

271 *Broadband Forbearance Order*, the Commission explained that the language of section 10(d) must be viewed in the context of the particular requirements at issue.¹³⁷ With respect to the requirements of section 251(c), Congress designated the Commission as the entity to implement the section 251(c) requirements. With respect to the competitive checklist requirements of section 271(c), however, these requirements first attach to the BOCs *as obligations* only after the BOCs have sufficiently opened their markets to competition under the standards set forth in section 271(c)(2)(B), and after the Commission has granted the BOC approval under section 271(a) to provide in-region interLATA services.¹³⁸ Thus, the BOCs have a role in implementing section 271(c) that incumbent LECs do not have in implementing section 251(c) – a role recognized in the statute.¹³⁹ It therefore would be inappropriate for the Commission to interpret section 10(d) as applied to section 251(c) as if the incumbent LECs had a role in implementing section 251(c) similar to the role the BOCs have in implementing section 271(c); doing so would ignore the Commission’s conclusion that the language of section 10(d) must be viewed in the context of the particular requirements at issue.¹⁴⁰

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forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented.” See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24018, para. 12 (1998) (*Advanced Services Order*) (subsequent history omitted). However, the Commission declined to reach the issue of whether sections 251(c) and 271(c) are fully implemented. See *id.* at 24048, para. 77.

¹³⁷ In particular, the Commission reasoned that the section 272 requirements referenced in section 271(d) differ from the rest of section 271, so that the three-year timeframe under which separate affiliate obligations apply following a section 271 grant should not apply to the section 271(c) competitive checklist. *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18.

¹³⁸ Under the Act, BOCs were not required to comply with any of the section 271(c) competitive checklist items prior to obtaining section 271 approval (except to the extent those items restate obligations imposed on them by other independent provisions). Following the grant of section 271 approval, which is when the Commission held that section 271(c) is fully implemented, the checklist items became binding legal obligations the violation of which may result in injunction, forfeiture or other penalty under Title V of the Act, or suspension or revocation of section 271 authority. 47 U.S.C. § 271(d)(6)(A); see also *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4174-77, paras. 446-53 (1999) (describing the Commission’s section 271 application post-approval enforcement framework, as well as its various section 271(d)(6) enforcement powers).

¹³⁹ 47 U.S.C. § 271(d)(3)(A)(i); see also *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503, para. 16 (stating that the meaning of “fully implemented” under section 10(d) is consistent with the language in section 271(d)(3)(A)(i), under which “a BOC has met the requirements of section 271(c)(1) if, among other obligations, it has ‘fully implemented’ the competitive checklist”).

¹⁴⁰ See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18. We therefore do not accept Qwest’s argument that whether section 251(c) has been “fully implemented” in a particular state turns on whether the carrier seeking forbearance has been granted section 271 authority to provide in-region long distance services in that state. See *SBC Reply* at 3; see also *Petition* at 4; *Qwest Reply* at 7-12; Letter from Cronan O’Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5-6 (filed July 25, 2005) (Qwest July 25, 2005 *Ex Parte* Letter). In addition, the fact that *all* incumbent LECs – rather than just BOCs – are subject to section 251(c) undercuts a reading that such a statutory provision would be “fully implemented” based upon a standard that applies only to BOCs and thus that only BOCs could satisfy.

55. We are not persuaded by the arguments in the record that we should adopt a competition-based test to determine when section 251(c) has been fully implemented.¹⁴¹ Qwest and others assert that the Commission should read section 10(d) to mean that particular measurements of market power, market share, or other indicators of competition should serve as the threshold barrier for the forbearance inquiry.¹⁴² However, as the Commission explained in the *Section 271 Broadband Forbearance Order*, such an interpretation would require inquiries redundant to the Commission's analysis under section 10, which already requires the Commission to consider the competitive market conditions in its forbearance analysis, including whether a grant of forbearance will enhance competition.¹⁴³ We do not believe Congress intended section 10(d) to require duplicative analyses.

56. Finally, some commenters argue that section 10(d) precludes forbearance in the absence of "permanent" unbundling rules.¹⁴⁴ We disagree. We believe that such an interpretation would render section 10(a) a nullity with respect to requirements arising under section 251(c). The extensive and necessarily detailed rules promulgated under section 251(c) frequently are revised as the Commission addresses petitions for rulemaking, reconsideration, or declaratory rulings and as it updates those regulations to reflect marketplace developments. Indeed, Congress requires the Commission biennially to evaluate its regulations that apply to telecommunications service providers and to determine whether economic competition has made those regulations no longer necessary in the public interest.¹⁴⁵ The Commission must modify or repeal any such regulations that it finds are no longer in the public interest.¹⁴⁶ In addition, the Commission's section 251(c) rules often are subject to court challenges.¹⁴⁷ To wait for a set of "permanent" rules that have survived every court challenge would presume a static state of technological and economic development, and would give the "fully implemented" clause a meaning more akin to that of an absolute bar than a threshold standard.¹⁴⁸

¹⁴¹ See, e.g., McLeodUSA Comments at 4-6, 12; AT&T Comments at 26; MCI Comments at 19.

