963(a)(2) would have no meaning independent of § 1963(a)(1), and would be mere surplusage. This argument is plainly incorrect. Subsection (a)(1) reaches "any interest," whether or not in an enterprise, provided it was "acquired . . . in violation of section 1962." Subsection (a)(2), on the other hand, is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired. Thus, there are things forfeitable under one, but not the other, of each of the subsections. [2]

We note that the RICO statute's definition of the term "enterprise" in § 1961(4) encompasses both legal entities and illegitimate associations-in-fact. See *United States v. Turkette,* **452 U. S. Reports 580** -593 , 101 S.Ct., at 2527-2533 . Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus, construing § 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. *United States v. Turkette,* **452 U. S. Reports 589** , 101 S.Ct., at 2531 .

Petitioner stresses that 21 U.S.C. § 848(a)(2), contained in the Controlled Substances Act, **84 Stat. 1242** , as amended, specifically authorizes the forfeiture of "profits" obtained in a continuing criminal enterprise engaged in certain drug offenses. Brief for Petitioner 6-7. The Ninth Circuit in

Marubeni, 611 F.2d, at 766, n. 7, placed similar reliance upon § 848(a)(2) and observed that the two statutes were passed by the same Congress in the same month. We feel, however, that the specific mention of "profits" in the Controlled Substances Act cannot be accepted as an indication that the broader language of § 1963(a)(1) was not meant to reach profits as well as other types of property interests. Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time. The term "profits" is specific; the term "interest" is general. The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute. In addition, the RICO statute was aimed at organized crime's economic power in all its forms, and it was natural to use the broad term "interest" to fulfill that aim. In contrast, the narcotics activity proscribed by § 848 usually generates only monetary profits, a fact which would explain the use of the narrower term in § 848(a)(2).

Petitioner, of course, correctly suggests that members of Congress who voted for the RICO statute were aware of the Controlled Substances Act. See **116 Cong.Rec. 33651** (1970) (remarks of Rep. Brotzman); *id.,* at 1180-1182 (remarks of Sen. Thurmond); *id.,* at 33631 (remarks of Rep. Weicker); *id.,* at 33646 (remarks of Rep. Kastenmeier); *id.,* at 35318 (remarks of Rep. Anderson). It is most unlikely, however, that without explanation a potent forfeiture weapon was withheld from the RICO statute, intended for use in a broad assault on organized crime, while the same weapon was included in the Controlled Substances Act, meant for use in only one part of the same struggle. If this was Congress' intent, one would expect it to have said so in clear and understandable terms.

Petitioner also suggests that subsequent proposed legislation demonstrates that the RICO forfeiture provision of 1970 excludes profits. Brief for Petitioner 29-34. The bills to which petitioner refers, however, were introduced in order to

overcome the decisions in *Marubeni, Meyers,* and *Thevis.* See, *e.g.,* S. 2320, 97th Cong., 2d Sess. (1982). The introduction of these bills hardly suggests that their sponsors viewed those decisions as correct interpretations of § 1963(a)(1). See *United States v. Gordon,* 638 F.2d 886 , 888, n. 5 (CA5), cert. denied, **452 U. S. Reports 909** , 101 S.Ct. 3038 , 69 L.Ed.2d 411 (1981) . In any event, it is well settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories,* --- U.S. ----, ----, n. 27, 103 S.Ct. 1011 , 1020, n. 27, 74 L.Ed.2d 882 (1983) , quoting from *United States v. Price,* **361 U. S. Reports 304** , 313, 80 S.Ct. 326 , 331, 4 L.Ed.2d 334 (1960) . See, also, *United States v. Clark,* **445 U. S. Reports 23** , 33, n. 9, 100 S.Ct. 895 , 902, n. 9, 63 L.Ed.2d 171 (1980) .

Neither are we persuaded by petitioner's argument that his position is supported by the fact that certain state racketeering statutes expressly provide for the forfeiture of "profits," "money," "interest or property," or "all property, real or personal," acquired from racketeering. Brief for Petitioner 8-9. Nearly all of the state statutes post-date the *Meyers* and *Thevis* district court decisions. See, *e.g.,* Colo.Rev.Stat. § 18-17-106 (Supp.1982) (enacted in 1981); R.I. Gen.Laws § 7-15-3 (Supp.1982) (enacted in 1979). The legislatures of those States presumably employed language different from that of § 1963(a)(1) so as to avoid narrow interpretations of their laws along the lines of the narrow interpretations given the federal statute by the courts in *Meyers* and *Thevis.*

V

If it is necessary to turn to the legislative history of the RICO statute, one finds that that history does not reveal, as petitioner would have us hold, see Brief for Petitioner 11-21, a limited congressional intent.

The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in

Page 27

enacting Pub.L. 91-452, **84 Stat. 922** (1970), is set forth in its § 1. This statement dramatically describes the problem presented by organized crime. Congress declared, *id.,* at 923: "It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." This Court has recognized the significance of this statement of findings and purpose. *United States v. Turkette,* **452 U. S. Reports 588** -589 , 101 S.Ct., at 2531-2532 . Further, Congress directed, by § 904(a) of Pub.L. 91-452, **84 Stat. 947** : "The provisions of this title shall be liberally construed to effectuate its remedial purposes." So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive; a similar provision, however, appears in the Criminal Appeals Act, 18 U.S.C. § 3731.

Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives. See S.Rep. No. 91-617, p. 76 (1969).

"What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." *Id.,* at 79.

Senator Scott spoke of "new legal weapons," **116 Cong.Rec. 819** (1970), and Senator McClellan stressed the need for new penal remedies. *Id.,* at 591-592. Representative Poff, floor manager of the bill in the House, made similar observations. *Id.,* at 35193. Representative Rodino observed that "drastic methods . . . are essential, and we must develop law enforcement measures at least as efficient as those of organized crime." *Id.,* at 35199. The RICO statute was viewed as one such "extraordinary" weapon. *Id.,* at 602 (remarks of Sen. Hruska). And the forfeiture provision was

Page 28

intended to serve all the aims of the RICO Statute, namely, to "punish, deter, incapacitate, and . . . directly to remove a corrupting influence from the channels of commerce." *Id.,* at 18955 (remarks of Sen. McClellan).

The legislative history leaves no doubt that, in the view of Congress, the economic power of organized crime derived from its huge illegal profits. See Blakey, The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 249-256 (1982). Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering profits. During the congressional debates, the sources and magnitude of organized crime's income were emphasized repeatedly. See, *e.g.,* 115 Cong.Rec. 5873, 5884-5885 (1969); 116 Cong.Rec. 590, 592 (1970) (remarks of Sen. McClellan). From all this, the intent to authorize forfeiture of racketeering profits seems obvious. H.R.Rep. No. 91-1549, p. 57 (1970), U.S.Code Cong. & Admin.News, p. 4007, recites that the forfeiture provision extends "to all property and interests, as broadly defined, which are related to the violations."

It is true that Congress viewed the RICO statute in large part as a response to organized crime's infiltration of legitimate enterprises. *United States v. Turkette,* **452 U. S. Reports 591** , 101 S.Ct., at 2532 . But Congress' concerns were not limited to infiltration. The broader goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains. Forfeiture of interest in an enterprise often would do little to deter; indeed, it might only encourage the speedy looting of an infiltrated company. It is unlikely that Congress intended to enact a forfeiture provision that provided an incentive for activity of this kind while authorizing forfeiture of

an interest of little worth in a bankrupt shell.

We are not persuaded otherwise by the presence of a 1969 letter from the then Deputy Attorney General to Senator McClellan. See Measures Relating to Organized Crime: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st

Page 29

Cong., 1st Sess., 407 (1969). That letter, with its reference to "one's interest in the enterprise" does not indicate, for us, any congressional intent to preclude forfeiture of racketeering profits. The reference, indeed, is not to § 1963(a) as finally enacted but to an earlier version in which forfeiture was to be expressly limited to an interest in an enterprise. The letter was merely following the language of the then pending bill. Furthermore, the real purpose of the sentence was not to explain what the statutory provision meant, but to explain why the Department of Justice believed it was constitutional.

The rule of lenity, which this Court has recognized in certain situations of statutory ambiguity, see *United States v. Turkette,* **452 U. S. Reports 587** , n. 10, 101 S.Ct., at 2531 has no application here. That rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrong-doers." *Callanan v. United States,* **364 U. S. Reports 587** , 596, 81 S.Ct. 321 , 326, 5 L.Ed.2d 312 (1961) . Here, the language of the RICO forfeiture provision is clear, and "the rule of lenity does not come into play." *United States v. Turkette,* **452 U. S. Reports 588** , n. 10, 101 S.Ct., at 2531 , n. 10.

We therefore disagree with the reasoning of the respective courts in the *Marubeni, McManigal, Meyers,* and *Thevis* cases, and we affirm the judgment of the United States Court of Appeals for the Fifth Circuit. [3]

It is so ordered.

1. The Solicitor General, while perceiving "a factual distinction between *Marubeni* and the present case," felt that "the holding and reasoning of *Marubeni* would require the Ninth Circuit to reach the opposite result from the Fifth Circuit on the facts of the instant case." Memorandum for United States 4, n. 3. Accordingly, he joined in the prayer that a writ of certiorari be granted.

2. There may well be factual situations to which both subsections apply. The subsections, however, are clearly not wholly redundant.

3. In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms "profits" and "proceeds." Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise.

EXHIBIT 22

466 F.2d 380 (1972)

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.
NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
COCA COLA BOTTLING WORKS, INC., Respondent.

Nos. 24867, 71-1103.

United States Court of Appeals, District of Columbia Circuit.

Argued December 20, 1971.

Decided July 28, 1972.

[466 F.2d 381]

COPYRIGHT MATERIAL OMITTED

[466 F.2d 382]

Mr. Marvin Menaker, Dallas, Tex., for petitioner in No. 24867.

Mr. Charles N. Steele, Atty., N.L.R.B., with whom Messrs. Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel and Ronald I. Tish, Atty., N.L.R.B., were on the brief, for petitioner in No. 71-1003 and respondent in No. 24867.

Mr. Hugh M. Smith, Dallas, Tex., of the bar of the Supreme Court of Texas, pro hac vice, by special leave of court, with whom Mr. J. Parker Connor, Washington, D. C., was on the brief, for respondent in No. 71-1103.

Before WRIGHT, McGOWAN and ROBB, Circuit Judges.

McGOWAN, Circuit Judge:

The decision of the National Labor Relations Board now before us arises out of a strike by the Retail, Wholesale and Department Store Union against Coca Cola Bottling Works, Inc. The petitioning Union in No. 24867 complains of the Board's order in certain respects. In No. 71-1103, the Board seeks enforcement. The most significant issue relates to the propriety of the Board's retroactive application of a change in policy effectuated by it through adjudication rather than rule making. For the reasons set forth hereinafter, the order of the Board is enforced only in part.

I

On February 18, 1966 the Union was certified as the collective bargaining agent of the workers at the Company's plant in Dallas, Texas. On July 26, 1966, as the result of a bargaining impasse, the workers went out on strike. The Company decided to continue operations

[466 F.2d 383]

with employees who chose not to strike and new employees hired to replace the strikers. During the course of the strike, the Company eliminated all of its electric eye bottle inspecting machines and abolished eleven sales helper jobs. The Union maintains that not submitting these decisions to the collective bargaining process constituted an unfair labor practice under Section 8(a)(5) of

the National Labor Relations Act, [1] and thus converted what was admittedly an economic strike into an unfair labor practice strike.

Two weeks after the beginning of the strike, some of the strikers began distributing "Health Warning" leaflets in the community, implying that, because of the inexperienced replacements at the plant, Coca-Cola bottles might be unclean and a hazard to health. [2] The Company claims that this leafleting was not protected activity under the Act, and that the Company was therefore justified in subsequently refusing to offer reinstatement to any strikers who personally engaged in it.

The Union announced the end of the strike on November 4, 1966, and at that time requested reinstatement for all striking employees. The Union also asked for a list of all strikers permanently replaced during the strike. Instead of furnishing such a list, the Company responded by asking the Union to submit a list of all strikers who actually desired reinstatement. On November 7, the Union submitted a list of 137 strikers who allegedly desired reinstatement, and on that day 40 of those appeared personally at the plant. The Company spent November 7 interviewing most of those 40 to determine whether or not any of them had engaged in the distribution of the "Health Warning" leaflet. On November 10, the Company notified the Union that 12 of the strikers had been offered reinstatement, but that all other strikers had been permanently replaced or had had their jobs abolished. By November 14, ten of the strikers offered reinstatement were actually reinstated. [3] Bargaining between the Company and the Union continued after the strike until February 22, 1967. [4] During that time, 242 job vacancies occurred in the normal turnover of personnel. Although aware that a substantial number of former strikers desired reinstatement, the Company never attempted to fill these vacancies by actively seeking out and offering positions to any of the unreinstated strikers, but instead filled them with other applicants obtained through newspaper advertisements and private

[466 F.2d 384]

employment services. On a number of occasions, however, the Company informed the Union that any of its members who came down to the plant and applied for work would be given "due consideration." Moreover, there is no evidence that any former striker who did so was ever denied reinstatement.

On February 22, 1967, the Company announced that it would no longer bargain with the Union because it did not believe that the Union continued to represent a majority of the employees.

On the basis of these facts, the Board's General Counsel filed a complaint against the Company charging a number of unfair labor practices, and, on December 4, 1970, the Board came to the following conclusions: [5]

1. The elimination of the bottle inspecting machines was not an unfair labor practice because it did not eliminate or significantly affect the job of any employee.

2. The Company committed an unfair labor practice by unduly delaying the reinstatement of the ten employees eventually reinstated on November 14.

3. Although the leafleting was not protected activity, the Company subsequently condoned or forgave the activity, and thus was not justified in refusing to consider any of the participants for reinstatement.

4. The Company\'s failure actively to seek out and offer reinstatement to unreinstated strikers was an unfair labor practice under the Board\'s decision in *Laidlaw,* note 5 *supra.*

5. The Company committed an unfair labor practice in withdrawing recognition from

the Union on February 22, 1966. [6]

On the basis of these conclusions, the Board ordered the Company to cease and desist from engaging in the cited unfair labor practices. The Board further ordered the Company to make whole the ten strikers whose reinstatement was unduly delayed, and to offer immediate reinstatement to the unreinstated strikers and to make them whole for the Company's failure to offer them jobs as they became available, discharging if necessary any employees hired instead. [7] The Board now seeks enforcement of its order.

II

The Union challenges only the Board's determinations that (1) the elimination of the bottle inspecting machines was not an unfair labor practice, and (2) the distribution of the "Health Warning" leaflets was not protected activity. There is ample evidence in the record to support the finding of the trial examiner, affirmed by the Board, that the elimination of the machines had no significant effect on the job of any worker, and that

[466 F.2d 385]

consequently the Company was not obliged to submit this decision to collective bargaining. The decision of the Board on this issue is affirmed.

The Board's conclusion that the leafleting was not protected activity rested on its view that the intent and effect of the leaflet was to attack the Company's product rather than inform the public of a genuine issue in a labor dispute. [8] We need not concern ourselves with the validity of this view because the Board resolved the matter in favor of the Union on the basis of condonation. We turn to the Company's challenge to this resolution, after first considering the question of undue delay in reinstatement.

1. *Delay in Reinstatement.*

The law is clear that striking employees may request reinstatement collectively through their union; [9] and that, once a request is made, the obligation is upon the employer to offer reinstatement to those employees for whom there are available positions. [10] The Board's position on the issue of undue delay in this case is that the Company's responding to the November 4 request for reinstatement by a counterrequest for a list of names of strikers specifically desiring reinstatement had the effect of shifting the burden back to the employees. Consequently, the Board has taken the position that any delay occasioned by such a counter-request is unreasonable *per se.*

The Company argues, on the other hand, that its attempt to find out which strikers actually wanted reinstatement before indiscriminately offering reinstatement to some who may not have wanted it was a reasonable and perhaps more expeditious method of reinstatement. Although the question is not entirely free from doubt, we are not prepared to say that the Board's position is plainly unreasonable or arbitrary. Certainly the employer does not need to know which specific employees desire reinstatement in order to determine which positions are available; and whether the Company's course of action in this case was a more or less expeditious method of reinstatement is a matter well within the expertise of a Board far more familiar than we with the realities of labor-management relations. It is not the function of reviewing courts to substitute their judgment for the determination of an administrative agency, so long as that determination is not plainly capricious. [11]

2. *Condonation of the Leafleting*

The Company next challenges the Board's finding that the Company condoned, or forgave, the distribution of the "Health Warning" leaflets by some of the strikers. On Monday, November 7, 1966, the Company's personnel manager, Wortham, interviewed thirty-seven strikers who

appeared at the plant seeking

[466 F.2d 386]

reinstatement. The Company maintains that the purpose of the interviews was to screen out from reinstatement those strikers who admitted to personal involvement in the leafleting, and the record indicates that the interviewees were in fact asked about their relationship to that effort. Wortham testified that he made a list of fourteen interviewees who admitted participation, and none of them were reinstated. The Board's finding of condonation is based on the fact that three employees, Parker, Smith, and Reese, who were reinstated, later testified that they had told Wortham that they had participated in the leafleting, and that he had replied that "There were no hard feelings, that they had done what they thought was right." Wortham's testimony, contrarily, is that he never reinstated anyone whom he knew had participated.

All parties agree that

> "condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred."

NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 , 414 (5th Cir. 1955). [12] However, the fact that there is conflicting testimony on the issue of condonation does not mean that the evidence of condonation is at best equivocal. If, in fact, the Company reinstated some employees despite its knowledge of their participation in the unprotected activity, and if, in fact, it told them that there were "no hard feelings" about it, then the Board's determination that the Company condoned the activity was proper. [13]

While we affirm the Board's determination, we note also that it is supported on the slenderest of reeds. The Board, by crediting the testimony of Parker, Smith, and Reese, purported to find as a fact that Wortham reinstated these strikers despite his knowledge of their participation, discrediting the contrary testimony of Wortham. The trial examiner, however, never ruled on the question of condonation, and never expressly discredited Wortham's testimony or credited the testimony of Parker, Smith, and Reese. Particularly in cases where, as here, the question of condonation on the facts is a close one, the resolution of credibility conflicts is more properly made in the first instance by the trial examiner, who, unlike the Board, has had the opportunity to observe the witnesses and to hear the testimony at first hand. [14] Nevertheless, the trial

[466 F.2d 387]

examiner did not make a finding on the issue here, and the Board does have the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility when he has made one. [15] Because the Board's finding of condonation was based on testimony which was not "hopelessly incredible," [16] we do not disturb its conclusion, although we feel bound to say that the way this matter was handled at both the trial examiner and the Board level does not engender confidence in the Board's fact-finding processes.

III

The Company's principal opposition to the Board's action in this case is directed against the imposition of a back-pay remedy in respect of the permanently replaced economic strikers to whom it did not offer reinstatement to vacancies that occurred in the normal turnover of personnel. This is the issue which was the subject of the 1969 supplemental evidentiary hearing referred to in Note 5 *supra.* Trial Examiner Goerlich identified the individual strikers who were, in his view, entitled to have reinstatement affirmatively offered them when and as vacancies occurred after November 4, 1966. He found that enough such vacancies had developed by June

21, 1967 to meet this obligation. The Board in its opinion dealt with the matter in these terms:

> We have found in agreement with Trial Examiner Goerlich that the Respondent discriminatorily refused to recall and reinstate strikers to available job openings during the period from November 4, 1966, to June 21, 1967, and in order to remedy these unfair labor practices, we shall order the Respondent to offer immediate and full reinstatement to the employees listed on Appendix B attached to this Decision discharging, if necessary, any employee hired after the date of the discrimination against each striker, respectively. . . . We shall also order the Respondent to make these employees whole for any loss of pay suffered by reason of the discrimination against them from the date they should have been so reinstated to the date of valid offers of reinstatement.

Prior to the decision of the Board in *Laidlaw* on June 13, 1968, it was a well settled rule, enunciated and applied by the Board, that when an employer permanently replaced an economic striker, he was under no obligation thereafter to treat that striker other than as a new applicant for employment. [17] Although he was not permitted to discriminate against a former striker on the basis of his prior protected activity, [18] he was not obliged actively to seek out and to offer former strikers reinstatement in preference to other applicants, or to accord rehired strikers their full former accrued rights and pay. Relying largely on the Supreme Court's opinion in NLRB v. Fleetwood Trailer Co., **389 U. S. Reports 375** , 88 S.Ct. 543 , 19 L.Ed.2d 614 (1967) , the Board in *Laidlaw,* overturned this rule, and held

[466 F.2d 388]

that former strikers, although not entitled to reinstatement in preference to replacements permanently hired during the strike, are entitled to offers of reinstatement to vacancies resulting from the subsequent departure of permanent replacements; and they remain so entitled until they have obtained "other regular and substantially equivalent employment." [19]

Applying the *Laidlaw* rule, the Board in this case determined that the Company committed unfair labor practices in failing to seek out and to offer to former strikers reinstatement to vacancies occasioned by the departure of replacements hired during the strike, and has imposed backpay liability against the Company on the basis of these unfair labor practices. Since all of the events relevant to this determination occurred before the Board's decision in *Laidlaw,* the Company protests the seeming inequity of branding as unfair, and imposing a back-pay remedy for, actions which, when undertaken, were squarely within explicitly articulated Board policy as sustained by the courts.

The Company does not assail the validity of the *Laidlaw* rule itself; and, were the validity of that rule directly before us, we would have no difficulty in joining the growing number of circuits that have upheld it. [20] The issue presently before us involves only the question of its retroactive reach in the circumstances of this case.

Whether to give retroactive effect to new rules adopted in the course of agency adjudication is a difficult and recurring problem in the field of administrative law. It has arisen with notable frequency in the review of decisions by the Board. In order to establish an alternative procedure where inequity may be avoided, the Administrative Procedure Act, 5 U.S.C. § 551 et seq., has authorized agencies to conduct formal rule making proceedings, in which all interested parties are notified, hearings conducted, and new rules thereby adopted. *See also* 29 U.S.C. § 156 (1970). Rules so adopted are prospective in application only. 5 U.S.C. § 551(4) (1970). Despite substantial and repeated scholarly and judicial criticism, the Board has largely ignored the rule making process, and has chosen rather to fashion new standards and to abrogate old ones in the context of case-by-case adjudication. *See, e. g.,* 1 Davis, Administrative Law § 6.17 (1970 Supp.); Peck, The Atrophied Rule-making Powers of the National Labor Relations Board, **70 Yale L.J. 729** (1961); Shapiro, The Choice of Rule-making or Adjudication in Development of

Administrative Policy, **78 Harv.L.Rev. 921** (1965); NLRB v. Wyman-Gordon Co., **394 U. S. Reports 759** , 89 S.Ct. 1426 , 22 L.Ed. 2d 709 (1969) .

Judge Henry Friendly has observed that "There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., **332 U. S. Reports 194** , 202, 67 S.Ct. 1575 1580, 91 L.Ed. 1995 (1947) , (footnote omitted) that since an administrative agency has the ability to make new law prospectively through the exercise of its rule-making powers, it has less

[466 F.2d 389]

reason (than a court) to rely upon *ad hoc* adjudication to formulate new standards of conduct' . . . ." NLRB v. Majestic Weaving Co., 355 F.2d 854 , 860 (2d Cir. 1966). And Judge Friendly went on to say in that case:

> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles. . . . And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency\'s changed disposition had been earlier made known or might even have been taken in express reliance on the standard previously established.

In a Second Circuit decision handed down since this case was taken under submission and brought to our attention by the Board, H. & F. Binch Co. Plant of Native Laces and Textile Division of Indian Head, Inc. v. NLRB, note 20 *supra,* Judge Friendly wrote for the court in sustaining a retroactive application of *Laidlaw.* He noted, however, that

> . . . the *Laidlaw* decision established a new norm of employer conduct toward strikers who had sought or achieved reinstatement, *cf.* NLRB v. Majestic Weaving Co., 355 F.2d 854 , 860-861 (2 Cir. 1966). Binch, in effect, is saying that the time has come when courts should stop merely shedding crocodile tears over the Board\'s failure to utilize its rule-making power and calling its attention to the Supreme Court\'s `rather pointed hint\' on that subject in the second *Chenery* case . . . and should administer the one kind of medicine the Board will have no difficulty in understanding. . . .

456 F.2d at 365 . After saying that "It is indeed surprising that the Board should so consistently have refused to utilize its rule-making power, or to develop techniques of prospective ruling and overruling . . . ," Judge Friendly concluded that ". . . we do not deem this case an appropriate vehicle for taking the action the company seeks . . . ," since the events in question occurred after *Fleetwood* and, accordingly, "the extension in *Laidlaw* thus was hardly a great surprise." *Id.* It was in the light of this salient fact that he weighed the hardships to the employees against ". . . the hardship in imposing liability on the company for conduct conforming to what it may reasonably have thought the limit of its duties . . . ," and concluded to "await a stronger case before we refuse to give retroactive force to a Board order because it was founded on a decision enunciating a stricter rule of conduct for employees or unions than the Board had previously imposed." In the case before us, this pivotal fact is missing, since the Company here, during the period referred to by the Board as giving rise to its remedy, acted without the benefit of *Fleetwood.* [21]

In deciding whether to grant or deny retroactive force to newly adopted administrative rules, reviewing courts must look to the standard established by

[466 F.2d 390]

the Supreme Court in SEC v. Chenery, *supra :*

> . . . Retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

332 U. S. Reports 203 , 67 S.Ct. at 1581 . Which side of this balance preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision, NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952) ; and courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests. *See* NLRB v. Majestic Weaving Co., *supra ;* NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960) ; NLRB v. International Brotherhood of Teamsters, 225 F.2d 343 (8th Cir. 1955) ; Pedersen v. NLRB, 234 F.2d 417 (2d Cir. 1956) ; NLRB v. Local 176, 276 F.2d 583 (1st Cir. 1960) .

Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. Taking all of these considerations into account, we find that the inequity of applying the *Laidlaw* rule to the facts of this case far outweighs the interests that might be furthered if it were applied.

First, while the Supreme Court has observed in *Chenery* that "Every case of first impression has a retroactive effect . . . ," this is not a case of first, but of second impression. The case in which the rule in question was adopted by the Board was *Laidlaw* itself, and, although the Seventh Circuit upheld its application to the employer there, it must be recognized that "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression." [22] The Supreme Court has identified a number of reasons calling for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced— reasons that do not apply with the same force to subsequent proceedings. [23] Thus the Court has suggested that to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines. The Court has also made reference to "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies. . . ." [24]

[466 F.2d 391]

This approach may have a special legitimacy in the agency field. In NLRB v. Wyman-Gordon Co., **394 U. S. Reports 759** , 89 S.Ct. 1426 , 22 L.Ed.2d 709 (1969) , a plurality of the members of the Supreme Court differentiated sharply between the Board's quasi-legislative (rule making) and quasi-judicial (adjudicatory) powers, suggesting that both the Board's own statute and the Administrative Procedure Act limit the Board's use of the latter to promulgate rules of wholly prospective application. In the various expressions to this effect, there was emphasis upon the circumstance that the Board, in its earlier purported adjudication relied upon by it in that case, had concluded to make its decision announcing a new principle of labor relations prospective only; and this circumstance was strongly intimated to be a potent indicator of rule making.

Whatever may be the precise reach of *Wyman-Gordon* in terms of agency power to engage in wholly prospective adjudication, *see* The Supreme Court, 1968 Term, 83 Harv.L.Rev. 7, 220-27 (1969), it does not prevent an agency in adjudication from declining in subsequent cases to apply a new rule retroactively if equitable or statutory considerations militate against it, any more than Article III prevents a federal court from limiting the retroactive scope of new legal principles articulated in judicial decisions. Nor does *Wyman-Gordon* prevent reviewing courts from refusing

to enforce such retroactive orders when the circumstances so dictate. [25] In short, some of the considerations which support retroactivity in cases of first impression are, in subsequent cases, absent from the scale on which a court must weigh its decision.

The standard to which the Company attempted to conform its conduct in this case was well established and long accepted by the Board. Unlike *Chenery,* this is not the kind of case where the Board "had not previously been confronted by the problem" and was required by the very absence of a previous standard and the nature of its duties to exercise the "function of filling in the interstices of the Act." [26] Rather it is a case where the Board had confronted the problem before, had established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted. [27]

The record shows that in this case the Company at all times sought and closely followed the advice of counsel. The trial

[466 F.2d 392]

examiner credited the testimony of personnel manager Wortham that, although the Union was told that any replaced strikers who wanted to come back should get in touch with the Company, he did not individually notify former strikers as vacancies occurred because he did not think that the law obliged him to do so. Promptly after *Laidlaw* was announced the Company sent offers of reinstatement to each striker. Unless the burden of imposing the new standard is *de minimis* or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect, at the least, in the pre-*Fleetwood* period.

The Board does not now deny or minimize any of the reasons just advanced which militate against the application of its order to past conduct, but rather attempts to justify that retroactivity solely by reference to the statutory design. A distinction must, however, be made between the purpose of a statute and the necessity of a particular remedy to effectuate that purpose. The purpose of Sections 8(a)(1) and (3) of the Act, as construed by the Supreme Court in *Fleetwood* and the Board in *Laidlaw,* was to provide that striking employees retain their status as employees under the Act even after they have been permanently replaced, and as such remain entitled to offers of reinstatement to positions that subsequently become available. In order to protect these rights, the Seventh Circuit in *Laidlaw* held that a retroactive back-pay order was appropriate:

> Unless the disadvantaged strikers are compensated, they will have been penalized for exercising statutorily protected rights *and the effect of discouraging future such exercises will not be completely dissipated.* In these circumstances, it was not arbitrary or capricious for the Board to conclude that complete vindication of employee rights should take precedence over the employer\'s reliance on prior Board law. (Emphasis supplied). 414 F.2d 99 , 107 (1969).

In that case, however, the Board had expressly found that the employer's failure to reinstate former strikers was discriminatorily motivated, as manifested by its "avowed policy of not considering the strikers once they had been replaced" and by the entire pattern of events before and during the strike. [28] Under those circumstances, it may be reasonable to conclude that a mere offer to reinstate is not enough, and that a back-pay order is necessary to prevent discouraging the future exercise of statutory rights by employees who have been subjected to anti-union bias. [29]

In this case, however, there is no evidence that the employer's actions were discriminatorily motivated, or that the relationship between the Company and the Union was characterized by hostility, or that any former striker who personally applied for reinstatement (in response

[466 F.2d 393]

to the invitation by the Company to do so, extended through the Union) was ever refused employment or denied any of his former rights. It is true, as the Supreme Court noted in *Fleetwood,* that the presence or absence of discriminatory motivation is irrelevant to the question of a striker's continuing status as an employee under the Act. But when the question involves the appropriateness of a particular remedy, the totality of circumstances are to be taken into account in order to strike a just balance. A remedy which may be appropriate to counter manifest discrimination may not be necessary to effectuate the purposes of the Act in a case where no discrimination is shown, and where the record shows, as here, that the employer, once the new rule is announced, has moved promptly to comply.

Since the circumstances of this case do not reflect discriminatory treatment or present any of the other considerations calling for the retroactive application of the Board's order, we conclude that

> . . . the practical operation of the Board\'s change of policy . . . is to work hardship upon the Company altogether out of proportion to the public ends to be accomplished. NLRB v. Guy F. Atkinson, 195 F.2d 141 , 149 (9th Cir. 1952).

Therefore, enforcement of the Board's order, insofar as it relates to reinstatement and back-pay liability for any period before the Supreme Court's decision in *Fleetwood,* is denied.

As we have said hereinabove, the advent of *Fleetwood* marks the earliest point at which the Company could be said to have been put on notice that it must deal differently with former striking employees in respect of reemployment. The Fifth and Second Circuits have regarded *Fleetwood* as clothing the Board with remedial discretion to apply *Laidlaw* retroactively, and we are not disposed to dispute that conclusion. *Fleetwood* was decided on December 18, 1967, and the Company did not begin offering reinstatement until some time in August of 1968. Thus we remand this case to the Board for further consideration of remedies in the light of what we consider to be its discretion to apply *Laidlaw* retroactively to vacancies occurring after January 15, 1968 (a date providing a reasonable time for notice of the *Fleetwood* decision).

IV

The remaining issue before us involves the Board's finding of an unfair labor practice in the Company's withdrawal of recognition from the Union on February 22, 1967. To support its claim of good faith doubt as to the Union's continuing majority status, the Company points to the fact that, in a bargaining unit of approximately 400 workers, 107 failed to join the strike, 82 who initially joined abandoned it and returned to work, and 100 were hired as permanent replacements during the strike. The Company does not contest the Board's position that the 105 unreinstated strikers (who may be presumed to support the Union) comprise the remaining employees in the bargaining unit, but argues that, even if they are included, the Company had a basis for questioning the Union majority.

Although an employer is permitted to refuse to bargain with a certified union after the expiration of one year from the time of its certification if he entertains a good faith doubt as to its continued majority support, the union is still presumed to represent a majority of the unit; and the refusal to bargain must clearly rest on more than an allegation of subjective good faith doubt, easily made and difficult to refute. [30] It must be founded in reason, and represent a doubt engendered by facts which provide some guarantee of objectivity.

[466 F.2d 394]

The Board has long held, with judicial approval, that an employee's failure to join a strike, or his subsequent abandonment of a strike, cannot give rise to any presumption that he repudiates the Union as his bargaining representative. [31] Thus, it was not improper for the Board to

conclude that the Company had no appropriate basis for doubting that a majority continued to support the Union, and to order it to bargain.

The petition in No. 24867 is denied; and, in No. 71-1103, enforcement is granted except as otherwise provided hereinabove and this case is remanded for the purpose stated.

It is so ordered.

Notes:

1 29 U.S.C. § 158(a)(5) (1970).

2 The leaflet reads as follows:

"HEALTH WARNING! Coca-Cola Bottles in Dallas Now Being `Cleaned and Inspected' by Inexperienced Workers—SPRITE FRESCA COCA COLA BEWARE!—Empty Coke Bottles very often serve as collectors of strange things. Roaches, ants, flies, bugs and even dead mice are sometimes found in return bottles.

Empty Coke bottles also serve as cigarette ashtrays as well as spittoons in emergencies.

The highest skill and experience is required by employees who are responsible for cleaning and inspecting the bottles for refills that you get out of dispensers or grocery stores.

The employees who are now on strike have the experience to protect the quality of the Coca-Cola product and the health of this community. Coca-Cola Bottling Works Inc., is now attempting to run its plant with fewer employees than normal. These stop-gap employees do not have the same level of experience in inspection as the regular employees on strike because of the company's unfair labor practices."

3 The record does not show what became of the other two strikers, but all the parties agree that no vacancies existed on November 14 other than those filled by the ten reinstated strikers.

4 The Union briefly went out on strike a second time, from November 14 to November 17, 1966, apparently in protest over the Company's failure to reinstate all of the original strikers and its failure to come to terms over some of the issues still under negotiation. The Board's finding that this second strike was not an unfair labor practice strike is not assailed by any party here, and is not relevant to any of the issues involved in this petition for review.

5 The Board's decision followed two hearings and two decisions by separate trial examiners. After a hearing and decision by Trial Examiner Youngblood on the General Counsel's original complaint, the Company petitioned the Board for a supplementary hearing in light of the Board's decision in The Laidlaw Corporation, 171 NLRB No. 175 (decided June 13, 1968), *enforced* 414 F.2d 99 (7th Cir., 1969), *cert. denied* **397 U. S. Reports 920** , 90 S.Ct. 928 , 25 L.Ed.2d 100 (1970) . This petition was granted, and supplementary hearings were held before Trial Examiner Goelrich on the specific issue of the Company's reinstatement obligation after the strike.

6 The Board additionally found that the Company's elimination of 11 sales helper jobs and its raising unilaterally the wages of two employees subsequent to the strike were unfair labor practices since they were not submitted to the bargaining process. Neither of these conclusions is challenged here.

7 Offers of reinstatement were in fact made by the Company in August, 1968, after the Board's decision in *Laidlaw.* Therefore the Company's back-pay liability under the Board's order would extend only from the time each striker should have been offered reinstatement to the time when the Company made valid offers of reinstatement.

8 *See* NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers, **346 U. S. Reports 464** , 476, 74 S.Ct. 172 , 98 L.Ed. 195 (1953) .

9 NLRB v. Brown & Root, Inc., 311 F.2d 447 , 451 (8th Cir. 1963).

10 *See, e. g.,* NLRB v. Transport Co. of Texas, 438 F.2d 258 , 263 (5th Cir. 1971); Serv-Air, Inc. v. NLRB, 395 F.2d 557 (10th Cir.), *cert. denied,* **393 U. S. Reports 840** , 89 S.Ct. 121 , 21 L.Ed.2d 112 (1968) .

11 29 U.S.C. § 160(e); Universal Camera Corp. v. NLRB, **340 U. S. Reports 474** , 71 S.Ct. 456 , 95 L.Ed. 456 (1951) . We note that, as a general rule, the Board calculates back-pay liability for failure to reinstate from a date beginning five days after the employee's request for reinstatement, *see* Aronsson Printing Co., **13 NLRB 799** , (1939) presumably reflecting the Board's view that five days is a reasonable time within which to reinstate. Here it appears from the record that (i) the strikers requested reinstatement on Friday, November 4, 1966, (ii) those for whom jobs

were available were all offered reinstatement Friday, November 11 (the fifth working day after the request for reinstatement), (iii) some were actually reinstated that day, and (iv) all were reinstated by the following Monday. Although these facts may remove or render insignificant the Company's actual back-pay liability, they do not invalidate the Board's position that any delay occasioned by the Company's request for a list of strikers desiring reinstatement is unreasonable.

12 *See also* Packers Hide Association v. NLRB, 360 F.2d 59 (8th Cir. 1966) .

13 We do not think that the statement of "no hard feelings" without actual reinstatement would amount to more than an equivocal statement, or that reinstatement alone, without that statement, would constitute condonation. *See* NLRB v. Fansteel Metallurgical Corp., **306 U. S. Reports 240** , 259, 59 S.Ct. 490 , 83 L.Ed. 627 (1939) ; NLRB v. Clearfield Cheese Co., 213 F.2d 70 , 75 (3rd Cir. 1954).

14 *See* NLRB v. Lenkurt Electric Co., 438 F.2d 1102 , 1105 n. 3 (9th Cir. 1971); Acme Products, Inc. v. NLRB, 389 F.2d 104 , 106 (8th Cir. 1968); Morrison-Knudsen Co. v. NLRB, 276 F.2d 63 , 70 (9th Cir. 1960).

What makes the question here particularly difficult is that the Board's resolution of the credibility conflict in the first instance was made in the face of undisputed evidence that Wortham did ask most of the interviewees about their participation in the distribution of the leaflets, which in itself hardly suggests a forgiving attitude on the part of the Company. Moreover, the Board's finding is arguably inconsistent with a stipulation of the General Counsel concerning the interviews. At the hearing before the trial examiner, the Company submitted a list of 14 names as those strikers who had told Wortham that they had participated in the leafleting. Parker, Smith, and Reese were not on that list. The General Counsel stipulated that those fourteen had told Wortham of their participation and were not reinstated. Whether the General Counsel also stipulated that those fourteen were the *only* strikers who told Wortham of their participation is not clear from the record. Because of the ambiguity in the stipulation, we do not hold the Board concluded on the issue of whether Parker, Smith, and Reese, who were reinstated, also told Wortham prior to their reinstatement.

15 *See* Nix v. NLRB, 418 F.2d 1001 , 1008 (5th Cir. 1969); Acme Products, Inc. v. NLRB, 389 F.2d 104 , 106 (8th Cir. 1968) Amco Electric v. NLRB, 358 F.2d 370 , 373 (9th Cir. 1966); Joy Silk Mills v. NLRB, 87 U.S.App.D.C. 360 , 185 F.2d 732 (1950) , cert. denied, **341 U. S. Reports 914** , 71 S.Ct. 734 , 95 L.Ed. 1350 (1951) .

16 NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) . *See also* NLRB v. C. Malone Trucking Inc., 278 F.2d 92 (1st Cir.1960) ; NLRB v. Dinion Coil Co., 201 F.2d 484 (2d Cir. 1952) .

17 *See* NLRB v. Brown & Root, **132 NLRB 486** (1961). *enforced* 311 F.2d 447 (8th Cir.1963) ; American Flint Glass Workers' Union v. NLRB, 97 U.S.App.D.C. 244 , 230 F.2d 212 , cert. denied, **351 U. S. Reports 988** , 76 S.Ct. 1047 , 100 L.Ed. 1501 (1956) ; Chauffeurs, Teamsters & Helpers "General" Local No. 200 A.F.L. v. NLRB, 233 F.2d 233 (7th Cir. 1956) ; Sax v. NLRB, 171 F.2d 769 , 771 (7th Cir. 1948); Hot Shoppes, Inc., **146 NLRB 802** (1964); Texas Boot Mfg. Co., **143 NLRB 264** (1963).

18 Phelps Dodge Corp. v. NLRB, **313 U. S. Reports 177** , 61 S.Ct. 845 , 85 L.Ed. 1271 (1941) .

19 29 U.S.C. § 152(3) (1970). In *Fleetwood,* the Supreme Court had held that an employer's refusal to reinstate former strikers to positions which became available because of an expansion of the business after the strike constituted an unfair labor practice under Sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3). In *Laidlaw,* the Board extended this principle to failures to offer reinstatement to positions available because of post-strike departures of replacements permanently hired during the strike.

20 NLRB v. Laidlaw Corp., 414 F.2d 99 (7th Cir. 1969) , cert. denied, **397 U. S. Reports 920** , 90 S.Ct. 928 , 25 L.Ed.2d 100 (1970) ; American Machinery Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970) ; NLRB v. Johnson Sheet Metal, 442 F.2d 1056 (10th Cir. 1971) ; NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971) ; H. & F. Binch Co., Plant of Native Laces and Textile Division of Indian Head, Inc. v. NLRB, 456 F.2d 357 (2nd Cir. 1972) .

21 Earlier in his decision in *Binch,* Judge Friendly referred to *Laidlaw* as "a permissible extrapolation from what the Supreme Court had decided in NLRB v. Great Dane Trailers, Inc., *supra,* **388 U. S. Reports 26** , 87 S.Ct. 1792 , 18 L.Ed.2d 1027 , and NLRB v. Fleetwood Trailer Co., *supra,* **389 U. S. Reports 375** , 88 S.Ct. 543 , 19 L.Ed.2d 614 , . . ." 456 F.2d at 364 . Those decisions came down, respectively, on June 12 and December 18, 1967. The unfair labor practice, upon which the backpay order in question here is founded, was said by the Board to be the Company's failure to reinstate strikers between November 4, 1966 and June 21, 1967. Although perhaps in theory *Great Dane* might have furnished an exceptionally alert and astute counsel with a few days foreboding of the future *Laidlaw* rule, *Fleetwood* was a far more significant signal of a necessary change in Board policy.

22 NLRB v. Majestic Weaving Co., 355 F.2d 854 , 860 (2d Cir. 1966). The fact that this circuit has not yet had occasion to rule on the validity of the *Laidlaw* rule clearly does not render this a case of "first impression" for purposes of retroactivity analysis, the principal concern of which is lack of notice and the degree of reliance on former standards. Since it is normally the *Board's* first announcement of a new rule in an adjudicatory setting that puts parties on notice and ends their ability to claim reliance on a previous standard, the question of retroactive application should not turn on whether the particular judicial forum the parties have chosen has had occasion to pass upon the

rule.

23 Although discussed in the context of constitutional adjudication, these reasons have equal relevance to the field of administrative law.

24 Stovall v. Denno, **388 U. S. Reports 293** , 301, 87 S.Ct. 1967 1972, 18 L.Ed.2d 1199 (1967) ; *See also* Mishkin, Foreword, The Supreme Court, 1964 Term, 79 Harv.L. Rev. 56, 60-61 (1965).

25 Whether a reviewing court under the *Wyman-Gordon* rationale is required to enforce a retroactive order applied by the Board in a case of first impression is unclear. We note that a number of reviewing courts have refused to enforce such orders. NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960) ; NLRB v. International Brotherhood of Teamsters, 225 F.2d 343 (8th Cir. 1955) ; NLRB v. Guy F. Atkinson Co., 195 F.2d 171 (9th Cir. 1952) . The power to do so would seem implicit in the standard articulated in *Chenery.*

26 **332 U. S. Reports 202** , 203, 67 S.Ct. at 1580 , 91 L.Ed. 1995 (1947) . *See also* Davis, Administrative Law § 17.08 (1970 Supp.), where Professor Davis observes: "Surely the difference between retroactive clarification of uncertain law and retroactive change in clear law that has been specifically relied upon can and should be recognized."

27 In its brief and supplemental memorandum, the Board has cited four cases in addition to *Laidlaw* itself in which the courts have enforced the *Laidlaw* rule. American Machinery Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970) ; Guenther & Son, Inc. v. NLRB, 427 F.2d 983 (5th Cir. 1970) , cert. denied, **400 U. S. Reports 942** , 91 S.Ct. 240 , 27 L.Ed.2d 246 ; NLRB v. Johnson Sheet Metal, 442 F.2d 1056 (10th Cir. 1971) ; and NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971) . In two of these, the events in question occurred after *Laidlaw* was decided. *Johnson Sheet Metal* and *Hartmann Luggage, supra .* And in *American Machinery* and *Guenther, supra,* the Fifth Circuit noted that "The long shadows of *Fleetwood* and *Laidlaw* presaged the Board's decisions in these cases." 424 F.2d at 1330 , 427 F.2d at 986 .

