requirements of Section 251(c) and Section 271 to Qwest's operations in the Omaha MSA. As shown below, Qwest's forbearance request meets each of the statutory criteria established in Section 10(c) of the 1996 Act, and also satisfies Section 10(d)'s condition that these regulations have been "fully implemented" by Qwest.

A. Qwest Seeks Forbearance from the Requirements of Section 251(c) and from Specific Requirements of Section 271

Qwest requests that the Commission forbear from imposition of the requirements of Section 251(c) and the requirements that it provide nondiscriminatory access to unbundled network elements pursuant to Section 271(c)(2)(B).

B. Qwest Meets Each of the Section 10 Criteria for Forbearance

Section 10(c) of the 1996 Act requires that the Commission "forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission finds that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;[67]

(2) enforcement of such regulation or provision is not necessary for the protection of consumers;[68] and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[69]

67 47 U.S.C. § 160(a)(1).

68 47 U.S.C. § 160(a)(2).

69 47 U.S.C. § 160(a)(3).

In making the public interest determination, Section 10 requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[70]

As shown below, Qwest satisfies each of the forbearance criteria in Section 10(c), as well as Section 10(d)'s requirement that the requirements of these provisions of Section 251(c) or Section 271 have been "fully implemented" by Qwest in the Omaha MSA.

1. Enforcement of Section 251(c) and Section 271 is no Longer Necessary to Ensure Reasonable and Nondiscriminatory Charges, Practices, Classifications and Justifications by Qwest

As discussed above, it is plain that Qwest no longer occupies the dominant market position of an ILEC in the Omaha MSA from a competitive standpoint. It is also clear that as a consequence of the intense and established status of competition in the Omaha MSA telecommunications market, Qwest no longer has either the market power or the monopoly on facilities that is assumed in Section 251(c) and in Section 271. As a result, it is no longer necessary for Qwest to meet the selected Section 251(c) and Section 271 requirements identified above in order to maintain or ensure "reasonable and nondiscriminatory charges, practices, classifications and justifications." The Commission must therefore eliminate the regulatory asymmetry between Qwest and its competitors in the Omaha MSA – which is neither sustainable nor justifiable – and grant Qwest forbearance from the specific Section 251(c) and Section 271 obligations identified above. Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[71]

Section 251(c) requires ILECs – and only ILECs – to meet certain specified obligations

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[70] 47 U.S.C. § 160(b).

[71] 47 U.S.C. § 160(a)(1).

with respect to providing other carriers with interconnection, access to UNEs such as switching and loops, resale of their retail services, notification of interoperability changes to their facilities or networks, and with physical collocation of equipment in their facilities.[72] The express purpose of these provisions has been to prevent discrimination by the ILECs and to encourage competition by other carriers.[73] Likewise, Section 271 requires ILECs that are also Bell Operating Companies ("BOCs") – such as Qwest – to meet a checklist of Section 251(c) items as a precondition of providing in-region interLATA services. In sharp contrast to Qwest's regulatory obligations, none of Qwest's competitors are regulated as ILECs or as BOCs, and none of Qwest's competitors are subject to the unbundling requirements of Section 251(c) or Section 271.

It is clear that the Commission cannot maintain resale, interconnection and unbundling requirements that are uniquely imposed on ILECs and BOCs in markets where competition has developed to the point where the LEC/BOC is just one of several facilities-based competitors.[74] There is no reasonable basis for thinking that competition will be impaired in the event of forbearance from Section 251(c) and Section 271.[75] In such circumstances, the legal and policy underpinnings for unbundling simply no longer exist. This is true not just because of Qwest's reduced market share but also because Qwest shares the Omaha MSA telecommunications

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[72] *See* 47 U.S.C. § 251(c)(2)-(6); *see also* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 121-22 (1996).

[73] *Id.* at 117-118.

[74] In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999), the Supreme Court stressed that the Commission cannot blind itself to the availability of elements outside the ILEC's network, including self-provisioning and leasing from other providers, when implementing the Section 251 impairment standard in the *UNE Remand Order.*

market with multiple facilities-based wireline competitors, each of which has their own networks and switching capabilities, as well as a CATV-based CLEC competitor and multiple CMRS providers.