¹⁴² Petition at 31; see also, e.g., USTA Reply at 1.

¹⁴³ 47 U.S.C. § 160(a), (b); *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17.

¹⁴⁴ See, e.g., Sprint Comments at 11 (noting that the court in *USTA II* struck down some of the Commission's section 251(c) rules).

¹⁴⁵ 47 U.S.C. § 151(a); see also *The 2002 Biennial Regulatory Review*, GC Docket No. 02-390, Report, 18 FCC Rcd 4726, 4726, para. 3 (2003) (stating that "[t]he process of reviewing our rules subject to Section 11 is, in essence, ever-continuing").

¹⁴⁶ 47 U.S.C. § 161(b).

¹⁴⁷ See, e.g., *USTA II*, 359 F.3d 554 (affirming in part, remanding in part, and vacating in part the *Triennial Review Order*, 18 FCC Rcd 19020).

¹⁴⁸ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17 (stating that "section 10(d) is reasonably interpreted as a threshold standard"). Interpreting section 10(d) to preclude forbearance in the absence of permanent unbundling rules would force the Commission to choose between not updating its rules when in the public interest to do so pursuant to section 11 or exercising its plenary rulemaking authority, on the one hand, or not granting a particular carrier or service forbearance from a rule when doing so would be in the public interest and otherwise satisfy the criteria of section 10, on the other. 47 U.S.C. §§ 160-61. We do not believe this result is one Congress intended when enacting section 10(d). We further note that the interpretation urged by Sprint and others would give the Commission the ability to deny all forbearance relief so long as it updated its section 251(c) rules on (continued....)

D. Forbearance from Section 251(c) Requirements

57. We grant Qwest's Petition in part, and forbear from applying to Qwest the requirements arising under section 251(c)(3) to provide unbundled access to loop and transport elements¹⁴⁹ in certain wire centers in the Omaha MSA based upon the development of sufficient facilities-based competition and other factors we explain below. We deny Qwest's Petition to the extent it seeks forbearance relief from all of the remaining obligations of section 251(c). Specifically, we deny Qwest's request for relief from obligations arising under section 251(c) to negotiate in good faith the terms and conditions of its section 251(b) and section 251(c) obligations; to provide other carriers with interconnection to Qwest's network at any technically feasible point; to offer its retail services for resale at avoided-cost wholesale rates; to provide access to UNEs other than loops and transport;¹⁵⁰ to provide reasonable public notice of changes in its network that would affect interoperability; and to satisfy certain collocation obligations.

58. In the Petition, Qwest contends that the growth of retail competition in the Omaha MSA has given enterprise and mass market customers multiple competitive options to satisfy their telecommunications needs.¹⁵¹ On the basis of this retail competition, Qwest argues that it is no longer necessary or appropriate that it remain subject to the requirements of section 251(c) in the Omaha MSA. To support its position, Qwest presents evidence that the number of retail lines it uses to serve customers has fallen steadily since 1997, and claims that retail competition from wireline carriers and intermodal competitors accounts for this decline.¹⁵² In particular, Qwest submits that an incumbent cable operator in the Omaha MSA, Cox, uses its own extensive facilities, including its own loop equivalents, to provide telecommunications services in parts of this MSA; has captured significant market share for narrowband voice customers in this MSA; and is actively competing for enterprise customers.¹⁵³

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an annual basis, which is in tension with the mandatory language contained in sections 10 and 11 of the Act. *See* 47 U.S.C. §§ 160-61.

¹⁴⁹ By "UNE loops and transport" we mean all analog, DS0, DS1 and DS3 loop and dedicated transport network elements that are subject to section 251(c)(3) unbundling. *See* 47 C.F.R. §§ 51.319(a) (loops), 51.319(e) (dedicated transport). In addition, for purposes of this Order, our discussion of UNE loops and transport extends to subloops and network interface devices as defined in sections 51.319(b) and (c) of the Commission's rules, regarding which we also forbear from the requirements arising under section 251(c)(3) as applied to Qwest in the Omaha MSA. 47 C.F.R. §§ 51.319(b), (c).

¹⁵⁰ We expressly do not forbear today from requirements arising under section 251(c)(3) with respect to 911 and E911 databases or operations support systems as defined in sections 51.319(f) and (g) of the Commission's rules. *See id.* at §§ 51.319(f), (g).

¹⁵¹ Petition at 3; Qwest Teitzel Aff. at 1.

¹⁵² Relying on estimates from an E911 database administrator from April 2004 as "a directional surrogate for the number of access lines served by facilities-based CLECs," in combination with competitive LEC resale and UNE-P data as of February 2004 and its own retail access line data, Qwest submits that the market share of competitive LECs is [REDACTED] percent of residential access lines in the Omaha MSA, and [REDACTED] percent of business voice grade equivalent (VGE) access lines. Qwest Teitzel Aff. at 6-8. Qwest concedes that a precise calculation of competitive LEC market share is difficult because it does not have access to its competitors' proprietary customer information, and that the number of E911 records is not directly equivalent to the number of access lines in service. *See id.* at 6-7.