28 414 F.2d at 106 . Thus, as the court reported in that case:

"Two days before the strike, foreman Krile told employee Lempke that he had orders to replace the four or five union members in his department. On the day of the strike, plant manager Johnston read the speech to employees in which he emphasized that if they went on strike and were replaced, they would `lose forever' their right to re-employment by the company. And during the strike, Johnson told foreman Bridges that they should replace the strikers `as fast as we can' so that they would get rid of the `troublemakers'." *Id.*

29 *See also* American Machinery Corp. v. NLRB, 424 F.2d 1321 , 1330 (5th Cir.1970), where the court said:

The Trial Examiner's and Board's finding of discriminatory motivation in the failure to rehire further reinforces our conclusion . . . that refusal of a back pay order in this case would indeed discourage concerted activities by the employees at the American Machinery plant. Consequently, we cannot treat American Machinery as an innocent party unfairly prejudiced by its strict compliance with the law.

30 *See* NLRB v. Gulfmont Hotel Co., 362 F.2d 588 , (5th Cir. 1966); NLRB v. Rish Equipment Co., 407 F.2d 1098 (4th Cir. 1969) ; Celanese Corp., **95 NLRB 664** (1951).

31 NLRB v. Frick Co., 423 F.2d 1327 , 1333 n. 12 (3rd Cir. 1970); NLRB v. Easton Packing Co., 437 F.2d 811 (3rd Cir. 1970) ; West Fork Cut Glass Co., **90 NLRB 944** , enf'd in relevant part sub nom. NLRB v. Borchert, 188 F.2d 474 (4th Cir. 1951) ; Palmer Asbestos and Rubber Co., **160 NLRB 723** (1966).

EXHIBIT 23

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2010 **Released: June 22, 2010**

By the Commission: Chairman Genachowski and Commissioner Copps issuing separate statements; Commissioners McDowell and Baker concurring and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. This order addresses a petition by Qwest Corporation (Qwest) seeking relief from certain longstanding wholesale and retail regulations—including requirements to sell bottleneck network elements such as last-mile copper loops to other communications service providers—in Phoenix, Arizona.[1] Qwest argues that it faces sufficient competition in Phoenix to render these regulations unnecessary, based primarily on claimed competition for traditional voice telephone services.[2] We evaluate Qwest's petition using a market power analysis, similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews. Under this approach, we separately evaluate competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers. We also consider how competition varies within localized areas in the Phoenix market.

2. Under this analysis and based on the data in the record, Qwest fails to demonstrate that there is sufficient competition to ensure that, if we provide the requested relief, Qwest will be unable to raise prices, discriminate unreasonably, or harm consumers. For example, the record reveals that no carrier besides Qwest provides meaningful wholesale services throughout the Phoenix marketplace, and that competitors offering business services largely must rely on inputs purchased from Qwest itself to provide service. Moreover, even if there were a stronger competitive showing for some services, there are unresolved policy and administrability questions about whether and how regulatory relief could be tailored to that competition when other services remain insufficiently competitive. We therefore conclude that, at this time, the regulations at issue remain necessary to protect against "unjust and reasonable" rate increases and are "necessary for the protection of consumers," and that forbearance would not be "consistent with the public interest," as required by section 10 of the Communications Act,[3] and we deny Qwest's petition.

3. We recognize that the communications marketplace is changing, as technology, prices, product characteristics, and consumer preferences evolve, and we believe that the analysis we use is well-

[1] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket 09-135 (filed March 24, 2009) (Qwest Petition).

[2] *See, e.g.*, *id*. at 1–6.

[3] 47 U.S.C. § 160 (2010); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 et seq. In this order, we use "1996 Act" to refer exclusively to the Telecommunications Act of 1996, and use "the Act" to refer either to the 1996 Act or the Communications Act which the 1996 Act amended.

designed to protect consumers, promote competition, and stimulate innovation by thoroughly analyzing competitive developments in this market. While Qwest has not met its burden to justify forbearance based on the current record, following the release of this order the Wireline Competition Bureau will seek comment on the application of this same analytical approach to other, similar requests for regulatory relief, including two pending remand proceedings.[4] This will help ensure that the Commission's approach in forbearance proceedings such as this one is not only data-driven, economically sound, and predictable, but also reflects a forward-looking approach to competition and the best understanding of ways to appropriately tailor regulatory relief when it is justified.

II. BACKGROUND

4. Since the Commission began implementing policies to foster competition in communications markets, it has recognized the need to adjust regulation to reflect competitive conditions. Thus, for example, in 1980 it distinguished between dominant carriers and nondominant carriers, and it streamlined the regulation of nondominant carriers.[5] Moreover, it recognized that it might need to reclassify carriers as dominant or nondominant as competitive conditions evolved.[6] Similarly, in passing the 1996 Act, Congress, *inter alia*, sought to introduce competition into local telecommunications markets and to facilitate increased competition in telecommunications markets already subject to competition, while at the same time directing the Commission to adjust or eliminate regulations as competition developed and market conditions evolved. In furtherance of these goals, the 1996 Act imposed different obligations on different types of carriers. Thus, it imposed certain minimal obligations on all telecommunications carriers, other obligations on all local exchange carriers (LECs), and certain additional obligations on incumbent LECs, including the obligation to give competitors access to their network elements on an unbundled basis at cost-based rates. The 1996 Act also included provisions to facilitate the adjustment of regulations to evolving market conditions. For example, section 10 of the Act requires the Commission to forbear from enforcing statutory or regulatory requirements if certain conditions are satisfied. These regulatory provisions and developments are summarized below.

A. Dominant Carrier Regulation

5. In a series of orders in the *Competitive Carrier* proceeding, the Commission distinguished between dominant carriers and nondominant carriers.[7] The Commission defined "a

---

[4] *See infra* paras. 19–20, 45.

[5] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*) (subsequent history omitted).

[6] *Id.* at 6, para. 26; *see, e.g.*, *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Nondominance Order*).

[7] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *Competitive Carrier First Report and Order*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (*AT&T v. FCC*), *cert. denied*, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Competitive Carrier Sixth Report and Order*), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceeding); *see* 47 C.F.R. § 61.3(q), (y).

dominant carrier as a carrier that possess[es] market power" (*i.e.*, the power to control price)," and a nondominant carrier as one that does "not possess power over price."[8] In discussing the market characteristics that it considered in determining whether a carrier possesses market power,[9] the Commission, *inter alia*, emphasized that, "[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities" because it provides the ability "to impede access of its competitors to those facilities," and thus is treated "as prima facie evidence of market power requiring detailed regulatory scrutiny."[10]

6. Because nondominant carriers lack market power, the Commission found that "application of our current regulatory procedures to nondominant carriers imposes unnecessary and counterproductive regulatory constraints upon a marketplace that can satisfy consumer demand efficiently without government intervention,"[11] and it therefore streamlined the regulation of such carriers.[12] Specifically, the Commission relieved nondominant carriers from *ex ante* rate regulation, reduced their tariff obligations, and accorded them presumptive streamlined treatment under section 214 of the Act.[13] By contrast, the Commission determined that dominant carriers should remain subject to more extensive regulation under Title II of the Act.[14] Of particular relevance here is the requirement that dominant LECs, including the Bell Operating Companies (BOCs), be subject to *ex ante* rate regulation for their switched access services,[15] including both intercarrier charges and end user charges.

7. The Commission also recognized that developments in the marketplace could result in a previously dominant carrier becoming nondominant with respect to particular services. For example, in 1995 in the *AT&T Domestic Nondominance Order*, the Commission, after an in-depth market analysis, concluded that AT&T lacked individual market power in the interstate interexchange markets and accordingly reclassified AT&T as nondominant in the provision of domestic interstate, long-distance services.[16] Among the factors the Commission cited in support of its finding were: (1) AT&T's market share had been falling steadily for ten years, and had decreased to approximately "55.2 and 58.6 percent in terms of revenues and minutes respectively;"[17] (2) AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors;[18] (3) AT&T's competitors possessed the ability to accommodate a substantial number of new customers on their networks with "little or no investment immediately, and relatively modest investment in the short term," (*i.e.*, that they had sufficient excess capacity to constrain AT&T's pricing behavior);[19] (4) "virtually all customers . . . have numerous choices

[8] *Competitive Carrier First Report and Order*, 85 FCC 2d at 13–14, paras. 54, 56.

[9] *Id.* at 14, para. 57.

[10] *Id.* at 14, para. 58.

[11] *Id.* at 13, para. 54.

[12] *Id.* at 7, para. 27.

[13] *See id.* at 20–26, paras. 85–111.

[14] *See id.* at 20, para. 84.

[15] *See id*. at 1, 15, 20, paras. 2 & n.1, 62–64, 84; *see also* 47 C.F.R. pt. 61 (Subpt. E), pt. 69.

[16] *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3273, para. 1.

[17] *Id.* at 3307, para. 67.

[18] *Id.* at 3308, para. 70.

[19] *Id.* at 3303–04, para. 59.

of equal access carriers;"[20] (5) both business and residential customers were highly demand elastic and frequently switched carriers;[21] and (6) AT&T had not controlled local bottleneck facilities for over ten years.[22] Based on these and other related competitive considerations, the Commission reclassified AT&T as nondominant with respect to interstate, domestic, interexchange services.[23]

8. In the *Competitive Carrier Proceeding* and in certain subsequent proceedings relating to dominance classification, the Commission was primarily concerned with whether the carrier possessed "individual" market power.[24] In the *AT&T Domestic Nondominance Order*, the Commission again primarily focused on individual or unilateral market power.[25] Importantly, however, the Commission in that order also recognized possible concerns that could arise from collusion.[26] In subsequent decisions applying its market power analysis, the Commission expressly recognized the potential for either individual or joint market power in particular circumstances.[27]

B. The Telecommunications Act of 1996

9. The major purpose of the 1996 Act was to establish "a pro-competitive, deregulatory national policy framework."[28] Among the primary goals of the 1996 Act were "opening the local exchange and exchange access markets to competitive entry" and "promoting increased competition in telecommunications markets that are already open to competition, including the long-distance services market."[29] The 1996 Act introduced several key changes that are relevant here.

---

[20] *Id.* at 3308, para. 71

[21] *Id.* at 3305–07, paras. 63–66. The Commission further noted that as many as 20% of AT&T's residential customers changed carriers at least once a year. *Id.* at 3305, para. 63.

[22] *Id.* at 3308, para. 70.

[23] Although the Commission found that AT&T lacked individual market power, it nevertheless remained concerned that AT&T, MCI, and Sprint might be colluding to raise the price of long-distance service for low-volume customers. *Id*. at 3313-15, paras. 81–83. In response, AT&T offered certain commitments to protect these low-volume, long-distance users, which the Commission adopted as a condition of the order. *Id*. at 3316–17, paras. 85-86. The Commission also adopted certain conditions related to service to Alaska and Hawaii. *See, e.g.*, *id.* at 3333–35, paras. 114–15. The Commission subsequently reclassified AT&T as generally nondominant with respect to international message telephone service (IMTS) based on a consideration of a similar range of criteria. *See generally Motion of AT&T Corp. to Be Declared Non-Dominant for International Service*, CC Docket No. 79-252, Order, 11 FCC Rcd 17963 (1996).

[24] *See, e.g.*, *Competitive Carrier First Report and Order*, 85 FCC 2d at 10, para. 26; *see also Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 557–62, paras. 6–12 (discussing alternative definitions of market power).

[25] *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3292, para. 35 (AT&T neither possesses nor can unilaterally exercise market power within the interstate, domestic, interexchange market taken as a whole); *see also id.* at 3313, para. 80 (finding that "AT&T unilaterally cannot raise and sustain prices profitably above a competitive level for residential services").

[26] *See supra* note 23.

[27] *See infra* notes 82 & 85.

[28] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. Rep. No. 104-230, at 113 (1996) (Conf. Rep.) (JOINT EXPLANATORY STATEMENT).

[29] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15505, para. 3 (1996) (*First Local Competition Order*) (subsequent history omitted).

1. Section 251(c)(3)—Unbundled Access to Network Elements

10. First, the 1996 Act imposes a number of duties on incumbent LECs designed to open local markets to competition. "Foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors."[30] In particular, section 251(c)(3) requires "that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2)."[31] In addition, section 251(d)(2) provides that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[32]

11. Following reversals by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) of its first two attempts to interpret section 251(d)(2)'s impairment standard,[33] the Commission ultimately adopted an interpretation of impairment that is tied to the concept of barriers to entry. Specifically, the Commission "held that a requesting carrier is impaired 'when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.'"[34] Consistent

[30] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T v. Iowa Utilities*).

[31] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2534, para. 1 (2005) (*Triennial Review Remand Order*), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (*Covad v. FCC*). Qwest also seeks forbearance from section 271(c)(2)(B)(ii) of the Act (*i.e.*, checklist item 2), which incorporates and is coextensive with section 251(c)(3). Qwest Petition at 7. Under this provision, a BOC must provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth a 14-point "competitive checklist" of access, interconnection, and other threshold requirements that a BOC must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services. *See* 47 U.S.C. § 271(c)(2)(B). After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements. *See* 47 U.S.C. § 271(d)(6); *see also 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, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19419, 19462–63, paras. 7, 94–96 (2005) (*Qwest Omaha Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (*Qwest v. FCC*).

[32] 47 U.S.C. § 251(d)(2). There is a different standard for unbundling proprietary network elements but, as a practical matter, such issues rarely arise. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17086, para. 171 (2003) (*Triennial Review Order*), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated* and *remanded in part*, *aff'd in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand*, *Triennial Review Remand Order*, *aff'd*, *Covad. v. FCC*.

[33] *AT&T v. Iowa Utilities*, 525 U.S. 366; *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

[34] *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (quoting *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84). As the Supreme Court observed in *Verizon Commc'ns v. FCC*, "[a] newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult of which would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 490 (2002) (*Verizon Commc'ns v. FCC*); *see also* JOINT EXPLANATORY (continued….)

with the direction of the D.C. Circuit, the Commission focused on those operational and economic barriers to entry that are linked to natural monopoly characteristics, in particular: "(1) economies of scale; (2) sunk costs; (3) first-mover advantages; (4) absolute cost advantages; and (5) barriers within the control of the incumbent."[35]

12. The Commission further concluded that it should make its impairment determinations with regard to a "reasonably efficient competitor," without attaching weight to the individualized circumstances of any actual requesting carrier.[36] Thus, the Commission presumes that a requesting carrier will use reasonably efficient technology, but does "not presume that a hypothetical entrant possesses any particular assets, legal entitlements or opportunities, even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances."[37]

13. The Commission's unbundling rules are not based solely on impairment, however. Rather, section 251(d)(1) requires the Commission to consider "at a minimum" whether competitors would be impaired without access to specific network elements, which enables the Commission to consider other factors in tailoring its unbundling rules. Thus, consistent with direction from the D.C. Circuit,[38] the Commission has limited its unbundling rules notwithstanding possible impairment in particular circumstances in an effort to promote regulatory parity and network investment.[39] The Commission also relied upon this language to "decline to order unbundling of network elements to provide service in the mobile wireless services market and the long distance services market" where "competition has evolved without access to UNEs."[40] The Commission did "not believe that it [was] appropriate at [that] time to render similar judgments regarding" services provided by LECs, but it noted that another provision added by the 1996 Act—section 10—provides an opportunity for incumbent LECs

(Continued from previous page)
STATEMENT at 148 (stating that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service because the investment necessary is so significant. Some facilities and capabilities . . . will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251.").

[35] *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (citing *Triennial Review Order*, 18 FCC Rcd at 17037–41, paras. 87–91).

[36] *Id.* at 2547–48, paras. 24, 26.

[37] *Id.* at 2548, para. 26. Thus, the Commission "reject[ed] the arguments of some parties that just because one competitive LEC holds a particular set of assets, 'by extension, any efficient [competitive LEC]' must be deemed to hold those assets." *Id*. at 2548, para. 26 n.77 (citation omitted).

[38] *See, e.g.*, *USTA II*, 359 F.3d at 580 ("[T]he CLECs rightly point to *USTA I*'s observation that 'impairment' was the 'touchstone,' . . . but that opinion, far from barring consideration of factors such as an unbundling order's impact on investment, clearly read the Act, as interpreted by the Supreme Court in *AT&T*, to mandate exactly such consideration.").

[39] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17148–54, paras. 285–97 (With respect to hybrid loops, the Commission considered, "balanced against impairment," possible investment disincentives that could arise from unbundling, the more extensive presence of cable modem service than wireline broadband Internet access service, and the possibility of using other unbundled network elements (UNEs) to offer similar services.); *Triennial Review Remand Order*, 20 FCC Rcd at 2656, para. 221 ("Considering the disincentives for competitive LECs to rely on competitive switches, we decline to unbundle switching on a nationwide basis pursuant to our 'at a minimum' authority, regardless of the assertions of some commenters that requesting carriers may face some limited impairment in particular subsets of the mass market without access to unbundled local circuit switching."); *USTA II*, 359 F.3d at 580 ("We therefore hold that the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

[40] *Triennial Review Remand Order*, 20 FCC Rcd at 2554–55, para. 36.

to seek forbearance from unbundling obligations in specific areas where the "requirements for forbearance have been met."[41]

2. Section 10—Forbearance

14. Section 10 of the Act provides that the Commission shall forbear from applying any provision of the Act or any Commission regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[42] In making the "public interest" determination, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[43] In proceedings initiated by a petition for forbearance under section 10(c), "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance."[44] This burden of proof "encompasses both the burden of production and the burden of persuasion."[45] Thus, in addition to stating a *prima facie* case in support of forbearance, "the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance."[46]

15. In its first major decision under section 10, which granted forbearance from tariffing requirements for interstate interexchange services, the Commission recognized that Congress adopted the forbearance statute against the backdrop of the Commission's efforts to limit regulation of nondominant carriers in the *Competitive Carrier* proceeding.[47] In particular, the Commission found that section 10 "provides the Commission with the forbearance authority that the courts had previously concluded was lacking," and that "[t]he Commission now has express authority to eliminate unnecessary regulation and to carry out the pro-competitive, deregulatory objectives that it pursued in the *Competitive Carrier* proceeding for more than a decade."[48] Building upon the competitive analysis and findings in the *Competitive Carrier* proceeding and the *AT&T Domestic Nondominance Order*, the Commission

---

[41] *Id.* at 2556–57, paras. 38–39.

[42] 47 U.S.C. § 160(a).

[43] 47 U.S.C. § 160(b).

[44] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, para. 20 (2009) (*Forbearance Procedures Order*).

[45] *Id*. at para. 21.

[46] *Id*.

[47] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738, para. 13 (1996) (*Detariffing Order*), *reconsideration granted in part*, Order on Reconsideration, 12 FCC 15014 (1997), *further reconsideration granted*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *rev. denied sub nom.'*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (*MCI WorldCom, Inc. v. FCC*). In the *Competitive Carrier* proceeding the Commission first permissively, and then mandatorily, detariffed nondominant carriers' interexchange services. *See Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 582–83, para. 43; *Competitive Carrier Sixth Report and Order*, 99 FCC 2d at 1027–28, para. 11. In 1985, the D.C. Circuit vacated the mandatory detariffing decision. *AT&T v. FCC*, 978 F.2d at 729. In 1994, the Supreme Court determined that the permissive detariffing decision was inconsistent with the "rate-regulation, file-tariff system for common-carrier communications" established by Congress. *MCI v. AT&T*, 512 U.S. at 234.

[48] *Detariffing Order*, 11 FCC Rcd at 20738, para. 13.

concluded that the section 10 criteria were satisfied, and it mandatorily detariffed interstate, domestic, interexchange services provided by nondominant carriers.[49]

16. Carriers subsequently have sought to satisfy the section 10 forbearance criteria by demonstrating the competitiveness of the local marketplace in particular geographic areas. The Commission addressed one such petition in the *Qwest Omaha Forbearance Order*.[50] As relevant here, Qwest sought forbearance from certain dominant carrier regulation of its access services, as well as forbearance from its section 251(c)(3) unbundling obligations.[51] Record evidence indicated that Qwest faced competition in the Omaha Metropolitan Statistical Area (MSA) primarily from the incumbent cable operator, Cox, and primarily with respect to services provided to residential customers.[52] Largely on that basis, the Commission granted Qwest forbearance from certain dominant carrier regulation on an MSA-wide basis, and from section 251(c)(3) unbundling obligations in wire centers where Cox's voice-enabled cable plant covered at least 75 percent of the end-user locations.[53] Rejecting commenters' concerns "that forbearing from application of unbundling obligations to Qwest will result in a duopoly,"[54] the Commission predicted that competition would continue to develop in Omaha after Qwest's unbundling obligations were eliminated in certain wire centers.[55]

17. The Commission followed the same general approach when considering subsequent petitions for forbearance that sought similar relief in other markets. For the roughly thirteen geographic areas where it has applied this general framework, the Commission has granted some relief in three areas, and denied it in ten.[56] In the two most recent Commission orders addressing such petitions—the 2007

---

[49] *See id*. at 20732-33, para. 3; *see also supra* note 47.

[50] *Qwest Omaha Forbearance Order*, 20 FCC Rcd 19415.

[51] *Id.* at 19417, 19422, paras. 3, 11.

[52] Although the Commission did cite certain evidence regarding competition by Cox for enterprise customers, this evidence was insufficient to satisfy even the limited competitive analysis "informed by" the Commission's dominance precedent. *Compare, e.g.*, *id.* at 19448, 19450–51 paras. 66, 69 (citing certain evidence of competition from Cox as part of the analysis granting UNE forbearance) *with id*. at 19438, para. 50 (holding that Qwest has not provided sufficient data regarding enterprise competition to justify forbearance from dominant carrier pricing regulations).

[53] *Id.* at 19446, para. 62; *Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 22 FCC Rcd 13561 (WCB 2007). As used in the *Qwest Omaha Forbearance Order*, "an intermodal competitor 'covers' a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19444, para. 60 n.156.

[54] *Id*. at 19452, para. 71.

[55] *See infra* paras. 33–36 for a more detailed discussion of those predictions.

[56] *See, e.g.*, *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, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959–60, paras. 1–2 (2007) (granting certain conditional forbearance from unbundling obligations in wire centers in the Anchorage study area) (*ACS UNE Forbearance Order*), *appeals dismissed*, *Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *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, (continued….)

Verizon 6 MSA Forbearance Order and 2008 *Qwest 4 MSA Forbearance Order*— the Commission denied the requested relief, including for Qwest's service territory in the Phoenix MSA, and Verizon and Qwest appealed to the D.C. Circuit.[57]

18. While those appeals were pending, both Verizon and Qwest filed additional forbearance petitions for portions of the geographic areas for which forbearance previously was denied. In particular, Verizon filed petitions seeking forbearance in Rhode Island and Cox's service territory in the Virginia Beach MSA, and Qwest subsequently filed the instant petition seeking forbearance in the Phoenix MSA. On May 12, 2009—the statutory deadline for the first of Verizon's two forbearance petitions—Verizon

(Continued from previous page)
Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (granting in part, subject to conditions, certain forbearance from dominant carrier regulation in Anchorage) (*ACS Dominance Forbearance Order*), *petitions for recon. pending*; *Petitions of 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, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (*Verizon 6 MSA Forbearance Order*) (denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 6 MSAs), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) (*Verizon v. FCC*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257 (2008) (*Qwest Terry Forbearance Order*) (granting certain forbearance from dominant carrier and UNE obligations in the Terry, Montana exchange); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008) (*Qwest 4 MSA Forbearance Order*) (denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 4 MSAs), *motion for voluntary remand granted*, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (*Qwest Corporation v. FCC*). For a more detailed summary of these decisions, see, for example, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11732–35, paras. 4–10. We note that two of the three proceedings granting forbearance implicated somewhat distinctive circumstances. In the *Qwest Terry Forbearance Order*, the Commission faced a situation where a new entrant, Mid-Rivers Telephone Cooperative Inc., had completely overbuilt the Terry, Montana exchange and had been formally designated as the "incumbent LEC," and was itself subject to dominant carrier regulation as well as section 251 requirements (albeit limited initially by the rural exemption in section 251(f)). *See generally Qwest Terry Forbearance Order*, 23 FCC Rcd 7257. In granting certain conditional forbearance in the *ACS UNE Forbearance Order*, the Commission also pointed out the "unique circumstances in the Anchorage study area," including factors not present in many of the other petitions such as the fact that "most businesses in the Anchorage study area purchase only low-capacity services," and "due to the unique physical characteristics of the Anchorage study area, new entrants would face unique circumstances in terms of network deployment." *ACS UNE Forbearance Order*, 22 FCC Rcd at 1986, para. 41. In addition, there was a voluntarily-negotiated interconnection agreement that formed the basis for the continued provision of wholesale services required as a condition of forbearance in Anchorage. *Id*. at 1983-85, para. 39.

[57] On January 14, 2008, Verizon filed an appeal of the Commission's decision in the *Verizon 6 MSA Forbearance Order* to deny Verizon forbearance from section 251(c)(3) unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs (6 MSAs). On July 29, 2008, Qwest filed an appeal with the D.C. Circuit of the *Qwest 4 MSA Forbearance Order* denying forbearance relief in the Denver, Minneapolis-St. Paul, Phoenix and Seattle MSAs (4 MSAs). *See Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, Public Notice, 24 FCC Rcd 10881 (WCB 2009) (*Remands Comment Cycle Public Notice*); *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. 06-172, WC Docket No. 07-97, Order, 24 FCC Rcd 11983 (WCB 2009) (extending comment period) (*Remands Extension Comment Cycle Public Notice*). Qwest filed its forbearance petition in this proceeding on March 24, 2009, while its appeal of the *Qwest 4 MSA Forbearance Order* was pending.

withdrew both its petitions.[58]

19. On June 19, 2009, the D.C. Circuit issued an opinion and remanded the *Verizon 6 MSA Forbearance Order* to the Commission for further consideration of its decision to deny Verizon relief from section 251(c)(3) unbundling obligations.[59] The D.C. Circuit found that the Commission, without explanation, "changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace."[60] On August 5, 2009, the D.C. Circuit, at the Commission's request, remanded the *Qwest 4 MSA Forbearance Order*, which relied on a substantially similar analytical framework.[61]

20. Following those remands, the Wireline Competition Bureau sought "comment on how the Commission should reconsider its analysis" in the remanded decisions,[62] and simultaneously extended the comment cycle for the related Qwest Phoenix petition.[63] Subsequently, at Qwest's request, the Bureau further extended the date for reply comments on both sets of proceedings to October 21, 2009.[64] Qwest sought this extension "to allow parties sufficient time to address the complex set of legal and economic issues likely to be raised in the initial comments."[65] Most recently, on April 15, 2010, the Bureau issued a public notice observing that "certain commenters have urged the Commission to adopt a different standard for analyzing" these forbearance petitions than had been used in the past—namely, a market-power-based approach—and seeking comment on the potential application of that approach in the context of the Qwest Phoenix forbearance petition.[66]

III. DISCUSSION

21. For purposes of Qwest's forbearance petition, we find it appropriate to return to a competitive analysis that more carefully defines the relevant product and geographic markets and examines whether there are any carriers in those markets that, individually or jointly, possess significant market power. As discussed below, a number of considerations persuade us that, in evaluating Qwest's

---

[58] Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket. Nos. 08-24, 08-49 (filed May 12, 2009).

[59] *Verizon v. FCC*, 570 F.3d at 296.

[60] *Id*. at 304.

[61] *Qwest Corporation v. FCC* (remanding *Qwest 4 MSA Forbearance Order*). In these four MSAs, Qwest sought the same forbearance relief that it seeks in this proceeding. *See infra* para. 22 (describing the scope of Qwest's instant forbearance request).

[62] *Remands Comment Cycle Public Notice*, 24 FCC Rcd at 10881–82.

[63] *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Public Notice, 24 FCC Rcd 10887 (WCB 2009).

[64] *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, Order, 24 FCC Rcd 11980 (2009); *Remands Extension Comment Cycle Public Notice*.

[65] Qwest Corporation, Request for Extension of Time to File Reply Comments on Qwest Corporation's Petition for Forbearance, WC Docket No. 09-135 at 1 (filed Sept. 3, 2009).

[66] *Request for Additional Comment and Data Related to Qwest Corporation's Petition for Forbearance from Certain Network Element and Other Obligations in the Phoenix, Arizona MSA*, WC Docket No. 09-135, Public Notice, DA 10-647 at 1 (rel. Apr. 15, 2010). Comments received in response to this Public Notice are referred to as "Market Power PN Comments."

current petition for forbearance in the Phoenix MSA, this analysis is preferable to the analysis the Commission applied to this type of petition in the *Qwest Omaha Forbearance Order* and its progeny.

A. Scope of Qwest's Petition

22. In its petition, Qwest seeks forbearance from a variety of regulations based on the level of competition in its service territory within the Phoenix-Mesa-Scottsdale, Arizona MSA (Phoenix MSA).[67] Specifically, Qwest seeks forbearance from loop and transport unbundling obligations of section 251(c)(3) and 271(c)(2)(B)(ii) of the Act,[68] as implemented in related provisions of the Commission's rules.[69] For mass market and enterprise switched access services, Qwest also seeks forbearance from Part 61 dominant carrier tariffing requirements;[70] Part 61 price cap regulations;[71] requirements applicable to dominant carriers arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control;[72] and certain *Computer III* requirements including comparably efficient interconnection (CEI) and open network architecture (ONA) requirements.[73]

B. The Need for a More Comprehensive Approach

23. Qwest bases its request for forbearance primarily on claims it is subject to effective competition in the Phoenix MSA. It is clear that competition, properly demonstrated, can form the basis for forbearance under section 10.

24. The Commission has discretion in determining the analytical approach it will use in evaluating forbearance petitions.[74] With the benefit of hindsight and upon further consideration, we conclude that there is a better analytical framework than the one the Commission employed in the *Qwest Omaha Forbearance Order*, which led the Commission to find adequate competition to justify

---

[67] Qwest Petition at 1 & Declaration of Robert H. Brigham, Attach. (Qwest Brigham Decl.). Qwest's service area footprint in the Phoenix MSA consists of 64 wire centers. Qwest Petition at 1. Throughout this order, we refer to "Qwest's service area footprint within the Phoenix MSA," which is the area within which Qwest has sought relief, simply as "the Phoenix MSA."

[68] Qwest Petition at 7 (citing 47 U.S.C. § 251(c)). Qwest seeks this relief for its wholesale provision of voice-grade, DS1, and DS3 unbundled loop and transport facilities. *Id*. Qwest also seeks forbearance from the congruent loop and transport unbundling obligations of 47 U.S.C. § 271(c)(2)(B)(ii). *Id*.

[69] *Id*. (citing 47 C.F.R. §§ 51.319(a), 51.319(b), and 51.319(e)).

[70] *Id*. (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, and 61.59). Qwest asserts that if it is granted forbearance relief from these dominant carrier tariffing requirements, it would willingly accept, as a condition of such relief, being subject to the permissive tariffing rules that apply to competitive LECs. *Id*. at 7-8 (citing 47 C.F.R. §§ 61.18–61.26).

[71] *Id*. at 8 (citing 47 C.F.R. §§ 61.41–49). Qwest asserts that it would willingly accept the conditioning of this relief on the application to Qwest of the pricing benchmark that applies to competitive LEC. *Id*.

[72] *Id*. at 10 (citing 47 C.F.R. §§ 63.03–.04).

[73] *Id*. at 11 (citing *Petition of AT&T, Inc*. *for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007)).

[74] *EarthLink Inc. v. FCC*, 462 F.3d 1, 7 (D.C. Cir. 2006) (*EarthLink v. FCC*) (using the *Chevron* framework to review the Commission's forbearance analysis, under which the court "will uphold the FCC's interpretation as long as it is reasonable, even if 'there may be other reasonable, or even more reasonable views'" (internal citation omitted)).

forbearance. Moreover, particularly in light of subsequent developments, there does not appear to be a basis for relying on the predictive judgments the Commission made there. Below, we identify some of the problematic elements of the framework used in the *Qwest Omaha Forbearance Order*, particularly with respect to its analysis of whether unbundling relief should be granted based upon the claimed competitiveness of the marketplace. As a result of those elements, application of that approach in other similar situations may result in granting relief from existing obligations before competition has developed sufficiently to protect against the exercise of market power by incumbent LECs. In the next section, we propose a more comprehensive analytical framework, based on traditional market power analysis, for evaluating forbearance petitions such as Qwest's.

25. The first relevant element of the *Qwest Omaha Forbearance Order* framework is its use of different analytical frameworks for evaluating the marketplace competitiveness underlying requests for relief from different obligations—*e.g.*, unbundling obligations, certain dominant carrier regulations, and certain other section 251(c) and section 271 obligations, respectively.[75] Although requests for forbearance from different statutory requirements or rules might correctly focus on competition for different products and services, the order does not adequately explain why it is appropriate to use fundamentally different analytical methodologies to evaluate competition for purposes of unbundling relief versus relief from dominant carrier regulation.

26. Second, while the *Qwest Omaha Forbearance Order* referenced certain wholesale or retail services in a general manner, the Commission has acknowledged that it did so as part of "a broader evaluation of competition and as a reflection of how parties submitted data in that proceeding,"[76] and not "to formally define product markets pursuant to a market power analysis."[77] This higher-level analysis led to certain conclusions that were not adequately justified as a matter of economics. For example, while acknowledging that there were no other providers of wholesale facilities or services besides Qwest,[78] the Commission eliminated all unbundled loop and transport obligations based largely on predictive judgments. As discussed below, we do not believe that the marketplace has borne out those predictions, and we do not rely on those predictions here.

27. As interpreted by subsequent Commission orders, the Commission in the *Qwest Omaha Forbearance Order* adopted what, as a practical matter, largely amounted to a two-part test to determine

[75] *Compare Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19425, para. 17 (dominant carrier forbearance "inquiry is informed by the Commission's traditional market power analysis"), *with id*. at 19447–52, paras. 65–72 (finding competition sufficient to forbear from section 251(c)(3) in certain wire centers without engaging in a market power analysis), *and id*. at 19456–71, paras. 84–111 (finding competition insufficient to forbear from remaining section 251(c) and 271 regulations without engaging in a market power analysis).

[76] *ACS UNE Forbearance Order*, 22 FCC Rcd at 1966, para. 12 n.41 (discussing the approach in the *Qwest Omaha Forbearance Order*).

[77] *Id*. at 1966, para. 12 (declining to define product markets for the purpose of its competitive analysis because it was following the approach to evaluating UNE forbearance from the *Qwest Omaha Forbearance Order*). In considering whether to forbear from dominant carrier regulation, the Commission identified various markets and assessed whether Qwest possessed market power, but it did not do so with the rigor we return to here. *See, e.g.*, Integra Opposition at 2–3 (noting that the *Qwest Omaha* line of forbearance precedent "suffers from several basic deficiencies, such as the practice of relying, at least to some extent, on a market share test in the residential telephone market as a basis for determining whether to grant forbearance in the business market"). Indeed, the Commission acknowledged that, even with respect to its analysis of whether to forbear from certain dominant carrier regulations, it was not undertaking a "stand-alone market power inquiry." *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19425, para. 17 n.52.

[78] *Id*. at 19448, para. 67.

whether to forbear from statutory unbundling obligations with respect to UNE loop and transport elements used to provide service to mass market and enterprise market customers. In the first part of the test, the Commission considered primarily whether the petitioner's *retail* market share for *mass market telephone* subscribers had dropped below a particular level. Although the Commission also included a high-level discussion of enterprise services, it reached conclusions without relying on a consistent analytical framework.[79] In the second part of the test, it considered the geographic reach of the incumbent cable company's network, and it granted unbundling relief in a wire center if the incumbent cable company's network reached more than a specified percentage of end-user locations served by that wire center.

28. Neither portion of this test adequately assesses the presence or absence of market power. The focus in the first part of the test on Qwest's market share for retail mass market telephone service was not, by itself, sufficient to determine whether Qwest possessed the power to control price (in other words, individual market power)[80] in the markets for retail mass market services or retail enterprise services, or in any wholesale market.[81] Nor did the generalized claims about competition for enterprise customers allow for such an evaluation. It is well established that the assessment of a carrier's individual market power requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.[82] Accordingly, the Commission's nearly exclusive emphasis on Qwest's share of the mass market retail voice marketplace—without meaningful consideration of Qwest's market shares in other relevant retail and wholesale markets, as well as other factors pertinent to whether Qwest, individually or jointly, possessed market power in those markets—is not supported by current economic theory.

29. The second, and arguably more important, part of the test focused on the extent to which a single provider (the incumbent cable company) could provide services in each Qwest wire center over

[79] *Id*. at 19448–49, paras. 66–68.

[80] *See Competitive Carrier First Report and Order*, 85 FCC 2d at 13, para. 54 (defining "market power" as "the power to control price").

[81] *See, e.g.*, EarthLink Market Power PN Comments at 2 (stating that, "in its forbearance decisions, the FCC's failure to apply a market-power analysis, including specifically refusing to define relevant product markets, has led to undisciplined decision making, particularly with respect to enterprise markets").

[82] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15775–82, paras. 28–41 (1997) (*LEC Classification Order*) (explaining that the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999); *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293–3309, paras. 38–73; *see also, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); William M. Landes and Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (Landes and Posner Market Power Law Review); Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Guidelines*). The FTC recently released for public comment a proposed revision of the *DOJ/FTC Guidelines*. *See Horizontal Merger Guidelines for Public Comment*, Public Notice (*Draft Revised Horizontal Guidelines*) (Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf. The approach adopted in this order is consistent with the *DOJ/FTC Guidelines* and the proposed revisions in the *Draft Revised Horizontal Guidelines*.

its own facilities. This focus inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers. The potential for supracompetitive prices may be a concern where there is a duopoly or a market dominated by a few firms and there are high barriers to entry into the market. Economists,[83] courts,[84] and the Commission[85] have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[86]

---

[83] *See, e.g.*, 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 359–60, para. 840a (1978) ("Under some conditions, a few relatively large firms in a market may simply individually recognize the mutual interdependence of their price and output decisions and refrain from competing in price. Diversity of circumstances and interests typically prevents such non-competitive pricing from precisely matching the price a monopolist would charge, but does not preclude results that more nearly resemble monopoly than competition."); MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS, ch. 15 (1998) (KATZ & ROSEN); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION, ch. 5 (1992) (TIROLE); ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY, ch. 12 (1995) (MAS-COLELL, WHINSTON & GREEN); Steffen Huck, et. al., *Two Are Few and Four Are Many: Number Effects in Experimental Oligopoly*, 53 JOURNAL OF ECONOMIC BEHAVIOR AND ORGANIZATION 435–46 (2004); *see also* Letter from Thomas Jones, et al., Counsel to Integra Telecom Inc., et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, Declaration of Stanley M. Besen, Attach. at 3–15 (filed Apr. 29, 2010) (Integra Besen Decl.) (discussing the theory and empirical evidence regarding pricing in concentrated markets).

[84] *See, e.g.*, *FTC v. H.J. Heinz Co*., 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (*FTC v. H.J. Heinz Co*.) ("In a duopoly, a market with only two competitors, supra-competitive pricing at monopolistic levels is a danger."); *id*. at 715 ("[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.").

[85] *See, e.g.*, *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket Nos. 02-34, 02-54, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10789, para. 64 (2003) (finding that "the factors that have led courts to disfavor mergers to duopoly also support establishing a procedure that will maintain at least three competitors in a frequency band, unless an interested party can rebut our presumption that three is necessary to a competitive market"); *Application of EchoStar Commc'ns Corp. (a Nevada Corporation), General Motors Corp, and Hughes Electronics Corp. (Delaware Corporations) (Transferors) and EchoStar Commc'ns Corp. (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20624–26, paras. 170–74 (2002) (*EchoStar/DirecTV Order*); *see also id* at 20624, para. 170 ("Both economic theory and empirical economic research have shown that firms in concentrated, oligopoly markets take their rivals' actions into account in deciding the actions they will take."); *Application of Air Virginia, Inc. (Assignor) and Clear Channel Radio Licenses, Inc. (Assignee), for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, MM Docket No. 02-38, Hearing Designation Order, 17 FCC Rcd 5423, 5432, para. 27 (2002) ("In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination."). *See also SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18325–34, paras. 65-78 (2005) (*SBC/AT&T Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, WC Docket No. 05-65, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008–09, para. 37 (1997); *see also, e.g.*, *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7872–73, para. 100 (1996).

[86] *FTC v. H.J. Heinz Co.*, 246 F.3d at 724 (citing precedent). In referring to the risk of collusion or coordination in this order, we are referring to the risk of tacit collusion. Tacit collusion occurs when firms coordinate their behavior by observing and anticipating their rivals' behavior. It does not require explicit agreement and need not constitute illegal conduct. Although not illegal, tacit coordination is discouraged by antitrust policy "even more than express (continued….)

30. We thus find that the move from monopoly to duopoly is not alone necessarily sufficient to justify forbearance in proceedings such as this one. While duopolies may yield competitive results in certain circumstances, both theoretical and empirical studies suggest that duopolies may pose competitive concerns in other circumstances. For example, economic theory holds that firms operating in a market with two or a few firms (*i.e.*, an oligopoly) are likely to recognize their mutual interdependence and, unless certain conditions are met, in many cases may engage in strategic behavior, resulting in prices above competitive levels.[87] Under a variety of theoretical models, based on realistic assumptions, prices in markets with few dominant firms are likely to be higher than prices in competitive markets for two reasons.[88] First, because each firm's actions directly affect the profit of the other firms, under some reasonable assumptions,[89] theory predicts that firms will unilaterally decide not to lower prices (or increase quantities) to competitive levels. Even when firms behave non-cooperatively and consider only unilateral actions, they recognize that lowering prices may trigger responses from rivals that render vigorous competition for customers unprofitable. Second, when there are only a few firms in a market, they are more likely to engage in coordinated interaction that harms consumers than when there are a greater number of firms. Such coordination includes tacit as well as explicit collusion, and can result in supracompetitive pricing.[90] We acknowledge, however, that under certain conditions duopoly will yield a competitive outcome.[91]

31. Empirical evidence of duopolistic competition in some telecommunications markets supports these theoretic conclusions. Specifically, two empirical studies found supracompetitive prices in

(Continued from previous page)
collusion, for tacit coordination, even when observed, cannot easily be controlled" by antitrust authorities. *Id*. at 725 (quoting 4 PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW 9, para. 901b2 (rev. ed.1998)).

[87] *See generally supra* note 83 (KATZ & ROSEN at ch. 15; JEAN TIROLE at ch. 5; MAS-COLELL, WHINSTON & GREEN at ch. 12). *See also* Integra Besen Decl. at 3-5; Integra Opposition at 29 & n.95.

[88] Two basic models of duopoly (or oligopoly behavior) are the Cournot Model, in which each firm maximizes its profits by choosing its output level, and the Bertrand Model, in which each firm maximizes its profits by choosing the price at which it will sell its output. In general, the Cournot Model will result in non-competitive market outcomes. It can be shown that for a firm operating in a market with homogenous products, the price-cost margin will be higher the higher the firm's market share, and smaller the higher the elasticity of demand for the product. *See supra* note 83 (KATZ & ROSEN at 491–504; TIROLE at 218–221). Under the Bertrand Model, duopoly can yield a competitive outcome assuming homogeneous products and no capacity constraints. Under other assumptions, duopoly may yield a non-competitive outcome even under Bertrand competition. *See supra* note 83 (TIROLE at 211–223, 245–247; MAS-COLELL, WHINSTON & GREEN at 400–405).

[89] As long as the firms have some degree of product differentiation or have capacity constraints, or compete in quantities as in the Cournot Model under any assumptions, then theories of oligopoly behavior predict that equilibrium prices will exceed competitive levels. *See* CARL SHAPIRO, *Theories of Oligopoly Behavior*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION ch. 6 (R. Schmalensee and R.D. Willig eds., North Holland Publishing 1989); JEFFREY CHURCH AND ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH ch. 10 (Irwin/McGraw-Hill 2000) (CHURCH & WARE).

[90] *See DOJ/FTC Guidelines*; *see also supra* note 86. A significant body of literature has developed on the factors that can facilitate or discourage oligopolistic collusion. *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44–61 (1964); Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 415–73 (Richard Schamalensee & Robert D. Willig, eds., 1989); DREW FUDENBERG AND JEAN TIROLE, DYNAMIC MODELS OF OLIGOPOLY (1986).