In addition, the Commission must consider the intermodal competition that Qwest faces from other service providers, such as from CATV providers that are providing CLEC services and from wireless carriers. In *USTA I*, the D.C. Circuit vacated the *Line Sharing Order*, because the Commission had "failed to consider the relevance of competition in broadband services coming from [CATV] (and to a lesser extent satellite)."[76] On remand, the Commission eliminated the duty to unbundle the high-frequency portion of the loop ("HFPL"), based in part on the existence of intermodal competition.[77] Qwest's CATV and wireless-based intermodal competitors use their own separate networks, and do not depend on Section 251(c) or Section 271 at all.

While these intermodal competitors are not legally required to provide CLECs with unbundled access to their networks, this does not justify the continued imposition of the requirements on Qwest. First, the existence of intermodal competition demonstrates that it is possible to offer service in competition with Qwest without relying on the ILEC's network.

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75 *See, e.g., United States Telecom Association v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002), *reh'g denied en banc* (No. 00-1012, Sept. 4, 2002), *cert. denied sub nom., WorldCom, Inc. v. United States Telecom Association*, 538 U.S. 940, 123 S. Ct. 1571 ("*USTA I*").

76 *Id.*, 290 F.3d at 428.

77 *See* In the Matter of 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, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17136 ¶ 263 (2003), *vacated in part, remanded in part, and petitions for review otherwise denied, United States Telecom Ass'n v. FCC*, 359 F.3d

Where intermodal competition exists, there is "no reason to think [that requiring unbundling] would bring on a significant enhancement of competition."[78] Thus, even if a particular competitor might prefer a business plan that requires relying on the ILEC's network to offer services, the existence of intermodal competition through non-ILEC facilities demonstrates that access to ILEC facilities is not a prerequisite to competition.

In sum, Qwest's facilities are no longer a competitive bottleneck in the Omaha MSA. As discussed above, Qwest currently shares the market with several other facilities-based providers that serve as ready sources for switching, transport, resold loops and other capabilities used by CLECs. The presence of intermodal competition and established facilities-based carriers would prevent Qwest from discriminating unreasonably against other carriers, even if Qwest were inclined to do so, or leveraging the prices and availability of its own network to exclude competition.

While Qwest is seeking forbearance from certain of its resale and unbundling obligations under Section 251(c) and Section 271 of the 1996 Act, it is clear that Qwest is willing to provide other carriers with access to its network on a contractual basis. The four-year wholesale agreement that Qwest recently negotiated with MCI Communications and the line-sharing agreement that Qwest recently negotiated with Covad were both voluntary. Qwest intends to continue working cooperatively with other service providers throughout its 14-state territory, and will provide them with switching, unbundled access to network elements, and resold services.

It is also clear that forbearance from the provisions of Section 251(c) and selected

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554 (D.C. Cir. 2004), *motions to stay mandate denied*, *Order*, No. 00-1012 (D.C. Cir., June 4, 2004), petition for cert. due June 30, 2004 (U.S. App. No. 03A940, May 21, 2004).

[78] *See USTA I*, 290 F.3d at 429.

provisions of Section 271 will not mean that Qwest is freed from all regulation. For example, while Qwest would no longer be obligated to resell its services at a discount, it would continue to be subject to the resale requirements of Section 251(b)(1) that apply to all providers of local exchange service. Similarly, while Qwest is asking for forbearance from cost-distorting requirements that CLECs can designate any feasible point of interconnection (Section 251(c)(2)(B)), Qwest would continue to be subject to the interconnection requirements of Section 251(a)(1) that apply to all carriers.

2. Enforcement of Section 251(c) and Selected Section 271 Provisions is not Necessary for the Protection of Consumers in the Omaha MSA

It is no longer necessary to enforce the Section 251(c) and Section 271 unbundling and resale requirements in order to protect consumers in the Omaha MSA. Due to the competitiveness of the Omaha MSA telecommunications market, the presence of facilities-based competitors and the reality of intermodal competition, maximizing consumer welfare no longer depends on intensive regulation of Qwest's network. Qwest therefore satisfies the criteria of Section 10(a)(2) of the 1996 Act.[79]

As Qwest demonstrates above, Qwest no longer has a dominant market share of the Omaha MSA telecommunications market for local exchange services, and Qwest long ago lost any market power over pricing and services. Qwest's network has been overbuilt by several competitors and is no longer the sole provider of telecommunications facilities in the Omaha MSA. Therefore, Qwest does not control a competitive bottleneck. As a result of the fact that consumers have choices from carriers who are not using services available through Section 251(c) and Section 271, due to both facilities-based competitors and intermodal competition,

[79] 47 U.S.C. § 160(a)(2).

imposition of Section 251(c) and Section 271 requirements on Qwest no longer serves any consumer-protection purpose.