¹⁵³ Petition at 8, 13; Qwest Teitzel Aff. at 10-17.

59. As explained below, we find that the substantial intermodal competition for telecommunications services provided over Cox's own extensive facilities is sufficient to grant Qwest forbearance from the application of its section 251(c)(3) obligations with respect to loops and transport, in light of the continued application in the Omaha MSA of other statutory and regulatory provisions designed to promote the development of competitive markets for telecommunications services and the actual competition these regulations have facilitated. Over two years ago, in the *Triennial Review Order*, the Commission determined that intermodal competition from cable had not "blossomed into a full substitute for wireline telephony."¹⁵⁴ Today, as a result of Cox's investment in network infrastructure in the Omaha MSA, Cox, like Qwest, is providing telecommunications services over its own extensive last-mile facilities. On the basis of this competition, combined with other statutory and regulatory safeguards that facilitate additional competition, we find that the criteria of section 10(a) are satisfied with respect to Qwest's section 251(c)(3) obligation to unbundle loop and transport elements in 9 of Qwest's 24 wire centers in the Omaha MSA where competitive deployment is greatest. Therefore, we forbear from the application of section 251(c)(3) to Qwest to the extent it requires Qwest to provide access to loops in and transport to those 9 wire centers.¹⁵⁵

60. However, for the remainder of the section 251(c) obligations from which Qwest seeks relief in the present Petition, we find that Qwest has not satisfied any of the criteria of section 10(a) that might allow us to grant its Petition. Except in limited geographic areas, Qwest has not demonstrated that it is subject to significant competition from competitors that do not rely heavily on Qwest's wholesale services. Cox does not have any coverage¹⁵⁶ at all in [REDACTED] of Qwest's 24 wire center service areas in the Omaha MSA, and in other wire center service areas has only limited coverage.¹⁵⁷ Cox is not able to provide the same level of competition where it does not have extensive coverage as where it has such coverage. We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing

¹⁵⁴ See *Triennial Review Order*, 18 FCC Rcd at 17127, para. 245.

¹⁵⁵ The Commission already has relieved Qwest and certain other carriers from unbundling obligations arising under section 251(c)(3) and section 271 to provide access to certain loop and transport facilities, which limits the scope of today's Order. See *supra* notes 25-29. The 9 wire centers in which we grant Qwest forbearance from the application of section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA are: Omaha Douglas, Omaha IZard Street, Omaha 90th Street, Omaha Fort Street, Omaha Fowler Street, Omaha O Street, Omaha 78th Street, Omaha 135th Street, and Omaha 156th Street. See also Cox June 30, 2005 *Ex Parte* Letter at 2 (disclosing Qwest's wire center service areas where Cox's network covers at least [REDACTED] of the end user locations); see also *infra* n.156 (defining "covers"). Cox does not include Multiple Tenant Environments (MTEs) to which it does not have access to provide telecommunications services in either the numerator or denominator of its calculation of which wire centers it "covers." See Letter from J.G. Harrington, Counsel to Cox, WC Docket No. 04-223, Attach. at 1 (filed Sep. 16, 2005) (Cox Sept. 16, 2005 *Ex Parte* Letter). However, Cox contends that including MTEs to which it does not have access in its calculations would not have a material effect on its coverage estimates. See *id.*

¹⁵⁶ As we use the term in this 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. Therefore, and for example, a carrier covers an MTE if that carrier would be willing and able, within a commercially reasonable time, of providing service to that MTE even if the building owner has not already granted the carrier the right to provide service within that particular building.

¹⁵⁷ See Cox June 30, 2005 *Ex Parte* Letter at 2.

“last-mile” facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA. Furthermore, all competitors in all areas of the Omaha MSA rely on Qwest for certain inputs and services mandated by section 251(c), such as direct interconnection under section 251(c)(2).¹⁵⁸ Forbearance from these remaining section 251(c) provisions similarly is unwarranted at present.

1. Unbundled Access to Loops and Transport

61. We determine that continued application to Qwest of the section 251(c)(3) obligation to provide unbundled access to loops and transport to competitors in certain parts of the Omaha MSA is unnecessary under the standards set forth in section 10(a) of the Act.¹⁵⁹ While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the MSA, as evident from our discussion below, the criteria of section 10(a) are not satisfied in all of Qwest’s territory in this MSA. The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a).¹⁶⁰ We are persuaded by record evidence, some of which Qwest and Cox submitted on a wire center basis, that such a level of competition exists in certain of Qwest’s wire center service areas located in the Omaha MSA. We are equally convinced that in other wire center service areas in this market, Qwest is not subject to this level of competition.¹⁶¹

¹⁵⁸ 47 U.S.C. § 251(c); *see also, e.g.*, Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Chairman Martin and Commissioners Abernathy, Copps and Adelstein, FCC, WC Docket No. 04-223 at 2 (Aug. 30, 2005) (arguing that in the absence of interconnection under section 251(c), “competitors would not be able to provide consumers with meaningful alternatives to incumbent LEC offerings”).