[91] For example, under Bertrand competition, in which each firm maximizes its profits by choosing the price at which it will sell its output, duopoly will yield a competitive result under certain assumptions. MAS-COLELL, WHINSTON & GREEN 387-400 *supra* note 83.

the mobile wireless industry during its duopoly period.[92] The Commission also has noted that high and stable prices for wireless service existed during the period of duopoly, but that such prices dropped dramatically as new PCS competitors began to launch service.[93] Empirical studies of other industries similarly have found that prices are likely to be higher in markets with greater concentration.[94]

32. Furthermore, forbearing from unbundling obligations on the basis of duopoly, without additional evidence of robust competition, appears inconsistent with Congress' imposition of unbundling obligations as a tool to open local telephone markets to competition in the 1996 Act. As discussed above, the major purpose of the 1996 Act was to establish "a pro-competitive, deregulatory national policy framework," and one of its key goals was to open "the local exchange and exchange access markets to competitive entry."[95] Indeed, in considering the 1996 Act, Congress recognized that cable operators were

[92] Parker and Röller found that prices for mobile wireless services during the duopoly period were significantly above competitive levels and that the industry participants' actions suggested tacit collusion. Philip M. Parker & Lars-Hendrik Röller, *Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephone Industry*, 28 RAND JOURNAL OF ECONOMICS 304, 304–322, (1997) (PARKER AND RÖLLER). Similarly, Busse concluded that firms engaged in collusive pricing in the U.S. mobile wireless industry during this time period. Maghan R. Busse, *Multimarket Contact and Price Coordination in the U.S. Cellular Telephone Industry*, 9 J. OF ECON. AND MANAGEMENT STRATEGY 287–320 (2000) (BUSSE). *See also* Integra Besen Decl. at 9–10 (discussing empirical studies of pricing for mobile wireless services); COMPTEL Opposition, Attach. at 22–26 (attaching a copy of comments filed in WC Docket Nos. 06-172 & 07-97) (discussing empirical studies of pricing for mobile wireless service in the United States and other countries, and describing price increases for other communications services in various states); Covad Opposition, Attach. 1 at 17–18 (attaching a copy of COMPTEL's comments filed in WC Docket Nos. 06-172 & 07-97) (discussing studies of rates increases in duopoly cable markets and of the failure of wireless mobile services to constrain pricing by cable/telco duopolies).

[93] In the *Cingular/AT&T Wireless Order*, the Commission stated that "[t]he Commission's first broadband PCS auction in 1995 marked the beginning of the transition from a cellular duopoly to a far more competitive market in mobile telephony services," and that "[a]fter stabilizing at a plateau in the final years of the cellular duopoly, the price per minute of mobile telephony service started to decline shortly before the first commercial launches of PCS service and subsequently dropped sharply and steadily." *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21553, 21555, paras. 61, 67 (2004) (*Cingular/AT&T Wireless Order*).

[94] *See generally* R. Schmalensee, *Inter-Industry Studies of Structure and Performance,* in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION ch. 16 987–88 (R. Schmalensee and R.D. Willig eds., North Holland Publishing 1989) (SCHMALENSEE) (noting that, "[i]n cross-section comparisons involving markets in the same industry, seller concentration is positively related to the level of price"); *see also, e.g.*, Integra Besen Decl. at 2–3, 5–14 (discussing empirical studies and evidence from mergers). According to Integra, one inter-industry comparison of price-cost margins for industries with different levels of concentration "generally shows that higher margins are associated with higher levels of concentration." *Id*. at 5 (citing SCHMALENSEE). Other empirical studies, evaluating variations in prices in a given industry in different geographic areas with different levels of concentration, "suggest that, at least in some industries, the presence of a third substantial competitor results in a significant reduction in prices." *Id.* at 8; *see also* 8–10 (summarizing studies by J.E. Kwoka, *The Effect of Market Share Distribution on Industry Performance*, THE REVIEW OF ECONOMICS AND STATISTICS 108 (1979); T.F. Bresnahan and P.C. Reiss, *Entry and Competition in Concentrated Markets*, JOURNAL OF POLITICAL ECONOMY 1006 (1991); J. Hausman, *Mobile Telephone*, HANDBOOK OF TELECOMMUNICATIONS ECONOMICS, eds. M.E. Cave, S.K. Majumdar, and I. Vogelsang, n.1, Elsevier, 579 (2002). Finally, Integra suggests that price comparisons from studies of mergers have revealed evidence of higher prices in duopoly markets than in less concentrated markets. *Id*. at 13–15.

[95] *First Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

likely to emerge as facilities-based competitors for local telephone services.[96] Were that level of competition sufficient to fulfill Congress' goals for telephone services, the 1996 Act only would have needed to require interconnection. Instead, Congress established means for additional competitors to enter without fully duplicating the incumbent's local network.[97] It is clear Congress wanted to enable entry by multiple competitors through use of the incumbent LEC's network.

33. Recognizing the theoretical and empirical concerns associated with duopoly, the Commission, in the *Qwest Omaha Forbearance Order*, offered three predictive judgments, which it concluded would mitigate those concerns. It first predicted that Qwest would continue to make wholesale facilities, such as DS0, DS1, and DS3 facilities, available to competitors at "competitive rates and terms."[98] Second, and relatedly, it predicted that non-cable competitors could "rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 . . . [to] minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market."[99] Third, it predicted that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport.[100]

34. Upon further consideration, we find that these predictions have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory.[101] There are a number of reasons to be skeptical of the first prediction—that incumbent LECs, even if not required to offer UNEs, would have an incentive "to make attractive wholesale offerings." First, the Commission has long recognized that a vertically integrated firm with market power in one market—here upstream wholesale markets where, as discussed below, Qwest remains dominant—may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs.[102] Second, because Qwest was the sole provider of wholesale facilities and

---

[96] *See, e.g.*, JOINT EXPLANATORY STATEMENT at 148 (recognizing potential of cable companies to become facilities-based competitors within the meaning of section 271(c)(1)(A)).

[97] *See, e.g.*, *id.* at 148 (concluding that competitors will still need access to the incumbent LEC's network, notwithstanding the potential emergence of cable companies as facilities-based competitors); *see also Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, para. 55 (1999) (*UNE Remand Order*) ("We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be 'impaired' within the meaning of section 251(d)(2). . . . A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are 'impaired' under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.").

[98] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19455, paras. 79–83.

[99] *Id.* at 19452, para. 71.

[100] *Id.* at 19451, para. 69.

[101] The D.C. Circuit has recognized that the Commission "is fully capable of reassessing the situation if its predictions are not borne out." *EarthLink v. FCC*, 462 F.3d at 12.

[102] *See General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 508, 510–11, paras. 71, 78 (2004); *see also LEC Classification Order*, 12 FCC Rcd at 15803, para. 83 (noting that "a

(continued….)

services,[103] there is no reason to expect it to offer such services at "competitive" rates. Rather, assuming that Qwest is profit-maximizing, we would expect it to exploit its monopoly position as a wholesaler and charge supracompetitive rates, especially given that (absent regulation) Qwest may have the incentive to foreclose competitors from the market altogether.[104] Moreover, there is little evidence, either in the record or of which we otherwise are aware, that the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated.[105] For example, other than Cox, McLeodUSA was the only other competitor of significant size cited by the Commission in the *Qwest Omaha Forbearance Order*.[106] The record indicates that subsequent to the *Qwest Omaha Forbearance Order*, Qwest, with one exception,[107] was not spurred to offer McLeodUSA any wholesale alternatives to UNEs that were not already offered prior to the grant of forbearance.[108] Moreover, the record indicates that McLeodUSA has removed most of its employees from the Omaha marketplace, has limited its operations primarily to serving its existing customer base, and has ceased sales of residential and nearly all business services in Omaha.[109] This suggests that McLeodUSA likewise no longer should be considered a significant competitor in the Omaha marketplace.[110] We also note record evidence that Integra, which had been contemplating entry into the

(Continued from previous page)

carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input").

[103] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19448, para. 67 ("The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.").

[104] Janusz A. Ordover, et. al., *Equilibrium Vertical Foreclosure*, 82 AM. ECON. REV. 698 (1990); Oliver Hart & Jean Tirole, *Vertical Mergers and Market Foreclosure* in BROOKINGS PAPERS ON ECONOMIC ACTIVITY - MICROECONOMICS 205 (1990).

[105] For example, just prior to the *Triennial Review Remand Order*, when UNE-P was eliminated, Qwest provided 194,778 UNE-P arrangements in Phoenix. *See* Selected Form 477 Data as of December 31, 2004, *available at* http://www.fcc.gov/wcb/iatd/comp.html. By comparison, now that such arrangements are provided via commercial agreements, the latest available data indicate that Qwest provides only 82,278 such arrangements in Arizona. *See* Selected Form 477 Data as of June 30, 2008, *available at* http://www.fcc.gov/wcb/iatd/comp.html. We acknowledge that multiple factors potentially contributed to this decline of approximately 58%, but also note that this experience does not give reason for particular confidence in the Commission's prediction that carriers' incentives in offering commercial arrangements once UNEs are eliminated will maintain or increase competition.

[106] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19433–34, para. 38 n.102.

[107] McLeodUSA states that Qwest has proposed a new "'commercial' DS0 loop offering," but claims that the rates, terms, and conditions are not reasonable. *See* Letter from Andrew D. Lipman, Counsel to PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Dockets 04-223 & 09-135, Exh. A at 4-5 (attaching a copy of the Petition for Modification of McLeodUSA Telecommunications Services, Inc. in WC Docket No. 04-223 (McLeodUSA Petition) (filed Dec. 11, 2009) (PAETEC Dec. 11, 2009 *Ex Parte* Letter). *Accord* PAETEC Opposition at 40–41. Subsequent to the *Qwest Omaha* decision, McLeodUSA was acquired by PAETEC. *See, e.g.*, Qwest Petition at 39 n.135.

[108] *See, e.g.*, PAETEC Dec. 11, 2009 *Ex Parte* Letter at 5; PAETEC Opposition at 39–40; Covad Opposition at 28-40; *see also* COMPTEL Opposition, Attach. at 6–11.

[109] McLeodUSA Petition at 14; PAETEC Dec. 11, 2009 *Ex Parte* Letter at 2–3; Arizona Corporation Commission Comments at 7; COMPTEL Opposition, Attach. at 6.

[110] In the *Verizon/MCI Order*, the Commission observed that MCI was no longer a significant competitor for small business and mass market customers "given the significant reduction in its marketing and consumer operations." *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18475, 18489–90, paras. 77, 104 (2005) (*Verizon/MCI Order*).

Omaha market, abandoned its plans to do so after the Commission issued the *Qwest Omaha Forbearance Order*.[111] Although it is beyond the scope of this proceeding to estimate the extent of competition in Omaha today,[112] these subsequent developments have cast doubt on the accuracy of the Commission's first prediction made in the *Qwest Omaha Forbearance Order*.

35. There are similar concerns with the Commission's second prediction. This prediction—that competitors could rely on wholesale access rights and other rights they have under sections 251(c) and 271—is inconsistent with conclusions reached in the Commission's previous unbundling analysis.[113] Specifically, in the *Triennial Review Remand Order*, the Commission, in response to *USTA II*, considered whether the availability of tariffed service offerings, such as special access services, meant that competitors were not impaired by lack of access to UNEs. Although the Commission found that the availability of special access services justified, in part, restricting the availability of UNEs to interexchange carriers and wireless carriers, it rejected this argument as a general reason for finding no impairment. Among the reasons the Commission gave in support of this conclusion was that these tariffed services might not be priced at cost-based rates.[114] We find the reasoning of the Commission in the *Triennial Review Remand Order* persuasive in this context.[115]

36. Finally, the Commission's third prediction—that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport—appears unwarranted. As an initial matter, there is no record evidence, nor are we aware of any evidence elsewhere, of significant new deployment of competitive facilities by non-incumbent providers in any of the Omaha wire centers where unbundling forbearance was granted. We see no persuasive economic reason to predict that, just because a cable company might find it profitable to make incremental investments in a preexisting network, subsequent entrants also would find it profitable to incur the costs of building an entire new network from scratch. Indeed, given that an incumbent, such as a cable company, may have an additional incentive to invest in facilities to deter additional entry from

---

[111] COMPTEL Opposition, Attach. at 6.

[112] We therefore do not prejudge the outcome of McLeod's pending petition for reconsideration of the *Qwest Omaha Forbearance Order*, nor have we attempted to enumerate all of the issues that are relevant to that proceeding. *See generally* McLeodUSA Petition; *see also, e.g.*, Qwest Reply at 51–52 (citing a report issued by the Nebraska Public Service Commission which indicates that, as of December 31, 2008, AT&T, including TCG Omaha, provided 48,144 facilities-based switched access lines to business customers in Nebraska, although neither the Nebraska report nor Qwest provide data demonstrating that these lines are located in Qwest's service territory in Omaha); 2009 NEB. PSC ANN. REP. ON TELECOMM., *available at* http://www.psc.state.ne.us/home/NPSC/communication/AnnualReport2009.pdf.

[113] As discussed more fully below, we are in no way implying that an impairment analysis is dispositive of the Commission's forbearance analysis pursuant to section 10. *See infra* note 127.

[114] *Triennial Review Remand Order*, 20 FCC Rcd at 2560–61, paras. 46–48 (also citing administrability, risk of abuse, and other factors for not concluding that the mere availability of tariffed services should be sufficient to demonstrate a lack of impairment). Indeed, even in subsequent orders following the *Qwest Omaha Forbearance Order* approach, the Commission has recognized that "[f]or the reasons set forth in the *Triennial Review Remand Order*, the Commission already has rejected the argument that use of special access, in itself, is a reason to forbear from UNE obligations, based on a number of different factors." *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21315, para. 38.

[115] We find this analysis persuasive with respect to both special access services and other services or facilities a BOC might offer under section 271. While the Commission has required that the prices of section 271 elements must be "just, reasonable, and not unreasonably discriminatory" as required under sections 201 and 202, it has not required that such prices be cost-based. *See Triennial Review Order*, 18 FCC Rcd at 17389, paras. 662-64.

potential rivals,[116] even less can be inferred about subsequent entrants from the fact that most cable companies have found it profitable to upgrade their cable television networks to provide telephone and data services. Supporting this view, we have seen few new entrants in any domestic telecommunications markets that have been willing to invest in a totally new wireline network, at least to serve residential customers.

37. Given the theoretical and empirical concerns with duopoly in some markets, and the experience in Omaha following the Commission's grant of forbearance, we find it appropriate to adopt a more comprehensive analytical framework for considering forbearance requests like Qwest's.[117] We thus return to a traditional market power framework, which the Commission established in the *Competitive Carrier* proceedings and developed further in subsequent decisions, to evaluate competition in telecommunications markets in forbearance proceedings such as this one.[118] This approach also is comparable to the analysis used by the DOJ, FTC, and telecom regulators in other countries, including those in the European Community,[119] to determine the extent of competition in a market. As discussed below, we find that this framework is better suited to analyzing claims that competition in the legacy services market is sufficient to satisfy the three-part section 10 forbearance criteria, not only with respect to dominant carrier regulation, but also with respect to the other regulatory obligations at issue here, such

[116] CHURCH & WARE, *supra* note 89 at ch. 14; A. Michael Spence, *Entry, Capacity, Investment and Oligopolistic Pricing*, 8 BELL J. ECON. 534–544 (1997); Avinash K. Dixit, *The Role of Investment in Entry Deterrence*, 90 ECON. J. 95–106 (1980).

[117] *See* Arizona Corporation Commission Comments at 1–2 (recommending that the Commission should put more weight on the availability of meaningful wholesale alternatives and incorporate more of a "market power" analysis, which it has used in many contexts in the past); Broadview Comments at 10–11 (requesting that the Commission stop using the section 251(c)(3) forbearance standard used in previous proceedings and replace it with a market power-based analysis); Cavalier Market Power PN Comments at 1 (similar); EarthLink Market Power PN Comments at 15 (similar). *See also* Qwest Market Power PN Comments at 2 (stating that "Qwest supports a market power approach that accords with Commission precedent, competition policy, and the goals of the Telecommunication Act of 1996").

[118] *See, e.g.*, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5675–76, paras. 23–26 (2007) (*AT&T/BellSouth Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18303-04, paras. 20-23; *Verizon/MCI Order*, 20 FCC Rcd at 18446–47, paras. 20–23; *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293-309, paras. 38–73.

[119] *See* Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OFFICIAL J. EURO. UNION, Mar. 7, 2002, at Annex 1, *available at* http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00330050.pdf (Framework Directive) (setting forth procedures for market definition and analysis to be used by national regulatory authorities to justify the imposition of regulatory obligations); *Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Counsel on a Common Regulatory Framework for Electronic Communication Networks and Services*. OFFICIAL J. EURO. UNION (February 11, 2003), *available at* http://ec.europa.eu/information_society/topics/telecoms/regulatory/publiconsult/documents/relevant_markets/l_11420030508en00450049.pdf (Framework Recommendation) (interpreting the Framework Directive with respect to the identification and evaluation of relevant markets); *see also Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*, Dec. 18, 2009, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:337:SOM:EN:HTML.

as section 251(c)(3) unbundling.[120] In particular, the Commission's market power analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.[121] This market power analysis is the precise inquiry specified in section 10(a)(1),[122] and informs our assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates. Finally, in making its public interest evaluations pursuant to section 10(a)(3) and section 10(b), the Commission is required to consider whether forbearance "will promote competitive market conditions."[123]

38. The Commission's traditional market power framework also is consistent with the policies underlying section 251(c)(3), as the Commission has implemented that provision. As discussed below, closer adherence to the Commission's traditional competitive analysis likely would prevent inappropriate grants of forbearance predicated on competition for a subset of services and customers between only two facilities-based providers, when it is unlikely that additional facilities-based entry would occur.[124] Forbearance from section 251(c)(3) unbundling instead would be based on whether the provider no longer has market power, which is consistent with Congress's goals of fostering local competition through multiple modes of entry.[125] Similarly, the Commission's "impairment" standard focuses heavily on barriers to entry,[126] which also are key components of a traditional market power

---

[120] Carriers are, of course, free to seek forbearance based on factors other than, or in addition to, claimed competition, so long as the section 10 criteria are satisfied. *See, e.g.*, *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements; Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c); Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of ARMIS Reporting Requirements; Petition of Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements; Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 08-190, 07-139, 07-204, 07-273, 07-21, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, 13654, para. 11 (2008) (granting conditional forbearance from "the current partial and uneven" collection of certain service quality and infrastructure data).

[121] In the *Competitive Carrier First Report and Order*, the Commission found that "firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." *Competitive Carrier First Report and Order*, 85 FCC 2d at 20, para. 88.

[122] 47 U.S.C. § 160(a)(1). We therefore disagree with AT&T and Verizon that a market power approach such as that outlined in the *DOJ/FTC Guidelines* applies only to mergers and is irrelevant to the question whether the Commission should grant forbearance in this situation. *See* AT&T Market Power PN Comments at 5, 7; Verizon Market Power PN Comments at 5.

[123] 47 U.S.C. §§ 160(a)(3), (b).

[124] *See infra* Part III.D.4.

[125] *See* JOINT EXPLANATORY STATEMENT at 148; *supra* para. 32; *UNE Remand Order*, 15 FCC Rcd at 3727, para. 55; *First Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

[126] Specifically, the Commission "held that a requesting carrier is impaired 'when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.'" *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (quoting *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84).

analysis.[127] Finally, as directed by the D.C. Circuit,[128] the Commission's unbundling analysis,[129] as well as a traditional market power analysis, considers evidence of both actual and potential competition.[130]

39. As some commenters note, in *EarthLink v. FCC*, the D.C. Circuit observed that section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,'" and provides the Commission flexibility to "balance the future benefits against short term impact."[131] Indeed, a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest's petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.[132] In this petition for forbearance from currently applicable regulations, by contrast, we do not find any persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.[133] To the contrary, maintaining unbundling of legacy facilities,

---

[127] Similar to the barriers to entry considered under the Commission's impairment analysis, the Commission, in assessing whether a firm possesses market power, considers the existence and nature of barriers to entry. *See supra* para. 11; *Competitive Carrier First Report and Order*, 85 FCC 2d at 14, para. 57; *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3297–98, para. 47. We decline to adopt Verizon's suggestion that the Commission make impairment determinations to determine whether to grant forbearance from unbundling obligations. *See* Verizon Market Power PN Comments at 2–3; Letter from Thomas Jones et al., Counsel to Integra Telecom, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 1–2 (filed May 11, 2010). The Commission steadfastly has declined to use the section 251 impairment standard to interpret or apply the statutory criteria of section 10. *See, e.g.*, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11753, para. 34, n.124; *see also Verizon v. FCC*, 570 F.3d at 300–02 (holding that the Commission's decision in the *Verizon 6 MSA Forbearance Order* to refuse to interpret and apply its section 251 impairment standard under section 10 was reasonable, and explaining that Verizon's argument to the contrary "fails because it unnecessarily conflates the FCC's impairment standard with the forbearance standard under § 10").

[128] *See, e.g.*, *USTA II*, 359 F.3d at 574–75.

[129] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2586–87, para. 87–88.

[130] *See, e.g.*, *LEC Classification Order*, 12 FCC Rcd at 15775, para. 28 (determining market power by assessing both "firms that are current suppliers and those firms that are potential suppliers in [a] particular market"); *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3303-05, paras. 57–62 (discussing supply elasticity, including the ability of existing competitors ability to expand capacity to serve future customers and the possibility of *de novo* entry).

[131] *EarthLink v. FCC*, 462 F.3d at 8–9.

[132] *See, e.g.*, *DOJ/FTC Guidelines*, § 1.521 (discussing how factors such as changing technology could lead existing market shares to either overstate or understate a company's future competitive significance); Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 14–15 (2007) ("Indeed, innovation raises the fundamental question of whether current product-market shares are meaningful predictors of future competitive conditions in a dynamic industry and, thus, whether they are relevant to the prediction of the price and output effects of a merger.").

[133] *Cf., e.g.*, *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19469, para. 107 ("The reasoning that formed the basis of the Commission's decision to forbear from applying the section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements."); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15860, para. 8 (2004) (The Commission declined to "eliminate unbundling [of fiber to predominantly (continued….)

such as copper loops, may increase the incentives of incumbent LECs to upgrade their facilities to fiber, as discussed below.[134]

40. Finally, although Qwest's petition does not primarily involve advanced services, the data-driven evaluation of the state of competition in legacy services intrinsic to the Commission's traditional market power framework also may support broadband deployment and competition. As the National Broadband Plan explains, "the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers."[135] By using the more comprehensive antitrust-based analysis the Commission frequently has used in past proceedings, and that the nation's antitrust agencies regularly use to measure competition, we ensure that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.[136]

C. Overview of Our Approach to Forbearance Analysis

41. Qwest bases its request for forbearance primarily on claims it is subject to effective competition in the Phoenix MSA. In assessing Qwest's petition for forbearance, we conduct a market power analysis. We recognize, as the D.C. Circuit has held, that "[o]n its face" section 10 "imposes no particular mode of market analysis or level of geographic rigor," but rather "allow[s] the forbearance analysis to vary depending on the circumstances."[137] It is clear that assessing competition through a market power analysis can form the basis for forbearance under section 10 in this context. Section 10 was adopted against the backdrop of the Commission's efforts to limit regulation of nondominant carriers through the *Competitive Carrier* proceeding,[138] and, as the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[139] As explained above, in the *Qwest Omaha Forbearance Order* and subsequent decisions following *Qwest Omaha*'s analytical approach, the Commission adopted an abbreviated analysis. While that approach may have been a permissible way to address forbearance petitions, in proceedings such as this one a traditional market power analysis is a more analytically precise method for evaluating predictive claims that competition in a market is sufficient to satisfy the section 10 criteria.[140]

(Continued from previous page)
commercial multiunit buildings] for enterprise customers where the record shows additional investment incentives are not needed," and thus the goals of section 706 were not implicated.).

[134] *See infra* Part III.E.1.c.

[135] *See* FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, 47 (2010) (NATIONAL BROADBAND PLAN) (stating that "end-user loops and other point-to-point data circuits often serve as critical inputs to retail broadband services for business, mobile and residential customers").

[136] *Id.* at 37.

[137] *EarthLink v. FCC*, 462 F.3d at 8.

[138] *Detariffing Order*, 11 FCC Rcd at 20738, para. 13.

[139] *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, *Petition of U S WEST Communications, Inc., for Forbearance*, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999) (*US West Forbearance Order*).

[140] *See, e.g.*, *AT&T Corp. v. FCC*, 236 F.3d 729, 736–37 (D.C. Cir. 2001) (*AT&T Corp. v. FCC*) (reversing Commission's denial of forbearance based on its failure to explain why it was deviating from its traditional market
(continued….)

42. The traditional market power framework enables us to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted. Specifically, our market power analysis begins by defining the relevant product[141] and geographic markets[142] and by identifying the market participants. Next, we perform an analysis, in which we examine available evidence regarding market shares[143] and evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by Qwest or by Qwest in concert with a few competitors.[144] Based on this finding, we determine whether the regulations

(Continued from previous page)
power analysis in evaluating competition); *EarthLink v. FCC*, 462 F.3d at 9 (noting EarthLink's claim that "'competition' can only rationally be assessed by focusing on more specific product and geographic markets and by conducting a 'traditional market analysis (including market share, demand and supply elasticity, and other factors)'" and concluding that "[w]hile such an analysis is no doubt appropriate in some circumstances, we cannot say the FCC was unreasonable in taking another tack here, tailoring the forbearance inquiry to the situation at hand").

141 A relevant product market has been defined as a group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "'small but significant and nontransitory' increase in price." *DOJ/FTC Guidelines*, §§ 1.11, 1.12; *see also EchoStar/DirecTV Order*, 17 FCC Rcd at 20605–06, para. 106.

142 A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines*, § 1.21).

143 Some commenters argue against consideration of market shares, claiming they are "backwards looking." *See, e.g.*, Qwest Market Power PN Comments at 2, 4; Verizon Market Power PN Comments at 30. We disagree. Market shares provide a useful snapshot of current market conditions. Moreover, such data, when combined with data on trends in market shares and data on entry conditions, provides insight into how competition may evolve in the near future. As explained above, economic theory predicts that firms operating in a market dominated by a few firms are likely to recognize their mutual interdependence and engage in strategic behavior, which may lead to supracompetitive prices and other harms to consumers. *See supra* para. 30. Qwest also asserts that, in calculating market share, the proper analysis must include capacity as well as existing service. Qwest Market Power PN Comments at 4–5. Our calculation of market shares for each relevant product market in the Phoenix MSA is based upon the data and information in the record and a capacity-based market share calculation would not materially affect the result here. In the case of residential services, Qwest and Cox are essentially the only providers with capacity to serve end-users. *See infra* para. 81. The remaining providers of residential services rely exclusively upon Qwest wholesale last-mile facilities. Our analysis based upon service line counts indicates that Qwest and Cox **[REDACTED]**% of the market. *See id.* In the case of wholesale and retail enterprise services, only Qwest has ubiquitous coverage of the market and thus capacity to serve end-users. The record evidence indicates that Qwest's competitors, absent leasing facilities from Qwest, would be unable to provide a timely supply response and that this response would likely require investment in significant sunk costs. *See, e.g.*, *infra* paras. 72–73, 89–90. Thus, our calculation of market shares based upon current service levels is likely an accurate representation of the current market structure in the Phoenix MSA. Finally, Qwest argues that the *DOJ/FTC Guidelines* require the Commission to factor in entry alternatives that can be achieved within two years from initial planning to significant market impact. Qwest Market Power PN Comments at 6. Contrary to Qwest's claims, the *DOJ/FTC Guidelines* state that in identifying market participants, entry must occur within one year and without the expenditure of significant sunk costs of entry and exit. *DOJ/FTC Guidelines*, § 1.32. The *DOJ/FTC Guidelines* recognize the need to consider potential entry, but state that entry must occur within two years. *DOJ/FTC Guidelines*, § 3.2. *But see Draft Revised Horizontal Guidelines*, § 9.1 (eliminating two-year time limitation on entry, but maintaining requirement that entry must "be rapid enough that customers are not significantly harmed"). Our analysis below considers potential entry.

144 *See, e.g.*, *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3346, para. 139; *AT&T Corp. v. FCC*, 236 F.3d at 736. In the *AT&T Domestic Nondominance Order*, the Commission explained that, after defining the relevant
(continued….)

at issue remain necessary to protect against "unjust and reasonable" rate increases and are "necessary for the protection of consumers," and whether forbearance would not be "consistent with the public interest," as required by section 10 of the Act.

43. Under this approach, Qwest could satisfy the section 10 criteria for the regulations as issue by demonstrating that it does not have market power.[145] For example, Qwest could prove the relevant wholesale markets are effectively competitive. Alternatively, Qwest could demonstrate that there are a sufficient number of significant, full facilities-based competitors providing the relevant *retail* services so as to make those markets effectively competitive. The forbearance criteria could not be met, however, if Qwest, either individually or in conjunction with a small number of firms, could profitably sustain supracompetitive prices.

44. We also consider policy and administrability issues in our analysis. For example, the evidence in a future forbearance proceeding could indicate the existence of significant competition only for a subset of relevant products under consideration. This would raise questions regarding the extent to which the Commission could tailor regulatory relief to the particular services subject to sufficient competition. For example, if there were evidence of sufficient competition for residential voice service, the Commission would need to consider whether, or how, forbearance from unbundling obligations could be tailored given that unbundled DS0 loops are used to serve not only residential customers but also businesses, and to provide not only voice service but bundles of communications services. Throughout this order, we have attempted to provide greater clarity as to the policy and administrability issues that would arise in the context of requests for forbearance from the regulations at issue in this petition.

45. We also recognize that the factual, policy, and administrability questions raised here could arise in the Commission's consideration of the remanded *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*, as well as future requests for regulatory relief based on intermodal competition to provide the services addressed in this order. To that end, following the release of this order the Wireline Competition Bureau will seek comment on the application of this same analytical approach to the remanded proceedings. By developing the factual record regarding the state of competition and possible ways to tailor any regulatory relief that might be warranted, the Commission will ensure that its approach is not only comprehensive and data-driven, but reflects a forward-looking approach to competition, including forbearance where warranted.

D. Threshold Market Analysis

1. Product Markets

46. The regulations from which Qwest seeks forbearance affect various types of wholesale and retail services. To evaluate Qwest's claims that competition is sufficient to justify forbearance under section 10 with respect to those regulations, our analytical framework calls for us to define both wholesale and retail product markets. We define relevant product markets below, to the extent permitted by the available information in the record, though we recognize that market definitions can change over

(Continued from previous page)
markets and identifying participating firms, it would then evaluate available evidence regarding market shares, including trends in market share, and other factors, including supply substitutability, elasticity of demand, and the cost structure, size, and resources of the carrier. *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293, 3346, paras. 38, 139.

[145] We decline in this order to adopt any bright-line test or specific set of necessary conditions that must be satisfied before any future forbearance petitions would be granted. We therefore have no need to determine whether the hypothetical market share and facilities deployment thresholds set forth as a proposed UNE forbearance test is necessary or sufficient to warrant forbearance in particular markets. *See, e.g.*, COMPTEL Opposition, Attach. at 3; Integra Opposition at 9–10 (both proposing bright-line tests for unbundling forbearance).

time, as technology, prices, product characteristics, and consumer preferences evolve.[146]

a. Wholesale Product Markets

47. The relevant distinct wholesale product markets we consider below are informed by prior Commission precedent,[147] the evidence in the record, and the regulations at issue.

(i) Wholesale Loops and Dedicated Local Transport

48. In determining which network elements it would require to be unbundled pursuant to section 251(c)(3), the Commission found impairment with respect to certain loops and dedicated interoffice transport, and it accordingly imposed unbundling obligations in certain situations.[148] In prior analyses, the Commission likewise has identified separate product markets for wholesale loops and local transport.[149] Consistent with our traditional approach to market definition, we find that, in the face of a "small but significant and nontransitory" increase in the price of wholesale loops, wholesale customers would be unlikely to switch to wholesale dedicated transport, since dedicated transport will not permit the wholesale customer to reach its customers. Likewise, we find that, in the face of a "small but significant and nontransitory" increase in the price of wholesale dedicated transport, a wholesale customer would be unlikely to switch to wholesale loops, since wholesale loops will not permit the wholesale customer to carry its traffic back to its switch. Thus, we find it appropriate here to define loops and dedicated local transport as distinct wholesale product markets.[150]

49. The Commission also has found that, in general, circuits of differing capacities, such as DS0, DS1, and higher-capacity circuits are likely to constitute separate relevant product markets.[151]

---

[146] Because the record does not contain data necessary to perform the hypothetical monopolist test quantitatively, we use the conceptual framework of the traditional approach as "a methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition" as a way to measure competition. *Draft Revised Horizontal Guidelines*, § 4.1.3. We reject as unfounded concerns that the use of formal market definition, "if carried to its logical extreme, [could] eliminate the Commission's ability to bracket uncertainty about complex market interactions even when clearing up that uncertainty would not affect the result," and "would threaten to render section 10 a dead letter by imposing a requirement that . . . would be practically impossible to meet." AT&T Market Power PN Comments at 10–11.

[147] *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18305–06, 18352-53, paras. 25–27, paras. 112–13; *Verizon/MCI Order*, 20 FCC Rcd at 18447–49, 18494–95, paras. 25–27, 113–14; *AT&T/BellSouth Order*, 22 FCC Rcd at 5677–78, 5729, paras. 28–30, 125.

[148] *See generally Triennial Review Order*, 18 FCC Rcd at 17035–49, paras. 84–104; *Triennial Review Remand Order*, 20 FCC Rcd at 2536–37, para. 5. In addition, the Commission required unbundling of certain subloops—particularly inside wire subloops. *Triennial Review Order*, 18 FCC Rcd at 17184–95, paras. 343–54 (discussing subloop unbundling obligations).

[149] *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18305, para. 25; *Verizon/MCI Order*, 20 FCC Rcd at 18447–48, para. 25; *AT&T/BellSouth Order*, 22 FCC Rcd at 5677, para. 28.

[150] *Cf.* Framework Recommendation at para. 8 (identifying wholesale unbundled access to metallic loops and subloops and wholesale trunk segments of leased lines as separate relevant product markets, which Member State regulators must examine under the Framework Directive).

[151] *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448–49, para. 27 n.89; *AT&T/BellSouth Order*, 22 FCC Rcd at 5678, para. 30 n.94. The Commission has also distinguished, for example, between "'Type I' special access services, which are offered wholly over a carrier's own facilities, and 'Type II' special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment." *AT&T/BellSouth Order*, 22 FCC Rcd at 5677–78, para. 29. Given the record evidence here, we need not address this distinction.

Consequently, we find it appropriate to distinguish product markets further based on capacity. Although Qwest maintains that "there are "numerous options for carriers to purchase 'last mile' wholesale services that allow them to bypass Qwest's network entirely,"[152] we disagree and find instead that, however evaluated, the record in this proceeding reveals a lack of significant wholesale competitors to Qwest in the Phoenix MSA. We therefore need not define the wholesale loop and transport product markets more precisely here.[153]

(ii) Originating and Terminating Switched Access

50. Qwest seeks forbearance from dominant carrier regulation of carrier's carrier switched access charges. These are charges that LECs impose on interexchange carriers for originating and terminating interexchange calls. We define originating and terminating switched access as separate relevant product markets.

b. Retail Product Markets

(i) Retail Residential/Mass Market Services

51. Retail mass market services generally are purchased by residential customers and some very small business customers.[154] Sometimes, however, the differences between residential customers and very small business customers make it more appropriate to treat products sold to very small business customers as part of a distinct product market.[155] In some situations, very small business customers demand different services or face different prices than residential customers.[156]

52. We begin our analysis by recognizing that, even though telecommunications offerings typically include multiple features that may be relevant when defining product markets, at the most basic level, a consumer demands "access" from a provider to connect to a communications network.[157] Depending upon the type of access, the consumer will be able to connect to a wireline telephone network, a mobile wireless network, a data network, or another communications network. Our determination of the

---

[152] Qwest Petition at 39.

[153] *See infra* Part III.D.4.a.

[154] *See Triennial Review Order*, 18 FCC Rcd at 17063, para. 127 (stating that "[m]ass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features").

[155] As in our recent merger orders, we recognize that some small businesses are more appropriately considered with residential customers, while others are more appropriately considered separately as part of the enterprise customer segment. *See SBC/AT&T Order*, 20 FCC Rcd at 18335, para. 82 n.243 (defining mass market to include both residential and small business customers); *Verizon/MCI Order*, 20 FCC Rcd at 18477, para. 83 n.245; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, CC Docket No. 00-175, WC Docket Nos. 02-112, 06-120, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16452, para. 22 (2007) (*Section 272 Sunset Forbearance Order*); *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5222, para. 24 (2007) (*Qwest Section 272 Sunset Forbearance Order*).

[156] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17063, para. 127 n.432; Arizona Corporation Commission Comments at 10–11 (arguing that small business market is distinct from the residential market).

[157] The access provider usually charges a recurring monthly fee, and it frequently offers various communications services in combination with this access service.

relevant product market considers the demand for access. For example, we consider the extent to which Qwest's residential voice customers would switch from Qwest's service to Cox's residential voice services or to mobile wireless voice service in response to an increase in Qwest's monthly price for voice service.[158]

53. *Wireline Services*. In prior proceedings, the Commission has determined that services offered to mass market customers fall into several separate product markets, including local voice service, bundled local and long distance voice service, broadband Internet access service, and bundled voice and broadband Internet access service.[159] We find no reason to reach a different conclusion in this proceeding.[160]

54. *VoIP*. We find that the degree to which particular VoIP services are viewed as close substitutes for other local services varies depending upon the characteristics of the particular VoIP offering. In accord with Commission precedent, we divide VoIP providers into two general types: (1) facilities-based VoIP providers; and (2) "over-the-top" VoIP providers.[161] As in the past, we find that mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market.[162] Also as in prior proceedings, we agree with commenters that the record here is insufficient to determine which over-the-top VoIP services should be included in the relevant product market.[163]

---

[158] As used in the present context, "usage substitution" occurs when a customer who subscribes to wireline telephone service and to mobile wireless service begins using the mobile wireless service more and the wireline telephone service less, or vice versa. "Access substitution," in contrast, occurs when the customer stops subscribing to wireline telephone service altogether in favor of mobile wireless service, or vice versa. *See infra* at para. 55.

[159] *SBC/AT&T Order*, 20 FCC Rcd at 18336, para. 82; *Verizon/MCI Order*, 20 FCC Rcd at 18477, para. 83; *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16452, para. 22; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5217, para. 15; *AT&T/BellSouth Order*, 22 FCC Rcd at 5723, para. 114. Stand-alone long distance service is not implicated by the regulations at issue here, and thus we do not consider that product market in our analysis. Although there is insufficient evidence in this record to define a separate relevant market for voice and broadband Internet service bundles, or other bundles such as those including video, there is some evidence that bundling may have competitive significance. *See, e.g.*, Qwest Petition at 14 (discussing bundling by cable operators); Qwest Brigham Decl., Exh. 4 at 8 (discussing evidence of the role of bundles in the decision whether to rely solely on wireless service). We note in addition that Staff analysis of the December 2008 data collected on Form 477 indicates that, nationwide, 91% of fixed interconnected VoIP customers purchase bundled voice and broadband service. Given the specific record here, we did not conduct a detailed analysis of broadband Internet services and bundled services. In future proceedings, such analysis may prove necessary.

[160] Incumbent LECs' mass market subscribers pay both intrastate rates for local telephone service and a "subscriber line charge," or "SLC," which is the end-user charge regulated by this Commission, for interstate access. As discussed below, the SLC and the carriers' carrier charge components collectively make up the regulation of rates for the switched services from which Qwest seeks dominant carrier relief.

[161] *SBC/AT&T Order*, 20 FCC Rcd at 18337, para. 86; *Verizon/MCI Order*, 20 FCC Rcd at 18479, para. 87.

[162] *SBC/AT&T Order*, 20 FCC Rcd at 18338, para. 87; *Verizon/MCI Order*, 20 FCC Rcd at 18479–80, para. 88. Arizona Corporation Commission Reply at 14.

[163] *See*, *e.g.*, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11740, para. 16 ("We do not include providers of 'over-the-top' or nomadic [VoIP] services in our competitive analysis because there are no data in the record that justify finding that these providers offer close substitute services."); Broadview Comments at 41 (Qwest provides no Phoenix-specific data regarding VoIP usage); Covad Opposition at 11–12 (VoIP over-the-top services are not equivalent substitutes for an incumbent LEC's wireline services); PAETEC Opposition at 11–12 (same); Arizona Corporation Commission Reply at 14 (same). Over-the-top VoIP providers do not operate their own loop and transport networks and instead require customers to obtain access facilities from Qwest or its competitors.

55. *Mobile Wireless Services*. Whether mobile wireless services should be included in the same relevant product markets as fixed wireline service is a complicated issue, and one that is evolving over time. Although a growing number of mass market customers subscribe exclusively to mobile wireless service, the majority of households continue to subscribe to both a wireline and a mobile wireless telephone service, and the proportion of households subscribing to both services has not substantially changed since the first half of 2006.[164] With respect to such households, the Commission previously has found that most subscribers to both wireline and wireless engage in some *usage* substitution.[165] The more difficult question is how to measure the degree of *access* substitution between mobile wireless and wireline services.[166] The issue of *access* substitution is critical for purposes of market definition, since, given trend toward flat-rated prices for wireline services, it is the degree of access substitution that will affect most directly whether mobile wireless services constrain the price of wireline services. The increasing percentage of residential customers that rely solely on mobile wireless voice service suggests that an increasing percentage of voice customers view wireless and wireline services as close substitutes, increasing the likelihood that wireless service may materially constrain the price of residential wireline voice service. As discussed below, however, the record here does not enable us to make such a finding for purposes of Qwest's forbearance request.

56. The fundamental question in a traditional product market definition exercise is whether mobile wireless access service constrains the price of wireline access service.[167] These two services should be in the same relevant market only if the prospect of buyer substitution to mobile wireless access constrains the price of wireline access. The first question before us then is whether a hypothetical profit-maximizing firm that was the only present and future seller of wireline local access services could

---

[164] The Centers for Disease Control and Prevention (CDC) estimates that 58.2% of households subscribe to both a mobile wireless and wireline service. For the last 3 years, the proportion of households subscribing to both landline and mobile wireless service has fluctuated around 59%, while the proportion of households that subscribe only to mobile wireless increased from 13.6% to 24.5%. CENTERS FOR DISEASE CONTROL AND PREVENTION, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY - DECEMBER 2009 tbl. 1 (2010) (2010 CDC Wireless Substitution Report), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.htm.

[165] In the *Section 272 Sunset Forbearance Order*, the Commission analyzed markets using different metrics to account for wireless usage substitution. *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16453, para. 24; *see also, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18342–44, paras. 92–94.

[166] *See, e.g.*, *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21612–13, para. 239 (finding it "premature to consider the existence of a separate relevant market in which wireline and wireless services compete for mass market consumers"); *Verizon/MCI Order*, 20 FCC Rcd at 18481–02, para. 90 (finding no evidence that mobile wireless service has a price constraining effect on residential wireline service, but including mobile wireless in the relevant market "when it is used as a complete substitute for all of a consumer's' voice communications needs"); *High Cost Universal Service Support*, Order, 23 FCC Rcd 8834, 8843–44 paras. 20–21 (2008) (concluding that "the majority of households do not view wireline and wireless services to be direct substitutes," and that "rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer's existing wireline service"); *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11742–43, paras. 19–20 (finding that "mobile wireless service should be included in the local services product market to the extent that it is used as a complete substitute for all of a consumer's voice communications needs").

[167] *Cf.* Cavalier Opposition, Declaration of Michael D. Pelcovits at 6–9 (Cavalier Pelcovits Decl.) (explaining that to properly define the relevant product market here, one would consider the demand for wireline service, estimate the cross elasticity of demand between wireline and wireless service, and analyze switching patterns between wireline and wireless in response to changes in the marketplace); *id*. at 10 ("[T]he key empirical test is *how much switching* between wireline and wireless access is due to changes in the relative prices (*i.e.*, the cross-elasticity of demand).").

profitably impose a small but significant and nontransitory increase in price (SSNIP).[168] In other words, we consider whether there are a sufficient number of wireline service customers who, in response to a price increase in wireline local access service, would stop subscribing to their wireline service and instead rely exclusively on mobile wireless service, so as to render the price increase unprofitable.

57. As an initial matter, we note that the Commission, the DOJ, and foreign regulators have previously found that mobile wireless service does not constrain the price of wireline service. For example, in 2005 and 2007 the Commission found that mobile wireless substitution does not appear to have a price-constraining effect on wireline service.[169] A recent report by the DOJ likewise found no evidence that mobile wireless access substitution constrains landline telephone service prices.[170] In addition, Ofcom (the telecom regulator for the United Kingdom), in evaluating the retail market for fixed (*i.e.*, wireline) access, found that, "while there is some substitutability between fixed and mobile access, consumers predominantly view the two types of access as meeting different needs and have a strong preference to purchase both fixed and mobile access."[171] It thus concluded that mobile wireless services should not be included in the same relevant product market as wireline access service.[172]

[168] *See EchoStar/DirecTV Order*, 17 FCC Rcd at 20607, para. 109 n.330; *see also, e.g.*, *DOJ/FTC Guidelines*, § 1.11.

[169] *See Verizon/MCI Order*, 20 FCC Rcd at 18483, para. 91 n.276; *SBC/AT&T Order*, 20 FCC Rcd at 18340–42, paras. 89–90; *AT&T/BellSouth Order*, 22 FCC Rcd at 5711, 5714–15, paras. 90, 95–96. In those decisions, the Commission nevertheless counted "cut-the-cord" *wireless* customers in calculating market shares for *wireline* service. As discussed above, we find that that prior approach incorrectly deviated from economically sound standards for defining product markets.

[170] U.S. DEPARTMENT OF JUSTICE, VOICE, VIDEO, AND BROADBAND: THE CHANGING COMPETITIVE LANDSCAPE AND ITS IMPACT ON CONSUMERS 61 (2008) (DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM), *available at* http://www.justice.gov/atr/public/reports/239284.pdf (discussing the competitive importance of service bundles); *see also* Cavalier Pelcovits Decl. at 16 n.22. Contrary to Qwest's claims, the DOJ report does not merely provide a summary of industry positions. *See* Qwest Market Power PN Comments at 13–16. Qwest also argues that the report reached incorrect conclusions because it compared wireless prices to stand-alone landline access prices rather than to the price for a bundle of local and long distance services. *Id*. However, the DOJ report primarily focused on purchasing patterns and did not conduct a price analysis. We therefore find little merit to Qwest's argument. For the reasons, discussed here, we also reject Qwest's assertion that the Commission should include wireless similar to Canada and the California Commission. Qwest Market Power PN Comments at 7–8.