3. Forbearance from Provisions of Section 251(c) and Section 271 is Consistent with the Public Interest

It is also clear that the public interest will be served, and even advanced, if Qwest is granted forbearance from the requirements of Section 251(c) and Section 271. Not only will this forbearance not harm competition, but forbearance would actually benefit consumers in the long run, since it will reduce the present regulatory asymmetry between Qwest and its competitors and eliminate the economic distortions caused by the imposition of intensive regulations that apply to Qwest but that are not imposed on similarly-situated providers. Qwest therefore satisfies the criteria of Section 10(a)(3) of the 1996 Act.[80]

Section 10 requires that the Commission consider whether forbearance will promote competitive market conditions. Asymmetric regulation between service providers is not sustainable and it does not serve the public interest, either from a competitive standpoint or from a consumer standpoint.[81] At present, Qwest is uniquely burdened by dominant carrier regulations that hamper its ability to freely compete in the Omaha MSA telecommunications market for local exchange services. There is no question that allowing Qwest to compete on equal footing with

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80 47 U.S.C. § 160(a)(3).

81 *See* Exhibit B, Strategic Policy Research Study at 3-4. As the Strategic Policy Research study notes, asymmetric regulation decreases the more heavily regulated entity's ability to derive advantages from their investments, and is a competitive disincentive. This in turn reduces the "vigor of the competitive process and the quality of service available to consumers." *Id.* As the study also notes, maintaining dominant carrier regulation on a non-dominant carrier will likely subvert the competitive marketplace and undermine the Commission's policy goals. *Id.* at 7, *citing* John Haring and Kathleen Levitz, "What Makes the Dominant Firm Dominant?" Federal Communications Commission, Office of Plans and Policy Working Paper Series, Number 25, 1989.

its competitors in the Omaha MSA will serve the public interest and enhance competition, and will enable Qwest to better respond to the demands of the marketplace.

From the standpoint of regulatory parity and commensurate with its diminished role in the marketplace, Qwest cannot and should not be the only facilities-based carrier that is subject to the mandatory resale and unbundling requirements of Section 251(c) and Section 271. To the extent that facilities-based providers other than ILECs do not make their facilities available to non-facilities-based CLECs, the deregulatory solution is not to maintain the existing unbundling regulations, but to eliminate them. Alternative facilities-based providers have no incentive to compete for wholesale business with ILEC facilities that must be offered at artificial prices set by regulators. The removal of unbundling requirements would allow market forces to replace regulatory impositions and create more efficient incentives for all carriers to lease their facilities to CLECs at competitive rates and prices.

The presence of intermodal competition and separate, overbuilt networks in the Omaha MSA already provides the competitive and consumer benefits that are the underlying goals of the 1996 Act. Indeed, in the context of cable, Congress has concluded that even one, partially built-out competitor offers sufficient "effective competition" to permit complete deregulation of cable.[82] By the same logic, the development of intermodal competition should, over the long term, lead to the elimination of all unbundling requirements in many markets.[83]

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[82] *See, e.g.*, 47 U.S.C. § 543(l)(1)(B)(ii) (a 15% market share by a multichannel video programming distributor other than the largest such distributor in a market qualifies as "effective competition").