¹⁵⁹ We deny as moot those aspects of the Petition in which Qwest seeks forbearance from the application of unbundling obligations the Commission has since affirmatively determined to withdraw nationwide pursuant to section 251(c)(3). After Qwest filed its Petition, the Commission determined that certain dedicated transport and loop facilities, and mass market local circuit switching, do not need to be unbundled under section 251(c)(3). *Triennial Review Remand Order*, 20 FCC Rcd at 2575-2661, paras. 66-228. Therefore, the question of whether to forbear from the application of those unbundling duties is no longer before us.

¹⁶⁰ As explained below, in order to avoid customer disruption, we establish a six-month transition period to facilitate the transition from UNEs to alternative options in those wire centers where we eliminate Qwest’s unbundling obligations. *See infra* para. 74.

¹⁶¹ We are under no statutory obligation to evaluate Qwest’s Petition other than as pled; nevertheless, sections 10(a) and 10(c) each provide this Commission sufficient authority to grant Qwest’s Petition in part – that is, only in certain wire centers. *See* 47 U.S.C. § 160(a) (granting the Commission forbearance authority independent of a filed petition), (c) (authorizing the Commission to grant or deny a forbearance petition in whole or in part). We see no reason categorically to deny Qwest relief in a broader geographic area when the evidence in the record is presented on a basis that allows us, in an administrable fashion and consistent with the Commission’s precedent, to make findings on a wire center basis. *See supra* n.13 (describing the wire-center-based analysis the Commission used in the *Triennial Review Remand Order* to determine impairment for high-capacity loop and dedicated transport UNEs); *cf. also* SBC Sept. 12, 2005 *Ex Parte* Letter at 1-2 (arguing that the Commission should use “much broader geographic areas” than wire center services areas to evaluate whether to grant Qwest forbearance relief, such as MSA boundaries). We believe that our action today serves the deregulatory goals of the Act. *See supra* note 61.

62. We tailor Qwest's relief to specific thresholds of facilities-based competition from Cox. Specifically, we grant Qwest forbearance from obligations to unbundle loops and transport pursuant to section 251(c)(3) in wire centers where Cox's voice-enabled cable plant covers at least [REDACTED] percent of the end user locations that are accessible from that wire center. Our decision today also is based on other actual and potential competition, which we find either is present, or readily could be present, in 100 percent of Qwest's service area in the Omaha MSA. Carriers are still able to rely on section 251(c)(4) resale and the other market-opening provisions from which we do not forbear today everywhere in Qwest's service area in this MSA. For instance, competitive LECs continue to have section 251(c) interconnection rights throughout Qwest's service area, and have rights under section 271(c)(2)(b)(iv)-(vi) to access Qwest's loops, switching and transport throughout Qwest's service area, except where Qwest's obligations already have been lifted by the *Section 271 Broadband Forbearance Order*.¹⁶²

a. Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

63. Although the Commission's unbundling analysis does not bind our forbearance review, we find it instructive for purposes of rendering our section 10(a) determination. In the *Triennial Review Remand Order*, the Commission declined 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.¹⁶³ 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 might justify forbearance from UNE obligations.¹⁶⁴ Today, that expectation is realized. We find that competition for telecommunication services is sufficiently developed in certain wire centers that the section 251(c)(3) obligation to provide unbundled access to loops and transport is no longer necessary to ensure that, in the Omaha MSA, Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."¹⁶⁵ As the Commission

¹⁶² 47 U.S.C. § 251(c)(2); see also *id.* § 271(c)(2)(B)(iv); see also *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19. We therefore reject the argument that our decision today will result in a duopoly. See *infra* para. 71.

¹⁶³ *Triennial Review Remand Order*, 20 FCC Rcd at 2553, 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.").

¹⁶⁴ *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, paras. 38-39; see also *id.* at 2556, para. 39 n.116. The Commission noted that incumbent LECs "are free to seek forbearance from the application of our unbundling rules in specific geographic markets where they believe the aims of section 251(c)(3) have been 'fully implemented' and the other requirements for forbearance have been met;" that Qwest had already sought such relief; and that incumbent LECs were encouraged to file similar petitions where appropriate. *Id.* at 2557, para. 39. We therefore disagree with CompTel that forbearing from UNE obligations based upon sufficient facilities-based competition amounts to a reversal of course from the *Triennial Review* proceeding. See Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 3-4 (filed Sept. 9, 2005) (CompTel Sept. 9, 2005 *Ex Parte* Letter).

¹⁶⁵ 47 U.S.C. § 160(a)(1).

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 unreasonably discriminatory.”¹⁶⁶

64. As discussed below, we conclude that sufficient facilities-based competition for local exchange and exchange access services exists in certain of Qwest’s Omaha MSA wire center service areas to justify forbearance relief for several reasons. Most importantly, we find that Cox has been successfully providing local exchange and exchange access services in these wire center service areas without relying on Qwest’s loops or transport.¹⁶⁷ We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today.¹⁶⁸ We are convinced that this facilities-based competition, combined with the other competition made possible by our rules, suffices to satisfy the section 10(a) criteria with respect to Qwest’s UNE loop and transport obligations arising under section 251(c)(3).