[171] Ofcom, *Fixed Narrowband Retail Services Markets: Consultation on the Identification of Markets and Determination of Market Power* at 21, paras. 4.33–4.34 (Mar. 19, 2009) (Ofcom Market Study), *available at* http://www.ofcom.org.uk/consult/condocs/retail_markets/fnrsm_condoc.pdf ("In a hypothetical scenario where BT's line rental price increased by 10% (and the price of other fixed and mobile access remained constant)[,] only 4% of respondents stated that they would cancel the fixed line with 22% responding they would switch to a different supplier. Of those who indicated that they would switch calls, only 5% (1% of total sample) would switch to a mobile phone supplier. While these hypothetical questions are more relevant for the assessment of BT's market power nonetheless they do provide some evidence that mobile access is not regarded by consumers as a particularly strong substitute for fixed line access."); *see also supra* note 164 (citing data showing that most U.S. households purchase both mobile wireless and landline services).

[172] *See generally* Ofcom Market Study at 19–21, paras. 4.26–4.34. We acknowledge that there is a split among the state regulators that have addressed this issue. *Compare* Qwest Comments at 7–8 (providing evidence that several state authorities have concluded that wireless service provides competitive discipline to wireline providers) *with* Letter from Samuel L. Feder, Counsel to Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135, at 1–3 (filed May 11, 2010) (Cavalier May 11, 2010 *Ex Parte* Letter) (providing evidence that several state authorities have reached the opposite conclusion and that none of the states cited by Qwest conducted or reviewed an econometric study).

58. No evidence in the record here causes us to reach a different conclusion. In particular, neither Qwest nor any other commenter has submitted evidence that would support a conclusion that mobile wireless service constrains the price of wireline service.[173] For example, Qwest has produced no econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services.[174] Nor has it produced any evidence that it has reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service.[175] Nor has it produced any marketing studies that show the extent to which consumers

[173] Although Qwest argues that wireless provides competitive discipline on wireline prices and that competition at the margin disciplines a firm's pricing behavior, it has provided no empirical or documentary evidence that its pricing has been constrained by wireless service offerings. *See* Qwest Reply at 29; Qwest Reply, Declaration of Timothy J. Tardiff and Dennis L. Wiesman, Exh. 1 at paras. 84–87 (Qwest Reply Tardiff/Weisman Decl.). Qwest's observation that the number of wireless access lines exceeds the number of wireline access lines is not probative of the issue of the substitutability between wireline and wireless services for residential households. *See* Qwest Reply Tardiff/Weisman Decl. at para. 87. We note there generally is a substantial price differential between mobile wireless service and fixed wireline service, although the record does not contain sufficiently geographically disaggregated pricing information for us to make findings with respect to the Phoenix MSA. Moreover, each individual in a multi-person household would need a mobile telephone to fully benefit from the mobility of such services, thereby somewhat increasing the equipment and service costs related to the service. In addition, although Qwest offers DSL service on a "stand-alone" basis, Qwest offers discounts for DSL service that is bundled with Qwest's local exchange service; thus, the effective price difference between Qwest's wireline telephone service and mobile wireless service is even larger for customers who wish to subscribe only to mobile wireless service and Qwest's DSL service. *See* Qwest Petition at 25; Compare Qwest High-Speed Internet Plans, *available at* http://www.qwest.com/residential/internet/broadbandlanding/compare_plans.html.

[174] *See, e.g.*, Cavalier May 11, 2010 *Ex Parte* Letter at 1–2 & Attach. at 1–3 (Cavalier Supp. Pelcovits Decl.) (attaching a copy of Supplemental Declaration of Michael D. Pelcovits filed in WC Docket Nos. 08-24 & 08-49) (discounting an econometric study by Ware and Taylor, which is cited by Qwest, because the study assumes the central question the analysis should be seeking to answer, contains no modeling, statistical analysis, or hypothesis testing, and, in any event, was not submitted in the record). Further, here, as well as in other proceedings, we find that the Mikkelsen Mobile Services White Paper is inadequate to estimate the cross-elastic effect from wireless price change on the decision to subscribe to any fixed line. *See* Kent W. Mikkelsen White Paper, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition* (Apr. 21, 2008) (Mikkelsen Mobile Services White Paper), *available at* http://www.comptel.org/files/free-to-compete/econ-inc_wireless-cut-cord_april21_2008.pdf; *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11743, para. 20 n.73; *see also SBC/AT&T Order*, 20 FCC Rcd at 18342, para. 90 n.277; Integra Opposition at 25–26, n.82. Cavalier's economic expert argues that the demand for wireline services may have become less elastic over time if the remaining wireline customers view the actual or perceived benefits of retaining the wireline service to have increased over time. Cavalier Pelcovits Decl. at 15. If the demand for wireline services has become less elastic, then the remaining customers could face a higher risk of a supra-competitive price increase, and this risk could increase with consumer preferences for voice services bundled with broadband and/video services.

[175] Indeed, the DOJ recently observed that "there is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices. In response to customers 'cutting the cord,' a telephone company can either lower its prices to all customers to keep subscribers from switching, or leave prices where they are. A company would choose the first option if the loss of revenue from cord-cutting is expected to be greater than the loss of revenue from reducing the fees paid by customers who would not switch. If, however, the extent of wireless substitution in response to price changes is small, the company would choose not to lower prices. In fact, stand-alone landline access prices have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation." DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 66.

view wireless and wireline access services as close substitutes.[176]

59. Instead, Qwest submitted studies that estimate the percentage of households that exclusively rely upon mobile wireless services in the Phoenix area,[177] which cannot alone establish whether mobile wireless services should be included in the same relevant product market as residential wireline voice service.[178] Knowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price-constraining effect on wireline access services.[179] Moreover, while we acknowledge that the number of customers that rely solely on mobile wireless service has been growing steadily, we find that other reasons may explain the growth in the number of wireless-only customers, besides an increasing cross-elasticity of demand between mobile wireless and wireline services. For example, nationwide statistics published by the CDC suggest that the choice to rely exclusively upon mobile wireless services could be driven more by differences in consumers' age, household structure, and underlying preferences than by relative price

---

[176] *See, e.g.*, *id*.; Cavalier Pelcovits Decl. at 16 (arguing that the extent to which customers would substitute wireless service in response to a price increase in wireline service "remains unknown and a large substitution effect cannot simply be assumed to exist").

[177] Qwest Petition, Exh. 4, Nielsen Study: Call My Cell—Wireless Substitution in the United States, September 2009 (Nielsen Study); Qwest Petition, Exh. 5, MarketStrategies: Understanding Wireless-Only Versus Wire-line Penetration in the Phoenix Metropolitan Area (MarketStrategies Study).

[178] We acknowledge that the Commission in the *Qwest 4 MSA Forbearance Order* suggested that geographically disaggregated evidence of the percentage of voice subscribers that rely on mobile wireless only might demonstrate that Qwest was entitled to forbearance in the Phoenix MSA. *See Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11745, para. 22. Since those statements were made, however, the D.C. Circuit remanded the *Verizon 6 MSA Forbearance Order* and instructed the Commission to provide a more complete economic analysis of its decision to deny forbearance. The D.C. Circuit, at the Commission's request, also remanded the *Qwest 4 MSA Forbearance Order*. After the remands, the Wireline Competition Bureau issued a Public Notice in the present proceeding seeking new record data that might show that, under a traditional market power analysis, mobile wireless service is in the same relevant product market as mass market wireline telephone service. *See supra* paras. 17–20.

[179] *See, e.g.*, DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 65–67; *see also id*. at 65 (stating that "[t]he existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on the prices for access to landline services" and that, while the evidence before it did not allow definitive conclusions, there are reasons "to think that wireless is not by itself an effective competitive constraint today"); Cavalier Pelcovits Decl. at 19 (explaining that a decline in demand should not be confused with an increase in demand elasticity). Even if we were to find the number of "cut-the-cord" customers to be relevant in our market definition analysis, however, we find that the Qwest studies provide insufficient detail about how the data was collected to assess the validity or confirm the results obtained. In the case of the MarketStrategies Study, we find that details on the data weighting are lacking as well as how this data is used to calculate the confidence intervals for the estimates. The report does not include the survey or describe the survey protocol in particular with respect to non-responses or follow-up contacts. *Cf.*, Arizona Corporation Commission Reply at 17-18 (asserting that the MarketStrategies Study is too small and the methodology of the Neilsen Study is not clear); COMPTEL Opposition at 32 (Nielsen Study has insufficient detail to evaluate and there are no details on the survey methodology), 33–35 (MarketStrategies Study appears to disproportionately survey mobile wireless households; unclear how households were selected). We reject Qwest's assertion that the studies' estimated proportion of wireless-only households are not statistically different from each other. *See* Qwest Reply, Exh. 3 at 1–2. This hypothesis cannot be accepted without conducting a statistical test of the difference between the two survey's estimated proportions. *See generally* ROBERT JOHNSON AND PATRICIA KUBY, JUST THE ESSENTIALS OF ELEMENTARY STATISTICS, ch. 10 (10th 2008). For these reasons above, we reject Qwest's assertion that the proportion of wireless-only households confirm "the validity of treating wireline and wireless as substitutes." Qwest Market Power PN Comments at 9.

differentials.[180] Furthermore, just as some customers may rely solely on mobile wireless service regardless of the price of wireline service, several classes of customers appear unlikely to drop wireline service in response to a significant price increase,[181] including those who: (a) value the reliability and safety of wireline service; (b) value a single point of contact for multiple household members; (c) live in a household with poor wireless coverage; (d) operate a business out of their home and believe that wireline service offers better reliability and sound quality; or (e) desire a service that is more economically purchased when bundled with a local service (*e.g.*, wireline broadband Internet service, or a video service).[182] Indeed, because the record reflects that the majority of residential customers continue to subscribe to both mobile wireless and wireline services, it appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.[183]

60. Accordingly, we find that Qwest has proffered insufficient evidence to justify including mobile wireless service in the same relevant product market as wireline service for purposes of evaluating the instant petition. We emphasize, however, that we make no affirmative finding that mobile wireless services do not currently, or may not soon, belong in the same product market as residential wireline voice services. Nor are we suggesting that mobile wireless services must be a perfect substitute for residential wireline services for it to constrain the price of wireline service.[184] In fact, we acknowledge that the increasing number of households that rely solely on mobile wireless services suggests that more consumers may view mobile wireless as a closer substitute for wireline voice service than in the past. We find only that there is insufficient data in the record to make such a determination here.[185]

---

[180] Nationwide, the CDC finds that, of the adults living in wireless-only households, 48.6% are 25–29 years old and 37.8% are 18–24 years old, while only 14.9% are 45–64 years old and fewer than 5.3% are 65 years old or older. 2010 CDC Wireless Substitution Report, Tbl. 2. In addition, 62.9% of adults living in wireless-only households live with unrelated adult roommates and only 24.1% of wireless-only households contain children. *Id. Cf.*, Cavalier Pelcovits Decl. at 14 ("[T]he complexity of the data points to significant differentiation in consumer demand for wireline and wireless services based on many different factors. Price is only one of these factors, whose importance has not been measured properly.").

[181] DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 63.

[182] *See, e.g.*, Cavalier Pelcovits Decl. at 17–19; *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615, 9619–21, 9624–26, paras. 8–14, 19–21 (2008) (describing the capabilities of various wireline and wireless technologies for providing broadband Internet access service); *see also* Qwest Brigham Decl., Exh. 4 at 8 (reporting the top reasons for returning to landline service); Integra Opposition at 5 (asserting that Qwest had not claimed that mobile wireless broadband belongs in the residential wireline broadband market nor do they belong in the same market).

[183] S*ee, e.g.*, *supra* note 164; DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 66 (more than 80% of consumers do not consider mobile wireless and wireline telephone services to be substitutes because they pay for both services).

[184] *See* Qwest Brigham Decl. at paras. 20–21.

[185] Even assuming arguendo that the Commission were to include mobile wireless service in the same product market as residential wireline voice service and concluded that Qwest lacked market power for this service, this would not change the outcome of our ultimate forbearance decision in this proceeding. The regulations at issue in Qwest's petition are not targeted to residential voice service, and the record does not reveal how any relief from such regulations could be tailored in a way that was limited in that manner. In our analysis below, we have sought to identify a number of the policy and administrability questions associated with tailoring such relief to inform the record in future proceedings seeking regulatory relief based on similar competitive claims.

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 forbearance orders. In the *Qwest 4 MSA Forbearance Order*, the Commission, in *dicta*, and without a thorough economic analysis, suggested that geographically-specific estimates of "mobile wireless service should be included in the local services product market,"[186] though it recognized that "mobile wireless service and wireline telephone services are not perfect substitutes."[187] Consistent with the more comprehensive analytic approach we use here, we conclude that mobile wireless-only customers should be included in calculating residential voice market shares only upon a showing that residential mobile wireless service constrains the price of residential wireline service.[188]

(ii) Retail Enterprise Services

62. Consistent with Commission precedent and with the record in this proceeding, we find that the communications services offered to enterprise customers fall into a number of separate relevant product markets.[189] We again find that local voice, long distance voice, and data services constitute distinct product markets.[190] In addition, enterprise customers frequently purchase high-capacity transmission services. We find again that different capacity services may constitute separate relevant product markets.[191] As in our prior merger orders, the evidence in the record is insufficient to define precisely the boundaries of various transmission service markets.

63. In previous orders, the Commission has found it appropriate to define separate relevant product markets based on the class of customer.[192] For example, the Commission previously found that small business customers fall into a separate relevant product market from mid-sized to large retail enterprise customers.[193] Moreover, carriers treat small enterprise customers differently from larger business customers, both in the way they market their products and in the prices they charge. As in our prior orders, we again find that there are separate product markets for the different enterprise customer groups. Although we also conclude that the record is insufficient to differentiate one class from another in a precise manner for most enterprise services, for purposes of this proceeding we accept the line-size classification used by the Arizona Corporation Commission to delineate small, medium, and large

---

[186] *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11742, para. 19; *id*. at para. 20 (recognizing "that mobile wireless service and wireline telephone services are not perfect substitutes"). The approach taken in the *Qwest 4 MSA Forbearance Order* relied on certain statements in the Commission's *BOC/IXC Merger Orders* but did not independently consider whether the facts in that record supported the inclusion of mobile wireless services in the relevant product markets in the particular 4 MSA areas. *See id*. at para. 20.

[187] *Id.*

[188] *See supra* para. 56.

[189] *SBC/AT&T Order*, 20 FCC Rcd at 18321–24, paras. 57–61; *Verizon/MCI Order*, 20 FCC Rcd at 18463–66, paras. 57–61.

[190] As with services provided to mass market customers, incumbent LECs' rates for local telephone service include both intrastate rates and interstate switched access charges, known as "subscriber line charges" (*i.e.*, SLCs).

[191] *SBC/AT&T Order*, 20 FCC Rcd at 18321–24, paras. 57–61; *Verizon/MCI Order*, 20 FCC Rcd at 18463–66, paras. 57–61.

[192] *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60.

[193] This distinction exists because, unlike small enterprise customers, larger businesses often contract for more complex services, including Frame Relay, virtual private networks, and enhanced 800 services. Larger businesses also tend to negotiate commercial contracts rather than taking services off of a tariff or general offering.

businesses.[194]

2. Geographic Markets

64. Consistent with Commission precedent, we reaffirm that each customer location constitutes a separate relevant geographic market, given that a customer is unlikely to move in response to a small, but significant and nontransitory increase in the price of the service.[195] For reasons of administrative convenience, the Commission traditionally has aggregated customers facing similar competitive choices.[196] We continue to follow this approach here.[197]

65. In addition to the effect on competition in the properly-defined relevant geographic market, however, forbearance could have effects in broader geographic areas, depending upon the particular facts and circumstances.[198] To the extent that we have evidence of effects in broader geographic areas, such as for wholesale loops and dedicated transport, we consider those broader areas as well in our competitive analysis below.

3. Marketplace Competitors

66. We find that Qwest faces competition in the Phoenix MSA from numerous competitors, though principally for retail services. Because the evidence indicates only minimal wholesale competition, we simply note below the extent to which any of these marketplace competitors might provide wholesale services.

67. *Residential Services*. The record indicates that, in addition to Cox, the incumbent cable operator in Phoenix, Qwest faces competition from a small number of competitive LECs in the Phoenix MSA. These competing providers of residential service, other than Cox, rely predominantly—if not exclusively upon Qwest facilities, including UNEs and other wholesale services, to provide their services.[199]

68. *Enterprise Services*. The record indicates that, in addition to Cox, Qwest faces

---

[194] The Arizona Corporation Commission recommended and obtained access line counts from each carrier in the Phoenix MSA, disaggregated into three business customer classifications: small (less than 4 lines provided); medium (4 to 100 lines provided); and large (more than 100 lines provided). Arizona Corporation Commission Comments at 10; Arizona Corporation Commission Reply at Exhs. 1–13.

[195] A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *See supra* note 142. For multi-location enterprise customers that want a single provider, the issue is more complicated. To be administratively feasible, we have adopted different relevant geographic markets to capture different classes of business customers. Thus, in some cases, we have looked at broader geographic areas, sometimes even the entire United States, for example. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18325, para. 63; *Verizon/MCI Order*, 20 FCC Rcd at 18467, para. 63. For each of these geographic markets, we then focus on carriers that provide service throughout the areas as defined.

[196] *See, e.g.*, *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19426, para. 18; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5222–23, paras. 25–28; *AT&T/BellSouth Order*, 22 FCC Rcd at 5700–01, paras. 68–69 & 5718, paras. 103–04.

[197] Although Qwest seeks forbearance from the relevant regulations in the 64 wire centers comprising its service area footprint in the Phoenix MSA, the geographic scope of its requested relief is not dispositive of the definition of the "relevant geographic markets" under the traditional market power analysis.

[198] *SBC/AT&T Order*, 20 FCC Rcd at 18307, para. 29; *Verizon/MCI Order*, 20 FCC Rcd at 18450, para. 29.

[199] Qwest Petition at 13–16, 27–28; *see also supra* Part III.D.1.b(i).

competition from more than a dozen competitive LECs in the Phoenix MSA.[200] These competitors, other than Cox, rely predominantly upon Qwest facilities, including UNEs and other wholesale services, to provide their services.[201]

69. *Wholesale Services*. The record indicates that Cox offers some wholesale services in the Phoenix MSA. Cox's non-cable plant facilities are not widely deployed, however, and it apparently provides little, if any, wholesale service over its cable plant, which is deployed primarily in residential areas.[202] The other potential wholesale suppliers Qwest cites, including Integra (via its acquisition of Electric Lightwave), XO, Level 3, tw telecom, SRP Telecom, and AGL Networks,[203] likewise have comparatively few networks facilities in the Phoenix MSA and rely primarily upon Qwest's facilities to provide services.[204] In addition, the record does not reveal significant fixed wireless wholesale service offerings in the Phoenix MSA.[205]

4. Competitive Analysis

a. Wholesale Competition

(i) Wholesale Loops

70. Although there are no data in the record by which to calculate market shares for any relevant wholesale loop product market,[206] we note that, in the *Qwest 4 MSA Forbearance Order*, the

---

[200] Qwest Petition at 25–32; *see also, e.g.*, Arizona Corporation Commission Reply, Exh. 7 (showing **[REDACTED]**); *infra* Part III.D.4.b(ii).

[201] Arizona Corporation Commission Reply, Exh. 7.

[202] *See infra* para. 71.

[203] Qwest Petition at 33–37; *id*. at 31 (reporting competitive fiber in the Phoenix MSA). *See* Integra Opposition, Declaration of Steve Fisher, Attach. D, at para. 7 (Integra Fisher Decl.).

[204] *See infra* para. 71.

[205] *See infra* notes 210, 212 (describing evidence of fixed wireless alternatives in the Phoenix MSA).

[206] Nor is there information in the record that would enable us to evaluate other factors, such as elasticity of demand, or whether any wholesale competitors have comparable size, resources, or cost structure to Qwest. Our analysis in this order relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in the Phoenix MSA. The data indicate that Qwest is the only significant provider of wholesale services. Arizona Corporation Commission Reply, Exh. 7. Qwest argues it is critical to include all competitors in our market share analysis. Qwest Market Power PN Comments at 5. The Arizona Corporation Commission included data from all competitors in the Phoenix market, including facilities-based and providers that rely upon wholesale inputs. Arizona Corporation Commission Reply, Exh. 7. Qwest expresses concern about Commission reliance on the Arizona Corporation Commission data because it was filed pursuant to the *Second Protective Order*. *See* Letter from Harisha J. Bastiampillai, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 3 & n.8 (filed May 26, 2010). Specifically, Qwest notes that under the terms of the *Second Protective Order* only outside counsel or third-party consultants are allowed to review the data, and claims that such individuals "are not familiar with the market data" and that the need to rely on such individuals would "significantly undermine Qwest's ability to address the validity of the data submitted by the ACC." *See id*. We find that the Arizona Corporation Commission data contains Highly Confidential Information, and is properly subject to the *Second Protective Order* adopted in this proceeding. In adopting the *Second Protective Order*, the Commission carefully balanced the Commission's desire to obtain the best available evidence against companies' legitimate interest in protecting highly confidential information. *See generally 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, Second Protective Order, 24 FCC Rcd 9509 (WCB rel. July 29, 2009) (*Second Protective Order*). The Commission routinely adopts protective orders like this in other proceedings that involve highly (continued….)

Commission found there were no "significant alternative sources of wholesale inputs" in the Phoenix MSA.[207] There is nothing in the record here to cause us to alter this conclusion.[208]

71. Specifically, the record indicates that, other than Qwest, there are no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA, either individually or in the aggregate. Further, the record reveals no wholesale suppliers of last-mile connections to *mass market* end users in the Phoenix MSA other than Qwest.[209] In limited situations, competitive carriers,[210] including Cox,[211] have constructed their own last-mile connections to enterprise customers, and in even more

(Continued from previous page)
confidential information. More importantly, Qwest did not object to adoption of the *Second Protective Order* and Qwest has submitted confidential data pursuant to the *Second Protective Order* in this proceeding—including in Qwest's petition itself. *See, e.g.*, Qwest Petition (seeking protective orders for the confidential and highly confidential information contained in Qwest's forbearance petition). The *Second Protective Order* applies to all participants in this proceeding, and commenters that want to review Qwest's highly confidential information must rely on outside counsel or consultants, just as Qwest must do to review other parties' highly confidential information. Thus, we find no procedural unfairness or merit to Qwest's claims in this regard.

[207] *See Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11756, para. 37.

[208] Much of the information Qwest submitted is insufficiently detailed to permit any specific inferences regarding the level of competition in the Phoenix MSA. *See, e.g.*, Qwest Petition at 12, 33–39; Qwest Brigham Decl. at para. 51 (providing information that Cox advertises certain wholesale offerings but not providing any evidence on the price of those services or Cox's success in marketing them); *id*. at paras. 57, 59–62 (primarily providing nationwide data regarding certain competitors taken from their marketing materials). For instance, Qwest relies on a competitor's marketing assertions as evidence that this competitor is a "very viable option for carriers that seek an alternative access solution to the use of Qwest's network in the Phoenix MSA." Qwest Brigham Decl. para. 53 (stating that this provider has "comprehensive 'last-mile' solutions to connect commercial buildings . . . throughout the Phoenix area—all without the use of Qwest facilities"). However, the same marketing materials explain that this competitor's fiber network reaches only 50 buildings and business campuses in the Phoenix MSA, which does not approach the coverage needed to provide effective competition to Qwest for retail or wholesale services throughout the Phoenix MSA. *Id.*

[209] Although Cox has an extensive last-mile network, it does not appear to supply wholesale loops connected to residential homes or very small businesses. *See* Arizona Corporation Commission Reply, Exh. 15 (showing that Cox provides **[REDACTED]** in the Phoenix MSA). The record does not indicate that any entity other than Qwest and Cox has extensive last-mile connections to residential customers or very small business customers that would enable it to provide wholesale services, nor are we aware of any entity other than Qwest actually providing a wholesale mass market wireline access service.

[210] *See, e.g.*, Arizona Corporation Commission Reply at 21 & Exh. 14 (showing that AGL Networks serves **[REDACTED]** and the Salt River Project serves **[REDACTED]** buildings over their own facilities in the Phoenix MSA); Broadview Comments at 48–49 (explaining that XO has its own facilities connected only to **[REDACTED]** buildings in the market and has added only **[REDACTED]** new commercial buildings in the last 16 months); Covad Opposition at 20–23; Integra Opposition at 18 (asserting there are no significant alternative sources of wholesale loops for carriers serving businesses in the Phoenix MSA); Integra Opposition, Declaration of Scott Liestman, Attach. C at para. 5 (Integra Liestman Decl.) (reporting that tw telecom has deployed its own loop facilities to only **[REDACTED]**% of its customer locations in Phoenix, and that it had constructed loops to only **[REDACTED]**% of the commercial buildings in Phoenix); PAETEC Opposition at 21, 25 (claiming a lack of wholesale competition and that competitive facilities deployment is limited); Broadview Comments at 50 (stating that Nextlink, a provider of fixed wireless services, has only **[REDACTED]** hubs in the Phoenix MSA, one of which is subject to **[REDACTED]** and currently serves business customers in only **[REDACTED]** buildings).

[211] Arizona Corporation Commission Reply, Exh. 6 (providing Cox's access line counts for its large business customers by ZIP Code area); Broadview Comments at 34 (Cox only provides services to **[REDACTED]** of 133,000 commercial buildings in Phoenix MSA); Integra Fisher Decl. at para. 7 (Cox only offers wholesale loops facilities to a limited number of buildings and **[REDACTED]**; *id*. at paras. 8–9 (discussing Cox's OSS limitations).

limited situations appear to offer these services to competitors as wholesale inputs.[212] We find that the record evidence does not provide support for Qwest's assertion that "wholesale customers have access to a wide range of competitive alternatives," or that the market for wholesale services is competitive.[213] In light of the limited state of competitive loop deployment and the even more limited availability of alternative wholesale loop facilities, we need not analyze in detail all the specific product and geographic markets defined above.[214]

72. Our analysis of whether Qwest possesses market power also considers potential entry.[215] We find, however, that the existence of significant barriers to entry, both in general[216] and specifically in

---

[212] *See, e.g.*, Arizona Corporation Commission Reply at 11, 22–23 (explaining that there are not many wholesale alternatives in the Phoenix MSA particularly for last-mile facilities); *id*. at 9, 21 & Exh. 7 (showing competitive carriers' extensive reliance on Qwest facilities, including UNEs); *id.* at Exh. 15 (showing the extent to which **[REDACTED]** rely on Cox's wholesale services); Integra Fisher Decl. at para. 10 ("Intregra has not found any fixed wireless providers that have the capabilities to serve as alternatives to Qwest for wholesale loops in the Phoenix MSA."). Even if we were to accept Qwest's claim that competitive fiber has been deployed to approximately **[REDACTED]** buildings in the Phoenix MSA and that the only end-users locations of relevance are the approximately **[REDACTED]** buildings Qwest asserts have more than $1,000 in monthly telecommunications demand, this would amount to competitive deployment to less than **[REDACTED]**% of end-user locations. Qwest Petition at 31 (reporting GeoTel data with additional Commission analysis); Letter from Thomas Jones et al., Counsel to Integra et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135, Attach. at 4 (filed Apr. 28, 2010) (Integra Apr. 28, 2010 *Ex Parte* Letter) (estimating there are approximately **[REDACTED]** buildings in the Phoenix MSA with **[REDACTED]** of demand). We note that various commenters contend that Qwest's estimate of the percentage of buildings with competitive fiber deployment is significantly overstated and that a much larger number of buildings should be considered relevant when estimating the size of the addressable market. *See, e.g.*, Broadview Comments at 38–39 (asserting that there is competitive LEC fiber to less than **[REDACTED]**% of 133,000 commercial buildings in Phoenix MSA and that aggregating the last-mile connections of the seven largest competitive networks in the Phoenix MSA plus XO yields only approximately **[REDACTED]** last-mile connections); Broadview Reply at 9 (citing a 2006 U.S. Government Accountability Office (GAO) Report showing that competitors with last-mile facilities reached only 3.7% of buildings in the Phoenix MSA with at least DS1 capacity). Whatever specific measure of competitive deployment is more accurate, we find insufficient competitive deployment of last-mile facilities to allow significant levels of competition in the relevant wholesale markets.

[213] Qwest Petition at 33; *see supra* note 206.

[214] As noted above, the Commission also required unbundling of subloops used for access to multiunit premises. 47 C.F.R. § 51.319(b); *see generally Triennial Review Order*, 18 FCC Rcd at 17184–95, paras. 343–54 (discussing subloop unbundling obligations). As the Commission found in the *Triennial Review Order*, generally there are no alternatives to the incumbent for these facilities, and future facilities-based entry is unlikely. *Triennial Review Order*, 18 FCC Rcd at 17193, para. 351 (stating that often there is no alternative inside wiring other than the incumbent LEC's).

[215] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC 12348, 12373 para. 50 (2008).

[216] The Commission previously has recognized that there are significant barriers to the deployment of last-mile network facilities. *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2579–81, 2616–19, paras. 72–77, 150–54; *Triennial Review Order*, 18 FCC Rcd at 17107–09, 17122–25, 17160–62, 17207–09, paras. 205–07, 237–40, 303–06, 371–73. We note that, in evaluating the competitive effects of certain BOC/IXC mergers on wholesale special access, both the DOJ and the Commission used a "screen" designed to predict the potential for additional competitive entry into particular buildings with certain minimum levels of enterprise demand. *AT&T/BellSouth Order*, 22 FCC Rcd at 5682–83, para. 42 n.114 (discussing the screens, which applied to buildings with demand of two DS3s or greater). Qwest failed to provide the data necessary to apply such a screen in the Phoenix MSA.

the Phoenix MSA,[217] indicates that potential competition poses no significant competitive constraint in this MSA. Our evaluation of the likelihood of potential competition for wholesale loops considers entry via supply-side substitution (*i.e.*, whether an existing provider of services is likely to construct new loop facilities to expand its service offerings) and *de novo* entry (*i.e*., whether an entrant is likely to construct its own last-mile network).[218]

73. We find potential competition from either supply-side substitution or from *de novo* entry to be unlikely in the Phoenix MSA. That a few competitors have constructed some competitive loop facilities in the Phoenix MSA does not support a conclusion that competitors would find it potentially profitable to build duplicative loop facilities throughout the market. Thus, potential entry cannot be relied upon to constrain market prices.[219] Further, there is no record evidence suggesting that Cox is likely to begin providing wholesale connections to mass market customers, and, as described above, the evidence indicates that Cox's network is connected to relatively few enterprise customers.[220] The record further indicates that Qwest's other competitors likewise have few lit buildings, and that these competitors are not viewed as offering significant alternatives to Qwest's wholesale service offerings.[221] Although there is some evidence of limited wholesale activity with respect to particular buildings, we find no basis to conclude that potential entry would be sufficient to ensure a competitive market in the overall Phoenix MSA. Rather, the fact that facilities-based competitors have so few last-mile connections suggests that entry is costly and difficult. Consequently, we conclude that new wholesale entry in the Phoenix market is not likely to be reasonably timely and that Qwest is therefore likely to remain the only major wholesale provider of relevant services in the Phoenix MSA.

74. The record indicates that competitors generally make entry and exit decisions based on an evaluation of broader geographic areas than individual buildings.[222] Moreover, if a competitor seeks to serve a multi-location business customer, it must have access to facilities that reach all of the customer's

[217] *See, e.g*., Broadview Comments at 49 (explaining that adding buildings is costly and XO will only undertake such investment if there is a strong business case and demonstrated capacity need for at least 3 DS-3s); Integra Opposition, Declaration of Byron S. Cantrall, Attach. A at paras. 3–6 (Integra Cantrall Decl.) (discussing barriers to building a profitable competitive network in Phoenix); *see also* Integra Opposition, Declaration of Dave Bennett, Attach. B at para. 4–5 (Integra Bennett Decl.); Integra Liestman Decl. at paras. 5–11.

[218] We note that the Commission often has framed its consideration of potential competition as part of its discussion of supply elasticity. Considerations of potential competition also relate to the issue of barriers to entry, however, and we consider it in that context here.

[219] *See supra* paras. 70–71.

[220] Arizona Corporation Commission Reply at 8 & Exhs. 7–10; Broadview Comments at 35, 45–46 (noting that Cox's switched Ethernet private line and virtual private line circuits are not provided on a dedicated basis and are susceptible to throughput degration; Cox does not offer 10MB services; and Cox's maximum Transition Unit size differs from the industry standard).

[221] *See supra* para. 71 and accompanying notes; *see also* Qwest Petition at 34–35. We reject Qwest's assertion that the competitive LEC lit building data is understated. As discussed below, data supplied by the Arizona Commission indicates that of the **[REDACTED]** business access lines served by competitive LECs (excluding Cox), only **[REDACTED]** of these lines, or **[REDACTED]**% are served without relying on Qwest's facilities. Arizona Corporation Commission Reply at 13 & Exh. 7.

[222] *See, e.g.*, Integra Liestman Decl. para. 6 (explaining that tw telecom will build its own facilities only if: (1) the customer will commit to a pay a monthly recurring charge above a certain amount for a lengthy time period; (2) the customer will have at least two locations; and (3) tw telecom can obtain similar commitments from additional customers for at least one of these locations).

locations.[223] Thus, in addition to evaluating the extent of competitive facilities deployment to particular buildings, we must also evaluate appropriate broader geographic areas. Of particular importance, we find credible assertions that Cox's last-mile network, although extensive in residential areas, could not readily serve most of the enterprise businesses in these markets at this time.[224] The record evidence here further indicates that the networks of competitive LECs other than Cox reach relatively few buildings.[225] We thus find that there is inadequate facilities-based wholesale competition in broader geographic areas to support a finding that Qwest lacks market power with respect to wholesale loops.

75. Based on the record, we also find that Qwest's special access services, section 271 access arrangements, Qwest's Local Services Platform (QLSP) wholesale service,[226] and section 251(c)(4) resale are not adequate alternatives to section 251(c)(3) unbundled loops for competitive LECs. As an initial matter, as discussed above, the proposition that competitors could rely on special access or wholesale access rights under section 271 is inconsistent with prior Commission decisions, which among other things have noted that these alternative wholesale offerings are not priced at cost-based rates.[227] There are technical distinctions between unbundled loops and these wholesale offerings, as well.[228] Finally, we do not find that section 251(c)(4) resale presents an adequate alternative. A carrier that resells Qwest's service is unable to compete on service quality or service features other than those offered by Qwest. Moreover, because it is unable to use its own network facilities to provision the service, a carrier using section 251(c)(4) resale has little incentive to invest in its own network facilities. As the Commission has recognized, competition over service quality and features is one of the key advantages of UNE-based competition over resale competition.[229]

(ii) Dedicated Local Transport

76. As with wholesale loops, there is insufficient data in the record to identify the location of competitive local transport facilities or to calculate market shares for dedicated local transport.[230] Although there appears to be a limited amount of competitive deployment of transport facilities in Phoenix, based on the present record, we cannot find that Qwest is subject to effective competition for its transport services in this market.

---

[223] *See* Integra Cantrall Decl. at para. 4 (explaining that "[m]ulti-location customers generally demand that their service provider serve all of their locations within the urban area").

[224] *See supra* note 211.

[225] *See supra* para. 71.

[226] QLSP is Qwest's commercially negotiated wholesale service that replaced its UNE-P service (UNE loop and switching).

[227] *See supra* Part III.B (discussing certain factors considered in the *Triennial Review Remand Order*, such as risk of abuse, and finding them persuasive in this instance as well).

[228] *See, e.g.*, Letter from Samuel L. Feder, Counsel to Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 3 (filed May 7, 2010) (Cavalier May 7, 2010 *Ex Parte* Letter) (stating that, unlike UNEs, the voice-grade loop special access service that is offered by certain incumbent LECs is a voice-grade service only, meaning that Cavalier would not be able to provide DSL, VoIP, or IPTV services over that special access offering).

[229] *See First Local Competition Order*, 11 FCC Rcd at 15667–69, paras. 332–34. Moreover, we note that other provisions of the Act suggest that resale cannot effectively discipline the behavior of facilities-based providers. *See, e.g.*, 47 U.S.C. § 271 (requiring the presence of a facilities-based competitor, not just a reseller, as a precondition of Bell Company entry into the long distance market).

[230] Likewise, we do not have data or information that would enable us to evaluate other factors, such as elasticity of demand, or whether any wholesale competitors have comparable size, resources, or cost structure to Qwest.

77. As an initial matter, competitive carriers allege they have only limited alternatives to Qwest for transport services.[231] To support its claims of adequate transport alternatives, Qwest submitted evidence from GeoTel that approximately 25 unaffiliated providers have approximately **[REDACTED]** fiber route miles in the Phoenix MSA.[232] However, these data do not demonstrate the presence of facilities-based competitive alternatives for any relevant product market—*i.e.*, routes between any two Qwest wire centers,[233] particularly given that "there are many routes between Qwest wire centers in which Qwest is the only provider of wholesale transport facilities."[234] In fact, the record indicates that the only competitive transport facilities deployed in the Phoenix MSA are on routes where Qwest already has obtained relief from UNE transport obligations by virtue of the Commission's unbundling rules (and for which further unbundling relief thus is unnecessary).[235] We therefore are not persuaded that Qwest is subject to effective competition for dedicated local transport services in relevant geographic markets in the Phoenix MSA, and we find no other record evidence demonstrating competitive alternatives for dedicated local transport services in the relevant geographic markets.

78. The Commission has recognized that barriers to entry in the provision of dedicated interoffice transport, while possibly somewhat easier to overcome than for loops, nevertheless may be significant.[236] The present record does not reveal likely widespread potential competition for wholesale

---

[231] *See, e.g.*, Broadview Comments at 47–48 & Declaration of Bryan Burns, App. A at para. 7 (explaining AGL Network's capabilities as a provider of transport in the Phoenix MSA).

[232] Qwest Petition at 30.

[233] As the Commission has repeatedly found, general evidence that a competitor has constructed fiber in a particular region, such as evidenced through fiber maps or the total number or route miles of fiber in a geographic region, is not alone sufficiently indicative of competition on particular transport routes to justify granting forbearance. *See, e.g.*, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11757–58, para. 39; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd 21316–17, para. 40; *Triennial Review Remand Order*, 20 FCC Rcd at 2583, 2597, paras. 82, 110 (cautioning that evidence of competitive transport based on maps and numbers of route miles of fiber is limited); *Verizon/MCI Order*, 20 FCC Rcd at 18455–56, para. 45 n.123. *See Triennial Review Remand Order*, 20 FCC Rcd at 2589–94, paras. 96–102; *see also id*. at 2589, para. 96 (establishing "fiber-based collocation as a key factor . . . because a sufficient degree of such collocation indicates the duplicability of these network elements and, thus, a lack of impairment").

[234] *See* Integra Fisher Decl. at para. 11; *see also id*. at Exh. 1 (listing **[REDACTED]** of a total of 64 wire centers in the Phoenix MSA in which Qwest is the only wholesale transport provider).

[235] *See* Integra Fisher Decl. at para. 11 & Exh. 2 (listing wire centers in the Phoenix MSA in which Qwest is not the only wholesale transport provider); *see also* Qwest Non-Impaired Wire Center Lists for Loops and Dedicated Transport, *available at* http://www.qwest.com/wholesale/clecs/nta.html (Non_Impaired_Wire_Center_12_23_09.xls) (last visited May 12, 2010) (listing wire centers in which Qwest has obtained unbundling relief under the Commission's unbundling rules); 47 C.F.R. § 51.319(e) (setting forth dedicated transport unbundling obligations); *Triennial Review Remand Order*, 20 FCC Rcd at 2575, para. 66 (establishing that for DS1 transport, competing carriers are impaired on routes for which at least one end-point is a wire center with fewer than 38,000 business lines and fewer than four fiber-based collocators; for DS3 transport, competing carriers are impaired on routes for which at least one end-point is a wire center with fewer than 24,000 business lines and fewer than three fiber-based collocators).

[236] *Triennial Review Remand Order*, 20 FCC Rcd at 2578–79, para. 71 ("Compared to loops, which serve individual customers, dedicated transport carries much more traffic and has much greater potential for added future traffic, as competitive LECs continue to aggregate traffic on a route. For these reasons, competitive LECs can take advantage of economies of scale, and can also make decisions about whether to self-deploy transport based not only on actual traffic, but on potential traffic as well."). We also note that carriers may not find it economic to purchase competitive transport in limited quantities. *See* Integra Fisher Decl. at para. 5 (describing the fixed and recurring costs associated with establishing and managing multiple wholesale relationships, and noting that establishing these (continued….)

dedicated local transport between Qwest's central offices in these areas. In particular, there is no evidence that competition via capacity expansion by existing facilities-based providers or *de novo* entry is likely. Evidence that present competitors have deployed limited amounts of fiber in a larger geographic area does not support a conclusion that those providers readily could offer wholesale services on a particular route, or that a potential entrant economically could deploy its own fiber on a particular route in a timely manner in response to a small but significant and nontransitory increase in the price of wholesale transport services.

(iii) Originating and Terminating Switched Access

79. In the *CLEC Access Charge Reform Order*, the Commission explained that, for switched access services, only end-user customers have the possibility of competitive alternatives in the market in which they purchase access service.[237] IXCs, which also must pay switched access charges, face a bottleneck monopoly from the LECs—whether incumbent LEC or competitive LEC—that provide access to their end users.[238] The Commission also recognized that, as long as switched access charges may be imposed by tariff, the market for these services is not structured in a way to allow competition to discipline rates for carriers' carrier charges, and the Commission thus determined that these charges may not be fully deregulated.[239] Nothing in the record here contradicts those conclusions. Thus, we conclude that Qwest, like other LECs, possesses market power over originating and terminating switched access.

b. Retail Competition

(i) Mass Market

80. For the reasons described below, we find the retail mass market for wireline services in Phoenix remains highly concentrated with two dominant providers, Qwest and Cox. Of particular importance to our analysis, Cox is Qwest's only competitor that now provides or is soon likely to provide[240] retail service to mass market customers over its own last-mile network to any significant extent in the Phoenix MSA. Although there are several other providers that serve some mass market customers in the Phoenix MSA, they are "fringe"[241] competitors that are able to compete only by relying extensively on UNEs and other Qwest wholesale services.

81. We begin by considering evidence regarding current retail market shares in the relevant geographic markets. Our analysis of mass market services relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in

(Continued from previous page)
duplicate capabilities and incurring duplicate costs make it difficult and in many instances impossible to offer and sustain a profitable service offering).

[237] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001) (*CLEC Access Charge Reform Order*).

[238] *Id*. The Commission explained that end-user customers have no incentive to choose a LEC that charges low switched access charges, since he or she does not pay the charges directly, and the customer's IXC is prevented by geographic rate averaging requirements from passing those charges on to the customer. *Id*. at 9935–36, para. 31.

[239] *Id*. at 9938, paras. 39–40.

[240] *See supra* note 209.

[241] A fringe competitor is a small firm operating in a market that is dominated by a single firm or a few firms. The fringe competitors take the price set by the dominant firm(s) as given and maximize their profits given this price. *See, e.g*., NOEL D. URI, THE ECONOMICS OF TELECOMMUNICATIONS SYSTEMS at 148–49 (Nova Science Publishers, Inc. 2004).

the Phoenix MSA.[242] Based on these data, we find that Qwest and Cox **[REDACTED]** percent in Phoenix MSA,[243] and that mass market consumers effectively face a duopoly for these services in the Phoenix MSA. The remaining **[REDACTED]** percent share of the relevant market are served by various fringe providers[244] that rely upon Qwest's resale or wholesale offerings.[245]

82. In conducting its traditional market power analysis, the Commission, among other things, generally has considered whether there are competitors in the market with spare capacity that readily could serve Qwest's customers if Qwest, or Qwest in conjunction with Cox, sought to raise prices above competitive levels.[246] We continue to believe that such evidence of facilities-based competition is highly

---

[242] We base our market share calculations on residential data because we cannot extract the data for very small business customers from the Arizona Commission's data. We believe these residential market shares are likely to approximate sufficiently closely the market shares for the mass market residential and very small business customers because they have similar demand patterns, are served primarily through mass marketing techniques, purchase similar volumes and types of communications services, and would likely face the same competitive alternatives within a geographic market. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18347, para. 102 n.307; *Verizon/MCI Order*, 20 FCC Rcd at 18488, para. 103 n.306.

[243] *Compare* Arizona Corporation Commission Reply, Exh. 7 (showing that competitive LECs provide **[REDACTED]** residential access lines using Qwest facilities); Arizona Corporation Commission Reply at 12 & Exh. 11 (showing that Cox provides **[REDACTED]** residential access lines in the Phoenix MSA] *with* Arizona Corporation Commission Reply at 15–16 & Exh. 13 (showing that Qwest provides **[REDACTED]** residential access lines in the Phoenix MSA, including reported VoIP "lines"). The Arizona Commission supplied estimates of Cox's access line totals by ZIP Code and by wire center; we rely on the wire center totals because they represent the area for which Qwest has requested forbearance. We are not persuaded by Qwest's attempt to demonstrate the level of competition in Phoenix by citing to reductions in Qwest's retail access lines in service. *See* Qwest Petition at 6. We find market share data based on actual line counts to be a more reliable indicator of the extent of competition in the market than Qwest's line loss data. In addition, there are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. *See, e.g.*, *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32; *see also* Broadview Comments at 52.