[83] For example, as cable telephony becomes more widely available and wireless phones become virtual substitutes for wireline service, as they have in the Omaha MSA, ILECs will eventually lose any residual pricing power based on their status as regulated utilities even in subsidized retail markets. Once this happens, unbundling would no longer enhance competition; rather, it would only handicap ILECs in markets where they face vigorous competition for retail

C. The Requirements of Section 251(c) and Section 271 Have Been Fully Implemented

Section 10(d) of the 1996 Act provides that the Commission may not grant an ILEC forbearance from Section 251(c) or Section 271 of the 1996 Act unless and until the Commission has determined that the requirements of Section 251(c) or Section 271 have been "fully implemented" by the ILEC.[84] Both the Nebraska PSC[85] and the Commission[86] have previously determined that Qwest has fully implemented the requirements of Sections 251, 252 and 271 in the State of Nebraska, and that Qwest provides CLECs with nondiscriminatory access to its systems, databases and personnel. Separately, Section 10(b) requires that in making forbearance determinations, the Commission must consider whether forbearance from enforcing a statutory provision or regulation will promote competitive market conditions, including the extent to which such forbearance will "enhance competition among providers of telecommunications services."[87]

Read in concert, Sections 10(b) and 10(d) therefore make clear that Congress intended that the Commission have the power to grant forbearance from Section 251(c) in circumstances where an ILEC had made its network facilities available to competitors, and where granting

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customers, and stifle the potential for competition for wholesale customers. Where that is the case, as the D.C. Circuit recognized, the Act does not justify continuing "to inflict on the economy" the harms associated with unbundling requirements. *USTA I*, 290 F.3d at 429.

84 *See* 47 U.S.C. § 160(d). Qwest does not qualify for the exceptions to this rule established in Section 251(f), which are applicable only to rural telephone companies.

85 *See* In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c), *Opinion: Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission*, 2002 Neb. PUC LEXIS 53 (2002).

86 *See Qwest Section 271 Order*, 17 FCC Rcd 26303.

87 *See* 47 U.S.C. § 160(b).

forbearance from Section 251(c) would serve to promote competition. Clearly, Section 251(c) and Section 271 have been fully implemented in Nebraska. On December 23, 2002, the Commission granted Qwest approval, pursuant to Section 271 of the 1996 Act to provide inter-LATA services originating in Nebraska. In that *Order*, the Commission found that Qwest met the checklist of Section 271(c)(2)(B), which included findings that Qwest is providing nondiscriminatory access to UNEs, resale, and interconnection pursuant to Section 251(c).[88] In addition, the competitive nature of the Omaha MSA demonstrates that Qwest has fully implemented the requirements of Section 251 and Section 271. The Commission would be conclusively determining that Qwest has implemented those sections if it declares Qwest to be nondominant. As a result, granting Qwest forbearance from dominant carrier regulation in the Omaha MSA should also justify a finding that for purposes of Section 10(d), the requirements of Section 251 and Section 271 have been "fully implemented" within the meaning of the statute.

From a regulatory standpoint, continuing to impose the requirements of Section 251(c) on Qwest in the Omaha MSA would be fundamentally incompatible with designating it as a nondominant and non-incumbent carrier for other purposes. Qwest's lack of market power, coupled with loss of nearly [redacted] of its market share and the established nature of its facilities-based competitors, should serve as a definitive end point for most of its Section 251(c) obligations.

IV. QWEST SEEKS FORBEARANCE FROM DOMINANT CARRIER REGULATION IN THE OMAHA MSA

Qwest also requests that the Commission forbear from regulating it as a dominant carrier in the Omaha MSA market for telecommunications services. In particular, Qwest seeks a

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88 *See Qwest Section 271 Order*, 17 FCC Rcd at 26319 ¶ 33, *et seq.*

declaration that it is not dominant in the provision of telecommunications services in the Omaha MSA and, consequently, for forbearance from dominant carrier regulation in the Omaha MSA pursuant to Section 10(c) of the 1996 Act. This forbearance request includes the following Commission regulations: (1) the requirements and procedures under Section 214 that apply to dominant carriers, (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days notice with cost support;[89] and (3) Sections 61.41-61.49, and 65, which impose price cap and rate of return regulation on dominant carriers.[90]

A. Dominant Carrier Regulation is Not Necessary to Ensure that Qwest's Rates and Practices Are Just, Reasonable and Not Unreasonably Discriminatory

Dominant carrier regulation of Qwest's local telephone services in the Omaha MSA is no longer necessary to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory. Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[91]

As shown above, and as demonstrated by the attached exhibits, the Omaha MSA telecommunications market has become highly competitive. None of these carriers have market power – including Qwest – and there is no longer any regulatory justification for applying unique regulatory requirements on any single carrier as "dominant." As the Commission has recognized, it is highly unlikely that carriers lacking market power can successfully charge rates that violate the Act, since any attempt to do so will prompt customers to switch to different carriers.[92] For

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[89] 47 C.F.R. §§ 61.38, 61.41-61.49.