65. *Competition in the Omaha MSA.* In today’s Order, consistent with our prior decisions, we examine the status of competition in the retail market as well as the role of the wholesale market in the Omaha MSA.¹⁶⁹ We begin by examining the retail market, and in so doing we agree with Qwest that, in evaluating the level of competition in a market, the Commission should not focus exclusively on competition provided using “identical technology that is currently deployed by the incumbent LECs.”¹⁷⁰ In accord with this determination, we take account of telecommunications services provided over intermodal facilities to the extent these services compete as substitutes for Qwest’s wireline telecommunications service offerings. Of greatest importance in our analysis is competition from Cox, which uses its cable plant to provide circuit-switched local exchange and exchange access services in this market.

¹⁶⁶ *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).

¹⁶⁷ Cox claims that “less than [REDACTED] percent of Cox’s current service to the business market” is based on DS1 and higher bandwidth facilities leased from Qwest to reach specific customer locations. Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Aug. 22, 2005) (Cox Aug. 22, 2005 *Ex Parte* Letter).

¹⁶⁸ See Qwest Teitzel Aff. at 8 (providing number of residential and business resold lines).

¹⁶⁹ See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21 (considering the wholesale market in conjunction with the retail market given the nature of relief requested).

¹⁷⁰ See Qwest Reply at 6; see also *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (*USTA D*) (holding in the context of broadband services that the Commission must consider intermodal competition). ALTS argues that competition for voice services by cable operators should not factor into the Commission’s analysis. ALTS Comments at 6; see also Sprint Comments at 7 (arguing that cable facilities tend to be concentrated in residential areas and that Cox’s service territory does not cover all of the Omaha MSA and overlaps only part of Qwest’s service territory). Rather than ignore competition from Cox because its network only partially overlaps with Qwest’s service area, we find that a better approach is to grant Qwest relief only in those areas where its network sufficiently overlaps with Cox’s network to justify such relief under section 10.

66. Cox has extensive facilities in the Omaha MSA capable of delivering both mass market and enterprise telecommunications services.¹⁷¹ Cox has proven it is capable of competing very successfully using its own network to provide services in the mass market where the revenue potential, compared with the enterprise market, is relatively low. Indeed, in the residential market, Cox has [REDACTED] voice customers in this MSA [REDACTED] Qwest.¹⁷² In addition, Qwest has provided evidence that Cox is actively marketing itself to enterprise customers, has succeeded in attracting a large number of significant Omaha businesses as customers, and has doubled its enterprise sales in the Omaha MSA each year for five consecutive years.¹⁷³ While Cox has captured a larger share of mass market customers to date, in light of record evidence of Cox's strong success in the mass market, its possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success in the enterprise market, we must conclude that Cox poses a substantial competitive threat to Qwest for higher revenue enterprise services as well.¹⁷⁴ In addition, Qwest has provided maps and other evidence that competitors have deployed their own transport facilities primarily concentrated within the boundaries of the 9 wire center service areas where we grant Qwest forbearance.¹⁷⁵

67. We also examine the role of the wholesale market. The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.¹⁷⁶ We find, however, that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and

¹⁷¹ See Cox Aug. 22, 2005 *Ex Parte* Letter, Attach. at 1 (stating that Cox can provide service up to the OCn level to each of the enterprise customers passed by its network).

¹⁷² Cox submits that as of May 1, 2005, it has [REDACTED] residential lines (accounting for second lines in some residential locations). Cox June 30, 2005 *Ex Parte* Letter at 3. Qwest reports that as of December 2004, it has [REDACTED] residential retail access lines (accounting for second lines). Qwest May 20, 2005 *Ex Parte* Letter, Attach., Tab 7, at 1.

¹⁷³ Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at Attach. 1, Tab 16 (filed Jul. 27, 2005) (Qwest July 27, 2005 *Ex Parte* Letter) (providing a Cox sales PowerPoint presentation).

¹⁷⁴ For the reasons above, we do not find dispositive Cox's claims that it currently reaches what it characterizes as [REDACTED] of potential enterprise customers with its own facilities. See Cox Sept. 14, 2005 *Ex Parte* Letter, Attach. at 2; see also Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1 (stating that Cox, over its own facilities, can reach [REDACTED] percent of the business locations in the 9 wire center service areas where the Commission grants Qwest forbearance relief).

¹⁷⁵ Cox June 30, 2005 *Ex Parte* Letter.

¹⁷⁶ See Letter from William A. Haas, Associate General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 2 (filed Sept. 14, 2005) (McLeodUSA Sept. 14, 2005 *Ex Parte* Letter) (“McLeodUSA is the only alternative provider of wholesale local services to other competitive local exchange carriers in the Omaha MSA market. No provider other than Qwest offers a commercial local wholesale solution to CLECs in the Omaha MSA.”). Several commenters are unaware that any carrier in the Omaha MSA other than Qwest provides wholesale telecommunications services. See ALTS Comments at 3-10; Sprint Comments at 2; MCI Comments at 3, 6; CompTel Comments at i; AT&T Comments at 11.