[244] *See* Integra Besen Decl. at 8 & n.17 (citing a study that "estimate[s] that the presence of a third competitor affects prices once its share is greater than or equal to 16 percent"); Covad Opposition, Attach. 1 at 15 (discussing the DOJ's allegations that the merger of WorldCom and Sprint would leave only two major competitors for particular services, along with a competitive fringe that was "insufficient to prevent coordinated pricing or other anticompetitive behavior" (citing *United States v. Worldcom, Inc., & Sprint Corp.*, Complaint, paras. 69–71, 94–95, 112, 134)); *U.S. v. Rockford Mem. Corp*., 898 F.2d 1278, 1283–84 (7th Cir. 1990) (noting that for a competitive fringe with 10% of the market to take an additional 10% share from the leading firms would only reduce the leading firms' shares to 81 percent but would require the fringe firms to increase their own output by 90% (*i.e.*, from 10 to 19% of the market), which would take time and would "force up their costs, perhaps steeply"); Landes and Posner Market Power Law Review, *supra* note 82, at 947 ("Intuitively, it is cheaper to raise price by curtailing output if fringe sellers have a lower market share since the same percentage increase by the fringe will yield a smaller absolute increase in their output.").

[245] Arizona Corporation Commission Reply, Exh. 7 (showing that **[REDACTED]** competitive LECs in the Phoenix MSA provide an aggregate of **[REDACTED]** residential access lines using Qwest facilities); Qwest Brigham Decl., Exh. 7 (showing that Qwest provides a total of **[REDACTED]** QLSP, UNE-P, and resale lines).

[246] *See, e.g.*, *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3303–04, 3308, paras. 59, 70 (finding that AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors, which possessed the ability to accommodate a substantial number of new customers on their networks with little or no investment immediately, and relatively modest investment in the short term).

relevant to determining whether competition is sufficient to satisfy the section 10 criteria.[247] Indeed, we believe that facilities-based coverage should be a leading factor in the Commission's analysis of whether, not just where, forbearance is warranted.[248] The record does not reveal any wireline providers other than Cox that have last-mile network facilities coverage to any significant degree, however.[249] To the contrary, as discussed above, the record indicates that other competitors are dependent on Qwest's last-mile facilities, including UNE loops, to serve mass market customers.[250]

83. We next evaluate the potential for competition to ameliorate the possibility of unilateral or joint exercise of market power by the entry of new facilities-based competitors by supply-side substitution and *de novo* entry. We find the potential for entry via supply-side substitution to be unlikely in the Phoenix MSA. Prior to Cox's offering of local services, it was a potential entrant via supply-side substitution in locations where its cable system was deployed and upgradeable (at relatively low incremental cost). It is now an actual competitor in the mass market where it has appropriate network facilities. Based on the current record, however, we are unable to identify any other potential facilities-based competitors for mass market services in Phoenix. Although the leading mobile wireless providers have ubiquitous networks, as described above, we cannot conclude on the basis of this record that residential mobile voice services fall within the same relevant product markets as wireline services.[251] Nor is there any evidence that mobile wireless carriers are likely to alter their pricing strategies dramatically to offer a closer substitute to Qwest's local service offerings in response to a small but significant and nontransitory increase in the price of fixed mass market services, particularly given that the majority of consumers already purchase mobile wireless services at current price levels.

84. With respect to the possibility of *de novo* entry, the Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile

---

[247] In the *Qwest Omaha Forbearance Order* and subsequent decisions, the Commission evaluated this to some extent with respect to the cable operator, by considering data regarding cable "coverage." *See supra* note 53 (citing the *Qwest Omaha Forbearance Order* and explaining that an intermodal competitor "covers" a location where it uses its own network, including its own last-mile facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings); *see also ACS UNE Forbearance Order*, 22 FCC Rcd at 1977, para. 32. We clarify that, for purposes of the analysis we now undertake, we do not require that a competitor offer "the full range of services that are substitutes for the incumbent LEC's local service offerings" for its facilities to be considered at all. Instead, we consider competitive facilities deployment if those facilities are, or readily could be, used to compete in particular product markets, but only to that extent.

[248] Thus, under the Commission's approach as articulated above, the presence of multiple competitors possessing facilities with sufficient spare capacity that are, or readily could be, used to compete in a particular product market potentially could be sufficient for forbearance in that product market, even if the incumbent carrier retained a majority share of the market. *See supra* Part III.B. As noted above, however, in light of our concerns about the sufficiency of a duopoly given the record evidence here, the presence of a single facilities-based competitor in a market for particular services is not a sufficient basis for us to conclude that Qwest is subject to effective competition. *Id*.

[249] *See* Arizona Corporation Commission Reply at 13 (stating that Cox is Qwest's only meaningful wireline facilities-based competitor for residential customers in the Phoenix MSA and that the only other carrier with significant market share relies on Qwest's facilities to provide service, and that AT&T and MCI, "to the best of the ACC's knowledge, have not been actively marketing any residential services to customers in the Phoenix MSA for some time"); *see also id.*, Exh. 7 (providing access line count data).

[250] Arizona Corporation Commission Reply at 9 & Exh. 7.

[251] *See supra* paras. 55–61.

facilities.[252] Congress enacted and the Commission implemented the UNE framework in an attempt to lower barriers to entry and to create a viable platform for entry into the local market. We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.[253] In short, cable operators may have faced comparatively lower barriers to entering telecommunications services markets because they owned existing cable networks that could be upgraded at a feasible incremental cost, but this does not imply that entry barriers for other competitive LECs have eased.

85. We recognize that, in a small number of geographic markets, cable over-builders such as RCN have entered the market. The extent of this entry has been limited, however, and the marketplace has become more difficult for these providers with the expansion of LECs into video services.[254] There is no record evidence that any cable over-builder is considering expanding its network into Phoenix. Nor is there any evidence that any new entry would be timely; likely; or sufficient in its magnitude, character, and scope to operate as a competitive counterbalance to any attempted price increase by a hypothetical monopolist.[255] In the absence of any record evidence that a *de novo* entrant is likely to construct a network in this market in the near future, we do not find the theoretical possibility of such occurrence sufficient to support a finding that Qwest, or Qwest in conjunction with Cox, would not have the ability to exercise significant market power with respect to retail mass market services.

86. Consequently, we are unable to find that Qwest is subject to effective competition in the Phoenix MSA. The theoretical and empirical concerns above prevent us from simply assuming that a duopoly in this context is sufficient to ensure effective competition for the legacy services at issue in Qwest's petition.[256] We recognize that, under some models and in some situations, duopoly can provide

[252] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd 17035–41, paras. 85–91; *see also Triennial Review Remand Order*, 20 FCC Rcd at 2615–19, paras. 149–54 (discussing barriers to entry for high-capacity loops).

[253] *Id.*; *see, e.g.*, *supra* paras. 71–73.

[254] Gary Kim, *Overbuilds, Municipal or Otherwise, a Tough Sell*, SATELLITE TECHNOLOGY, March 15, 2010 http://satellite.tmcnet.com/topics/satellite/articles/78538-overbuilds-municipal-otherwise-tough-sell.htm.

[255] *See DOJ/FTC Guidelines*, § 3.0.

[256] *See supra* paras. 30–31. We note that the Commission has, in some instances, granted regulatory relief in certain markets where there were only two competitors at the time, based on findings of potential competition, among other considerations. *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review--Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, 01-337, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880–81, 14894–98, paras. 50, 77–85 (2005) (*Wireline Broadband Internet Access Order*) (finding that the marketplace for broadband Internet service was "an emerging market," and that while "[c]able modem and DSL providers are currently the market leaders," there was evidence of "other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations," and noting that, consistent with the mandate of section 706, it was appropriate to limit certain regulatory requirements); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1467–68, 1470, paras. 138, 148 (1994) (noting that "the Commission has previously acknowledged that, while competition in the provision of cellular services exists, the record does not support a conclusion that (continued….)

sufficient competition. In particular, under the Bertrand model, duopoly can result in a competitive equilibrium under the assumption of perfectly homogeneous products and no capacity constraints even in the short run.[257] We have no evidence in the record here, however, suggesting that these conditions are present in the markets at issue. Nor do we find direct evidence that the markets at issue are behaving in a competitive manner, or other record evidence that duopoly has resulted in effective competition for the relevant products.[258]

(ii) Enterprise Market

87. Based on the record evidence, we find competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest's wholesale services,[259] and that Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services by competitors that rely on their own last-mile connections to serve customers.

(Continued from previous page)
cellular services are fully competitive," but finding that "[i]n addition to actual competition today, the threat of potential competition in the future may also affect current cellular pricing and investment"). As discussed above, we likewise consider any evidence of potential competition as part of our traditional market power analysis. *See supra* paras. 84–85.

[257] As noted above, however, the Bertrand model can also result in noncompetitive equilibrium under different assumptions (*e.g.*, product differentiation). *See supra* notes 88 & 89.

[258] *See generally* Covad Opposition, Attach. 1 at 10 (noting that, as the D.C. Circuit has explained, in a market "characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions"); COMPTEL Opposition, Attach. at 23–26; Integra Apr. 28, 2010 *Ex Parte* Letter, Attach. at 6 (Cox's prices for wholesale loops are high in the limited number of locations it offers such facilities). We reject Qwest's argument that modest levels of competition may be sufficient to impose pricing discipline in a market where the providers have pronounced scale and scope economies and high price-cost margins, because Qwest's explanation implicitly assumes a relatively high elasticity of demand, and there is no evidence in this record that the demand for the relevant product is particularly elastic in Phoenix or any other geographic market. We also reject Qwest's hypothetical argument about the incentives of an incumbent LEC offering a bundled service offering of local, long-distance, vertical features, and broadband service. First, this bundled service offering is not within the relevant product market for the Petition under consideration. Second, even if this bundled service offering were being considered in this proceeding, we would reject this argument because there is no evidence in this record of an estimate of the elasticity of demand for this service offering and Qwest's analysis does not consider the impact of any switching costs that the consumer would incur with the substitution of one firm's bundled service offering for a competitor's bundled service offering. *See* Qwest Reply Tardiff/Wiseman Decl. at paras. 61–65.

[259] In prior proceedings, we have not had sufficiently detailed data to define localized relevant geographic markets in which all enterprise customers face the same competitive choices, and instead used the most disaggregated data possible in performing the structural analysis for different types of business services and for certain broad classes of business customers, where such data is available. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18328–31, paras. 69–72; *Verizon/MCI Order*, 20 FCC Rcd at 18470–73, paras. 69–72; *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16459–60, paras. 34, 35. In this proceeding, most competitive deployment of facilities is reported as a Phoenix MSA total rather than being provided in a more disaggregated geographic area. *See, e.g.*, Arizona Corporation Commission Reply, Exh. 7 (showing competitive LEC lines served with non-Qwest facilities in the Phoenix MSA). Thus, even though some of the data in the record is provided on a more disaggregated basis, we would be ignoring facilities-based competition of which we are aware to conduct our analysis on that more disaggregated basis. *See, e.g.*, Qwest Brigham Decl., Exh. 2 (providing Qwest's retail switched access line totals by wire center); Arizona Corporation Commission Reply, Exhs. 8–10 (providing Cox's business retail switched access line total estimates by wire center); *id*. at 22 & Exh. 14 (providing lit building totals by ZIP Code for AGL Networks and Salt River Project). Nevertheless, having examined the ZIP Code and wire center data that has been filed in the record, we find nothing in that data that causes us to alter our conclusions above.

88. We begin by considering evidence regarding current retail market shares in the Phoenix MSA where Qwest provides services.[260] Our analysis of retail enterprise services, like our analysis of mass market services, relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in the Phoenix MSA. Although we find that we cannot precisely define separate relevant product markets for all enterprise services, we rely upon the Arizona Commission data to inform our analysis of the enterprise market.[261] These data indicate that Qwest has a market share of **[REDACTED]** percent across all business customer classes, a market share of **[REDACTED]** percent for small business, a market share of **[REDACTED]** percent for medium businesses; and a market share of **[REDACTED]** percent for large businesses.[262] In addition, competitors other than Cox rely heavily on Qwest's wholesale offerings to provide enterprise services.[263] The Arizona Commission data suggest that Qwest's facilities are used to provide the following percentages of competitors' lines: **[REDACTED]** percent for all business lines, **[REDACTED]** percent for small businesses, **[REDACTED]** percent for medium businesses, and **[REDACTED]** percent for large businesses.[264] These data further show that Cox has a market share of **[REDACTED]** percent for all businesses, a market share of **[REDACTED]** percent for small businesses, a market share of **[REDACTED]** percent for medium businesses, and a market share of **[REDACTED]** percent for large businesses.[265] Along with the other data in the record, these market share data suggest that none of Qwest's competitors, either individually or in the aggregate, have deployed facilities that enable effective

---

[260] We do not have data or information that would enable us to evaluate other factors, such as elasticity of demand, or whether any retail enterprise competitors have comparable size, resources, or cost structure to Qwest. We do not find Qwest's evidence of decreases in its switched business access lines persuasive. *See* Qwest Reply at 12. We find market share data based on actual line counts to be a more reliable indicator of the extent of competition in the market than Qwest's line loss data. In addition, Qwest does not provide any evidence of the overall size of the market during the relevant time period, or the extent to which decreases in Qwest's retail switched access sales could be offset by increases in its retail special access sales or its wholesale switched and special access sales, or the extent to which Qwest's retail switched access customers are migrating to managed services or IP-based technologies that can reduce the number of voice-grade-equivalent access lines required to serve the same level of demand, or other relevant possibilities.

[261] Our analysis of particular enterprise customer classes is determined by the availability of data in this record. The analysis may overstate or understate Qwest's competitive significance because the number of lines used by an enterprise customer may be an imperfect means of delineating customer classes.

[262] The Arizona Corporation Commission obtained access line counts from each carrier in the Phoenix MSA disaggregated into three business customer classifications: small (less than 4 lines provided); medium (4 to 100 lines provided); and large (more than 100 lines provided). Arizona Corporation Commission Comments at 10; Arizona Corporation Commission Reply, Exhs. 1, 3, 5 (Cox Business lines), Exh. 7 (non-Cox competitive LEC lines), Exhs. 8-10 (Qwest lines, including VoIP "lines").

[263] *See supra* note 221 (stating that of the **[REDACTED]** business lines that are served by competitive LECs in the Phoenix MSA, only **[REDACTED]**, or **[REDACTED]**% of those lines are served without Qwest facilities). For instance, the data submitted by the Arizona Commission indicates that **[REDACTED]** business lines, **[REDACTED]** business lines, **[REDACTED]** business lines and **[REDACTED]** business lines are served using Qwest's facilities. *See* Arizona Corporation Commission Reply, Exh. 7.

[264] Arizona Corporation Commission Reply Exh. 7 (non-Cox competitive LEC lines), Exhs. 1, 3, 5 (Cox lines). Consistent with our findings above, these data are evidence that Qwest's network is practically ubiquitous while the aggregate network capacity of Qwest's competitors is comparably limited. *See supra* at Part III.D.4.a.i.

[265] Arizona Corporation Commission Reply Exh. 7 (non-Cox competitive LEC lines), Exhs. 1, 3, 5 (Cox lines), Exhs. 8, 9, 10 (Qwest lines).

competition to Qwest in the absence of the regulated wholesale offerings at issue.[266] Qwest has provided no evidence sufficient to rebut this conclusion.[267]

89. The same barriers to entry noted above in the context of wholesale loop and transport services apply equally to the facilities-based provision of retail enterprise services.[268] In this regard, we find no record basis for concluding that Qwest is subject to effective potential competition through either supply-side substitution or *de novo* entry. Although there are other facilities-based communications networks operating in these geographic markets, including mobile wireless providers and satellite providers, there is no persuasive record evidence that the services offered via such networks are in the same relevant product markets as those at issue here. Finally, although Qwest asserts that *fixed* wireless providers are capable of providing enterprise services,[269] there is no evidence in this record that one or more of these providers is likely to enter and offer enterprise services to any significant portion of enterprise businesses anytime in the future.[270]

90. We find that *de novo* entry is equally unlikely. As discussed above, in the *Triennial Review Order*, the Commission found that competitive carriers face extensive economic barriers to the construction of last-mile facilities.[271] Congress enacted and the Commission implemented the UNE framework in an attempt to lower barriers to entry and to create a viable platform for entry into the local market. We see nothing in the record to indicate that the passage of time has lowered these barriers for competitive LECs that do not already have an extensive local network used to provide other services to enterprise locations today.[272] Qwest suggests that fixed wireless is a possible means of *de novo* entry, but the record contains no evidence that such entry is likely in these areas any reasonable timeframe.

91. As discussed above,[273] upon further consideration, we are unwilling to predict that Cox's

---

[266] *See, e.g.*, *supra* note 210 (describing the extent of competitive last-mile facilities deployment in the Phoenix MSA).

[267] We reject the Harte-Hanks business share estimate submitted by Qwest. That share estimate is based upon a single question in which some group of 1,500 business customers in the Phoenix MSA were asked to identify their "primary telecommunications provider." Qwest Petition at 27. We do not find this to be a reliable predictor of Qwest's market share of the enterprise market in total or for any customer class for enterprise services because: (1) there is no indication of how respondents were chosen; (2) the response to a single question seeking the name of the customer's "primary provider for telecommunications services" is not dispositive of a firm's market share in the relevant product market at issue here (switched access services) whether for the enterprise market as a whole or for any specific customer class of this market; (3) the survey response is not indicative of the market participants' current output for any service market; and (4) the survey response is not indicative of any competitor's reliance upon Qwest for key product inputs, including the inputs for which Qwest seeks forbearance from unbundling obligations. *See, e.g.*, Ad Hoc Comments at 4–5; Broadview Comments at 26–27; COMPTEL Opposition at 38–39; Broadview Reply at 5 n.14.

[268] To reach potential customers with its own facilities, Cox, like any other competitive LEC, would need to overcome the relevant entry barriers. *See* Integra Opposition at 14–17; Integra Bennett Decl. at para. 4; Integra Liestman Decl. at paras. 5–9; *see also supra* para. 73 (discussing the hurdles Cox and other competitive LECs face for supply side substitution); *supra* note 217 (describing difficulties competitive LECs other than Cox face in extending their last-mile networks).

[269] Qwest Petition at 36; Qwest Brigham Decl. at paras. 45, 58.

[270] *See supra* notes 210, 212 (describing evidence of fixed wireless alternatives in the Phoenix MSA).

[271] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17035–41, paras. 85–91.

[272] *See supra* para. 84.

[273] *See supra* para. 36.

competitive success in the retail mass market currently subjects, or will in the future subject, Qwest to effective competition in the enterprise market. As a result, we conclude that there is insufficient actual and potential competition to constrain effectively the price of Qwest's enterprise services.

E. Forbearance Analysis

92. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[274] In determining whether forbearance is consistent with the public interest, the Commission also must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[275] Forbearance is warranted under section 10(a) only if all three elements of the forbearance criteria are satisfied.[276] Moreover, as the Commission has recognized, when seeking forbearance, "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance."[277] We evaluate the petition for forbearance based on the record as a whole and conclude that Qwest has not satisfied its burden of demonstrating that the section 10(a) standards have been met with respect to its request.[278]

1. Forbearance from Section 251(c) UNE obligations

93. As discussed above,[279] Congress enacted section 251(c)(3) with the goal of opening local markets to competition. With respect to the UNEs at issue here, the Commission has concluded that reasonably efficient competitors face barriers to entry that are likely to make entry into these markets uneconomic without access to those UNEs.[280]

94. Qwest contends that competition for telecommunications services in the Phoenix MSA is sufficiently developed that the regulations adopted pursuant to section 251(c)(3) from which it seeks forbearance are no longer necessary under the criteria of section 10, and that forbearance is in the public interest. Under the framework described above, competitive conditions might justify forbearance from UNE obligations if the petitioner could demonstrate that it lacks market power in the relevant wholesale markets.[281] Even in the absence of robust wholesale competition, forbearance relief might be warranted

---

[274] 47 U.S.C. § 160(a).

[275] 47 U.S.C. § 160(b) (providing that, in making the determination under section 10(a)(3), the Commission shall consider whether forbearance will promote competitive market conditions).

[276] *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

[277] *Forbearance Procedures Order*, 24 FCC Rcd at 9544, para. 20.

[278] Because we deny Qwest's request for forbearance on the merits, we decline to reach the substance of Broadview Networks Motion for Summary Denial. *See* Motion for Summary Denial of Broadview Networks, WC Docket No. 09-135 (filed Aug. 25, 2009) (arguing that the Commission should summarily deny the present petition and consider the merits of Qwest's request for forbearance in the Phoenix MSA only in the pending *Qwest 4 MSA* remand proceeding to avoid the unnecessary expenditure of resources).

[279] *See supra* Part II.B.1.

[280] *See supra* paras. 11–12.

[281] *See supra* Part III.C.

if, for example, there is sufficient full, facilities-based competition for the relevant retail services.[282] Based on the competitive analysis above, however, we do not find sufficient evidence to conclude that either circumstance is present here.[283]

a. Section 10(a)(1)—Charges, Practices, Classifications, and Regulations

95. Based on the record evidence and our analysis above, we conclude that section 251(c)(3) UNE regulations remain necessary to ensure that Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in Phoenix.[284]

[282] *See id*. As we observe above, the mere fact that a relevant retail market was effectively competitive would not, by itself, be sufficient to justify relief, particularly if that retail competition may depend on the rules or regulations from which forbearance relief is being sought. *Id*.

[283] COMPTEL and Covad (among others) argue, as a threshold matter, that the Commission may not forbear from enforcing the pertinent section 251(c)(3) unbundling requirements because it has not validly determined, pursuant to section 10(d), that those requirements have been "fully implemented." *See, e.g.*, COMPTEL Opposition at 14–20; Covad Opposition at 43–45. These commenters acknowledge that the Commission previously ruled, in the *Qwest Omaha Forbearance Order* that the section 251(c) obligations had been fully implemented "because the Commission has issued rules implementing section 251(c) and those rules have gone into effect" and further conceding that the D.C. Circuit affirmed the Commission's statutory interpretation as reasonable. COMPTEL Opposition at 14–15; Covad Opposition at 43–44. Nevertheless, COMPTEL and Covad assert that, because it had not first been presented to the Commission as required by 47 U.S.C. § 405(a), the court expressly declined to address the "distinct" claim that the Commission's interpretation of section 10(d) with respect to section 251(c) obligations was inconsistent with language in the earlier *First Local Competition Order* that allegedly had acknowledged "a role for States and service providers in implementing § 251(c)." *See* COMPTEL Opposition at 16; Covad Opposition at 43–44; *Qwest Corporation v. FCC*, 482 F.3d at 478. The commenters contend that the Commission must address and reconcile that alleged inconsistency now. *See* COMPTEL Opposition at 15–20; Covad Opposition at 43–44. Doing so here, we find that there is no inconsistency. COMPTEL and Covad quote general statements from the *First Local Competition Order* and other related rulemaking orders about the roles assigned to state commissions and incumbent carriers under sections 251 and 252. *See, e.g.*, COMPTEL Opposition at 16–18 (relying on paras. 6, 41, 54, 67, 85, 111, 116, 307 of the *First Local Competition Order*). Those statements do not purport to interpret the "fully implemented" language of section 10(d) that is at issue here. Moreover, the Commission's *Qwest Omaha Forbearance Order* interpretation of sections 10(d)'s "fully implemented" language as it relates to section 251(c) obligations has the practical virtue of establishing a bright line threshold standard for determining whether a forbearance inquiry may proceed, while still preserving more nuanced analysis, under the standards of sections 10(a) and (b), for determining whether forbearance ultimately should be granted. *Cf. Qwest v. FCC*, 482 F.3d at 478 (rejecting claim that the FCC's "fully implemented" interpretation would permit forbearance "before the benefits from unbundling were 'significantly realized,'" in light of the "independent requirements of § 10, such as § 10(b)'s mandate to consider whether forbearance would 'promote competitive market conditions'"). Such analysis is fully capable of taking into consideration the performance of service providers and the actions of state commissions under section 251(c) and section 252. Thus, even if there were tension between the Commission's interpretation of section 10(d)'s "fully implemented" language in the *Qwest Omaha Forbearance Order* and its earlier statements about section 251(c) in the *First Local Competition Order* such tension would provide no basis upon which to set aside our section 10(d) interpretation. *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) ("[T]he existence of contrary agency precedent gives [the court] no more power than usual to question the Commission's substantive determinations. We still ask only whether the Commission has adequately explained the reasons for its current action and whether those reasons themselves reflect a 'clear error of judgment.'" (internal citations omitted)).

[284] 47 U.S.C. § 160(a)(1). As noted above, Qwest also seeks forbearance from section 271(c)(2)(B)(ii) of the Act or checklist item 2, which incorporates and is coextensive with section 251(c)(3). *See supra* para. 22. For the same reasons discussed here, we also reject Qwest's forbearance request with respect to section 271(c)(2)(B)(ii) of the Act.

In particular, we find both the wholesale and the retail markets insufficiently competitive to satisfy section 10(a)(1).

(i) Wholesale Markets

96. The present record regarding wholesale competition does not enable us to find that the unbundling requirements no longer are necessary to ensure that Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in the absence of section 251(c)(3) regulations. As explained in our competitive analysis, *supra*, there is no record evidence of significant competition for the wholesale products used to serve either mass market or enterprise customers.[285] Further, as described above, we have reconsidered several predictions we made in the *Qwest Omaha Forbearance Order* regarding wholesale services and decline to make similar predictions in the context of Qwest's request for forbearance in this proceeding.[286]

(ii) Retail Markets

97. As noted above, notwithstanding a lack of competition in wholesale markets, forbearance nevertheless might be warranted if there were evidence of sufficient retail competition among facilities-based competitors that have deployed last-mile networks to serve end users.[287] As the Commission previously has found, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[288] The competitive evidence here, however, falls far short of such a showing.

98. *Retail Mass Market Services*. For the reasons explained in our competitive analysis, we cannot conclude that there is sufficient facilities-based competition for retail mass market services in the Phoenix MSA to meet the section 10(a)(1) criteria for UNE forbearance. As explained above, Qwest and Cox dominate the relevant mass market services. Together, they have a combined market share of **[REDACTED]** percent in Qwest's service territory in the Phoenix MSA.[289] With the exception of Cox, all other providers of the relevant mass market services remain dependent on Qwest's facilities.[290] Nothing in the record indicates that the recognized barriers to entry, which UNEs are designed to help competitors overcome, have been lowered to enable similar competitive facilities deployment by any provider other than Cox. Thus, there is no evidence that, absent section 251(c)(3) regulation, Qwest would be subject to effective retail competition for mass market customers. For the reasons discussed above, that is inadequate competition to ensure that the rates and practices for retail mass market services would be just, reasonable, and non-discriminatory.

99. *Retail Enterprise Market Services*. As discussed in our competitive analysis, *supra*, we also conclude there is insufficient evidence of competition in the retail enterprise markets to forbear from UNE obligations under section 10(a)(1). In the retail enterprise markets, Qwest appears to be the sole provider with facilities serving the vast majority of commercial buildings.[291] Given the need to consider

[285] *See supra* Part III.D.1.a.

[286] *See supra* Part III.B.

[287] *See supra* Part III.C.

[288] *US West Forbearance Order*, 14 FCC Rcd at 16270, para. 31.

[289] *See supra* para. 81.

[290] *See supra* para. 80.

[291] *See, e.g.*, *supra* para. 88 (showing Qwest has a market share of **[REDACTED]**% of all business lines and that its facilities are used to provide **[REDACTED]**% of competitive LEC business lines).

competitive effects on a broader geographic basis as well, it is important to observe that for the vast majority of enterprise customers in these markets, no competitor or aggregate of competitors to Qwest has deployed last-mile facilities that could be used to provide competitive enterprise services. Moreover, if competitive entry to core parts of a region is limited by the premature elimination of UNEs, competitive LECs may not be able to justify entry into the surrounding wire centers, even where UNEs loops remain available.[292]

100. Therefore, given the absence of evidence of a competitive wholesale market or sufficient competition among integrated firms competing for downstream retail services over their own facilities, we cannot justify forbearance from UNE obligations under section 10(a)(1) due to facilities-based competition. Specifically, we conclude that section 251(c)(3) UNEs continue to be necessary to ensure just and reasonable and not unjustly and unreasonably discriminatory rates, terms, and conditions for retail services in Phoenix at this time.

b. Section 10(a)(2)—Protection of Consumers

101. The analysis above underlying our conclusion that section 251(c)(3) UNEs remain necessary to ensure just and reasonable and not unjustly and unreasonably discriminatory rates, terms, and conditions, likewise leads to the conclusion that these requirements remain necessary for the protection of consumers.[293] We find that our unbundling rules remain necessary to protect consumers for additional reasons, as well.

102. First, there is evidence that consumers can benefit from innovative offerings provided by competitors relying on UNEs.[294] Several providers have explained that by attaching their own equipment to legacy copper loops leased as UNEs, they have been able to differentiate their service offerings and provide additional choices to residential or business customers in markets entered by relying on UNEs.[295] In this manner, for example, Cavalier is able to offer telephone, television, and broadband Internet services, thus promoting competition for voice, video, and broadband services.[296] Although Cavalier to

[292] *See, e.g.*, Covad Opposition at 21–22; Integra Opposition at 18–20 & Attach. 1 at paras. 2, 6; PAETEC Opposition, Attach. 1 at 22. In Omaha, for example, McLeod and others contend that the Commission's decision to eliminate UNE regulations in 9 of 24 Omaha wire centers has deterred additional competitive entry in the entire Omaha market. *See*, *e.g.*, McLeodUSA Petition at 14.

[293] 47 U.S.C. § 160(a)(2).

[294] *See, e.g.*, *Noramco of Delaware, Inc. v. DEA*, 375 F.3d 1148, 1158 (D.C. Cir. 2004) (affirming agency finding of inadequate competition from duopoly and that a greater number of entrants may yield benefits such as improved product quality, reliability of supply, financial terms and conditions, and order lead times).

[295] Cavalier May 7, 2010 *Ex Parte* Letter at 2 (stating that Cavalier offers basic dial tone, long distance, dial-up Internet access, DSL, and IPTV); *id.*, Declaration of Sean Wainwright, Attach. at para. 5 (Cavalier Wainwright Decl.) (stating that "Cavalier's price for local phone service with unlimited long distance and 12 calling features, including voicemail, is on average about $15–20 a month cheaper than either the applicable cable company or incumbent LEC in the markets Cavalier serves."); *id*. at para. 5 (stating that Cavalier provides a prepaid landline phone service priced at less than one dollar per day that can be purchased in blocks of 90-day intervals in markets where it provides service); Letter from Philip J. Macres, Counsel to Covad et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, 06-172, 07-97, 04-223 at 2 (filed Apr. 21, 2010) (Covad Apr. 21, 2010 *Ex Parte* Letter) (stating that high-capacity broadband services, including high-speed DSL and Ethernet services, can be provided over conditioned copper UNE DS0 loops by attaching certain electronics to these lines).

[296] Cavalier May 7, 2010 *Ex Parte* Letter at 2–3; Cavalier Wainwright Decl. at para. 8 (explaining that Cavalier is the only triple-play telecommunications alternative to the incumbent LEC for residential customers in certain markets it has entered); *see also* Letter from Genevieve Morelli, Counsel to Broadview et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, Attach. A at ii (filed May 20, 2010) (CLEC May 20, 2010 *Ex Parte*

(continued….)

date has not entered the Phoenix market, it contends that the only realistic potential for Cavalier and other similarly situated entities to enter the Phoenix MSA is through the continued availability of UNEs.[297]

103. Second, evidence in the record also suggests that competitors rely on UNEs to target particular niche markets or customer segments. For example, multiple carriers provide advanced services over copper loops to enterprise customers, including hospitals, fire departments, and schools, as well as government clients.[298] Competitive LECs already rely heavily on UNE loops to provide services to businesses in Phoenix.[299] Similarly, Cavalier reports that in other markets, it has been able to deploy advanced services to mass market consumers in inner-city neighborhoods where fiber technologies have not been deployed.[300] Cavalier asserts that, although it owns many of its own facilities, its "only realistic access to the vast majority of customers" over the last-mile is over unbundled DS0 UNE loops, and that it "likely will have to cease operations" if access to UNEs is foreclosed.[301] Therefore, forbearing from DS0 UNEs in particular could foreclose important choices for certain groups of customers.

c. Section 10(a)(3)—Public Interest

104. Pursuant to section 10(a)(3), we evaluate whether forbearance from UNE obligations in Phoenix is in the public interest.[302] In making that determination, we must consider whether forbearance from UNE obligations "will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services."[303]

105. We find that forbearance from section 251(c)(3) UNE obligations in Phoenix is not in the public interest. We found above that Qwest has failed to demonstrate that these regulations are no longer needed to protect consumers or to ensure just, reasonable, and not unreasonably discriminatory prices.

(Continued from previous page)
Letter) (explaining that "existing copper infrastructure represents a ready-made solution for expanding broadband access" in both the residential and business markets," including for competitors using UNEs).

[297] Cavalier May 7, 2010 *Ex Parte* Letter at 3; Cavalier Wainwright Decl. at para. 12 (stating that Cavalier has concluded that unbundled local loops are a necessary condition of it entering and remaining in a market).

[298] CLEC May 20, 2010 *Ex Parte* Letter, Attach. A at 10 (stating that Ethernet over UNE copper loops "is widely used today to meet the telecommunications needs of businesses, governmental agencies, and other community 'anchor tenants,' such as hospitals, schools, and libraries"); *cf. also* Cavalier May 7, 2010 *Ex Parte* Letter at 2; Cavalier Wainwright Decl. at para. 4 (stating that Cavalier provides a comprehensive suite of voice and data products to hospitals, fire departments, and schools, although the majority of Cavalier's business customers are small and medium-sized companies). Specifically, Cavalier provides businesses high speed Internet service using ADSL 2+ technology, 10mb Ethernet pipes, site-to-site private lines and full Internet T1s. Cavalier May 7, 2010 *Ex Parte* Letter at 2; Cavalier Wainwright Decl. at para. 4.

[299] *See* Arizona Corporation Commission Reply, Exh.7.

[300] Cavalier Wainwright Decl. at para. 8 ("Unlike Verizon's FiOS, Cavalier's service reaches older neighborhoods with copper facilities, in the inner city, not just the suburban fringe."). It is not always cost-effective to deploy fiber to enterprise locations either. *See* CLEC May 20, 2010 *Ex Parte* Letter, Attach. A at 10 ("Fiber optic cables currently reach less than 20% of buildings in the United States, and fiber deployment is expanding very slowly, by only one percent per year on average for the past five years."). Consequently, by using legacy copper facilities and UNEs, incumbents and competitive carriers can "greatly expand their broadband capacity and deliver business-grade Ethernet solutions while avoiding the millions of dollars in up-front capital costs that new fiber deployments may require." *Id.*

[301] Cavalier Wainwright Decl. at paras. 10, 12; Cavalier May 7, 2010 *Ex Parte* Letter at 1; *supra* note 297.

[302] *See* 47 U.S.C. § 160(a)(3).

[303] 47 U.S.C. § 160(b).

The findings discussed above likewise contribute to our conclusion that forbearance is not in the public interest. Indeed, our competitive analysis above is crucial in light of the statutory directive to examine whether forbearance will "promote competitive market conditions" and "promote competition among providers of telecommunications services."[304]

106. In addition, we find other potential competitive concerns here. For example, the Commission's rules allow a carrier that obtains access to a UNE for the provision of a telecommunications service also to use that UNE to provide other services.[305] Thus, a carrier could combine Qwest's UNE loops with its own electronics to provide bundled broadband, voice, and video services to mass market customers or a suite of voice and data products to enterprise customers in Phoenix.[306] The loss of UNEs thus could have competitive implications not only for traditional voice and data services, but for broadband Internet and video services as well. In addition, there is empirical econometric evidence from other contexts that wireline UNEs encourage the provision of broadband service.[307]

107. We are not persuaded that Congress intended us to forbear for the sole purpose of achieving regulatory parity between Qwest and the local cable operator, as Qwest suggests. First, "although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers."[308] Second, Qwest remains the dominant provider of both wholesale services and most enterprise services. Finally, given the lack of evidence of sufficient actual or potential competition here, we find the potential competitive harms associated with forbearance outweigh any theoretical benefits arising from regulatory parity.[309]

---

[304] 47 U.S.C. § 160(b).

[305] *See* 47 C.F.R. §§ 51.100(b), 51.309(b); *see also Triennial Review Remand Order*, 20 FCC Rcd 2533, 2550, para. 29 n.83 ("Although we discard our qualifying services approach, this does not call into question our existing rule that a carrier obtaining access to a UNE for the provision of a telecommunications service for which UNEs are available may use that UNE to provide other services as well.").

[306] *See supra* paras. 102–03.

[307] For example, García-Murillo, Gabel, Ford, and Spiwak argue that UNEs encourage entry by voice competitors that spills over to the broadband market as well. *See* Martha García-Murillo & David Gabel, D., *International Broadband Deployment: The Impact of Unbundling* (presented at the 31st Telecommunications Policy Research Conference, Washington, D.C. (2003)); George Ford & Lawrence Spiwak, *The Positive Effects of Unbundling on Broadband Deployment* (Phoenix Center for Advanced Legal & Economic Public Policy Studies, Policy Paper No. 19) (2004), *available at* http://www.phoeni[X]-center.org/pcpp/PCPP19Final.pdf (retrieved Mar. 30, 2008). Prieger and Lee, using U.S. data, identify a statistically significant correlation between lower UNE rates and greater broadband availability, although the magnitude of the effects is small. James Prieger & Sunhwa Lee, *Regulation and the Deployment of Broadband*, HANDBOOK OF RESEARCH ON GLOBAL DIFFUSION OF BROADBAND DATA TRANSMISSION 241–259 (Y.K. Dwivedi, et al., eds., 2007). Distaso, Lupi, and Manenti obtain similar results using data from Europe. Walter Distaso, Paolo Lupi, & Fabio Manenti, *Platform Competition and Broadband Uptake: Theory and Empirical Evidence from the European Union*, 18 INFORMATION ECONOMICS AND POLICY 87–106 (2006). *But see* Jerry Hausman, *Internet-Related Services: The Results of Asymmetric Regulation*, BROADBAND: SHOULD WE REGULATE HIGH-SPEED INTERNET ACCESS? 129–156 (R. W. Crandall & J. H. Alleman, eds., 2002) (arguing that allowing competitors to rent facilities after they are deployed by the incumbents causes the incumbents to invest less in infrastructure).

[308] *UNE Remand Order*, 15 FCC Rcd at 3727, para. 55.

[309] In the *Qwest Omaha Forbearance Order*, we found that forbearance would further the public interest by increasing regulatory parity "[o]nce the benefits of competition have been sufficiently realized and competitive (continued….)

108. Nor are we persuaded that forbearance will enhance investment incentives in this context.[310] For the most part, the loop and transport UNEs at issue in this proceeding are legacy facilities that already have been constructed. Any investment disincentives therefore would seem to have little likely impact on Qwest's investment behavior in Phoenix, and Qwest would continue to have incentives to invest in fiber. The Commission already has taken significant steps to address possible investment disincentives through the unbundling rules in place today. In particular, the Commission has "substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market," has eliminated unbundling of OCN-capacity loops and transport and dark fiber loops, and placed caps on the ability to obtain other high-capacity loops and transport.[311] Indeed, the unbundling obligations associated with legacy DS0 loop facilities, for example, might give Qwest incentives to deploy fiber-to-the-home, which is subject to more limited unbundling obligations.[312] Furthermore, the record here reflects that the availability of price-regulated UNEs has provided an incentive for competitive carriers to invest in facilities and operational support services to bring innovative new services to customers.[313] Moreover, as mentioned above, UNE obligations have led some competitive carriers to invest in equipment and technologies to provide innovative broadband and video services over legacy copper loops.[314] Thus, public interest considerations in encouraging investment might well cut against Qwest's requested relief based on the record here.

109. In the *Qwest Omaha Forbearance Order*, the Commission found that the costs of regulatory intervention, including investment disincentives, are unwarranted and do not serve the public interest "once local exchange and exchange access markets are sufficiently competitive."[315] Here, we conclude that the relevant markets in Phoenix are not sufficiently competitive. In sum, we find on balance that forbearance would not promote competition and that, at this time, the public interest benefits associated with UNE obligations outweigh any possible public interest benefits arising from forbearance.

2. Forbearance from Dominant Carrier Regulation of Switched Access Services

110. Qwest asks the Commission to forbear from applying certain dominant carrier rate and

(Continued from previous page)
carriers have constructed their own last-mile facilities and their own transport facilities." *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19454–55, para. 78. For the reasons discussed above, we conclude that the *Qwest Omaha Forbearance Order* reached such competitive conclusions based on an unsound approach and unrealistic predictions. Thus, while we recognize the potential public interest benefits of regulatory parity in appropriate circumstances, we do not find such circumstances present here.

310 Qwest Petition at 44.

311 *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2536-37, 2561–62, paras. 5, 49.

312 *See* 47 C.F.R. § 51.319(a)(3) (describing limited unbundling obligations following deployment of fiber loops).

313 *See, e.g.*, Susan M. Gately, et al., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs* (Feb. 2010) (submitted as an attachment to Letter from Harold J. Feld, Legal Director, Public Knowledge, et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 05-25, 06-172, 07-97, 09-135, 09-222, 09-223 (Feb. 12, 2010) (providing evidence that unbundling requirements and other wholesale access obligations foster investment by competitive LECs and incumbent LECs); PAETEC Opposition at 38 (stating that the Qwest Omaha forbearance decision "severely devalued" the investment PAETEC had made in its own network facilities prior to the forbearance the Commission granted in certain wire centers in Omaha).

314 *See supra* paras. 102–03, 106. *But see* Qwest Market Power PN Comments at 6 (arguing "mandatory unbundling and/or wholesale pricing of network elements can discourage facilities-based investment.").

315 *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19454, para. 77.

tariffing regulations to its provision of mass market and enterprise switched access services in the Phoenix MSA.[316] For the reasons described below, we find that the section 10 criteria are not met, and we deny the requested forbearance.[317]

a. Section 10(a)(1)—Charges, Practices, Classifications and Regulations

111. The record does not support Qwest's contention that competition is sufficient to ensure that its interstate switched access charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory absent dominant carrier regulation.[318] The Commission has recognized that providers of switched access services serve two distinct customer groups: (1) interexchange carriers (IXCs), which purchase originating and terminating switched access services as an input for the long distance service that they provide to their end-user customers; and (2) end users who benefit from the ability, provided by access service, to place and receive long distance calls.[319] Accordingly, Qwest's switched access charges have two essential rate components: (1) carriers' carrier charges, imposed on interexchange carriers; and (2) the Subscriber Line Charge, or SLC, which is a flat-rated charge imposed on end users.[320] Qwest seeks forbearance from dominant carrier regulation for both rate components.

112. *Carrier's Carrier Switched Access Charges.* In the *CLEC Access Charge Reform Order*, the Commission explained that, for switched access services, only end-user customers potentially have competitive alternatives.[321] IXCs—the other class of switched access customers—are subject to the monopoly power that all LECs—incumbent and competitor alike—wield over access to their end users.[322] Consequently, competition for carriers' carrier switched access service is insufficient to constrain Qwest's rates, terms, and conditions, and thus cannot satisfy the criteria of section 10(a)(1). Nevertheless, in the

---

[316] Qwest Petition at 7–10 (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41–.49, 61.58, 61,59) ; *see also id.* at 45–46.

[317] Qwest also asks that we forbear from certain dominant carrier requirements governing the section 214 processes for acquiring lines, discontinuing service and transfers of control. *See* Qwest Petition at 10 (citing 47 U.S.C. § 214, 47 C.F.R. §§ 63.03–.04). Given our findings that there is insufficient evidence of competition in the markets at issue, we conclude Qwest has not satisfied the section 10 criteria and also deny its request for forbearance from these dominant carrier rules.

[318] *See, e.g.*, Qwest Petition at 45–46.

[319] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432, para. 33; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323, para. 40; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21306, para. 25; *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11747–48, para. 25; *see also CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38. Access services are not provisioned exclusively to IXCs; under Qwest's applicable tariff, any entity can purchase switched access services. *See* Qwest Corporation Tariff FCC No. 1, § 6.2.1A.1; *see also Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082, 1187, App. D, §§ 1.1, 2.6 (1984) (defining "customer(s)" to denote "any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or any other entity" that subscribes to tariffed services "including both Interexchange Carriers (ICs) and End Users").

[320] *See* 47 C.F.R. §§ 69.4(b); 69.152. Carrier's carrier charges include local switching, tandem switched transport, direct-trunked transport, and entrance facilities. 47 C.F.R. § 69.4(b).

[321] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38.

[322] *Id.* Although, the *CLEC Access Charge Reform Order* concerned rates for access charged by competitive LECs rather than incumbents, the distinction made there between end-user customers, that may choose among competitive alternatives, and interexchange carrier customers, that cannot, pertains with equal force to the provision of access by incumbent LECs such as Qwest.