[90] 47 C.F.R. §§ 61.41-61.49, 47 C.F.R. § 65.

[91] 47 U.S.C. § 160(a)(1).

[92] In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services, Alliance's Petition for Forbearance For Broadband Personal

that reason, the Commission has determined that tariffing is not necessary to ensure reasonable rates for carriers that lack market power.[93]

Qwest does not possess market power in the Omaha MSA market for local exchange services. Therefore, Qwest should not be required to file dominant carrier tariffs and comply with other dominant carrier regulations, such as the rate averaging requirement. Rather, as is the case for every other non-dominant carrier in the market, Qwest should be subject to permissive detariffing, which would allow, but not require, the filing of tariffs on one-day's notice with a presumption of lawfulness and without any cost support.[94] Marketplace forces will effectively preclude Qwest from charging customers with unreasonable rates for local exchange services.

Notwithstanding the relief from dominant carrier regulations, other regulations remain and are sufficient to protect consumers from any carrier attempting to charge unreasonable rates. In particular, Sections 201 and 202 of the Communications Act require that rates and practices be just, reasonable, and not unreasonably discriminatory and would continue to apply to Qwest and all non-dominant carriers in the market.[95] The Commission can address any claims of unlawful rates or practices through the exercise of its authority to investigate and adjudicate complaints

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Communications Services, *Memorandum Opinion and Order and Notice of Proposed* Rulemaking, 13 FCC Rcd 16857, 16885 ¶ 57 (1998) ("*PCIA Forbearance Order*") (citing *CAP Forbearance Order*, 12 FCC Rcd 8596, 8608 ¶ 23 (1998); and *IXC Forbearance Order*, 11 FCC Rcd 20730, 20742-47 ¶¶ 21-28 (1996)).

[93] *CAP Forbearance Order*, 12 FCC Rcd at 8608 ¶ 23; *IXC Forbearance Order*, 11 FCC Rcd at 20742-43 ¶ 21.

[94] *CAP Forbearance Order*, 12 FCC Rcd at 8610 ¶ 27. It should be noted that the Commission tentatively concluded that it should adopt mandatory detariffing for interstate exchange access services, as it previously adopted for interexchange services. *Id.* at 8613 ¶ 34.

[95] 47 U.S.C. §§ 201(b), 202(a).

under Section 208.[96] As the Commission recently noted, Sections 201 and 202 provide important safeguards for consumers in areas that have been deregulated by the Commission.[97] In those circumstances where the Commission has reclassified carriers as non-dominant because they lack market power and reduced those carriers' regulatory burden, the Commission has continued to require compliance with Sections 201 and 202.[98]

It is also important to recognize that Qwest is not seeking relief from the obligation to make its services available for resale by other carriers. The Commission has recognized that the presence of resellers in a market exert pressure on rates.[99] In the Omaha MSA telecommunications market, where facilities-based competitive providers already have captured over [redacted] of the retail market segment, resellers have and will continue to have the ability to exert such pressure. Thus, grant of Qwest's petition would not weaken the market forces that restrain Qwest's ability to charge unreasonable rates.

B. Dominant Carrier Regulation is no Longer Necessary to Protect Consumers

The second statutory criterion for forbearance requires that the Commission determine whether dominant carrier regulation of Qwest's services in the Omaha MSA is necessary for the protection of consumers.[100] Qwest believes that the high level of facilities-based competition, the lack of entry barriers, and the vitality of existing competitors will provide all the product, price, service and choice protection that consumers need. Qwest therefore satisfies the criteria of

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96 47 U.S.C. § 208(a); *see also AT&T Reclassification Order*, 13 FCC Rcd at 3355 ¶ 160.

97 *PCIA Forbearance Order*, 13 FCC Rcd at 16872 ¶ 31.

98 *Id.* at 16866 ¶ 17.

99 *Id.* at 16874-75 ¶ 35.

100 47 U.S.C. § 160(a)(2).