transport offerings.¹⁷⁷ First, for mass market offerings, we note that Qwest provides [REDACTED] residential QPP arrangements¹⁷⁸ (i.e., combinations of DS0 loops, switching, and shared transport) and [REDACTED] residential resale arrangements¹⁷⁹ in the 9 wire centers in which we grant unbundling relief. Indeed, Qwest's section 251(c)(4) and section 271(c) wholesale obligations remain in place. The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little to no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest. This gives us enormous comfort that in the mass market, unbundling loops and transport pursuant to section 251(c)(3) 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.”¹⁸⁰

68. Similarly, with regard to the enterprise market, Qwest has provided evidence that a number of carriers have had success competing for enterprise services using DS1 and DS3 special access channel terminations obtained from Qwest, presumably in addition to loops at least some of these competitive carriers self-provision where economically feasible.¹⁸¹ Specifically, Qwest reports that competitive carriers rely on it to provide [REDACTED] DS1 and [REDACTED] DS3 interstate special access channel terminations in the 9 wire centers in which we grant unbundling relief.¹⁸² In addition, Qwest

¹⁷⁷ Contrary to the arguments of some commenters, our decision today is consistent with the Commission's determination in the *Triennial Review Remand Order* not to rely on wholesale offerings in making impairment determinations. See, e.g., CompTel Sept. 9, 2005 *Ex Parte* Letter at 1-2. In the *Triennial Review Remand Order*, the Commission determined that the availability of incumbent LECs' tariffed wholesale offerings was not a sufficient basis to prevent the Commission from finding that requesting carriers are impaired without unbundled access under section 251(c)(3) to certain facilities that may also be available as tariffed offerings. See *Triennial Review Remand Order*, 20 FCC Rcd at 2560-75, paras. 46-65 (holding that this conclusion is the best interpretation of the Communications Act, and best addresses the Commission's concerns about administrability and risk of abuse, among other reasons). In today's Order, rather than making national impairment findings, we are applying the statutory standards of section 10 in a specific geographic market. 47 U.S.C. § 160(a). The record in the current proceeding reveals that Qwest in certain parts of the Omaha MSA is subject to significant competition from Cox; Cox already has constructed an extensive competitive network and has captured [REDACTED] of the residential voice market in the Omaha MSA, and has a demonstrated and growing capacity – and inclination – to compete for enterprise customers. See *supra* text accompanying n.175.

¹⁷⁸ See Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8.

¹⁷⁹ See *id.*

¹⁸⁰ 47 U.S.C. § 160(a)(1).

¹⁸¹ See *supra* note 177.

¹⁸² See Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1, Tab 7, Attach. 2 (showing Qwest's combined retail and wholesale provisioned special access circuits by wire center); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 (filed Sept. 6, 2005) (Qwest Sept. 6, 2005 *Ex Parte* Letter) (submitting Tab 7B showing Qwest's retail special access provisioned circuits by wire center). In comparison to what it is providing at wholesale to competitive carriers, Qwest discloses that, as of December 2004, it had the following number of retail lines in service that it provides to end users for each (continued....)

reports that it provides [REDACTED] business QPP arrangements and [REDACTED] business resale arrangements in the 9 wire centers where we grant unbundling relief.¹⁸³ We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that relies on Qwest's wholesale inputs – which must be priced at just, reasonable and nondiscriminatory rates¹⁸⁴ and is subject to Qwest's continuing obligations under section 251(c)(4) and section 271(c) – supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of Qwest's telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1). We emphasize that we do not take account in our analysis of competitive telecommunications services being offered over UNE loops and transport provisioned under section 251(c)(3), and note that competition based on UNE loops and transport make up a minor portion of the competition in the Omaha MSA. Qwest provides at most [REDACTED] DS1 UNE loops, at most [REDACTED] DS3 UNEs loops, and only [REDACTED] DS0 UNE loops in the Omaha MSA – constituting only a fraction of the overall local exchange and exchange access market in this MSA.¹⁸⁵

69. While our decision today relies on competitive factors other than facilities-based competition from Cox, to the extent our decision today is based on competition from Cox, we find such competition to be sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to [REDACTED] percent of the end user locations accessible from that wire center.¹⁸⁶ We believe that requiring that Cox cover at least [REDACTED]

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of the following categories: [REDACTED] DS1s; [REDACTED] DS3s; [REDACTED] OCn lines; and [REDACTED] local area networks (LANs). See Qwest Sept. 6, 2005 *Ex Parte* Letter, Attach. 1 (Tab 7B).

¹⁸³ See Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8.

¹⁸⁴ See 47 U.S.C. §§ 201, 202.

¹⁸⁵ See Qwest May 20, 2005 *Ex Parte* Letter at Attach. 1, Tab 8, Attach. Granting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification. See, e.g., Letter from Tina M. Pidgeon, Vice President, Federal Regulatory Affairs, GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 1 (filed, Sept. 13, 2005) (arguing that “a situation where the primary competitor has relied on UNE-L for customer acquisition raises very different issues than those before the Commission in the instant proceeding”).