Qwest Omaha Forbearance Order, the Commission granted conditional forbearance from dominant carrier regulation of these charges with respect to the mass market. In at least partial recognition of the end-user monopoly problem, the Commission imposed a condition designed to approximate the regulatory regime applicable to competitive LEC carriers' carrier switched access charges. In particular, access charges imposed by competitive LECs on their carrier customers by tariff are presumed to be just and reasonable if the rates are at or below a benchmark that is the rate of the competing incumbent LEC.[323] In an effort to approximate this regime for Qwest, the Commission conditioned forbearance on Qwest benchmarking to Qwest's own then-existing carriers' carrier switched access charges.[324] We decline to perpetuate this approach here. The *Qwest Omaha Forbearance Order* granted relief based on competitive findings regarding retail end-user services[325]—which do not pose a competitive constraint on a LEC's carrier's carrier switched access charges. Thus, the approach of the *Qwest Omaha Forbearance Order* is divorced from the competitive claims that were the foundation of the relief requested there, and in similar petitions. In addition, the relief granted in the *Qwest Omaha Forbearance Order*, which was specific to the mass market, is at odds with the manner in which carrier's carrier switched access charges are imposed. All incumbent LECs, including Qwest, have uniform carriers' carrier charges. These charges do not differentiate between retail customer classes, *i.e.*, whether the traffic is generated by mass market or enterprise end users.[326] Further, incumbent LECs do not maintain accounts that track residential and business switched access traffic separately. To date, no price cap carrier—including Qwest—has explained how it has or can implement switched access service forbearance relief specific to a single retail customer class (such as mass market customers).

113. *End-user Switched Access Charges.* Although it is at least theoretically plausible that sufficient retail competition could render dominant carrier regulation of SLCs unnecessary to ensure just, reasonable, and not unjustly and unreasonably discriminatory rates and practices, the record here does not demonstrate effective retail competition with respect to switched access services.[327] Moreover, as addressed further below, there are public interest concerns associated with decoupling the carriers' carrier charge and the SLC.[328]

b. Section 10(a)(2)—Protection of Consumers

114. Given our findings above that, contrary to Qwest's claims, there is insufficient evidence of competition to ensure that Qwest's switched access charges are just, reasonable, and not unjustly or unreasonably discriminatory, we likewise conclude that the dominant carrier pricing and tariffing regulations remain necessary to protect consumers under section 10(a)(2).[329] In addition, the record does

---

[323] *See id.* at 9938, para. 40; 47 C.F.R. § 61.26(b). Further, competitive LECs may file tariffs on one-day's notice without cost support but are subject to mandatory detariffing of any rates that exceed the benchmark. 47 C.F.R. §§ 61.23(c), 61.26(b); *see also CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40. The Commission does not regulate the rates that competitive LECs charge their interexchange carrier customers pursuant to nontariffed arrangements.

[324] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435, para. 41.

[325] *See id*. at 19429, para. 25.

[326] *See* Qwest Corporation Tariff FCC No. 1, § 6.8.

[327] *See supra* Part III.D.4.b.

[328] *See infra* Part III.E.2.c.

[329] 47 U.S.C. § 160(a)(2); *see also MCI v. AT&T*, 512 U.S. at 231 (tariff filings are the essential characteristic of a rate-regulated industry). We also note that Qwest's requested forbearance could have impacts beyond the MSA level. As we noted in the *Qwest 4 MSA* and *Verizon 6 MSA Forbearance Orders*, our rules require incumbent LECs to geographically average their access rates. *See Qwest 4 MSA Forbearance* Order, 23 FCC Rcd at 11751, para. 30 (continued….)

not fully address the impact a grant of forbearance relief would have on the affordability of telephone service. As detailed below,[330] the Commission historically has capped the SLC and provided for revenue recovery through other charges, such as carrier's carrier switched access charges.[331] This was done to help ensure affordability of service regardless of the actual cost of providing service to a particular customer.[332] In this regard, we note that price cap carriers already have the authority to lower their SLCs under dominant carrier price cap regulation today. Accordingly, the main effect of a grant of the requested forbearance would be to allow these carriers the flexibility to *raise* their SLCs without any associated obligation to lower any other charges (such as carrier's carrier charges). Future petitioners seeking similar forbearance should address these policy concerns, were the requested relief to be granted.[333]

(Continued from previous page)
n.112; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995)); 47 C.F.R. § 69.3(e)(7). This regulatory requirement causes price cap incumbents with state-wide operations, like Qwest, to effectively use their low-cost, urban and suburban operations to subsidize their higher cost rural operations. The likely effect of removing from price cap regulation lower cost operations in large urban metropolitan areas (like the one at issue in this matter) would be to increase the cost to Qwest's rural operations. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (stating that, "[i]n the future, applicants for forbearance relief from dominant carrier rate regulation should address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area."). We direct future applicants for forbearance relief to address: (1) the impact of a grant of relief on other rates in the applicable study area; (2) the policy implications of a potential rise in rates; and (3) how to ameliorate any negative impacts. Because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

[330] *See infra* Part III.E.2.c.

[331] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 15992–93, para. 24 (1997) (*Access Charge Reform Order*), *aff'd*, *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *see also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low Volume Long-Distance Users; Federal State Joint Board on Universal Service*, CC Docket No. 96-262, et al., Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12974–77, paras. 29–35 (2000) (*CALLS Order*), *aff'd in part*, *rev'd in part*, *and remanded in part sub nom.*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

[332] *See Access Charge Reform Order*, 12 FCC Rcd at 15992–93, para. 24; *MTS & WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 280, para. 129 (1983) (*1983 Access Charge Order*), *modified*, 97 FCC 2d 682 (1983), *further modified*, 97 FCC 2d 834, *aff'd in principal part and remanded in part sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see generally MTS & WATS Market Structure*, CC Docket No. 78-72, Phase I, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135 (1982) (*Supplemental Notice*).

[333] We note that Qwest proposes to use the Subpart C rules in Part 69 and the associated rules in Part 61 to calculate maximum SLC rates "as if" the demand associated with the area subject to forbearance relief was still being treated as dominant and subject to the rules. *See* Qwest Petition at 9–10. Qwest reasons that this proposal would cause neither a change in average carriers' carrier rates nor a rise in end user rates outside the area granted relief. Further, Qwest agrees not to raise its SLC in the Phoenix MSA. *See id*. We question whether forbearance would be necessary under this approach, which appears to achieve the same result as price cap regulation.

c. Section 10(a)(3)—Public Interest

115. Finally, we are unpersuaded by Qwest's claims that forbearance from dominant carrier regulation of its switched access services is in the public interest. Qwest argues that dominant carrier regulation for switched access services dampens competition by limiting its ability to respond to competitive forces quickly to offer consumers new pricing plans or service packages; it further asserts that eliminating such regulation will promote the public interest by eliminating the unnecessary costs such regulations impose.[334] While dominant carrier regulation does impose some costs, as discussed above, we find based on this record that such regulation remains necessary to ensure just, reasonable, and not unjustly and unreasonably discriminatory rates and practices, and for the protection of consumers. Given those findings, we are not persuaded by Qwest's claims that the costs of such regulations outweigh their public interest benefits.

116. In addition, the Commission's current switched access charge rules reflect its public interest balancing of a number of competing concerns. In particular, the Commission created the end-user and carriers' carrier switched access charges to recover a group of related incumbent LEC costs. Due to affordability concerns, the Commission capped the amount to be recovered from end users.[335] The remaining costs were recovered through several other mechanisms, which included carriers' carrier charges.[336] The SLC was capped to ensure affordability regardless of the actual cost of providing service to particular customers. Over time, through access charge reform efforts, the cap on the SLC has been raised, while revenue recovery through other access charges has been reduced or eliminated, and replaced to a significant extent with explicit universal service support mechanisms.[337] Through these efforts, the Commission has been moving away from cost recovery through carriers' carrier charges, which, as explained above, never will be subject to competition. The requested forbearance proposes to deviate from the balances struck in this framework. For one, were we to grant the requested forbearance from dominant carrier regulation, that relief could allow a price cap carrier to raise its SLCs, while it continued to recover a tariffed carriers' carrier charge at existing levels (since its rates simply would be benchmarked to its existing rates). If the Commission granted a carrier the right to increase its SLC revenues, corresponding reductions in intercarrier revenues might be appropriate. Although Qwest proposes to cap its maximum SLC rates at existing levels,[338] neither it nor any carrier seeking dominant carrier relief has addressed the larger issue of how the public interest would be served by disconnecting the treatment of the SLC and the carriers' carrier charge, which historically have been two components of a delicate public interest balancing by the Commission.[339]

---

[334] *See* Qwest Petition at 45–46.

[335] *See Access Charge Reform Order*, 12 FCC Rcd at 15992–93, para. 24; *1983 Access Charge Order*, 93 FCC 2d at 280, para. 129*; see generally Supplemental Notice*, 90 FCC 2d 135.

[336] *See generally CALLS Order*, 15 FCC Rcd at 12962.

[337] *See Access Charge Reform Order*, 12 FCC Rcd at 16142–50, paras. 367-87; *see also CALLS Order*, 15 FCC Rcd at 12974–77, paras. 29–35.

[338] *See* Qwest Petition at 9–10.

[339] We also note that Qwest's petition cites competition from mobile wireless service providers as a basis for granting forbearance from dominant carrier regulations. Qwest Petition at 45. Although we find insufficient evidence here to include mobile wireless services in the same product market as wireline services, were the Commission to reach a different conclusion based on the evidence in a future proceeding, the petitioner would need to address the competitive implications of the different opportunities for revenue recovery by LECs and mobile wireless providers under the Commission's rules. Specifically, the Commission's rules allow wireline carriers to recover some costs from other carriers, through carriers' carrier charges, while mobile wireless carriers generally (continued….)

117. Qwest also proposes that, as part of dominant carrier relief, its primary interexchange carrier charge (PICC) and carrier common line charge (CCLC) rate elements would "potentially" be placed in a nondominant carrier tariff.[340] As discussed above, in the *CLEC Access Charge Reform Order*, the Commission determined that nondominant carriers may not impose tariffed charges on their interexchange customers in excess of the benchmark rate.[341] Qwest does not currently charge a PICC or a CCLC in Arizona, and thus it cannot benchmark to existing rates. As long as Qwest does not tariff these charges as a dominant carrier, it may not do so as a nondominant carrier.[342] Even if a carrier was permitted to impose these charges as a dominant carrier, however, we question whether it would be in the public interest to allow a carrier that has been granted relief from dominant carrier regulation to continue to impose them. These charges were established to allow incumbent carriers to recover common line revenues they otherwise would have been unable to recover, due to the cap on the SLC.[343] As discussed above, a carrier receiving SLC forbearance relief no longer would be subject to the SLC cap. Accordingly, these charges, which are artifacts of dominant carrier rate regulation, might not be appropriate in a post-forbearance competitive market.

118. As a separate matter, Qwest's petition raises issues about universal service support that are not fully addressed in the record. If a carrier seeking forbearance receives universal service support such as interstate access support (IAS) in the areas for which relief is sought, as Qwest does here, its petition should address how forbearance relief would affect its receipt of support. IAS is meant to provide support to price cap carriers serving lines in areas where, due to the operation of the SLC cap, they are unable to recover their permitted CMT revenues.[344] Neither the SLC cap nor the CMT revenue requirement would necessarily apply in an area where forbearance relief is granted. As noted, because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

3. Forbearance from *Computer III*

119. We deny Qwest's request for forbearance from *Computer III* requirements.[345] We cannot find on the record before us that enforcement of the *Computer III* requirements is unnecessary within the meaning of section 10(a) of the Act.[346] Although Qwest requests forbearance from the *Computer III* requirements, there is no evidence in the record demonstrating why, on balance, the *Computer III* requirements are not necessary to ensure that the "charges, practices, classifications, or regulations . . .

(Continued from previous page)
must recover all costs from their end users. *Compare* 47 C.F.R. § 69.4(b) *with* 47 C.F.R. § 20.15(c). As part of our public interest analysis under section 10(a)(3), we consider the effect of forbearance on competitive market conditions. *See* 47 U.S.C. § 160(a)(3), (b). Petitioners seeking forbearance from rate regulation, or other requirements, based on competition from mobile wireless providers thus need to address the competitive implications of the disparate ability of LECs and mobile wireless providers to impose carriers' carrier access charges.

340 *See* Qwest Petition at 9.

341 *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

342 *See id*. at 9945–46, para. 54.

343 *See Access Charge Reform Order*, 12 FCC Rcd at 16005–06, 16009, paras. 58–60, 71.

344 *See CALLS Order*, 15 FCC Rcd at 13043, para. 195; 47 C.F.R. § 69.152.

345 We note that Qwest previously has obtained significant relief from *Computer III* requirements. *See, e.g.*, *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14875–76, para. 41. Our actions in this order do not disturb or implicate regulatory relief from *Computer III* requirements that Qwest already has obtained.

346 47 U.S.C. § 160(a).

for[] or in connection with [Qwest's local exchange and exchange access services] are just and reasonable and are not unjustly or unreasonably discriminatory" and necessary for the protection of consumers.[347] Indeed, there is scant evidence in the record regarding the requested relief from *Computer III* requirements at all.[348]

120. The Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards to prevent the BOCs from using "exclusionary market power" arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market.[349] The record here does not demonstrate that Qwest no longer possesses exclusionary market power, and thus, as in the *Section 272 Sunset Forbearance Order*, we must assume that Qwest still possesses such market power.[350] Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations . . . for[] or in connection with" enhanced services that are unjust, unreasonable, or unjustly or unreasonably discriminatory, and could otherwise harm consumers. Such results would be contrary to the public interest.[351] We thus are unable to find on this record that forbearance from the *Computer III* requirements satisfy any of the criteria of sections 10(a)(1), (a)(2), or (a)(3).

IV. EFFECTIVE DATE

121. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on June 15, 2010. The time for appeal shall run from the release date of this order.

V. ORDERING CLAUSES

122. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that Qwest Corporation's Petition for Forbearance in the Phoenix MSA filed March 24, 2009, IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

---

[347] *Id.*

[348] The Qwest Petition devotes one paragraph, on page 11, to the *Computer III* forbearance issue and presents no explanation of why forbearance is warranted. Qwest Petition at 11.

[349] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384, 466–67, para. 216 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, 964, para. 4 (1986). "Exclusionary" (or "Bainian") market power, which is the "ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output." *See LEC Classification Order*, 12 FCC Rcd at 15802–03, para. 83 n.214 (citing Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L. J. 241, 249–53 (1987)).

[350] *See Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16473, para. 64.

[351] *See* 47 U.S.C. § 160(a).

APPENDIX

Comments/Oppositions in WC Docket No. 09-135

Commenter/Opponent	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
Arizona Corporation Commission	Arizona Corporation Commission
AT&T Inc.	AT&T
Broadview Networks Inc., NuVox, and XO Communications, LLC	Broadview
Cavalier Telephone, LLC	Cavalier
COMPTEL	COMPTEL
Covad Communications Company, Alpheus Communications, L.P., U.S. TelePacific Corp., and Mpower Communications Corp., both d/b/a/ TelePacific Communications; First Communications, Inc., DeltaCom, Inc., Trucom LLC d/b/a CityNet – Arizona; and TDS Metrocom, LLC	Covad
Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp.	Integra
Paetec Holding Corp.	PAETEC

Replies in WC Docket No. 09-135

Replies	Abbreviation
Arizona Corporation Commission	Arizona Corporation Commission
Broadview Networks, Inc., NuVox, and XO Communications, LLC	Broadview
Qwest Corporation	Qwest

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

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

Healthy, competitive markets are good for investment, good for jobs, and good for consumers. The Commission today unanimously agrees that Qwest has not demonstrated that the pro-competitive policy status quo should change for telecommunications markets in Phoenix, Arizona. This outcome is consistent with the agency's denial of similar petitions in 2007 and 2008. To increase predictability for the telecommunications industry, today's Order provides a clear, data-driven, and economically sound analytic framework for evaluating future petitions of this type.

Communications markets are dynamic, and cable companies, mobile phone providers, and others are increasingly serving consumers and businesses that previously had only one option for phone service. We must take account of these developments and use a forward-looking approach to evaluating competition in deciding whether incumbents have met the analytic test the Order spells out, in order to ensure that we grant relief where appropriate. Accordingly, today the Wireline Competition Bureau is releasing a Public Notice seeking comment on applying this test to similar petitions before the Commission, consistent with our efforts to facilitate openness and participation in Commission proceedings.

I thank the staff, particularly the staff of the Wireline Competition Bureau, for their hard work on this item.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

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

Today the Commission returns to utilization of a comprehensive analytical framework, based on traditional market power analysis, when considering a request for forbearance from Title II and *Computer Inquiry* obligations. Over the past few years, the Commission had headed down an ill-considered road of granting far-reaching forbearance to petitioners who provided grossly insufficient evidence to support their cases. Starting in 2007, over my strong objection, the Commission abandoned well-established market power analysis—similar to that used by the Federal Trade Commission and the Department of Justice—and replaced it with approval-oriented decisions that relied more on the assertions of the petitioners than on a sound review entailing, *inter alia*, definition of specific product markets, establishment of clear geographic markets, and evaluation of the existence of true competition. In addition, these decisions included predictive judgments which relied on the workings of some invisible hand to find that competition would somehow grow through the elimination of pro-competitive obligations. As we see in the record developed for the instant proceeding, those rosy expectations of new competition just did not come to pass.

I commend Chairman Genachowski for demonstrating in this Order his commitment to conducting fact-based and data-driven proceedings. About one year ago, as Acting Chairman, I intended to apply just such an analysis to pending forbearance requests. However, those petitions were withdrawn at the eleventh hour, after a fully developed record had been collected and federal employees had dedicated extensive amounts of time to complete the proceeding. But we nevertheless proceeded to adopt new forbearance rules and the positive outcome of that action is today's vastly improved analysis and decision. So I am pleased to support this Order and commend Chairman Genachowski and my colleagues for giving forbearance petitions the attention and thorough analysis they deserve.

CONCURRING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

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

I vote to concur because I agree with the outcome, but not the justification for, this decision. To be sure, in its remands of the Commission's prior forbearance decisions, the D.C. Circuit tasked the Commission with devising a new analytical framework. On the other hand, it appears that this analysis may set too high a bar – a test so stringent that *no* requesting carrier will ever satisfy it. I question whether, in reality, today's action eliminates the opportunity for achieving forbearance, which was expressly provided to carriers by Congress. As we move forward to consider the two pending cases, as well as any new petitions that may be filed, I hope that we will not find ourselves shackled by the stringent test established today.

I am hopeful that our fresh examination will lead to a stronger analysis of the effects of mobile wireless access penetration in the retail and wholesale markets in particular. Today's order states that this is a "complicated issue." This may be true. It is hard to believe, however, that a 25 percent rate of mobile wireless-only households does not have any effect on the market for access to telecommunications services. Indeed, in order to even try to keep up with the dynamism of the marketplace, the Commission must maintain the necessary flexibility to make adjustments when circumstances warrant. This is especially the case here as the analysis set forth in today's order is novel and untested.

I thank the staff of the Wireline Competition Bureau for their work on this matter. I am hopeful that my questions will be addressed in the record as we move forward.

CONCURRING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER

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

I applaud the Commission for its efforts in this Order to implement a more rigorous, predictable and consistent analysis of forbearance petitions such as this, and in particular for attempting to develop a data-driven approach that relies on hard evidence of competition in the market. Despite my support for developing a data-driven approach, I concur today because I have concerns about how this analytic framework might function in practice going forward.

As a general matter, I have continuing concerns that requiring too much infrastructure sharing among competitors at TELRIC rates skews incentives to invest for both incumbents and new entrants. I strongly believe that facilities-based competition best serves consumers under most market conditions and that we should intervene in the market only when there is persuasive evidence of market failure—and even then as narrowly as possible to address the failure without distorting market incentives. In the Telecommunications Act of 1996, Congress mandated that the Commission *shall* forbear when the three-prong test laid out in the statute is satisfied. Although I agree with the conclusions for the petition before us, I hope that the application of the statutory test using the analytic framework in this Order will not become an insurmountable hurdle for petitioners, which in turn would undermine the will of Congress to relieve regulatory burdens where competition can better regulate the market. I fear that if the bar is too high, findings of market failure will be overinclusive, the regulatory response will not be narrow enough, and infrastructure investment will suffer.

Moreover, although this Order finds that Qwest did not carry its burden of showing that mobile wireless constrains wireline prices, a recent study found that nearly one in four American homes have "cut the cord." In future forbearance proceedings, I hope the Commission will take the opportunity to consider in more depth the competitive effect of mobile wireless competition in the rapidly changing marketplace. Finally, my support for this analytic framework rests in part on our acknowledgment that other analyses may be appropriate under the statute in contexts other than forbearance from section 251 unbundling for legacy facilities—most notably in examining the market for broadband services.

For these reasons, I respectfully concur and as we gain experience with this new approach, I hope the Commission will be willing to modify it—with appropriate administrative procedure—if this test proves to be impossible to satisfy or conditions otherwise warrant. I thank the staff of the Wireline Competition Bureau for their thoughtful work on this item. I am also pleased that we are requesting additional comment on applying this analytic framework in similar forbearance proceedings. I hope that my concerns will be addressed in the record as we move forward.

EXHIBIT 24

Before the
Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 2008 **Released: July 25, 2008**

By the Commission: Chairman Martin issuing a statement; Commissioners Copps and Adelstein concurring and issuing separate statements.

TABLE OF CONTENTS

Para.

I. INTRODUCTION

1. In this Order, we address four forbearance petitions[1] filed by Qwest Corporation (Qwest) pursuant to section 10 of the of the Communications Act of 1934, as amended (Act),[2] seeking certain forbearance relief in specific areas in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas (MSAs).[3] Specifically, Qwest seeks forbearance from loop and transport unbundling obligations pursuant to sections 251(c) and 271(c)(2)(B)(ii).[4] For mass market and enterprise services, Qwest also seeks forbearance from Part 61 dominant carrier tariffing requirements;[5] Part 61 price cap regulations;[6] dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control,[7] and for certain of Qwest's services, *Computer III* requirements including comparably efficient interconnection (CEI) and open network architecture (ONA) requirements.[8] For the reasons set forth below, we find that the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Qwest seeks, and, accordingly, we deny the requested relief in the four MSAs.

---

[1] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Denver Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Minneapolis-St. Paul Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Phoenix Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Seattle Petition) (collectively, Qwest Petitions). On May 3, 2007, and August 3, 2007, Qwest filed errata to make certain corrections to its petitions. *See* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed May 3, 2007) (correcting the Denver, Phoenix, and Seattle petitions); Letters from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed Aug. 3, 2007) (filing two separate letters correcting the Denver and Seattle petitions). *See* Appendix A for a list of commenters.

[2] 47 U.S.C. § 160.

[3] *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed June 13, 2008) (Qwest June 13, 2008 *Ex Parte* Letter) (clarifying the geographic scope of Qwest's petitions). For convenience, we refer to the 4 geographic markets for which Qwest seeks forbearance in this proceeding as "MSAs," even though the areas Qwest identifies is in each case more limited than an MSA. *See infra* para. 15.

[4] 47 C.F.R. § 51.319(a), (b), (e).

[5] 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, 61.59.

[6] 47 C.F.R. §§ 61.41-49.

[7] 47 C.F.R. §§ 63.03, 63.04. In its petitions, Qwest requested forbearance from Sections 63.60-66 of the Commission's rules, but subsequently withdrew this aspect of its petitions; therefore, we do not include those rule sections in our analysis below. *See* Qwest June 13, 2008 *Ex Parte* Letter at 4.

[8] Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3. As described more fully below, Qwest subsequently limited the scope of *Computer III* relief it is seeking. *See infra* note 154; Qwest June 13, 2008 *Ex Parte* Letter at 5.

II. BACKGROUND

A. Regulatory Requirements

2. *Dominant Carrier Regulation, Section 251(c)(3) and Section 271(c)(2)(B)(ii) Unbundling Obligations*. As noted above, the Qwest Petitions request forbearance from dominant carrier regulation with respect to mass market and enterprise services and forbearance from certain of the unbundling obligations of section 251(c)(3) and 271(c)(2)(B)(ii). Dominant carrier regulations include, among other things, requirements arising under section 214 related to transfer of control and discontinuance, cost-supported tariffing requirements, and price regulation for services falling under the Commission's jurisdiction.[9] Section 251(c)(3) imposes on incumbent local exchange carriers (LECs) "[t]he duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . . in accordance with . . . this section and section 252."[10] Section 271(c)(2)(B)(ii) of the Act, checklist item 2, incorporates and is coextensive with section 251(c)(3). Under this provision, a Bell Operating Company (BOC) must provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[11] The *Qwest Omaha Forbearance Order* described the relevant dominant carrier, section 251(c)(3) and section 271(c)(2)(B)(ii) unbundling obligations, so we need not repeat that summary here.[12]

3. *Computer Inquiry Requirements*. Facilities-based wireline carriers also are subject to *Computer Inquiry* requirements. In the *Computer III* proceedings,[13] the Commission gave the BOCs the

[9] *See* 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04.

[10] 47 U.S.C. § 251(c)(3).

[11] 47 U.S.C. § 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth a 14-point "competitive checklist" of access, interconnection, and other threshold requirements that a BOC must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services. *See* 47 U.S.C. § 271(c)(2)(B). After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements. *See* 47 U.S.C. § 271(d)(6); *see also 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, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19419, 19462-63, paras. 7, 94-96 (2005) (*Qwest Omaha Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (*Qwest Corp. v. FCC*).

[12] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417-22, paras. 3-11.

[13] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); *see also Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20, 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the ONA framework, (continued....)

choice of continuing to comply with the *Computer II* structural separation requirements or of providing enhanced services pursuant to nonstructural safeguards. More specifically, the Commission adopted CEI, ONA, and other nonstructural requirements as an alternative to the *Computer II* structural separation requirements for the BOCs.[14] The *Verizon 6 MSA Forbearance Order* described these obligations in detail, so we do not repeat that discussion here.[15]

B. Prior Forbearance Relief

4. *Qwest Omaha Forbearance Order.* On December 2, 2005, the Commission released an order granting in part a forbearance petition filed by Qwest seeking forbearance from the application of certain dominant carrier regulation and UNE obligations in the Omaha MSA.[16] Specifically, the Commission forbore from applying its dominant carrier price cap, rate-of-return, tariffing, and 60-day discontinuance and transfer of control rules to Qwest's mass market switched access and mass market broadband Internet access services in the Omaha MSA.[17] The Commission denied forbearance relief with respect to Qwest's enterprise telecommunications services because Qwest had failed to provide sufficient information to meet the statutory forbearance criteria.[18]

5. With respect to Qwest's requested forbearance from unbundling obligations, in the *Qwest Omaha Forbearance Order*, the Commission held that section 251(c)(3) had been "fully implemented" nationwide,[19] and it granted Qwest forbearance from section 251(c)(3) unbundling obligations in nine of the 24 wire centers in the Omaha MSA. In granting this relief, the Commission relied on the state of competition, and level of deployment of competitive last-mile facilities in those nine wire centers, as well as certain other regulatory safeguards, such as continued availability of section 251(c)(4) resale and section 271 unbundled elements.[20] The Commission concluded that, in areas served by those nine wire centers, Cox Communications, Inc. (Cox), the local cable operator, had built out "extensive facilities" and was using those facilities to provide service to customers in competition with Qwest.[21] Although Cox

(Continued from previous page)
information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

[14] *See Computer III Phase I Order*, 104 FCC 2d at 964, para. 4. An ONA plan includes a description of how a BOC unbundles its network to enable its competitors to provide enhanced services generally. *Id.* at 1019-20, para. 113, 1064-67, paras. 214-19. A CEI plan includes a description of how a BOC unbundles its network to enable its competitors to provide a particular enhanced service or set of enhanced services that the BOC intends to provide. *Id.* at 1055-56, paras. 190-91.

[15] *Petition of 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, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21295-96, paras. 3-5 (2007) (*Verizon 6 MSA Forbearance Order*), *pet. for review pending*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

[16] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417, para. 2.

[17] *See id.* at 19424, para. 15.

[18] *Id.* at 19426, para. 19.

[19] *Id.* at 19440, para. 53 (concluding that section 251(c) is "fully implemented" because the Commission has issued rules implementing section 251(c) and those rules have gone into effect).

[20] *See id. at* 19447, para. 64; *see also* 47 U.S.C. §§ 251(c)(4) (resale obligation), 271(c)(2)(B) (competitive checklist).

[21] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19444, para. 59; *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area*, WC Docket 04-223, Public Notice, 22 FCC Rcd 13561 (2007) (disclosing, after receiving Cox's consent to disclose the coverage threshold in the *Qwest Omaha Forbearance Order*, that Qwest was granted unbundling relief in those wire center service areas where, among other
(continued....)

leased some wholesale last-mile inputs from Qwest pursuant to voluntary commercial agreements, Cox provided competition to Qwest without accessing UNEs provided by Qwest pursuant to section 251(c)(3).[22] To avoid customer disruption, the Commission adopted a six-month transition period for customers of competitive LECs, other than Cox, that relied on Qwest's UNEs offered pursuant to section 251(c)(3).[23]

6. The Commission declined to grant Qwest forbearance from its section 251(c)(3) unbundling obligations in the remaining 15 wire centers in the Omaha MSA where Cox's facilities deployment was less extensive.[24] The Commission also denied Qwest forbearance from certain section 271 obligations, to which Qwest is subject as a BOC.[25] Finally, the Commission denied Qwest forbearance from section 271 checklist items 4, 5, and 6, which establish independent obligations to provide unbundled access to local loops, local transport, and local switching,[26] and it relied on the continued availability of wholesale access to Qwest's network under section 271 in forbearing from section 251(c)(3).[27]

7. *ACS UNE Forbearance Order.* On September 30, 2005, ACS filed a petition with the Commission seeking relief from section 251(c)(3) unbundling obligations similar to that granted to Qwest in the *Qwest Omaha Forbearance Order.*[28] On December 28, 2006, the Commission, in the *ACS UNE Forbearance Order*, granted in part ACS's petition for forbearance from section 251 unbundling. Subject to certain specific conditions, the Commission granted ACS forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to sections 251(c)(3) and 252(d)(1) in certain wire centers in the Anchorage study area based on the development of facilities-based competition and other factors.[29] First, the Commission granted ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in the five of the 11 wire centers in the Anchorage study area where it found that the level of facilities-based competition by GCI, ACS's main competitor in the Anchorage

(Continued from previous page)
things, Cox's voice-enabled cable plant covered more than 75% of the end-user locations that were accessible from those wire centers).

[22] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19450, para. 69 n.186 (stating that "Cox does not itself rely on Qwest's UNEs to compete").

[23] *Id.* at 19452-53, paras. 73-74.

[24] *Id.* at 19444-45, para. 60.

[25] *Id.* at 19460, para. 90; *see also* 47 U.S.C. § 153(4) (defining "Bell operating company").

[26] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19465, para. 100; 47 U.S.C. § 271(c)(2)(B)(iv)-(vi).

[27] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19446-47, 19449-50, 19452, 19455, paras. 62, 64, 67-68, 71, 80.

[28] 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 (filed Sept. 30, 2005).

[29] *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, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959-60, paras. 1-2 (2007) (*ACS UNE Forbearance Order*), *appeals dismissed, Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting ACS of Anchorage, Inc. Forbearance Relief in the Anchorage, Alaska Study Area*, WC Docket No. 05-281, Public Notice, 22 FCC Rcd 11962 (2007) (disclosing, after receiving General Communication, Inc.'s (GCI) consent to disclose the coverage threshold in the *ACS UNE Forbearance Order*, that ACS was granted unbundling relief in those wire center service areas where, among other things, GCI's voice-enabled cable plant covered more than 75% of the end-user locations that were accessible from those wire centers).

study area, ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary. Second, as a condition of the order, the Commission required ACS to make loops and certain subloops available in those five wire centers, by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until reaching agreement on commercially negotiated rates. Third, the Commission provided for a one-year transition period before the forbearance grant would take effect.[30] Since that time, ACS and GCI reached an agreement, governing ACS's continued provision of access to the specified elements in the Anchorage study area during the next five years.[31]

8. *ACS Dominance Forbearance Order.* On August 20, 2007, the Commission conditionally granted in part an additional forbearance petition filed by ACS, which sought forbearance in the Anchorage study area from certain statutory and regulatory dominant carrier obligations.[32] In particular, ACS sought forbearance comparable to the relief from dominant carrier regulation of mass market switched access service the Commission granted to Qwest in the Omaha MSA.[33] In the *ACS Dominance Forbearance Order*, the Commission recognized that ACS's forbearance petition raised significantly different issues from those raised in the *Qwest Omaha* proceeding because ACS is a rate-of-return carrier while Qwest is a price cap carrier. Given the evidence that ACS faced extraordinary facilities-based competition from GCI in Anchorage, the Commission found that granting partial relief, subject to conditions, was justified.[34] Specifically, with respect to the requested relief that was similar to that granted to Qwest in the Omaha MSA, the Commission forbore from applying to ACS's switched access services the rate-of-return, tariffing, discontinuance, and transfer of control regulations that apply to dominant carriers, subject to various conditions.[35]

9. *Verizon 6 MSA Forbearance Order.* On September 6, 2006, Verizon sought certain forbearance relief in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.[36] Specifically, Verizon sought relief from dominant carrier regulation of its mass market switched access services,[37] from section 251(c)(3) loop and transport unbundling obligations,[38] and from all

[30] *ACS UNE Forbearance Order*, 22 FCC Rcd at 1960, para. 2.

[31] Letter from Karen Brinkmann, Counsel to ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed May 24, 2007); *see also* Letter from Karen Brinkmann *et al.*, Counsel to ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed June 29, 2007).

[32] *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, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16305-06, para. 1 (2007) (*ACS Dominance Forbearance Order*), *pets. for recon. pending.*

[33] The *ACS Dominance Forbearance Order* also addressed ACS's other requests for forbearance, including forbearance from dominant carrier regulation of enterprise switched access services, broadband Internet access services, and special access services, and forbearance from Title II and *Computer Inquiries* requirements for ACS's enterprise broadband services. *See generally ACS Dominance Forbearance Order*, 22 FCC Rcd 16304.

[34] *Id.* at 16306-07, para. 3.

[35] *Id.* at 16307, para. 4.

[36] *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1.

[37] Verizon sought forbearance from the following: tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1 n.4 (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04, 63.60-66).

[38] *Id.* at 21294, para. 1 n.5 (citing 47 C.F.R. § 51.319(a), (b), (e)).

Computer III obligations (*e.g.*, ONA and CEI requirements).[39] On December 4, 2007, the Commission found that the record evidence did not satisfy the section 10 criteria for forbearance and therefore denied the requested relief in the six MSAs.[40] In particular, among other factors, the Commission found that the record did not establish the existence of sufficient facilities-based competition to warrant forbearance.[41]

10. *Qwest Terry, Montana Forbearance Order*. On January 22, 2007, Qwest filed a petition seeking forbearance from section 251(c), 271(c), and from otherwise regulating Qwest as an incumbent LEC in the Terry, Montana local exchange.[42] On April 21, 2008, the Commission granted Qwest's petition for forbearance from certain requirements of sections 251(c), 271(c), and 252, and otherwise denied the petition.[43] The competitive situation in the Terry exchange was unique. The Commission found that the sole competitors in the Terry exchange are Qwest and Mid-River Telephone Cooperative, Inc. (Mid-Rivers), and that there was little potential for additional competitive entry.[44] Qwest and Mid-Rivers each has its own independent network in this market, and both were treated as incumbent LECs for purposes of section 251.[45] In granting Qwest forbearance from unbundling obligations, the Commission relied in part on evidence that Mid-Rivers serves approximately 93 percent of the access lines in the Terry exchange, was capable of serving the entire exchange over its own facilities,[46] and did not rely on UNEs from Qwest to provide service in this market.[47]

---

[39] *Id.* at 21294, para. 1.

[40] *Id.*

[41] *Id.* at 21307-08, para. 27 (dominant carrier analysis), 21312, para. 36 (UNE analysis); *see also id.* at 21318-19, para. 45 (finding insufficient evidence to demonstrate that Verizon no longer possesses exclusionary market power and therefore denying forbearance from *Computer III* requirements). In declining to forbear from unbundling obligations, the Commission found evidence that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers, and therefore concluded that "future relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs." *See id.* at 21312, para. 36.

[42] *See* Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange, WC Docket No. 07-9 (filed Jan. 22, 2007).

[43] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257 (2008) (*Qwest Terry Forbearance Order*).

[44] As the Commission stated in the *Qwest Terry Forbearance Order*, there are only a few hundred access lines in Terry, Montana and the nearest city is approximately 200 miles away. *See id.* at 7264, para. 13 n.45.

[45] *See Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to Be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Report and Order, 21 FCC Rcd 11506, 11509, para. 8 (2006) (*Mid-Rivers Order*) (determining that Mid-Rivers, among other things had "substantially replaced" Qwest in the Terry exchange under section 251(h)(2), and thus should be treated as an incumbent LEC for the purposes of section 251 in that market). In the *Mid-Rivers Order*, the Commission also determined that Qwest lacks market power in the Terry exchange and should be treated as a non-dominant carrier for its interstate telecommunications services in that exchange. *Id.* at 11519, 11521, paras. 29, 34 (permitting Qwest for purposes of administrative convenience to continue to operate pursuant to dominant carrier regulation if it elected to do so).

[46] *See Qwest Terry Forbearance Order*, 23 FCC Rcd at 7264-66, paras. 13, 17-18.

[47] *See id.* at 7266, para. 17.

III. DISCUSSION

11. Based on the record evidence filed in this proceeding, we find that granting the Qwest Petitions for forbearance would not be consistent with section 10 of the Act. Specifically, we find that the criteria of section 10 are not satisfied with regard to forbearance from the relevant dominant carrier requirements, UNE requirements, and *Computer III* obligations. We therefore deny the four Qwest Petitions in their entirety.[48]

A. Forbearance Standard

12. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and

[48] We deny the requests of some commenters asking the Commission to establish a "complete when filed" policy and, on that basis, dismiss the 4 Qwest Petitions in their entirety. *See* CLEC Group Comments at 2 (stating that the Commission should establish a "complete when filed" policy similar to that adopted in the section 271 proceedings); Covad Comments at 15 (claiming that Qwest's petitions should be evaluated and judged by the Commission as they were presented by Qwest at the time of filing); New Jersey Rate Counsel Reply at 1. These commenters in effect are seeking the adoption of new procedural rules to govern forbearance proceedings. The Commission currently is examining whether to adopt new procedural rules for forbearance proceedings and we believe that any new procedural rules would better be addressed in that context. *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Notice of Proposed Rulemaking, 22 FCC Rcd 21212 (2007). We also deny Qwest's "Petition to Modify Protective Order," which was filed on June 29, 2007. *See* Qwest's Petition to Modify Protective Order, WC Docket No. 07-97 (filed June 29, 2007); *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, Order, 22 FCC Rcd 10129 (WCB 2007) (*Qwest 4 MSA First Protective Order*); *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, Second Protective Order, 22 FCC Rcd 10134 (WCB 2007) (*Qwest 4 MSA Second Protective Order*). Although Qwest asks the Commission to allow parties to proceed under the *Qwest 4 MSA First Protective Order* and to revoke the *Qwest 4 MSA Second Protective Order* adopted in this proceeding, we see no reason to do so. A number of parties have relied on the *Qwest 4 MSA Second Protective Order* when submitting highly confidential material in this proceeding and we find that any changes to the *Qwest 4 MSA Second Protective Order* may put sensitive information at risk and would likely discourage parties from submitting sensitive proprietary information to the Commission in future proceedings. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21300, para. 13 n.42. We also dismiss Qwest's motion objecting to the disclosure of confidential information to Integra Telecom Inc.'s (Integra) Chief Executive Officer pursuant to the *Qwest 4 MSA First Protective Order*. *See* Qwest's "Motion to Object to the Disclosure of Qwest's Confidential Information to the Chief Executive Officer of Integra Telecom," WC Docket No. 07-97 (filed June 19, 2007); Integra Telecom, Inc.'s "Reply to Objection," WC Docket No. 07-97 (filed Aug. 1, 2007). If an appropriate motion is filed within a procedurally proper period of time, both protective orders in this proceeding prohibit the disclosure of confidential or highly confidential information to the person who is the subject of the objection prior to a decision by the Commission that would permit such disclosure. *See Qwest 4 MSA First Protective Order*, 22 FCC Rcd at 10130, para. 3(b); *Qwest 4 MSA Second Protective Order*, 22 FCC Rcd at 10137, para. 10. Neither Qwest nor Integra has filed any additional information regarding this dispute since August 1, 2007, and Dudley Slater, the CEO of Integra, has participated in this proceeding. *See* Letter from Russell C. Merbeth, Assistant General Counsel for Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed June 13, 2008) (stating that the CEO of Integra participated in meetings with the Commissioners on June 11, 2008 and June 12, 2008). We therefore find no reason at this stage of the proceeding to address the merits of Qwest's motion. *See also* Qwest's Motion to Object to the Disclosure of Qwest's Confidential Information to the Director – Interconnection of New Edge Networks an EarthLink Company, WC Docket No. 07-97 (filed July 6, 2007); Qwest's Withdrawal of Motion to Object to the Disclosure of Qwest's Confidential Information to the Director – Interconnection of New Edge Networks an EarthLink Company, WC Docket No. 07-97 (filed July 18, 2007).

(3) forbearance from applying such provision or regulation is consistent with the public interest.[49] In making such determinations, the Commission also must consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[50]

B. Application of the Section 10 Forbearance Criteria

13. In this section, we evaluate Qwest's forbearance requests under the statutory criteria of section 10(a) of the Act.[51] Forbearance is warranted under section 10(a) only if all three elements of the forbearance criteria are satisfied.[52] The Commission previously has evaluated requests for relief similar to that sought by Qwest in the *Qwest Omaha Forbearance Order*, the *ACS UNE Forbearance Order*, the *ACS Dominance Forbearance Order*, and the *Verizon 6 MSA Forbearance Order*, and the analytical framework established in that precedent guides our actions here.[53]

---

[49] 47 U.S.C. § 160(a). We note that section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or section 271 unless it determines that those requirements are "fully implemented." 47 U.S.C. § 160(d). In the *Qwest Omaha Forbearance Order*, the Commission determined that, for purposes of section 10(d), the requirements of section 251(c) and 271(c) are fully implemented nationwide and may be forborne from. *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19439-42, paras. 51-56. The D.C. Circuit affirmed the Commission's interpretation, *see Qwest Corp. v. FCC*, 482 F.3d at 477-79, and we therefore reject commenters' requests to revisit the Commission's interpretation of "fully implemented" in this proceeding. *See, e.g.*, Arizona Commission Comments at 17-18; COMPTEL Opposition at 10-17; Arizona Commission Reply at 27; Covad Reply at 24-26.

[50] 47 U.S.C. § 160(b) (providing that, in making the determination under section 10(a)(3), the Commission shall consider whether forbearance will promote competitive market conditions).

[51] *See* 47 U.S.C. § 160(a). We reject New Jersey Rate Counsel's argument that exercise of the Commission's forbearance authority pursuant to section 10 of the Act violates the Separation of Powers provision, the Equal Protection Clause, and the Tenth and Eleventh Amendments of the U.S. Constitution. *See* New Jersey Rate Counsel Comments at 6-7; New Jersey Rate Counsel Reply at 9. As we held in previous orders in response to this same argument, the New Jersey Rate Counsel makes no attempt to develop this argument, and we find the assertion insufficient to call into question the constitutionality of section 10. *See Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Their Broadband Services,* WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19487, para. 15 n.60 (2007), *pet. for review pending*, No. 07-1452 (D.C. Cir. filed Nov. 5, 2007); *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5232, para. 49 n.139 (2007) (*Qwest Section 272 Sunset Forbearance Order*). We also disagree with, and find a similar lack of support for New Jersey Rate Counsel's argument that section 10 proceedings may only lawfully be decided in a formal adjudication or hearing. New Jersey Rate Counsel Reply at 4-5.

[52] *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong). As the Commission previously has held, it would be appropriate to deny a petition for forbearance even if only one of the three prongs of section 10(a) is not satisfied. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125, para. 12 (2007), *pet. for review pending*, No. 07-1381 (D.C. Cir. filed Sept. 20, 2007).

[53] The Commission's forbearance analysis is a fact-based inquiry that relies on factors unique to the markets under consideration. *See ACS UNE Forbearance Order*, 22 FCC Rcd at 1963, para 9, n.28; *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417, para. 2, n.4 & 19423, para. 14, n.46; *see also* Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 1 (filed June 11, 2008) (Cox June 11, 2008 *Ex Parte* Letter) (arguing that the Commission should continue to require that (continued....)

1. Forbearance Analysis for Dominant Carrier Regulation

a. Thresbold Market Analysis

(i) Services for Which Forbearance Is Requested

14. Qwest seeks identical forbearance relief in each of the four petitions at issue in this proceeding. Specifically, Qwest seeks forbearance from the following dominant carrier regulations to the extent they apply to its interstate mass market and enterprise switched access services:[54] tariffing requirements and price cap regulation, as well as dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control.[55]

(ii) Geographic Scope of Analysis

15. Qwest seeks forbearance from dominant carrier regulation of its mass market and enterprise switched access services in the following geographic areas: (1) the Qwest wire centers located within the Denver-Aurora MSA (Denver MSA), except for the Fairplay wire center for which Qwest does not seek relief; (2) the 64 Qwest wire centers located within the boundaries of the Phoenix-Mesa-Scottsdale MSA (Phoenix MSA); (3) the 26 Qwest wire centers located within the boundaries of the Seattle-Bellevue-Everett Metropolitan Division (Seattle MSA);[56] and (4) the 58 Qwest wire centers located within the

(Continued from previous page)
petitioners show how market conditions justify forbearance for each rule). The decision we reach today is based on the present record and our precedent.