Section 10(a)(2) of the 1996 Act.[101]

As demonstrated in the previous section, Qwest no longer has any market power in the Omaha MSA and currently holds less than [redacted] percent of the Omaha MSA market for residential and business telephone service. As a result, dominant carrier regulation is no longer necessary to assure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory. Because Qwest lacks market power in the Omaha MSA, rates for local exchange telecommunications services will be effectively set at competitive levels by market forces in the Omaha MSA.

Further, the requirements of Sections 201 and 202 serve as an additional safeguard for consumers. Therefore, dominant carrier regulation of Qwest also is not necessary to protect consumers from unreasonable rates or discriminatory practices. In fact, telecommunications customers in the Omaha MSA are being deprived of the full benefits of competition in the Omaha MSA market for services because of the continued regulation of Qwest as a dominant carrier. Accordingly, the second criterion is satisfied.[102]

C. Forbearance From Dominant Carrier Regulation Is Consistent With the Public Interest

The third statutory criterion for forbearance requires that the Commission determine whether forbearance from applying dominant carrier regulation to Qwest's telecommunications services in the Omaha MSA is consistent with the public interest. In making this public interest determination, the Commission considers whether forbearance will "promote competitive market conditions, including the extent to which forbearance will enhance competition among providers

101 *Id.*

102 *Id.* at 16885 ¶ 58; *CAP Forbearance Order*, 12 FCC Rcd at 8609-10 ¶ 26.

of telecommunications services."[103] Continuing to regulate Qwest as a dominant carrier in the Omaha MSA telecommunications market would hobble Qwest's ability to compete for customers, and would continue competitive distortions that do not serve the public interest. Qwest therefore satisfies the criteria of Section 10(a)(3) of the 1996 Act.[104]

In the *AT&T Reclassification Order*, the Commission graphically described the significant costs of continued asymmetric regulation: (1) the longer tariff notices imposed on AT&T dampened its incentives to innovate because rivals could respond to innovations before they were allowed to go into effect, the so-called "first-mover advantage"; (2) the tariff filing requirements also dampened AT&T's incentives to reduce prices; (3) AT&T's competitors could use asymmetric regulatory processes to delay and undermine its initiatives; and (4) regulation imposed unique administrative and overhead costs on both AT&T and the Commission, which flowed into AT&T's prices.

Dominant carrier regulation of Qwest in the Omaha MSA market involves the same kinds of social costs. The 15-day tariff notice requirement, which applies only to Qwest, gives competitive providers the opportunity to respond to Qwest's filed rate service changes or get to market first with a new price or service offering before Qwest's tariff becomes effective. Further, as a dominant carrier, Qwest also is uniquely prohibited from responding to competition with deaveraged rates within the study area. If anything, the costs of dominant carrier regulation are compounded by the fact that Qwest is prohibited from responding to competitive providers' bundled offerings, which may include interLATA voice and data services.

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[103] *Comsat Reclassification Order*, 13 FCC Rcd at 14157 ¶ 151; *see also PCIA Forbearance Order*, 13 FCC Rcd at 16870 ¶ 27.

[104] 47 U.S.C. § 160(a)(3).

Moreover, continuing to regulate Qwest as a dominant carrier in a competitive market results in "umbrella" pricing, where competitors argue that Qwest's proposed tariff rates are unlawfully low while pricing their own services below Qwest's tariffed rates. The Commission has previously recognized that requiring tariff filings may facilitate tacit collusion by enabling carriers to "ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level."[105] In comparison, forbearance of the tariff filing requirements "will foster competition which will expand the consumer benefits of a competitive marketplace."[106] Thus, continued dominant carrier regulation of Qwest reduces the incentive of all competitors to initiate price reductions and new services and adversely affects Qwest's ability to respond quickly and creatively to competition.

Qwest is not requesting that its services in the Omaha MSA be totally deregulated. Rather, Qwest is requesting only that the Commission exercise its authority under Section 10 and forbear from applying dominant carrier regulations to Qwest in the Omaha MSA. As discussed above, like all other non-dominant carriers, Qwest will still be subject to regulation under Title II of the Communications Act. As a non-dominant carrier, however, Qwest would enjoy streamlined, reduced regulation equal to that of all its competitors in the Omaha MSA telecommunications market. This would place Qwest on equal footing with all other competitors in the Omaha MSA and will benefit consumers by permitting Qwest to be more flexible and

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[105] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1479 ¶ 177 (1994).