¹⁸⁶ A primary reason we use wire centers as opposed to some other measure to geographically limit the forbearance we grant Qwest today is that both Qwest and Cox submitted data to us on a wire center basis. We have considered and reject the idea of measuring facilities-based coverage on the basis of individual end users. The costs of implementing this approach would far exceed the benefits. As an initial matter, implementing this approach would require Cox to provide Qwest with a list of every potential customer in the Omaha MSA and to report whether Cox's network covers that customer, even though Cox does not itself rely on Qwest's UNEs to compete. Even if the burdens of this large task were otherwise reasonable, because Cox is a direct competitor of Qwest, providing a list of every potential customer in the Omaha MSA and disclosing whether Cox is willing and able, within a commercially reasonable time, of providing service to that customer does not serve the goal of a competitive marketplace. In addition, such an approach would be of limited utility unless updated on a regular basis. Here again, we do not believe it in the public interest to impose on a new entrant the requirement to constantly update a direct incumbent competitor as to precisely where it is expanding service. We also have considered and rejected the idea of measuring facilities-based coverage on an MSA basis. Using such a broad geographic region would not allow us to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that (continued....)

percent of the end user locations in a wire center service area before Qwest obtains forbearance from section 251(c)(3) unbundling obligations in that wire center will ensure that all of the customers capable of being served by Qwest from that wire center will benefit from competitive rates, terms and conditions.¹⁸⁷ In support of these findings, the record shows that in these 9 wire center service areas, Cox provides approximately [REDACTED] residential access lines, [REDACTED] DS0 loops to business customers, [REDACTED] DS1 loops, [REDACTED] DS3 loops and [REDACTED] OCn loops, and covers approximately [REDACTED] percent of the business locations.¹⁸⁸ In contrast, in the remaining 15 wire center service areas, Cox provides only approximately [REDACTED] residential access lines, [REDACTED] DS0 loops to business customers, [REDACTED] DS1 loops, [REDACTED] DS3 loops and [REDACTED] OCn loops and covers a lower percentage of business locations.¹⁸⁹ In addition, the service areas of these 9 wire centers in which we partially grant Qwest's Petition for forbearance are precisely the geographic areas where we expect to see further investment and deployment by Cox, and where we are most likely to see other competitors make the investments necessary to provide service without resorting to unbundled loops and transport. If we were to require that Cox's network must cover 100 percent of the end user locations in a wire center service area before granting Qwest forbearance in that wire center, Qwest would only be entitled to forbearance relief in [REDACTED] today, despite the fact that Cox provides mass market services to [REDACTED].

70. Furthermore, as the record confirms, a facilities-based competitor such as Cox that does not compete through reliance on section 251(c)(3) access to unbundled loops is unlikely to pattern the architecture of its network after wire center service area boundaries.¹⁹⁰ We do not believe that we should require that Cox's network neatly map to Qwest's wire center service area boundaries as a precondition of granting Qwest forbearance relief. In addition, if we were to require Cox's network to cover 100 percent of a wire center before granting Qwest forbearance in that wire center, Cox would be able to

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the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations. See *supra* note 161.

¹⁸⁷ Wire center boundaries do not necessarily follow political or demographic boundaries; do not necessarily correspond to newspapers' circulation boundaries, television or radio reception boundaries or advertising boundaries (whether broadcast or cable); and are not identical to zip code boundaries. Wire center boundaries are most relevant only to the incumbent LEC and competitors that make use of an incumbent LEC's last mile facilities. There is no evidence in the record to suggest that Qwest is able to discern exactly where its facilities-based competitors are capable of providing service or to suggest that where a facilities-based competitor covers as much as [REDACTED] percent of the end user locations in a wire center that Qwest could impose prices, terms and conditions on the remaining [REDACTED] percent of customers that are less favorable than the prices, terms and conditions available to the other [REDACTED] percent of customers in that wire center. See *Qwest Teitzel Aff.* at 6-7 (stating that it is difficult to obtain information about competitors' market shares in Qwest's territory).

¹⁸⁸ See Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1. We find Cox's submission of actual evidence of the number of business locations to which it provides service more compelling than estimates that are based on inferences of the number of business locations Cox serves. See *Cbeyond et al.* Sept. 13, 2005 *Ex Parte* Letter at 7-8.

¹⁸⁹ See Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1. We emphasize that because our analysis relies on the extent to which facilities-based competition has taken root in the Omaha MSA and the specific nature of that competition, the appropriate coverage threshold for forbearance relief – if any – may differ in other geographic markets exhibiting different characteristics.

¹⁹⁰ See Cox June 30, 2005 *Ex Parte* Letter.

prevent Qwest from obtaining forbearance relief (and may have the incentive to do so) by declining to provide telecommunications services to only a relatively small percentage of potential customers in each wire center service area.