[54] Several parties argue that the market for small business services is sufficiently different from the market for residential services and that the Commission should analyze them differently. In the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order*, however, the Commission divided its analysis of switched access services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). *See* Arizona Commission Comments at 2, 12-13; CLEC Group Reply at 8; *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19427, para. 22; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318, para. 27. We see no reason to depart from our forbearance precedent based on the record in this proceeding, and we thus will use the same product categories in our dominant carrier forbearance analysis as in those prior decisions. Furthermore, some parties claim that cable providers do not offer a stand-alone local service product and instead offer only bundled products. According to these parties, because cable companies do not offer services in all product markets, Qwest's Petitions do not meet the criteria for granting forbearance. *See* Colorado Office of Consumer Counsel Comments at 24; Covad Reply at 16; New Jersey Rate Counsel Reply at 12. Contrary to these claims, Cox, for example, in Arizona does offer stand-alone local services. *See, e.g.*, http://www.cox.com/arizona/phone.asp (visited July 21, 2008). Moreover, our dominant carrier forbearance analysis is merely informed by our traditional market power analysis, and given our inclusion of competition from cable operators in prior forbearance decisions, we are not persuaded to deviate from that approach here.

[55] *See, e.g.*, Qwest Denver Petition at 3 nn.3-5; Qwest Minneapolis-St. Paul Petition at 3-4 nn.3-5; Qwest Phoenix Petition at 3 nn.3-5; and Qwest Seattle Petition at 3-4 nn.6-8; *see also* 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04. Qwest later clarified it seeks relief "for both mass market and enterprise switched access services." Qwest has not sought forbearance for its special access services in this proceeding. *See* Qwest June 13, 2008 *Ex Parte* Letter at 2; *see also* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 (filed June 26, 2008) (Qwest June 26, 2008 *Ex Parte* Letter) (stating that "Qwest is not seeking special access relief in this docket"). Therefore, there is no need to address commenters' arguments regarding whether forbearance for Qwest's special access services is warranted. *See, e.g.*, EarthLink Comments at 44; T-Mobile Reply at 3 (stating that the Qwest Seattle Petition "could be construed as seeking forbearance from special access regulations").

[56] The U.S. Census Bureau has divided the Seattle-Takoma-Bellevue, WA MSA into two Metropolitan Divisions: Seattle-Bellevue-Everett (King and Snohomish counties) and Tacoma (Pierce County). *See* U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table C-1, Metropolitan Areas with Component Counties – Population and Population Characteristics, *available at* http://www.census.gov/prod/2006pubs/smadb/smadb-06tablec.pdf (visited July 21, 2008).

boundaries of the Minneapolis-St. Paul-Bloomington MSA (Minneapolis-St. Paul MSA).[57] For purposes of analyzing dominant carrier regulation of Qwest in this proceeding, we define the relevant geographic market to be the specific areas identified by Qwest within these four MSAs. As indicated in the Commission's precedent, we perform our forbearance analysis on the geographic basis requested by the petitioner unless the record indicates compelling reasons to narrow it.[58] We find no such evidence here, and thus evaluate each of Qwest's mass market and enterprise switched access forbearance requests on the basis of the specific market areas described above.[59]

(iii) Marketplace Competitors

16. We find that Qwest is subject to competition in the four MSAs from both intra- and intermodal competitors.[60] The record indicates that a number of competitive LECs (*i.e.*, intramodal competitors) compete with Qwest for mass market and enterprise customers in certain subsections of the four MSAs. The evidence also shows, however, that, in serving mass market and enterprise customers, these intramodal competitors rely significantly on access to Qwest's last-mile network facilities, including UNEs, and Qwest's other wholesale services in all four MSAs.[61] We also find that, in these four MSAs,

---

[57] *See* Qwest June 13, 2008 *Ex Parte* Letter at 1 (clarifying the scope of Qwest's petitions); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Denver Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter). As stated above, for convenience, we refer to the 4 geographic markets for which Qwest seeks forbearance in this proceeding as "MSAs," even though the areas Qwest identifies in each case is more limited than an MSA. *See* U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table B-1, Metropolitan Areas – Area and Population, *available at* http://www.census.gov/prod/2006pubs/smadb/smadb-06tableb.pdf (visited July 21, 2008) (listing MSAs). We therefore generally do not invoke the technical meaning of "MSA" when using that term in this Order. The Denver, Minneapolis-St. Paul, Phoenix and the Seattle MSAs are among the most populous in the nation. The corresponding rankings are, respectively: 22nd, 16th, 14th, and 15th. U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table E-13, Metropolitan Area Rankings – Population Indicators (MSA Rankings), *available at* http://www.census.gov/prod/2006pubs/smadb/smadb-06appe.pdf (visited July 21, 2008).

[58] *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19428, para. 24; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16320, para. 32; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21304, para 22.

[59] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19445, para. 61 n.161 (stating that "[w]e are under no statutory obligation to evaluate Qwest's Petition other than as pled"). We decline to accept the recommendation of the Arizona Commission that, within the Phoenix MSA, the Commission's dominant carrier analysis should be conducted for each zip code or, in the alternative, each wire center. *See, e.g.*, Arizona Commission Reply at 7-10. The most reliable competitive data in the record are MSA-level data, which we have found sufficiently granular to evaluate forbearance from dominant carrier regulation of switched access services in prior orders.

[60] *See, e.g.*, Qwest Denver Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 13-31 (Qwest Denver Brigham/Teitzel Decl.); Qwest Minneapolis-St. Paul Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 13-34 (Qwest Minneapolis-St. Paul Brigham/Teitzel Decl.); Qwest Phoenix Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 14-31 (Qwest Phoenix Brigham/Teitzel Decl.); Qwest Seattle Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 14-34 (Qwest Seattle Brigham/Teitzel Decl.).

[61] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Denver May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC (continued....)

Qwest is subject to intermodal competition, particularly from cable operators, primarily for residential services.[62] We do not include providers of "over-the-top" or nomadic voice over Internet Protocol (VoIP) services in our competitive analysis because there are no data in the record that justify finding that these providers offer close substitute services.[63]

(iv) Market Share Calculations

17. Many commenters have addressed how the Commission should calculate market share for purposes of this proceeding. The approach we adopt in this order is consistent with the Commission's methodology in past proceedings.[64]

(Continued from previous page)
Docket No. 07-97, Attach. 7 (filed May 2, 2008), corrected by errata (filed May 5, 2008) (Qwest Phoenix May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Seattle May 2, 2008 *Ex Parte* Letter); AdHoc Comments, Declaration of Lee L. Selwyn (AdHoc Selwyn Decl.) Attach. A at paras. 26-27; CLEC Group Comments at 20-21, 33-38, 54-55; COMPTEL Opposition at 33.

[62] *See* AdHoc Selwyn Decl. at paras. 2-3; Arizona Reply at 14 (stating that "the Residential Market is competitive but dominated by two providers: Qwest and Cox" and that there is little evidence to suggest increasing competition from other providers); Colorado Commission Comments at 20-23; CLEC Group Reply at 14-16; Comcast Comments at 6; Letter from J.G. Harrington, Counsel to Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 3-5 (filed June 17, 2008) (Cox June 17, 2008 *Ex Parte* Letter).

[63] *See, e.g.*, *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18479-81, paras. 87-89 (2005) (*Verizon/MCI Merger Order)*. We do, however, include in our analysis competition from entities that utilize VoIP technology to provide voice services to their customers over their own network facilities – that is, providers of "fixed" VoIP service, including cable operators and Qwest itself. *See, e.g.*, Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Denver May 20, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Phoenix May 20, 2008 *Ex Parte* letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Seattle May 20, 2008 *Ex Parte* Letter). Although Qwest suggests that the Commission should include system integrators in our competitive analysis, we decline to do so because, as noted by some parties, there is no MSA-specific data in the record, it is unclear to what extent system integrators use Qwest facilities, and it may be that Qwest is more appropriately characterized as a partner of the system integrators than as a competitor. *See* Qwest Denver Petition at 24-26; Qwest Minneapolis-St. Paul Petition at 25-26; Qwest Phoenix Petition at 25-26; Qwest Seattle Petition at 24-26; *see also* COMPTEL Opposition at 44-45; Cox Comments at 18.

[64] *See, e.g.*, *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21323, App. B; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175; *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16461-63, paras. 41-42 & App. B (2007) (*Section 272 Sunset Order*); *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5225-27, para. 34-35; *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5719-20, para. 107 (2007) (*AT&T/BellSouth Merger Order*); *Verizon/MCI Merger Order*, 20 FCC Rcd at 18484-89, para. 103. The formulas used to calculate market shares for purposes of this order are set forth in Appendix B. As we have done in the past, we include resellers and competitive lines provisioned via Qwest's UNE-P replacement service in our market share calculations (the Qwest Platform Plus (QPP) and Qwest Local Services Platform (QLSP) products). Resale and QPP/QLSP lines historically have been a way for competitors to enter the market, are currently used as a competitive option, and will continue to be available after today's order. Furthermore, the Commission has included resale and QPP/QLSP lines when calculating the incumbent LEC's market share in prior forbearance orders. In any (continued....)

(a) Mass Market Switched Access

18. *Wireline Households*. In support of its petitions, Qwest submitted actual line count data for its own retail switched access lines, data regarding its fixed VoIP subscribers, and line count data regarding its competitors' retail lines provisioned through reliance on Qwest's wholesale last-mile facilities.[65] Qwest disaggregated these retail and wholesale line counts by residential and business customers. We rely on Qwest's data as the most reliable evidence of its competitive presence and find, consistent with the *Qwest Omaha* line of precedent, that the data Qwest has submitted regarding residential customers are a reasonable proxy for the number of mass market switched access customers in each of the four MSAs at issue.[66] In addition, Qwest submitted white page listing data to estimate the number of competitive wireline residential access lines that do not rely on Qwest's wholesale services.[67] For purposes of this proceeding, we find Qwest's white page listing data, although an inexact estimate, are a reasonable proxy for the number of total residential access lines in service.[68] Therefore, in accord

(Continued from previous page)

event, there is only a small number of QPP/QLSP and resold lines here and excluding them from the calculation would not significantly affect the market share. *See, e.g.*, Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Covad *et al.* May 15, 2008 *Ex Parte* Letter); Joseph Gillan White Paper, The Irrelevance of Resale and RBOC Commercial Offers to Competitive Activity in Local Markets, Attach. at 1 (arguing that a competitive LEC "using resale or a Commercial Offer cannot meaningfully discipline ILEC exercises of market power to increase prices to the detriment of consumers"); Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Group *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8, 12-13 (Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter).

[65] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 5 & Exh. 2 (filed Mar. 10, 2008) (Qwest Denver Mar. 10, 2008 *Ex Parte* Letter) (Qwest's line count estimates as of December 2007); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 & Exh. 2 (filed Mar. 14, 2008) (Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter) (same); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 & Exh. 2 (filed Mar. 10, 2008) (Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter) (same); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 5 & Exh. 2 (filed Mar. 5, 2008) (Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter) (same); Qwest Denver May 20, 2008 *Ex Parte* Letter, Attach. 8 (Qwest's fixed VoIP subscriber counts as of December 2007); Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Phoenix May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Seattle May 20, 2008 *Ex Parte* Letter, Attach. 8 (same).

[66] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19430, para. 28 n.78. As the Commission explained in the *Qwest Omaha Forbearance Order* in a similar situation, because Qwest and other parties submitted their customer data grouped in categories of "residential" customers and "business" customers, and because the economic considerations that lead to the provision of service to a residential customer are similar to the economic considerations that lead to the provision of service to a very small business customer, we find it reasonable to treat the data submitted in this proceeding regarding residential customers as a proxy for the number of mass market customers served by each carrier. *See id.*; *see also Section 272 Sunset Order*, 22 FCC Rcd at 16461, para. 40 n.115 ("Our analysis of concentration in the mass market relies upon data for residential customers because of the administrative difficulty of distinguishing small business data from data for other classes of businesses."). The methodology we adopt in this order to calculate market shares also avoids an issue raised by commenters that white page listings do not include all competitive activity in the small business sector. *See* Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 11.

[67] Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 6 (Qwest's white page estimates as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 11 (same); Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 5 (same); Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 6 (same).

[68] We disagree that some adjustments Qwest proposes would improve the accuracy of the white page listings. Specifically, (1) Qwest begins with all white page listings that have an NPA/NXX associated with a rate center that is at least partly within one of the 4 MSAs at issue; (2) Qwest then divides the total number of residential listings (continued….)

with the Commission's precedent, we rely on these data to estimate market shares in the Denver, Minneapolis-St. Paul, and Seattle MSAs.[69] For the Phoenix MSA, Cox submitted its actual access line counts.[70] Due to the lack of record evidence of substantial additional competition for residential customers in the Phoenix MSA from competitive LECs using self-provisioned last-mile facilities, we find no reason to rely on Qwest's white page listing data in the Phoenix MSA.

19. *Mobile Wireless-Only Households*. In calculating market shares, we believe it is appropriate to include wireless-only households (*i.e.*, residential telephone customers who have "cut the cord").[71] In particular, we find that mobile wireless service should be included in the local services product market to the extent that it is used as a complete substitute for all of a consumer's voice communications needs. Over the past several years, as wireless substitution rates have continued to rise, the Commission has begun including such intermodal substitution in its competitive analyses of the local services market.[72]

(Continued from previous page)

by **[REDACTED]**; (3) Qwest then multiplies the prior figure by the percentage of facilities-based lines that it believes are provided by cable telephony providers in the MSA. *See* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 4. We find certain of Qwest's assumptions highly questionable, and in any event not in accord with the approach the Commission has used previously when relying on white page listings to estimate the number of residential access lines in a market. *See, e.g.*, CLEC Group Reply at 21; Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed May 18, 2008) (Cbeyond *et al.* May 15, 2008 *Ex Parte* Letter).

[69] We clarify that, in accord with the Commission's precedent and the methodology Qwest has followed in prior proceedings, we count each white page listing as a single residential access line in service for purposes of our residential market share calculations. *See, e.g.*, *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5218 para. 17 n.62 (treating each white page listing as a single residential access line); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. 1f (same) (filed Jan. 10, 2007). We disagree that Qwest's white pages listing data submissions raise concerns under Section 222(b). *See, e.g.*, CLEC Group Reply at 19-21. White page listings are "subscriber list information" under the Act, which Qwest submitted as aggregated data. 47 U.S.C. § 222(h)(2)-(3).

[70] *See* Cox June 17, 2008 *Ex Parte* Letter, Attach. at 3-5. We find that the other market share estimates in the record are based on incomplete data or data that appear not to be fully up-to-date. *See* Colorado Office of Consumer Counsel at 9, Exhs. 2 & 3 (providing data from a survey conducted in 2005 and 2006). The Arizona Commission also provided market shares but it is unclear what timeframe they reflect and whether the estimates are based on actual line data. *See, e.g.*, Arizona Commission Reply at 10-17; Qwest June 26, 2008 *Ex Parte* Letter at 5 (stating that Qwest is "unaware of Cox producing any such data to the ACC at any time in the last year in any regulatory docket").

[71] Qwest Denver Mar. 10, 2008, *Ex Parte* Letter at 4; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 8; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 2; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 4; *see also* Letter from Christopher M. Heimann, Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed July 18, 2008) (AT&T July 18, 2008 *Ex Parte* Letter) (noting the rapidly growing number of wireless consumers that have "cut the cord").

[72] *See, e.g.*, *Verizon/MCI Merger Order*, 20 FCC Rcd at 18481-83, paras. 90-91; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18340-42, para. 89-90 (2005) (*SBC/AT&T Merger Order*); *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5711, 5714-15, paras. 90, 95-96. The Commission also included wireless-only households in its market share calculations of bundled local and long distance services in the section 272 sunset proceedings. *See Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5226-27, para. 35; *Section 272 Sunset Order*, 22 FCC Rcd at 16462-63, para. 42. Although the Commission did not include wireless-only households in its mass market switched access market share calculations in the *Qwest Omaha* and *ACS Dominance* forbearance proceedings, the records in those proceedings did not include any data that justified including such services in the analysis. *See* (continued....)

20. We recognize, as certain commenters have argued, that mobile wireless service and wireline telephone services are not perfect substitutes.[73] As the Commission stated in the *Competitive ETC Order*, "the majority of households do not view wireline and wireless services to be direct substitutes" and most households purchase mobile wireless telephony service in addition to a customer's existing wireline service.[74] We therefore limit the inclusion of mobile wireless services in our competitive analysis, and include such services only to the extent a household has elected to forgo wireline telephone service, rather than use mobile wireless services only as a complement to wireline telephony services. We believe this approach reasonably approximates the extent to which residential telephony customers view mobile wireless and wireline services as substitutes, and is the approach most consistent with the Commission's precedent.[75]

21. Finally, although various commenters suggest that we rely on the national wireless-only household data published by the Center for Disease Control (CDC) or the more localized information provided by Telephia,[76] we decline to do so. First, as explained below, with respect to every MSA but

(Continued from previous page)
Qwest Omaha Forbearance Order, 20 FCC Rcd at 19452, para. 72; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318-19, para. 28.

[73] *See, e.g.*, Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6 (filed May 7, 2008) (Cbeyond May 7, *2008 Ex Parte* Letter) (stating that a recent Verizon survey found that "83% of respondents intend to continue to use their landline home phone indefinitely"); Letter from Brad Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed Apr. 22, 2008) (Covad *et al.* Apr. 22, 2008 *Ex Parte* Letter), Attach. 1, Kent W. Mikkelsen White Paper, Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition (Mikkelsen White Paper); Letter from Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8 (filed June 12, 2008). As the Mikkelsen White Paper admits, there is no recent empirical study that specifically considers the type of substitution at issue here. We are not persuaded by the purportedly analogous evidence the Mikkelsen White Paper offers in support of completely excluding mobile wireless services from the relevant product market, including a paper by Rodini, Ward and Woroch. *See* Mikkelsen White Paper at 4; Mark Rodini, Michael R. Ward, and Glenn A. Woroch, *Going Mobile: Substitutability Between Fixed and Mobile Access*, 27 TELECOMM POLICY 457, 457-76 (2003) (Rodini/Ward/Woroch Paper). For instance, as the authors of the Rodini/Ward/Woroch Paper state, their focus was on a household's decision to subscribe to mobile wireless service in lieu of a *second* fixed line and that their data were not "rich enough to estimate the cross-elastic effect from wireless price changes on the decision to subscribe to any fixed line." *Id.* at 465, 470. We also find the results of the Rodini/Ward/Woroch Paper provide little evidence of current conditions because that study relied on 2000-2001 data and fewer than 2 percent of the sample participants had "cut the cord." *Id.* at 470.

[74] *High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, Order, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8843-44, paras. 19-21 (2008) (*Competitive ETC Order*) (adopting an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (ETCs) may receive).

[75] *See, e.g.*, *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5711, 5715, paras. 90, 96 (stating that "for certain categories of customers, mobile wireless service is viewed as a close substitute to wireline local service" and that "[e]ven if most segments of the mass market are unlikely to rely solely upon wireless services instead of wireline local services today, our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis") (footnote omitted).

[76] *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed May 15, 2008) Attach., Centers for Disease Control, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007, Table 1 (*CDC Wireless Estimates*) (reporting that as of December 2007, 15.8 percent of households nationally have at least one mobile wireless phone but no wireline phone, a significant increase since December 2004 when the estimate was 6 percent); Covad *et al.* Apr. 22, 2008 *Ex Parte* Letter, Attach. 2, Joseph Gillan White Paper, Properly Estimating the Size of the Wireless-Only Market at 1 (*Gillan White Paper*).

Phoenix, our decision to include or not include these data are not outcome determinative. Second, with respect to the CDC data, we believe it is most consistent with our geographically-specific analysis in the *Qwest Omaha* line of precedent to rely on a similarly geographically-specific measure of wireless substitution.[77] In the present context, Qwest seeks regulatory relief for particular MSAs based on the specific competitive conditions in those markets, but the CDC estimates and the record generally do not contain reliable data of this type. Third, and most importantly, even if we were to consider the CDC or Telephia data, we could not determine with any degree of confidence that the statutory criteria for granting forbearance would be met. For example, Qwest's submission of geographically-specific data regarding the measure of wireless substitution in the four MSAs primarily consists of information Telephia published based on some sort of survey conducted of the wireless-only household rate in specific market areas, including the Denver, Phoenix, Minncapolis-St. Paul, and Seattle metropolitan areas.[78] If we were to rely on the Telephia data, Qwest's market share would be approximately **[REDACTED]** percent in the Phoenix MSA, which, in conjunction with other evidence, likely would be sufficient to grant forbearance under the Commission's precedent.[79] However, the only substantive information in the record regarding the Telephia survey is a news release that does not describe Telephia's methodology or provide any other information to support the significance of the data. To the contrary, the news release states that the "[d]ifferences in wireless penetration rates between cities may not be statistically significant."[80] Thus, the margin of error in such a survey alone would not allow us to

[77] Where the Commission has relied on national estimates of wireless substitution, it has been to evaluate market conditions throughout a BOC's franchise area within a state in a context where the BOC was seeking a single result over a very wide geographic area. *See, e.g., Verizon/MCI Merger Order*, 20 FCC Rcd at 18481-83, 18488, paras. 90-91, 103; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18340-42, 18347, paras. 89-90, 102; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5714-15, 5719-20, paras. 95-96, 107; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5226-27, para. 35; *Section 272 Sunset Order*, 22 FCC Rcd at 16462-63, para. 42. In the *Verizon 6 MSA Order*, the Commission found that even assuming *arguendo* that the relevant estimate of wireless substitution in the markets at issue was equal to that of the CDC's national wireless substitution estimate, competition in those MSAs was not yet sufficiently extensive to warrant the requested forbearance. *See, e.g., Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21308, para. 27. *See also, e.g., infra* para. 27 (citing Qwest's estimated market shares in the Denver, Minneapolis-St. Paul, and Seattle MSAs even assuming *arguendo* that the CDC's national wireless-only household data are the appropriate measures of wireless substitution). By determining that forbearance was unwarranted even under an approach favorable to the petitioner, the Commission was not endorsing the use of a national estimate of wireless substitution as *sufficient* to support forbearance in all future forbearance proceedings. In any event, the evidence of significant demographic variations in wireless substitution was directly raised in the record of this proceeding, and the Commission's analysis thus accounts for that evidence.

[78] *See, e.g.*, Qwest Denver Brigham/Teitzel Decl. at para. 38 & Exh. 5 (attaching the Telephia news release); Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 41 & Exh. 5 (same); Qwest Phoenix Brigham/Teitzel Decl. at para. 30 & Exh. 5 (same); Qwest Seattle Brigham/Teitzel Decl. at para. 41 & Exh. 5 (same). In addition, on July 21, 2008, Qwest submitted a letter claiming that Nielsen Mobile has conducted research indicating that the wireless only household rate in the Phoenix MSA is **[REDACTED]** percent. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed July 21, 2008) (attaching letter from Eric Fogle, a vice president of Nielsen Mobile). We are unable to find this estimate reliable on the present record in part because Qwest's submission does not describe Nielsen Mobile's methodology or provide any other information to support the significance of the data. *See* Letter from Thomas Jones *et al.*, Counsel for Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 23, 2008) (arguing, among other things, that the methodology of such studies must be transparent on the record to permit the Commission and interested parties to test the accuracy, completeness and reliability of the data).

[79] Under this approach, we would not have sufficient basis under the criteria of section 10 to grant Qwest relief in the other 3 MSAs. *See infra* para. 27.

[80] *See* Qwest Denver Brigham/Teitzel Decl. Exh. 5 at 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 5 at 4; Qwest Phoenix Brigham/Teitzel Decl. Exh. 5 at 6; Qwest Seattle Brigham/Teitzel Decl. Exh. 5 at 7. We also (continued....)

draw any firm conclusion as to whether the criteria had been met. Reliance on the CDC survey is similarly problematic, as the CDC regional and metropolitan estimates present methodological problems, yielding inconclusive results.[81] For instance, if we were to rely on CDC's regional wireless substitution estimate for the "West" – which CDC defines to include Arizona, and hence, the Phoenix MSA – Qwest's market share would be approximately]**REDACTED**] percent in the Phoenix, MSA.[82] However, we find that the geographic subcategories in the CDC survey are not sufficiently disaggregated for purposes of evaluating competition in particular MSAs. Additionally, with respect to CDC's metropolitan estimates, we find significant evidence in the record that the wireless substitution rate varies substantially depending on differences between urban and rural areas.[83] Finally, in terms of methodology, the CDC estimates regional wireless substitution by adults, rather than households; if we relied on these estimates in our market share calculations, we could overstate the percentage of wireless-only households, suggesting that forbearance might not be warranted in the Phoenix MSA under our precedent. In any event, the measure of wireless substitution by adults is not consistent with the other competitive data in the record, nor with the data the Commission has relied upon in prior proceedings. Nor does the record reveal a reliable methodology for adapting these data for use in evaluating competition in particular MSAs.[84] The record also contains additional arguments and estimates of the appropriate measure of wireless substitution, though no estimates that are not subject to concerns similar to those identified above.

22. For these reasons, Qwest has not sufficiently supported its case for forbearance on the basis of reliable, geographically-specific data regarding the measure of wireless substitution in the four MSAs.[85] We understand the importance of our decision to insist upon reliable data and recognize that Qwest might have qualified for some forbearance upon a better evidentiary showing. Qwest may, of course, refile its petitions and our decision in this instance does not prejudge the outcome in any future proceeding.[86] We emphasize that petitioners relying on mobile wireless substitution to support forbearance relief should submit complete and reliable data that is geographically specific to the areas for which forbearance is sought.

(Continued from previous page)
reject certain commenters' reliance on geographic or demographic subcategories of data from the CDC study. *See Gillan White Paper* at 4-7; Letter from Brad E. Mutschelknaus and Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Covad *et al.* July 2, 2008 *Ex Parte* Letter).

[81] *See supra* note 76.

[82] The CDC defines the West region to include Washington, Oregon, California, Nevada, New Mexico, Arizona, Idaho, Colorado, Montana, Wyoming, Alaska and Hawaii. *See* CDC Report, Table 2, n.5.

[83] *See CDC Wireless Estimates*, Table 2; *see also SBC/AT&T Merger Order*, 20 FCC Rcd at 18341, para. 90.

[84] We reject an attempt to adjust the CDC's regional estimate from "the percentage of adults in wireless-only households" to a "percentage of households." Covad *et al.* July 2, 2008 *Ex Parte* Letter at 3. The methodology the commenters used is apparently based on conversations with CDC staff and is not sufficiently supported on the record. *See id.* at 4 n.8.

[85] We disagree with Qwest that its submission of the data identified above entitles it as a matter of law to forbearance and that the Commission may not use the absence of certain evidence as a basis for denial of a forbearance petition. *See, e.g.*, Letter from Craig J. Brown, Counsel to Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2-6 (filed July 15, 2008) (Qwest July 15, 2008 *Ex Parte* Letter). The Commission need not grant forbearance based on evidence it finds unreliable merely because the record is incomplete.

[86] 47 U.S.C. § 160(c) (stating that "[a]ny telecommunications carrier . . . may submit a petition to the Commission requesting that the Commission exercise the authority granted under [section 10] with respect to that carrier . . . or any service offered by that carrier").

(b) Enterprise Switched Access

23. In the absence of sufficient record evidence to reliably estimate the total number of enterprise switched access lines in service in any of the four MSAs,[87] we find the record cannot support forbearance for these services in any of the four MSAs. As noted above, Qwest submitted actual line count data for its own retail switched access lines, data regarding its fixed VoIP subscribers, and line count data regarding its competitors' retail lines provisioned through reliance on Qwest's wholesale last-mile facilities.[88] Several of Qwest's intramodal competitors for enterprise switched access services also submitted actual line count data totals for their retail access lines in various markets, as did Cox in the Phoenix MSA.[89] In none of the four MSAs did all of the major competitors for enterprise switched access services submit their own actual access line data. Because it lacks access to its competitors' internal data, Qwest submitted white page listing data to estimate the number of enterprise switched access lines that do not rely on its wholesale services. Although we find that white page listing data provides a reasonable estimate of residential lines, we find such data to be unreliable in estimating the number of enterprise switched access lines in service.[90]

---

[87] In particular, we reject Qwest's market share estimates based on a comparison of the number of channel terminations Qwest provides over DS0 and DS1 switched access lines to the number of wholesale voice-grade equivalent circuits Qwest provisions as UNE loops, UNE Enhanced Extended Links (EELs) and platform-based and resold business lines. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-7 (filed June 25, 2008). We do not find this estimate reliable for several reasons. First, we find Qwest's estimate biased because Qwest compares its actual number of channel terminations to the maximum capacity of its competitors' access lines. Qwest's methodology also conflates mass market and enterprise switched access services by counting all DS0 switched access lines regardless of customer category. Finally, some of the voice-grade equivalent circuits Qwest counts as competitive switched access lines presumably are used to provide data services rather than switched access services.

[88] *See supra* para. 18.

[89] Cox June 17, 2008 *Ex Parte* Letter, Attach. at 3-5 (setting forth Cox's enterprise access line totals in the Phoenix MSA); *see also* Letter from Genevieve Morelli, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed May 20, 2008) (XO May 20, 2008 *Ex Parte* Letter) (providing the number of lit buildings it serves in all 4 MSAs); Letter from Thomas Jones and Nirali Patel, Counsel to Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 (filed June 30, 2008) (Time Warner Telecom June 30, 2008 *Ex Parte* Letter) (same); Letter from William A. Haas, V.P. Regulatory of Public Policy for PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed June 30, 2008) (PAETEC June 30, 2008 *Ex Parte* Letter) (same), redacted version corrected by errata (filed July 1, 2008); Letter from Thomas Jones and Nirali Patel, Counsel to Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed July 1, 2008) (Integra July 1, 2008 *Ex Parte* Letter) (providing the number of lit buildings it serves in the Phoenix and Seattle MSAs).

[90] Qwest's own data shows a low correlation between the number of business white page listings and the number of enterprise switched access lines in service. *See* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 4. Moreover, the business white page listings include listings for a significant number of mass market switched access customers in addition to enterprise switched access customers. There is no reason to assume that other carriers' distributions of mass market business switched access customers and enterprise switched access customers are approximately identical to Qwest's distribution, nor that each customer purchases approximately the same number of switched access lines from each service provider. *See, e.g.*, Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 7-11 (filed June 12, 2008) (Cbeyond *et al.* June 12, 2008 *Ex Parte* Letter). In addition, Qwest's white page listings data include lines served via special access, which should not be included in the present analysis. *See* Qwest Reply at 10-11 (acknowledging that the white page listings include competitive LEC lines "utilizing CLEC-owned switches along with either an unbundled loop or Special Access

(continued....)

b. Forbearance Analysis

24. Qwest asks the Commission to forbear from applying certain dominant carrier rate and tariff regulations to its provision of mass market and enterprise switched access services in the Phoenix, Denver, Minneapolis-St. Paul, and Seattle MSAs.[91] Forbearing from these dominant carrier requirements would free Qwest from dominant carrier price cap rules.[92] Further, Qwest would no longer be required to file tariffs for these services on seven or more days' notice, but could file tariffs on one day's notice or could offer these services under negotiated rates and terms.[93] Qwest also seeks forbearance in these four MSAs from dominant carrier requirements governing the section 214 processes for transfers of control and discontinuance of service.[94] As explained below, we conclude that Qwest is not entitled relief from dominant carrier regulation under the section 10 criteria.

25. We begin our section 10(a)(1) analysis by considering the market for the services for which Qwest seeks relief and the customers that use them.[95] Qwest seeks forbearance from dominant carrier regulation in its provision of mass market and enterprise switched access services in four MSAs.[96] Switched access services use local exchange switches to route originating and terminating interstate toll calls. As explained in the *Qwest Omaha Forbearance Order*, *ACS Dominance Forbearance Order*, and the *Verizon 6 MSA Forbearance Order*, the Commission has recognized that providers of access services serve two distinct customer groups: (1) interexchange carriers, which purchase access service as an input for the long distance service that they provide to their end-user customers and (2) end users who benefit

(Continued from previous page)

services purchased from Qwest"). *See also* Time Warner Telecom Opposition at 26-27; Cbeyond *et al.* May 15, 2008 *Ex Parte* Letter at 1.

[91] *See* Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3; *see also* Qwest June 13, 2008 *Ex Parte* Letter at 2-4.

[92] *Compare* 47 C.F.R. Part 61, Subpart C, *with id.* at Subpart E; *see also Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19434, para. 39. The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Act to ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. Qwest specifically asks the Commission to forbear from the rules in Subpart E of Part 61; that Subpart applies exclusively to dominant carriers.

[93] *Compare* 47 C.F.R. § 61.58 (tariff notice requirements for dominant carriers), *with id.* § 61.23 (tariff notice requirements for nondominant carriers), § 61.26 (tariffing requirements for competitive interstate switched access services); *see also Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435, para. 41.

[94] *See* Qwest June 13, 2008 *Ex Parte* Letter at 4; *see also Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435-36, para. 43.

[95] We recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers. Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets" closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. 47 U.S.C. § 160(a). We are mindful that, when determining whether a carrier has market power in conducting a dominance analysis, the Commission must not limit itself to market share, but rather look to all four factors that the Commission traditionally considers. *See AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (*AT&T v. FCC*). Because we do not undertake a stand-alone market power inquiry in this proceeding, this four-factor test does not bind our section 10 forbearance analysis.

[96] Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3-4; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3-4. In both the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order*, the Commission divided its analysis of retail switched access services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19427, para. 22; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318, para. 27.

from the ability, provided by access service, to place and receive long distance calls.[97] Qwest's switched access charges have two essential rate components: (1) the Subscriber Line Charge, or SLC, which is a flat-rated charge imposed on end-users to recover the interstate-allocated portion of local loop costs[98] and (2) carrier's carrier charges, which Qwest imposes on interexchange carriers for access to its end user customers for the purpose of originating or completing interstate toll calls.[99]

26. To grant forbearance, we first must determine that enforcement of dominant carrier regulations is unnecessary to ensure that charges, practices, classifications, or regulations for Qwest's interstate switched access services are just and reasonable and not unjustly or unreasonably discriminatory.[100] In its petition, Qwest argues that retail customers throughout the relevant MSAs have access to a wide range of competitive alternatives for affordable local telephone service offering ubiquitous facilities-based alternatives to Qwest's service.[101] Qwest argues that, due to this extensive competition, dominant carrier regulation is no longer necessary in these MSAs to ensure just, reasonable and nondiscriminatory rates but that market forces will protect the interests of consumers; thus the regulations at issue no longer are necessary for that purpose.[102] As discussed above, in support of its argument that it is entitled to relief from dominant carrier regulation, Qwest submitted data including its own switched access lines, the number of resale and QPP/QLSP lines, and estimates of facilities-based residential and enterprise access line counts disaggregated by capacity for each of the four MSAs.[103] Qwest primarily bases the estimates of facilities-based residential and enterprise switched access line counts upon its competitors' white page listings data.[104]

(i) Mass Market Switched Access.

27. Based on this record, we find that Qwest does not satisfy section 10(a)(1) for mass market switched access services in any of the four MSAs. In particular, Qwest's market shares in the MSAs at

---

[97] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432, para. 33; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323, para. 40; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21306, para. 25; *see also Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001).

[98] *See generally Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 559 (8th Cir. 1998). Pursuant to the jurisdictional separations process, 25% of the cost of the loop is allocated to the interstate jurisdiction. 47 C.F.R. § 36.154(c). To promote economically efficient competition and to avoid cross-subsidization, the Commission has recognized that, to the extent possible, LECs should recover costs of interstate access in the same way that they are incurred. Because the cost of using a price cap carrier's common line does not increase with usage, the costs associated with the provision of this line are recovered through this flat, non-traffic sensitive fee. *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12969-70, para. 18 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

[99] Carrier's carrier charges include local switching, tandem switched transport and direct-trunked transport. 47 C.F.R. § 69.4(b).

[100] 47 U.S.C. § 160(a)(1).

[101] *See, e.g.*, Qwest Denver Petition at 5; Qwest Minneapolis-St. Paul Petition at 5; Qwest Phoenix Petition at 5; Qwest Seattle Petition at 5.

[102] Qwest Denver Petition at 28-31; Qwest Minneapolis-St. Paul Petition at 28-32; Qwest Phoenix Petition at 28-31; Qwest Seattle Petition at 27-31.

[103] *See supra* paras. 17-23.

[104] *Id.* paras. 18 & 23.

issue, measured consistent with our approach in the *Qwest Omaha Forbearance Order*, *ACS Dominance Forbearance Order*, and *Verizon 6 MSA Forbearance Order* are sufficiently high to suggest that competition in these areas is not adequate to ensure that the "charges, practices, classifications, or regulations . . . for [] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" absent the regulations at issue.[105] The record evidence does not reflect that in any of the four MSAs do the cable operators, even in the aggregate, have more than a **[REDACTED]** percent share of the market for mass market telephone services in an MSA.[106] In addition, at least in the Denver, Minneapolis-St. Paul and Seattle MSAs, even if we were to rely on the national wireless-only household data published by the CDC as Qwest advocates, Qwest's estimated market shares for residential telephone services do not approach levels at which the Commission has granted forbearance in prior proceedings. Specifically, even including competition that relies on section 251(c)(4) resale and Qwest's QPP/QLSP service, and assuming *arguendo* that 15.8 percent of households in each of these three MSAs is a wireless only household, Qwest's estimated market shares are approximately: Denver **[REDACTED]** percent, Minneapolis-St. Paul **[REDACTED]** percent, and Seattle **[REDACTED]** percent.[107] Qwest's market share in the Phoenix MSA is lower, although in part

[105] We rely on Cox's actual line count data for the Phoenix MSA that Cox submitted on the record. The record does not include similar information from the cable providers that compete in the Denver, Minneapolis-St. Paul, and Seattle MSAs. Therefore, as noted above, we rely on the actual white page listings count for purposes of calculating Qwest's mass market switched access market shares in the Denver, Minneapolis, and Seattle MSAs. *See supra* para. 18. The wholesale services we include in this calculation are section 251(c)(4) resale and Qwest's QPP/QLSP service. *See* Appendix B for the market share calculation methodology. We note that section 251(c)(4) resale services are made available at regulated rates. Qwest's QPP/QLSP service is a service that includes loops and switching functionality. There is no evidence to suggest that UNEs constrain the prices of Qwest's QPP/QLSP service, and we note that switching is not available at TELRIC rates, which tends to support this conclusion. As discussed above, consistent with our precedent, we would include mobile wireless-only households in our market share calculation but in this instance we do not have reliable geographically-specific data to allow us to do so. *See, e.g.*, *Verizon/MCI Merger Order*, 20 FCC Rcd 18481-83, paras. 90-91; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5714, para. 95.

[106] The market share for Cox, the sole cable provider operating in the Phoenix MSA, is less than **[REDACTED]%**. Assuming *arguendo* that the cable operators provide every competitive residential line in service in the other three MSAs that is not provided by Qwest or by a competitive LEC using Qwest's resold or QPP/QLSP facilities, the implied market shares of the cable operators in the other 3 MSAs are less than: Denver **[REDACTED]%**, Minneapolis-St. Paul **[REDACTED]%**, and Seattle **[REDACTED]%**. For the reasons explained above, we are unable to make any specific findings regarding the percentage of wireless substitution in the 4 MSAs on the present record. These estimates of the cable operators' market shares were calculated without including any wireless substitution. Including wireless substitution when calculating the market shares of the cable operators would result in even lower market share estimates.

[107] *Id.* As explained above, we are not endorsing the use of a national estimate of wireless substitution as sufficient to support forbearance in particular local markets. *See supra* note 77. Although Qwest submitted partial updated line count estimates as of May 2008, it did not submit updated fixed VoIP subscriber counts or updated white page listings data. *See* Letters from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 2, 2008) (filing four separate letters updating line count estimates in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs). Rather than relying on data from Qwest from different time periods, we base the market shares on Qwest's December 2007 data. *See infra* App. B notes 4-7. Nevertheless, we note that relying on Qwest's data as of May 2008 would not materially affect the market shares or the outcome we reach today. To support its claim that there is significant competition in the residential markets, Qwest provided a study by TNS Telecom (TNS) that calculates quarterly "shares of customer connections." *See* Qwest Denver Brigham/Teitzel Decl. at para. 6; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 6; Qwest Phoenix Brigham/Teitzel Decl. at para. 6; Qwest Seattle Brigham/Teitzel Decl. at para. 6. According to Qwest, TNS collects actual billing information from a statistically-reliable sample of customers in each state and tabulates the number of residential customers subscribing to Qwest service (landline, DS1, or wireless) as well as services of non-Qwest landline and wireless competitors. *Id.* We declined to rely on a similar (continued....)

for the reasons explained above,[108] we are unable to find on the present record that Qwest is subject to sufficient competition to warrant the requested forbearance.

28. Although record cvidence here shows competitive facilities deployment used in the provision of mass market telephone service by cable operators in the four MSAs at issue, we find that it does not match the evidence of competition relied upon in previous orders granting forbearance. In the absence of comparable evidence of facilities-based competition, we are not persuaded by Qwest's suggestion that its market shares in the four MSAs are sufficient to justify forbearance from dominant carrier regulation here. Indeed, where the Commission has found an incumbent carrier to be nondominant in the provision of access services, it had a retail market share of less than 50 percent and faced significant facilities-based competition.[109] Although our forbearance analysis here is merely guided by our dominance precedent, we find it significant that, in granting forbearance from dominant carrier regulation of mass market switched access services in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*, the Commission similarly emphasized the evidence of the competitive gains of facilities-based competitors, in conjunction with the incumbent LECs' overall market shares, in its marketplace analysis.[110]

29. With respect to elasticity of demand and firm cost, size, and resources, we find no basis to reach different conclusions than those in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*.[111] However, we do not find those factors, in and of themselves, adequate to

(Continued from previous page)
TNS study in the *Qwest Section 272 Sunset Forbearance Order* and we do not rely on these estimates here. *See Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 47. The estimates are based upon consumer purchases of any telecommunications services rather than purchases for the relevant product, whicb is local service and the estimates have not been shown to be based on a representative sample. In particular, we are not able to determine on the present record the size of the sample or the response rate.

[108] *See supra* paras. 19-22.

[109] *Mid-Rivers Order*, 21 FCC Rcd at 11519-21, paras. 29-34 (declaring Qwest to be nondominant in its provision of all interstate telecommunications services, including access services, in Terry, Montana, where a facilities-based competitor served between 85 and 93% of the access lines); *cf. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket No. 97-142, *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23959, para. 161 (1997) (establishing a presumption that foreign carriers with less than 50% market share in each of the relevant foreign markets, including the market for local access, lack sufficient market power to adversely affect competition in the U.S., and noting that "[a]s the authors of the 1997 edition of the American Bar Association *Antitrust Law Developments* publication recently concluded, '[c]ourts virtually never find monopoly power when market sbare is less than about 50 percent.'"(Quoting A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-36 (4th ed.) (1997))).

[110] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, para. 36 (relying on "Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers"); *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323-24, paras. 40-41 (relying on evidence that "GCI has extensive and modern facilities throughout much of Anchorage, and that its network has sufficient capacity such that GCI could easily expand the number of customers it serves," and that "the growth in GCI's residential access line base and corresponding decline in ACS's base support our forbearance determination here"). We note that the Commission relied, as a secondary matter, on competition based on wholesale inputs obtained from the incumbent LEC. *See, e.g., Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, para. 36. However, we do not find the evidence regarding competition in the 4 MSAs based on resale and Qwest's QPP/QLSP service sufficient to overcome the less convincing evidence regarding Qwest's market shares and the success of its facilities-based competitors that was present in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*.

[111] *See, e.g., Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, paras. 33, 38; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323-24, paras. 40, 42.

conclude that competition is sufficient to ensure just, reasonable, and not unreasonably discriminatory rates and practices under section 10(a)(1), given the concerns identified above.

30. Moreover, we find no other basis in the record for concluding that section 10(a)(1) is satisfied with respect to Qwest's requested forbearance from dominant carrier regulations for mass market switched access services. We find that the evidence considered in our market analysis above provides the best evidence regarding the state of competition in the relevant markets. In particular, we reject Qwest's attempt to demonstrate that a particular MSA is competitive by calculating percentage reductions in retail lines.[112] There are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. For example, as the Commission explained in the *ACS UNE Forbearance Order*, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.[113]

---

[112] Qwest has submitted tables summarizing its loss of switched access lines from 2000 to 2006. Qwest Denver Brigham/Teitzel Decl. at para. 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 5; Qwest Phoenix Brigham/Teitzel Decl. at para. 5; Qwest Seattle Brigham/Teitzel Decl. at para. 5. Qwest updated these tables with its loss of switched access lines from 2006 to 2007. *See* Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 4; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 6. We also note that Qwest's requested forbearance could have impacts beyond the MSA level. As we noted in the *Verizon 6 MSA Forbearance Order*, our rules require incumbent LECs to geographically average their access rates. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995)); 47 C.F.R. § 69.3(e)(7). This regulatory requirement causes price cap incumbents with state-wide operations, like Qwest, to effectively use their low-cost, urban and suburban operations to subsidize their higher cost rural operations. The likely effect of removing from price cap regulation lower cost operations in large urban metropolitan areas (like the ones at issue in this matter) would be to increase the cost to Qwest's rural operations. Because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve the issue here. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (stating that, "[i]n the future, applicants for forbearance relief from dominant carrier rate regulation should address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area."). As a separate matter, Qwest's petitions raise issues about universal service support that are not addressed in the record. If a carrier seeking forbearance receives universal service support such as interstate access support (IAS) in the areas for which relief is sought, as Qwest does here, its petition should address how forbearance relief would affect its receipt of support. IAS is meant to provide support to price cap carriers serving lines in areas where, due to the operation of the SLC cap, they are unable to recover their permitted revenues from their SLCs. *See CALLS Order*, 15 FCC Rcd at 13043, para. 195; 47 C.F.R. § 69.152. The SLC cap would not apply in an area where relief is granted. Accordingly, a carrier should explain whether it should continue to receive IAS, and, if so, what conditions should apply. Further, if a carrier asserts that it should continue to receive IAS after a forbearance grant of this type, it must address how to ensure that grant of relief does not significantly reduce the amount it contributes to the universal service fund. As the Commission discussed in the *ACS Dominance Forbearance Order*, a grant of forbearance relief would allow a carrier to reduce its SLC rates. This, in turn, would reduce the amount the carrier contributes to the universal service fund. *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16338, para. 72. As noted, because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

[113] *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88 (citing Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005) (noting that the decline of lines provided by wireline carriers might be due to some households eliminating second lines when they move from dial-up Internet service to broadband service)); *see also infra* para. 38. Moreover, even if Qwest's line loss data accurately captured the extent of competition (a position we reject above), neither Qwest nor others offered any persuasive rationale for determining a particular level of line loss to be sufficient evidence of competition to justify forbearance.