[106] *Id.*

responsive in the way it offers its services to the public, just as other nondominant carriers.[107]

V. QWEST SEEKS FORBEARANCE FROM REGULATION AS AN ILEC IN THE OMAHA MSA

In addition to granting Qwest general forbearance from dominant carrier regulation and from the specific unbundling and resale requirements of Section 251(c) and Section 271 in the Omaha MSA, Qwest seeks forbearance from regulation as an ILEC pursuant to Section 251(h)(1) of the 1996 Act.[108] As with Qwest's other forbearance requests, this is consistent with Qwest's lack of market power in the Omaha MSA, and would help eliminate the unnecessary regulatory asymmetry that exists between Qwest and its competitors.

Pursuant to Section 251(h)(2)(A) of the 1996 Act, the Commission may designate a non-ILEC as an ILEC if (a) its position is comparable to another ILEC, (b) it has substantially replaced an ILEC, and (c) such a designation is in the public interest.[109] Based on the competitive facts of the Omaha MSA telecommunications market discussed above, the Commission could likely designate Cox Communications as an ILEC. However, after living under the onerous conditions of ILEC regulation, Qwest has no desire to impose these obligations on other carriers. The Commission has two options in this situation: (1) declare Cox

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107 *See, e.g.*, In the Matter of 1998 Biennial Regulatory Review – Part 61 of the Commission's Rules and Related Tariffing Requirements; Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, *Report and Order and First Order on Reconsideration*, 14 FCC Rcd 12293, 12299 ¶ 16 (1999).

108 Granting Qwest's forbearance request should have no effect on the way high cost universal service support is calculated in the Omaha MSA. Under the Commission's rules, all eligible telecommunications carriers serving lines in the service area of a non-rural ILEC receive high cost support based on the forward-looking economic cost of providing the supported services in that area, as determined by a cost model. *See* 47 C.F.R. § 54.309(a). In granting the forbearance requested in this petition, the Commission should specify that Qwest's service territory in the Omaha MSA will continue to be treated as a service area of a non-rural ILEC.

109 *See* 47 U.S.C. § 251(h)(1).

an incumbent and forbear from ILEC regulation on both Qwest and Cox, or (2) skip the process of declaring Cox an incumbent and forbear from ILEC regulation on Qwest. The second choice is clearly the more efficient process.

It is no longer appropriate to regulate Qwest as an ILEC pursuant to Section 251(h)(1) simply because of Qwest's legacy status in the Omaha MSA telecommunications market. The underlying assumptions of Section 251(h)(1) are no longer true. As discussed above, Qwest's legacy network has been overbuilt by other facilities-based carriers. Qwest has lost over 50 percent of its residential and business customers, and no longer enjoys market power in the Omaha MSA. What is more, Cox has been designated as a second ETC in the Omaha MSA, and Qwest's network of telecommunications facilities has been overbuilt both by Cox and by AllTel and other facilities-based CLECs are utilizing their own switches in combination with unbundled loops purchased from Qwest to serve local customers.

Based on these changed circumstances, it is no longer equitable or reasonable to regulate Qwest differently than its competitors with respect to its operations in the Omaha MSA or to subject Qwest to different competitive requirements, either as a dominant carrier or as an ILEC. Qwest therefore requests that the Commission additionally forbear from regulating it as an ILEC pursuant to Section 251(h)(1).

VI. CONCLUSION

Congress adopted Section 10 because it recognized that regulation can be unnecessary and even harmful in a competitive market. Under Section 10, the Commission is required to eliminate regulations that are no longer necessary to ensure that rates and practices are just, reasonable and not unreasonably discriminatory. Qwest has gathered substantial evidence in support of its petition demonstrating that the Omaha MSA telecommunications market is robustly competitive. In light of Qwest's lack of market power, competition, without dominant carrier regulation, is sufficient to constrain Qwest's ability to impose anti-competitive prices and other terms and conditions of service. For these reasons, the Commission should grant Qwest's petition and exercise its authority to forbear from regulating Qwest from the selected regulations under Section 251(c) and Section 271 of the 1996 Act, as well as from regulation as a dominant carrier and an ILEC in its provision of local exchange services in the Omaha MSA.

Respectfully submitted,

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