31. As discussed above, section 10(a)(1) requires that we determine that enforcement of the regulations at issue is unnecessary to ensure that charges, practices, classifications or regulations for the services for which Qwest seeks relief are not unjustly or unreasonably discriminatory.[114] On the basis of the record evidence and the application of the section 10(a) statutory criteria, we find that forbearance from dominant carrier regulation for the services and geographic areas at issue is unjustified. This matter is distinguishable from the cases cited by Qwest and from prior orders in which the Commission granted dominant carrier relief. Specifically, there is inadequate evidence of facilities-based mass market competition and we are unable to conclude from the evidence in the record that Qwest no longer holds a significant market share of the services at issue.[115] Thus we deny Qwest's request for forbearance.

32. For the same reasons, we find that Qwest has not demonstrated that enforcement of the Commission's dominant carrier regulations as they apply to Qwest's interstate switched access services is unnecessary for the protection of consumers.[116] Nor has Qwest demonstrated that forbearance from the application of these regulations to these services is consistent with the public interest.[117] Accordingly, Qwest's request for forbearance from such regulations is denied.[118]

(ii) Enterprise Switched Access

33. There is insufficient information in the record to reasonably assess market shares for enterprise switched access services, and the record evidence suggests Qwest faces more limited facilities-based competition in these MSAs.[119] The record does not include sufficient data for Qwest's service territory in the MSAs to demonstrate sufficient competition to satisfy the section 10(a) criteria for enterprise switched access services,[120] nor does it include any other basis for such relief. Consistent with our precedent, we therefore deny this aspect of the Petitions.[121]

---

[114] 47 U.S.C. § 160(a)(1).

[115] Similarly, in the *Verizon 6 MSA Forbearance Order*, the Commission distinguished prior nondominance orders cited by Verizon. *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21309, paras. 28-29.

[116] 47 U.S.C. § 160(a)(2).

[117] 47 U.S.C. § 160(a)(3).

[118] Because Qwest relies on the same competitive evidence in support of its request for forbearance from dominant carrier section 214 discontinuance and transfer of control requirements, we deny such forbearance for the same reasons expressed above. *Cf. Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435-36, para. 43 (evaluating forbearance from dominant carrier section 214 discontinuance and transfer of control requirements on the basis of the same competitive evidence relied upon to analyze forbearance from other dominance carrier regulations); *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16333-34, para. 63 (same).

[119] *See* AdHoc Comments at 10-12; Arizona Commission Reply, Attachs. C, D1, D2 and D3; Comcast Comments at 6-7 (stating that it serves fewer than **[REDACTED[** enterprise business customers in the Seattle, Minneapolis-St. Paul and Denver markets combined; and that Comcast **[REDACTED[]**); Cox June 17, 2008 *Ex Parte Letter* Attach. at 3-5; *see also* BT Americas Comments at 9; Covad Comments at 28; Time Warner Telecom Opposition at 31-32; Washington Public Counsel Comments at 9.

[120] We note that, under Commission precedent, a carrier that has been found to possess market power, and thus be dominant, with respect to particular services remains so classified absent an affirmative finding of changed competitive conditions. *See, e.g.*, *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21318-19, para. 45; *Section 272 Sunset Order*, 22 FCC Rcd at 16473, para. 64; *see generally Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

[121] *See, e.g.*, *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19438, para. 50 (denying forbearance from dominant carrier regulation of enterprise services); *see also ACS Dominance Forbearance Order*, 22 FCC Rcd at 16342-43, paras. 84-85 (denying forbearance from dominant carrier regulation of special access services).

2. Forbearance Analysis for Section 251(c)(3) Unbnndling Obligatious

34. This proceeding represents the fifth time an incumbent LEC has sought forbearance from section 251(c)(3) UNE obligations based on claims of robust facilities-based competition. In the *Triennial Review Remand Order*, the Commission tailored its unbundling rules to account for the presence of competition by establishing "triggers" designed to eliminate high-capacity loop and transport unbundling obligations with respect to wire centers with significant demand, such as in central business districts,[122] and by declining to order unbundling of network elements to provide service in the mobile wireless services market and long distance services market, due to the evolution of retail competition that has not relied upon UNE access.[123] The Commission did not believe it was appropriate at that time to render similar judgments for local exchange service and exchange access service. Nevertheless, the Commission announced that it might one day be appropriate to conclude, based upon sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition would justify forbearance from UNE obligations.[124] The Commission now has granted such relief in the *Qwest Omaha Forbearance Order*, the *ACS UNE Forbearance Order* and the *Qwest Terry Forbearance Order*[125] based on evidence that, among other things, the incumbent LEC had lost significant market share to facilities-based competitors that had substantial deployment of last-mile facilities capable of providing competing services in the wire center service areas where forbearance was granted.

35. We continue to follow the approach that the Commission adopted in the *Qwest Omaha Forbearance Order* and subsequent decisions for determining whether forbearance from unbundling

---

[122] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2588-96, 2625-29, paras. 93-106, 167-73 (2004) (*Triennial Review Remand Order*), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[123] *Triennial Review Remand Order*, 20 FCC Rcd at 2553-55, para. 36; 47 C.F.R. § 51.309(b) ("A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.").

[124] *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, paras. 38-39; *see also id.* at 2556, para. 39 n.116. Some parties suggest that the Commission should analyze "impairment" in determining whether to grant forbearance from UNE obligations. *See, e.g.*, Colorado Commission Comments at 23-27; CLEC Group Reply at 5. As we have stated in the past, the Commission's unbundling framework, while instructive in a section 10(a) forbearance proceeding, does not bind the Commission's forbearance review. *See, e.g.*, *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19423-24, 19445, paras. 14 n.47 & 61 n.161; *ACS UNE Forbearance Order*, 22 FCC Rcd at 1961, para. 5 n.13. In a forbearance proceeding, Congress has charged the Commission with determining whether the standards of section 10(a) are satisfied; those standards are not identical to the standards of section 251(d)(2). *Compare* 47 U.S.C. § 160(a) *with* 47 U.S.C. § 251(d)(2); *see also Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, para. 39 (stating that incumbent LECs are free to seek forbearance from unbundling rules in specific geographic markets once section 251(c) has been fully implemented "and the other requirements for forbearance have been met"); *AT&T v. FCC*, 236 F.3d at 738 (stating that Congress established § 10 as an "independent means" of obtaining deregulatory relief).

[125] Given the characteristics of the markets at issue in the instant proceeding, we look for guidance first to the Commission's precedents involving Omaha, Anchorage, and the markets addressed in the Verizon 6 MSA proceeding. *See supra* para. 10 (stating that the Terry exchange was unique as compared to the other markets at issue in the Commission's UNE forbearance precedents); *see also Qwest Terry Forbearance Order*, 23 FCC Rcd at 7264, para. 13 (noting the "relatively small size of the Terry exchange, its relative isolation from major metropolitan areas, and the absence of any large business customers").

obligations is warranted under the section 10 criteria.[126] By carefully applying this precedent, we determine that forbearance from the application to Qwest of the section 251(c)(3) obligations to provide unbundled access to loops, subloops, and transport to competitors in the four MSAs does not meet the standards set forth in section 10(a). Specifically, the record evidence in this proceeding demonstrates that Qwest is not subject to a sufficient level of facilities-based competition in the four MSAs to grant relief under the Commission's precedent. We therefore deny the Qwest Petitions with respect to the request for forbearance from UNE obligations. While the current evidence of facilities-based competition in these MSAs is insufficient to justify forbearance, we note that the evidence does show that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers.[127] Thus, future relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs.

36. *Section 10(a)(1) – Charges, Practices, Classifications, and Regulation.* We begin our analysis by examining competition in the retail and wholesale markets in the relevant MSAs.[128] As we

---

[126] We reject Qwest's argument that the Commission's analysis of market share in the *Verizon 6 MSA Forbearance Order* marked a departure from the ACS and Omaha decisions. *See, e.g.*, Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 1-2; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 6-7; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 1-2; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 1-2; *see also Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37 n.113 (rejecting a similar argument made by Verizon). The framework the Commission used to determine whether forbearance was warranted in the Verizon 6 MSA proceeding was patterned after, and no more stringent than, the framework the Commission used for determining whether forbearance was warranted in the Qwest Omaha and ACS UNE forbearance proceedings. *See, e.g.*, Letter from John T. Nakahata, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-4 (filed Apr. 14, 2008) (disputing Qwest's contention that the *Verizon 6 MSA Forbearance Order* was not based on precedent and explaining why the Commission's approach was reasonable); Time Warner Telecom Opposition at 11 (stating that the Commission's UNE forbearance precedent requires that an "intermodal competitor has demonstrated substantial success in winning retail market share by providing service over its own network"). In any event, pursuant to section 10(b), the Commission is required to consider competition when evaluating forbearance petitions and considering market shares in our analysis fits squarely within this directive. *See* 47 U.S.C. § 160(b).

[127] Cox submitted coverage estimates for its network in the Phoenix MSA, which show that Cox satisfies the 75 percent coverage threshold in certain Qwest wire centers in this market. *See* Cox June 17, 2008 *Ex Parte* Letter, Attach at 2; *see also* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 (filed July 7, 2008) (seeking clarification of Cox's coverage estimates). Because we do not find sufficient facilities-based competition in the Denver, Minneapolis-St. Paul or Seattle MSAs to warrant forbearance, we need not make any specific findings regarding the sufficiency of Qwest's methodology in estimating cable coverage in those MSAs. *See* Letters from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed April 2, 2008) (three separate letters showing cable coverage estimates in the Denver, Minneapolis-St. Paul, and Seattle MSAs); Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 25 (arguing that the Commission should dismiss Qwest's information).

[128] *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19447, para. 65; *ACS UNE Forbearance Order*, 22 FCC Rcd at 1974, para. 27; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37. In accord with our precedent, we see no benefit in limiting our competitive analysis solely to the wholesale market as some commenters have suggested. *See, e.g.*, Arizona Commission Reply at 30-31; CLEC Group Reply at 5. We also decline to follow the recommendation of the Arizona Commission to use zip codes as the relevant geographic area for purposes of UNE analysis in the Phoenix MSA. *See* Arizona Commission Comments at 14-15; Arizona Commission Reply at 7 (stating that the use of data at the zip code level would produce better and more accurate results). Although we appreciate the efforts of the Arizona Commission, the approach we adopt in this order is consistent with the Commission's prior orders and appropriately balances the deregulatory aims of section 10 with interests in administrability. *ACS UNE Forbearance Order*, 22 FCC Rcd at 1968-69, para. 16. In addition, we find the most up-to-date and reliable data submitted for the Phoenix MSA was submitted on an MSA or wire center basis rather than zip code basis. Zip code boundaries generally do not correspond to wire center boundaries, and no party suggested a reliable way to translate zip code based data to wire center based data. *See* Arizona Commission Reply at 11 (showing **[REDACTED]** zip codes are shared by the Qwest wire centers for which Qwest seeks relief and that (continued….)

held above, with respect to retail competition for mass market customers,[129] we are unable to find that Qwest's MSA-wide mass market market shares, even including competition from section 251(c)(4) resale and Qwest's QPP/QLSP service,[130] and taken in conjunction with other factors, are sufficient to warrant forbearance from dominant carrier regulation.[131] Consistent with our precedent, we likewise are not persuaded that these data, in themselves, support the grant of forbearance from UNE obligations.[132] Moreover, the record evidence indicates that competition from cable operators in the four MSAs currently does not, without more, provide a sufficient basis for relief.[133] Nor does the record reveal that other competitors in these MSAs have deployed their own extensive last-mile facilities for use in serving the enterprise market.[134] Although Qwest and others submitted data regarding competitive LEC lit buildings, the facilities "coverage" suggested by those data do not approach the 75 percent threshold relied upon by

(Continued from previous page)
only **[REDACTED]** zip codes within the area covered by these wire centers are in a single Qwest wire center service area). In any event, the underlying data on which the Arizona Commission based its summaries were not submitted to the record in the instant proceeding, making comparisons between the two records infeasible.

[129] In accord with our precedent, we decline to formally define product markets pursuant to a market power analysis for purposes of our UNE forbearance analysis as certain commenters requested. *See, e.g.*, CLEC Group Comments at 8-9 (asking the Commission to divide the product markets into the mass market, small business, and enterprise, and for each category of transport or loop facility that must be unbundled); CLEC Group Reply at 8-9; Arizona Commission Reply at 31-32 (claiming that the business market should be completely separate from the mass market and then disaggregated into small, medium and large segments); Time Warner Telecom Opposition at 8. The Commission has never formally defined product markets for purposes of its UNE forbearance analysis, and nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here. *See ACS UNE Forbearance Order*, 22 FCC Rcd at 1965-66, para. 12.

[130] For purposes of our UNE analysis, some parties argue that the Commission should exclude Qwest's QPP/QLSP and resold lines from the market share calculation. *See, e.g.*, Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 8; Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6 (filed July 9, 2008). However, these services are not affected in this proceeding and, as explained above, the Commission has included these lines in the past and we see no reason to exclude them here. *See supra* note 64.

[131] *See supra* paras. 21 & 27 (setting forth Qwest's market shares in the 4 MSAs). For the reasons explained above, we find the record does not contain data sufficient to evaluate the extent of wireless substitution in the specific markets at issue. We therefore do not need to address the merits of arguments regarding the inclusion of wireless substitution in our UNE forbearance analysis.

[132] *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37 n.113 (citing precedent). Our analysis extends beyond this point because we do not rely on market share as the "sole determining factor in deciding" the outcome of this proceeding. *See* Qwest July 15, 2008 *Ex Parte* Letter at 7-8.

[133] *See supra* note 106.

[134] *See* XO May 20, 2008 *Ex Parte* Letter at 2 (revealing that XO has constructed its own high-capacity loops to at most **[REDACTED]** commercial buildings in any of the 4 MSAs); PAETEC June 30, 2008 *Ex Parte* Letter at 2 (revealing that PAETEC has lit fiber connected to at most **[REDACTED]** commercial buildings in any of the 4 MSAs); Time Warner June 30, 2008 *Ex Parte* Letter at 4 (revealing that Time Warner has constructed its own high-capacity loops to at most **[REDACTED]** commercial buildings in any of the 4 MSAs); Integra July 1, 2008 *Ex Parte* Letter at 1 (revealing that Integra provides high-capacity retail circuits to, at most **[REDACTED]** commercial buildings in the Phoenix and Seattle MSAs). *See also* CLEC Group Reply at 15-16 ("As of August 2007 there were 125,379 commercial buildings in Minneapolis, of which only **[REDACTED]** had a lit CLEC presence."); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 4, 8 (noting that cable providers provide the "vast majority" and "by far the largest source of facilities-based competition" in the Minneapolis-St. Paul MSA); Arizona Commission Comments at 21; BT Americas Comments at 6; COMPTEL Opposition at 40-41; Covad Comments at 40-41; Cox Comments at 17.

the Commission in the past.[135] Indeed, there is record evidence that some of the competition from competitive LECs for enterprise services in these MSAs instead depends on access to Qwest's own facilities, including UNEs.[136] Lacking significant evidence of the type of last-mile facilities-based competition the Commission relied on in the *Qwest Omaha* and *ACS UNE* forbearance proceedings to grant relief, we find that the criteria of section 10(a) are not satisfied with respect to Qwest's request for forbearance from UNE obligations in these MSAs.

37. We also examine the role of the wholesale market. The record does not reflect any significant alternative sources of wholesale inputs for carriers in the four MSAs.[137] Although Qwest cites

---

[135] *See* Qwest Denver Brigham/Teitzel Decl. at para. 34 (stating that the number of non-Qwest fiber is now being used to serve almost [REDACTED] buildings in the Denver MSA); Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 37 (similar); Qwest Phoenix Brigham/Teitzel Decl. at para. 34 (similar); Qwest Seattle Brigham/Teitzel Decl. at para. 37 (similar). We note that certain competitive LECs placed data in the record regarding the number of commercial buildings located within 300 or 1000 feet of the competitive LEC's fiber network. *See supra* note 134 (citing these submissions). As these competitive LECs explain, it frequently would not be economically feasible to construct loops over that distance in the absence of a demand level that exceeds levels for which UNEs are available, and we lack sufficient record data to make any specific conclusions regarding the coverage of these competitive LECs' networks. Finally, Qwest does not attempt to justify the use of a different threshold when evaluating competitive LEC lit buildings, other than the 75 percent threshold relied upon in the context of cable facilities deployment in prior orders. Nor do we find any other basis in the record here to adopt a different approach. *See also Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21314, para. 37 n.118.

[136] Qwest Denver Brigham/Teitzel Decl. Exh. 2; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 2; Qwest Phoenix Brigham/Teitzel Decl. Exh. 2; Qwest Seattle Brigham/Teitzel Decl. Exh. 2. To illustrate, in the Phoenix MSA, Qwest states that it provides more than [REDACTED] DS1 UNEs loops and approximately [REDACTED] DS1 UNE EELs in addition to a significant number of other categories of UNEs, and the data from the other 3 MSAs also demonstrate competitive LECs' significant reliance on UNEs to compete. Qwest Phoenix May 2, 2008 *Ex Parte* Letter, Attach. 7; *see also* Qwest Denver May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Seattle May 2, 2008 *Ex Parte* Letter, Attach. 7; AdHoc Selwyn Decl. paras. 26-27; CLEC Group Comments at 20; CLEC Comments at 20-21, 33-38, 54-55; COMPTEL Opposition at 33 (stating that in contrast to Omaha, a significant number of competitors in the Denver, Minneapolis, Phoenix and Seattle MSAs use Qwest UNE loops as the primary vehicle for serving and acquiring customers); Letter from Genevieve Morelli, Counsel to Covad Communications Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 10-17 (filed June 10, 2008).

[137] *See, e.g.*, Letter from Arizona Corporation Commission, Commissioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 (filed June 18, 2008) (Arizona Commission June 18, 2008 *Ex Parte* Letter) (noting the lack of significant wholesale alternatives in the wire centers where Qwest seeks relief); Letter from John T. Nakahata and Stephanie Weiner, Counsel to EarthLink, Inc. and New Edge Networks, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 15, 2008 (contending that EarthLink and New Edge Networks are not aware of any mass market or enterprise wholesale alternatives that do not rely on Qwest's facilities in the areas in the 4 MSAs where these providers offer service). We acknowledge that Qwest submitted some evidence that Cox offers wholesale DS1 and DS3 loop and transport services, which can be channelized, in the Phoenix MSA. *See* Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4-5 (filed May 22, 2008). But we are unable to determine on this record that Cox is a significant provider of wholesale enterprise services in this MSA. Qwest also submitted evidence that Nextlink provides fixed wireless alternatives for wholesale customers seeking DS3 or multiple DS1 loop and transport alternatives. *See* Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8-9 (filed May 15, 2008) (Qwest May 15, 2008 *Ex Parte* Letter). For similar reasons, we decline to find that Nextlink is a significant provider of wholesale enterprise services in this MSA. *See, e.g.*, Letter from Brad Mutschelknaus & Genevieve Morelli, Counsel to Covad Communications Group *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6-7 (filed June 16, 2008) (Covad *et al.* June 16, 2008 *Ex Parte* Letter) (explaining that the GeoResults survey data includes Nextlink which supports that this provider has very few last-mile facilities in the markets at issue and providing additional evidence that fixed wireless (continued....)

a significant amount of retail enterprise competition relying upon Qwest's special access services and UNEs,[138] we found above that the levels of facilities-based competition do not justify forbearance and the evidence of additional competition that relies on Qwest's wholesale services is insufficient to warrant forbearance. We note that Qwest has received relief, or has pending claims of entitlement to relief, from unbundling obligations in wire centers in all four MSAs, based on the competitive triggers established in the *Triennial Review Remand Order*.[139]

38. The other evidence that Qwest has submitted does not overcome the findings above regarding the levels of facilities-based competition. First, we reject Qwest's attempt to demonstrate the MSAs are competitive by calculating percentage reductions in retail lines.[140] As the Commission has explained, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but, for example, may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.[141] The record in this proceeding also indicates that there are other possible reasons for such decrease.[142]

39. Further, we acknowledge that Qwest has submitted assorted competitive fiber network data, including fiber network maps; the number of route miles on these networks; the percentage of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors' web-sites

(Continued from previous page)
has not become a significant wholesale alternative to date); *see also* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 1, 2008).

[138] Qwest Denver Brigham/Teitzel Decl. Exh. 2; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 2; Qwest Phoenix Brigham/Teitzel Decl. Exh. 2; Qwest Seattle Brigham/Teitzel Decl. Exh. 2; Qwest Denver May 2, 2008 *Ex Parte Letter*, Attach. 7; Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Phoenix May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Seattle May 2, 2008 *Ex Parte* Letter, Attach. 7.

[139] *See* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; *see also* Arizona Commission June 18, 2008 *Ex Parte* Letter at 4 (stating that the Arizona Commission "will act on [Qwest's] petition shortly" in which Qwest purports that it meets certain *Triennial Review Remand Order* UNE triggers in eight additional wire centers in the Phoenix MSA); Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attach. (filed June 27, 2008) (listing 3 additional wire centers in the Phoenix MSA, and 8 additional wire centers in the Minneapolis-St. Paul MSA, where Qwest contends it satisfies the non-impairment thresholds for loop and transport facilities established in the *Triennial Review Remand Order*).

[140] Qwest has submitted tables summarizing its loss of switched access lines from 2000 to 2006. Qwest Denver Brigham/Teitzel Decl. at para. 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 5; Qwest Phoenix Brigham/Teitzel Decl. at para. 5; Qwest Seattle Brigham/Teitzel Decl. at para. 5. Qwest updated these tables with its loss of switched access lines from 2006 to 2007. *See* Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10; Qwest Phoenix Feb. 21, 2008 *Ex Parte Letter* at 4; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 6.

[141] *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88 (citing Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005) (noting that the decline of lines provided by wireline carriers might be due to some households eliminating second lines when they move from dial-up Internet service to broadband service)).

[142] *See, e.g.*, Covad Comments at 24; Covad Reply at 9; Cbeyond *et al.* June 12, 2008 *Ex Parte* Letter at 2 (stating that Qwest's own responses confirm that there are many reasons why customers disconnect service for reasons other than successful competition); Letter from Brad Mutschelknaus and Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3-4 (filed July 11, 2008), redacted version corrected by errata (filed July 15, 2008) (arguing that Qwest's switched access line losses are more than offset by Qwest's increases in non-switched access lines due to customer migration); *see also* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 3; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 3; Qwest Phoenix Apr. 22 *Ex Parte* Letter, Attach. 3; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 3.

describing their service offerings and territories.[143] We are not persuaded that they overcome the shortage in facilities-based competition shown above. For example, the fiber maps submitted by Qwest do not contain sufficient detail upon which the Commission could base a forbearance determination, and the Commission previously has found that such maps provide only limited evidence of market-wide deployment.[144] Similarly, just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the Commission's unbundling rules,[145] we also find that such data have limits for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center.

40. Finally, we address record evidence of the number of lit buildings.[146] Qwest does not provide any comparative data for the number of buildings with demand for high-capacity services that Qwest serves, and the percentage of all commercial buildings that competitors serve with their own fiber facilities is extremely small on a relative basis – 0.17 percent to 0.26 percent.[147] Also, in those MSAs where relief has already been partially granted by virtue of the impairment triggers, Qwest's submission counts all lit buildings indistinguishably. Although the accuracy and reliability of these data are

---

[143] *E.g.*, Qwest Denver Petition at 26-27; Qwest Denver Brigham/Teitzel Decl. at paras. 34-35 & Exh. 4; Qwest Minnesota Petition at 26-27; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at paras. 37-38 & Exh. 4; Qwest Phoenix Petition at 26-27; Qwest Phoenix Brigham/Teitzel Decl. at paras. 34-35 & Exh. 4; Qwest Seattle Petition at 26; Qwest Seattle Brigham/Teitzel Decl. at paras. 37-38 & Exh. 4.

[144] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2583, para. 82 ("These maps confirm that competitive fiber consistently is located in and around the core business district of every major city – and not necessarily elsewhere. Due to the wide variability in market characteristics within an MSA, MSA-wide conclusions would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy." footnotes omitted)); *Verizon/MCI Merger Order*, 20 FCC Rcd at 18455-56, para. 45 n.123 (cautioning that the evidence such maps provide is limited).

[145] *Triennial Review Remand Order*, 20 FCC Rcd at 2597, para. 110 ("These data are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions."). Similarly, to the extent Qwest introduces evidence that competitors advertise various telecommunications services, we find that such evidence lacks the specificity needed to grant forbearance and, for example, does not distinguish between competitive services that are self-provisioned from those provided using UNEs. *See, e.g.*, Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 2-3 (citing press releases and news reports).

[146] *See supra* notes 134-135. Based on GeoTel database, Qwest reports the number of buildings in each of the 4 MSAs that are served by competitive fiber. Qwest Reply at 49.

[147] *See, e.g.*, Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 20; *see also* Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. (filed Apr. 23, 2008) (GeoResults data) (showing by wire center service area the number of commercial buildings, the percent of commercial buildings served by facilities-based competitive LECs, and the total aggregated demand in DS0 equivalents); Covad *et al.* June 16, 2008 *Ex Parte* Letter at 5-7 (explaining the scope of the GeoResults data); Time Warner Telecom Opposition at 3-4 (citing GAO statistics showing that competitors have deployed loop facilities to only 5.7 percent of the commercial buildings with demand of DS1 or greater in Minneapolis-St. Paul, 3.7 percent of such buildings in Phoenix and 3.8 percent of such buildings in Seattle, and providing the actual percentage of commercial buildings in the 4 MSAs to which Time Warner Telecom has constructed loops); *see also id.* at 21 (stating that "Eschelon relies exclusively on Qwest loops to serve business customers" in the markets at issue in this proceeding). Although Qwest claims that the GeoResults data are in error because they include 141 wire center service areas where Qwest does not seek forbearance, we find it highly unlikely that removing these areas from the data would result in a coverage estimate approaching the 75 percent threshold relied upon by the Commission in the past. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-2 (filed July 21, 2008); *see also supra* note 135.

challenged on our record,[148] we do not reach the question of whether we could forbear based on these data.

41. In support of its request for UNE relief, Qwest also argues that competitors are competing extensively using special access rather than UNEs when providing service over Qwest's facilities.[149] While Qwest ean demonstrate a fair amount of retail enterprise competition using Qwest's special access services and UNEs, consistent with the Commission's precedent, competition that relies on Qwest's own facilities is not a sufficient basis to grant forbearance from UNE requirements.[150]

42. *Section 10(a)(2) – Protection of Consumers*. The second prong of section 10(a) states that the Commission shall forbear if "enforcement of such regulation or provision is not necessary for the protection of consumers."[151] For reasons similar to those set forth in the previous section, we conclude that UNEs are still necessary for the protection of consumers in these MSAs. There is insufficient evidence of competition from other last-mile facilities-based providers for us to determine that consumers will be protected if we forbear from Qwest's unbundling obligations.

43. *Section 10(a)(3) – Public Interest*. We also find that relieving Qwest from the section 251(c)(3) access obligations for loop, certain subloop, and transport elements is not in the public interest under section 10(a)(3).[152] Having found above that UNEs remain necessary for the protection of consumers and to ensure just and reasonable and not unjustly and unreasonably discriminatory, prices, terms and conditions in these MSAs, we conclude that forbearing from UNE obligations is not in the public interest.[153]

---

[148] *See, e.g.*, Time Warner Telecom Opposition at 28; Qwest May 15, 2008 *Ex Parte* Letter at 7-8.

[149] *See* Qwest Denver Petition at 24; Qwest Minneapolis-St. Paul Petition at 24-25; Qwest Phoenix Petition at 24-25; Qwest Seattle Petition at 24.

[150] *See, e.g.*, *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21317-18, para. 42.

[151] 47 U.S.C. § 160(a)(2).

[152] 47 U.S.C § 160(a)(3). In making its public interest determination, the Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *Id.* § 160(b).

[153] Because we otherwise are denying Qwest's request for forbearance from UNEs in the 4 MSAs, we need not specifically address the remaining arguments why these forbearance requests should be denied. *See, e.g.*, Covad Comments at 22 (stating that the Commission cannot rely here on the same predictive judgment it exercised in Omaha regarding Qwest's future behavior and how that conduct would impact competition if forbearance is granted); Washington Commission Comments at 3 (claiming that if the Commission were to grant Qwest's forbearance petition, it "would undercut the very foundation and delicate balance" of past state decisions").

3. Forbearance Analysis for *Computer III* Requirements

44. We deny Qwest's request for forbearance from *Computer III* requirements.[154] We cannot find on the record before us that the application of the *Computer III* requirements is unnecessary within the meaning of section 10(a) of the Act.[155] Although Qwest asserts that forbearance from the *Computer III* requirements is justified, there is no evidence in the record demonstrating why, on balance, the *Computer III* requirements are not necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [Qwest's local exchange and exchange access services] are just and reasonable and are not unjustly or unreasonably discriminatory" and necessary for the protection of consumers.[156] As we explained in the *Verizon 6 MSA Forbearance Order*, the Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards in order to prevent the BOCs from using "exclusionary market power" arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market.[157] The record here does not demonstrate that Qwest no longer possesses exclusionary market power, and thus as in the *Qwest Section 272 Sunset Order*, we must assume that Qwest still possesses such market power.[158] Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations . . . for[] or in connection with" Qwest's interexchange services that are unjust, unreasonable, or "unjustly or

[154] Qwest clarified that it was seeking relief "from the application of the Commission's *Computer III* requirements, including [CEI and ONA] requirements, to the mass market and enterprise switched access services at issue here to the extent that Qwest offers information services in conjunction with such services" and "formally withdraws its request for forbearance from the *Computer III* requirements of transmission access and nondiscrimination in light of earlier Commission decisions." *See* Qwest June 13, 2008 *Ex Parte* Letter at 5. Qwest also clarified that its forbearance request does not extend to Qwest information services to the extent that they incorporate telecommunications components other than the services at issue here and maintains its request as to the BOC-specific *Computer III* obligations, which will allow Qwest to respond quickly to customer demands for information services with innovative offerings. *Id.* We note that Qwest previously has obtained significant relief from *Computer III* requirements. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14875-76, para. 41 (2005), *aff'd*, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. Oct. 16, 2007). Our actions in this Order do not disturb regulatory relief from *Computer III* requirements that Qwest already has obtained.

[155] 47 U.S.C. § 160(a).

[156] *See* Qwest Reply at 55-56 (arguing that the traditional reason for the *Computer Inquiry* rules was that the telephone was the primary, if not exclusive means through which information service providers can gain access to their customers).

[157] *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21318, para. 45; *see also Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, 466-67, para. 216 (1980) (subsequent history omitted); *Computer III Phase I Order*, 104 FCC 2d at 1013, para. 100. "Exclusionary" (or "Bainian") market power, which is the "ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output." *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15802-03, para. 83 (1997) (citing Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 249-53 (1987)), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999).

[158] *See Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 47 (stating that "Qwest has failed, however, to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network."); *see also Section 272 Sunset Order*, 22 FCC Rcd at 16449-50, para. 17.

unreasonably discriminatory" and could harm consumers. Such results would be contrary to the public interest. We thus are unable to find on this record that forbearance from the *Computer III* requirements satisfy any of the criteria of section 10(a).

IV. EFFECTIVE DATE

45. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, July 25, 2008.[159] The time for appeal shall run from the release date of this order.

V. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the Qwest Corporation's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs, filed April 27, 2007, ARE DENIED as set forth herein.

47. IT IS FURTHER ORDERED that, for the reasons set forth above, Qwest's Motion to Object to the Disclosure of Qwest's Confidential Information to the Chief Executive Officer of Integra Telecom, filed on June 19, 2007, IS DISMISSED.

48. IT IS FURTHER ORDERED that, for the reasons set forth above, Qwest's Petition to Modify Protective Order, filed on June 29, 2007, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[159] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a) ("The Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action.").

APPENDIX A

Comments/Oppositions to the Qwest 4 MSA Petitions for Forbearance in WC Docket No. 07-97

Commenter/Opponent	Abbreviation
Ad Hoc Telecommunications Users Committee	AdHoc
Affinity Telecom, Inc. *et al.*	CLEC Group
Ann P. Bowling	Ann P. Bowling
Arizona Corporation Commission	Arizona Commission
BT Americas Inc.	BT Americas
Colorado Office of Consumer Counsel	Colorado Office of Consumer Counsel
Colorado Public Utilities Commission	Colorado Commission
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Covad Communications Group, NuVox Communications, XO Communications, LLC	Covad
Cox Communications, Inc.	Cox
EarthLink Inc. and New Edge Network, Inc.	EarthLink
Independent Business Association	IBA
National Association of State Utility Consumer Advocates	NASUCA
New Jersey Division of Rate Counsel	New Jersey Rate Counsel
The Public Counsel Section of the Washington State Attorney General's Office and the Washington Electronic Business and Telecommunications Coalition	Washington Public Counsel
The Voice on the Net Coalition	VON Coalition
Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc.	Time Warner Telecom
Washington Utilities and Transportation Commission	Washington Commission

Replies to the Qwest 4 MSA Petitions for Forbearance in WC Docket No. 07-97

Replies	Abbreviation
Affinity Telecom, Inc. *et al.*	CLEC Group
Arizona Corporation Commission	Arizona Commission
Colorado Office of Consumer Counsel	Colorado Office of Consumer Counsel
Covad Communications Group, NuVox Communications, XO Communications, LLC	Covad
EarthLink Inc. and New Edge Network, Inc.	EarthLink
Independent Business Association	IBA
National Association of State Utility Consumer Advocates	NASUCA
New Jersey Division of Rate Counsel	New Jersey Rate Counsel
Qwest Corporation	Qwest
Sprint Nextel Corporation	Sprint Nextel
T-Mobile USA, Inc.	T-Mobile

APPENDIX B

Residential Market Share

We estimate Qwest's residential market share for each MSA by employing a two step procedure.[1]

Step 1. We estimate the total number of households that have telephone service (whether wireline or mobile wireless) and the number of households that exclusively subscribe to mobile wireless service (*i.e.* households that are wireless only).[2] We further assume that the typical wireline household has one wireline phone.[3]

(Qwest + CLEC)	$= (1\text{-WOH}) * C_{telephone}$
Where,	
WOH	= The percentage of wireless-only households expressed in decimal notation.
$C_{telephone}$	= The total number of households with telephone service (whether wireline or mobile wireless).
Qwest	= Qwest residential local service lines[4] + Qwest residential fixed VoIP subscriber counts[5]
CLEC	= Qwest residential resold lines + Qwest residential platform service lines (QPP+ QLSP lines)[6] + facilities-based residential access lines[7]

[1] This approach is consistent with our methodology for calculating market share in prior orders. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21323, App. B.

[2] *See supra* paras. 19-22 (explaining the need for reliable geographically-specific data).

[3] In December 2006, there were 72.8 million primary residential lines and 8.5 non-primary residential lines nationwide. *See* Statistics of Common Carriers, Table 2.4 - Access Lines in Service by Customer for Reporting Incumbent Local Exchange Carriers as of December 31, 2006, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282813A1.pdf. This suggests that 88% of households with wireline service have a single wireline phone.

[4] Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5 (providing residential data as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10 (same); Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 4 (same); Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 5 (same).

[5] Qwest Denver May 20, 2008 *Ex Parte* Letter, Attach. 8 (providing Qwest's fixed VoIP subscriber counts as of December 2007); Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Phoenix May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Seattle May 20, 2008 *Ex Parte* Letter, Attach. 8 (same). Qwest's residential VoIP counts include customers that are using the service for "both inbound and outbound local calling." *Id.*

[6] Qwest Denver Mar. 10, 2008 *Ex Parte* Letter, Exh. 2; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter, Exh. 2; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter, Exh. 2; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter, Exh. 2.

[7] For facilities-based residential access lines in Denver, Minneapolis-St. Paul, and Seattle, we undo the adjustments Qwest made to its estimate of facilities-based competitive LEC access lines in service in accord with the Commission's precedent. *See* Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 6 (Qwest's white page estimates as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10-11 (same); Qwest Seattle Mar. 5, (continued....)

Rearranging the expression yields,

$C_{telephone}$ = (Qwest + CLEC)/(1-WOH).

We estimate, $Wireless_{CTC}$, the total number of mobile wireless-only households, by

$Wireless_{CTC}$ = $C_{telephone}$ - Qwest - CLEC.

Step 2. We estimate Qwest's market share as follows:

MS_{Qwest} = [Qwest + Qwest-$wireless_{CTC}$] / [Qwest + CLEC + $Wireless_{CTC}$]

Where,
Qwest-$Wireless_{CTC}$ = Wireless-only households subscribing to Qwest wireless service.[8]

(Continued from previous page)
2008 *Ex Parte* Letter at 6 (same); *see also supra* note 68. For facilities-based residential access lines in the Phoenix MSA, we rely on data provided by Cox. Cox June 17, 2008 *Ex Parte* Letter, Attach. at 3-5.

[8] Qwest submitted various estimates of its share of mobile wireless households and Qwest's wireless subscribers. *See* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (estimating Qwest's share of mobile wireless households in the MSA using TNS Telecoms data and statewide wireless data and Qwest's wireless subscribers); Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); *see also* Qwest June 13, 2008 *Ex Parte* Letter at 5 (clarifying that Qwest's wireless subscriber counts are the same as the number of wireless phone numbers). In light of our questions about the reliability of certain data in this proceeding, we do not address the merits of Qwest's estimates of its share of mobile wireless households. Rather, as in prior proceedings, we use the Numbering Resource and Utilization Forecast (NRUF) database and the number of Qwest's wireless phone numbers to estimate Qwest's share of mobile wireless-only households in the geographic area at issue. We reiterate our insistence on reliable and geographically specific data in future forbearance proceedings, but find that Qwest has not sufficiently supported its case for forbearance on the basis of such evidence here. *See supra* paras. 19-22. We do not find sufficient evidence in the record to exclude other incumbent LEC-affiliated wireless carriers operating in Qwest's region from the competitors' market share. *See, e.g.*, Letter from Thomas Jones, Counsel for Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4-6 (filed July 22, 2008). Nor do we find sufficient evidence in the record to exclude Qwest's wireless service from its market share. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3-5 (filed July 1, 2008), corrected by errata (filed July 2, 2008); AT&T July 18, 2008 *Ex Parte* Letter at 5-6.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Petitions of Qwest 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

The Commission adopted an Order denying forbearance petitions by Qwest for relief from network sharing and other obligations in four Metropolitan Statistical Areas (MSAs). Qwest requested relief similar to the relief the Commission granted the company in Omaha. Although significant competition exists in Qwest's markets, particularly in Phoenix, the Commission determined based on the specific market facts provided to us that Qwest's petitions did not provide sufficient evidence to conclude that regulatory relief like that afforded the company in Omaha was warranted. As competition in these markets continues to develop, I am happy to reevaluate these markets based on updated market facts.

CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97

I support today's Order which denies petitioner forbearance relief from dominant carrier regulation and from its UNE and Computer III obligations. In doing so the Commission continues to advance the notion that its decisions in *Qwest-Omaha*, *ACS-Anchorage*, and *Qwest-Terry, Montana* were based on some truly unique sets of circumstances. In contrast, the Commission's denial of the *Verizon 6 MSA Forbearance Petitions* and today's denial of Qwest's petition for regulatory relief in Denver, Minneapolis-St. Paul, Seattle and Phoenix should hopefully send a signal to those considering similar requests that the Commission is cautious, even skeptical, of granting this kind of hurried and ill-considered relief. I support the denial of these petitions because to do otherwise would result in less competition and higher prices – to the clear detriment of consumers in the aforementioned metropolitan areas. As I have previously done in these types of cases, however, I limit myself to concurrence in this decision because the Commission herein relies too heavily on the intermodal efforts of a single alternative provider to decide whether we should forbear from the incumbent's retail and wholesale obligations. That is not the level of competition envisioned by our governing statute.

I continue to believe that the Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace. For example, as the Commission looks to establish policies that promote broadband the lack of competitive alternatives in this market are a severe drag on these efforts. As a recent study by the Pew Internet and American Life Project points out, 35% of dial-up users would switch to broadband if it were more affordable. More competition would certainly put downward pressure on broadband prices and yet the current cable-telephone form of competition has been insufficient to reach those with the least disposable income. Accordingly, I have always been extremely leery of the test established in *Qwest-Omaha* and its progeny that rely so heavily on cable-telephone competition to determine whether there is sufficient competition in the marketplace. I would have been more comfortable with an analysis less accepting of duopoly as a competitive marketplace and that did not lead us further down this road.

There was much debate in the record as to the role that "cut-the-cord" customers (those who use a wireless phone service in place of a wireline phone service) should play in the Commission's market share analysis. This is certainly an important question to be answered, particularly as the number of cut-the-cord customers grows. The Order concludes – too quickly in my view – that these customers should be included in the market share analysis. Important questions about what is the appropriate market, does wireless substitution act to constrain pricing, how do you account for the fact that wireless service is generally not a substitute in the business market, and what type of survey data is appropriate to be used are all questions that were not sufficiently considered. The Order's conclusion that cut-the-cord customers should be included in the market analysis may or may not withstand such a rigorous analysis but it is important to conduct such an analysis if we are going to grant such widespread relief on this basis in the future.

It is also important to note that the public service commissions in Colorado, Washington, Arizona, and Minnesota, as well as NASUCA and numerous consumer and public interest organizations strongly opposed these petitions. These commissions and organizations have a front row seat as to the level of competition that exists in the relevant cities today and the consumer harm that forbearance would cause. Certainly their strong concern is evidence that Qwest has not met the forbearance standard set forth in section 10 – permitting forbearance only where, among other things, current regulations are no longer needed to protect consumers and to serve the public interest.

Finally, while the final outcome in this case is a good one, I continue to be less than enthused about the forbearance process generally. Recent Congressional hearings suggest that some help may be on the way. Nevertheless, I continue to hope that the Commission begins to tack on our own towards industry-wide rulemakings, where appropriate, rather than continue with the piecemeal, time consuming, and resource heavy forbearance process. At a bare minimum, the Commission should complete its NPRM on forbearance procedures as expeditiously as possible.

For the foregoing reasons, I concur in today's decision.

CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *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

In today's decision, the Commission denies a yet another petition seeking broad exemption from the retail and wholesale obligations of Act and the Commission's rules. I agree with the Order's finding that the petitioner has not met its burden of showing that sufficient competitive conditions exist to justify the relief requested, a decision buttressed by the filings of numerous state commissions and consumer advocates with close vantage to the particular markets in question.

I concur in this decision because I continue to believe that the Commission could improve its analysis of local competitive conditions and the impact of forbearance on consumers. Petitions such as this would have a profound impact on the telecommunications and broadband options available to millions of business and residential customers. Given these implications, the Commission should base its decisions on careful and sound examination of specific geographic and product markets. I do agree with the Order's findings that the record here does not permit the Commission to determine with any degree of confidence that competition from mobile wireless providers would satisfy the statutory criteria for forbearance. The Commission grapples seriously with this question for the first time in this Order, but it is clear that there are many questions raised and more work to be done to determine the appropriate framework for weighing the impact of mobile wireless services, and wireless substitution in particular, in our competitive analysis.

As I've stated before, I also continue to be concerned about the Commission's balancing of the pro-competitive and deregulatory goals of the Act. Section 10 requires the Commission to consider, among other things, competitive conditions, the protection of consumers, and the public interest. It is apparent that the Act contemplates a competitive environment based on more than a simple rivalry – or duopoly – of a wireline and cable provider. The Commission must be ready to respond to a dynamic marketplace but it must also beware of the potential to lock consumers into a choice between two providers, a result that would have been more likely had relief been granted here and one that would fall short of the vital goals of the 1996 Act.

Finally, I must observe that the forbearance process continues to consume a tremendous amount of resources of the Commission, our state commission colleagues, and market participants. Moreover, the emerging cycle of filing and re-filing petitions for forbearance does little to promote regulatory stability in the market. I note that numerous Members of Congress have expressed concern about the forbearance process and, particularly, the "deemed grant" provision of section 10, which puts at peril the very standard for forbearance articulated by Congress. Although the decision about whether to modify the statute rests with Congress alone, I again encourage the Commission to do all it can by moving forward with our pending proceeding concerning the need for procedural rules to govern the forbearance process.