71. For the reasons explained above, we disagree with commenters who contend that forbearing from application of unbundling obligations to Qwest will result in a duopoly.¹⁹¹ In the present context, we believe that the facilities-based competition between Qwest and Cox, in addition to the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market.¹⁹² We note that the Commission previously has rejected arguments “that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied.”¹⁹³

72. Apart from intermodal competition from Cox, Qwest contends that it subject to additional intermodal competition from VoIP and wireless providers, and that it is “appropriate and necessary” for the Commission to consider competition from these sources as well. Because Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.

b. Section 10(a)(2) – Protection of Consumers

73. Section 10(a)(2) of the forbearance analysis requires us to determine whether the section 251(c)(3) access obligations for loop and transport elements are necessary to protect consumers.¹⁹⁴ For reasons similar to those that persuade us that the section 251(c)(3) access obligations for loop and transport elements are not necessary under section 10(a)(1), we also determine that these access obligations are no longer necessary for the protection of consumers in light of the transition period we describe in the following paragraph. As we conclude above, Qwest faces competition in the local exchange and exchange access markets in the Omaha MSA from Cox, which provides service without relying on Qwest’s loops and transport, as well as from other carriers. We also conclude above that the continued application in the Omaha MSA of regulatory provisions designed to promote the development of competitive markets other than section 251(c)(3) will ensure that customers in the Omaha MSA have competitive choices, and will continue to have competitive choices if we forbear from applying most

¹⁹¹ See, e.g., Sprint Comments at 16; MCI Comments at 3, 10, 12-16; CompTel Comments at 19; AT&T Comments at 17; AT&T Comments, Declaration of Lee L. Selwyn on Behalf of AT&T Corp. (AT&T Selwyn Decl.) at 63-68, paras. 76-82; Letter from Andrew D. Lipman et al., Counsel for McLeodUSA, MPower & Pac-West, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 3 (filed Sept. 12, 2005).

¹⁹² AT&T argues that “the presence of Cox in the Omaha market makes further facilities-based entry even less likely than it would be absent an incumbent cable telephony provider.” AT&T Selwyn Decl. at 33, para. 41. Even assuming AT&T’s contention is correct, it does not constitute a reason to deny Qwest forbearance from unbundling obligations under section 251(c)(3).

¹⁹³ Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21509, para. 27.

¹⁹⁴ 47 U.S.C. § 160(a)(2).

section 251(c)(3) requirements to Qwest. Therefore, for the reasons we explained above, in those areas of the Omaha MSA where Qwest faces this competition, we find that the 251(c)(3) access obligation for loop and transport elements is no longer necessary to protect consumers in part because we adopt a six-month transition period for the protection of consumers.

74. *Transition Period.* Because we remove some unbundling obligations formerly placed on Qwest in certain wire centers, and as a foundation of our section 10(a)(2) finding, to avoid customer disruption we establish a plan to facilitate the transition from section 251(c)(3) unbundling to alternative options – an approach similar to the Commission’s adoption of transition plans in other contexts in which it eliminated UNE obligations.¹⁹⁵ Specifically, we adopt a six-month plan for competing carriers to transition to *alternative facilities or arrangements, including self-provided facilities, or services offered by Qwest.* This transition plan shall apply only to the embedded customer base, and does not permit competitive LECs to add new loop or transport UNEs pursuant to section 251(c)(3) where the Commission has determined to forbear from a section 251(c) unbundling requirement. We believe this transition period provides adequate time for both competitive LECs and Qwest to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities, obtain other wholesale facilities, or take other actions. Consequently, carriers have six months from the effective date of this Order to modify their interconnection agreements, *including completing any change of law processes.* At the end of the six-month period, requesting carriers must transition all of their affected UNE loops and dedicated transport elements to alternative facilities or arrangements. *The relief we grant Qwest today is conditioned upon compliance with the requirements of this paragraph.*

c. Section 10(a)(3) – Public Interest

75. We also conclude that relieving Qwest from the section 251(c)(3) *access obligations for loop and transport elements* is in the public interest under section 10(a)(3). We determined above that Qwest is subject to a significant amount of competition in the Omaha MSA. Based on this level of competition, in conjunction with other regulatory safeguards, we determined that requiring Qwest to provide access to loops and transport under section 251(c)(3) is no longer necessary for the protection of consumers or to ensure that Qwest will not engage in unjust or unreasonable pricing or practices.¹⁹⁶ The factors upon which we based those conclusions also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section 10(a)(3). In addition, we conclude that granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and *enhance competition among providers of telecommunications services as contemplated by section 10(b).*¹⁹⁷

¹⁹⁵ See *Triennial Review Remand Order*, 20 FCC Rcd 2639-41, paras. 195-98; see also, e.g., 47 C.F.R. §§ 51.319(a)(4)(iii) (establishing DS1 loop transition period), 51.319(a)(5)(iii) (establishing DS3 loop transition period), 51.319(a)(6)(ii) (establishing dark fiber loop transition period).

¹⁹⁶ See *supra* at Part III.D.1.a.

¹⁹⁷ Section 10(b) directs the Commission to consider whether forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services,” and provides that such a determination may be the basis for finding that forbearance is in the public interest. 47 U.S.C. § 160(b).

76. Moreover, we conclude that the forbearance we grant Qwest today is in the public interest for two significant additional reasons: first, we conclude that the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits, and second, we find that our decision today will increase the regulatory parity in this market. *First*, we conclude that it is in the public interest under section 10(a)(3) to forbear from section 251(c)(3) loop and transport element unbundling obligations because the costs of these unbundling requirements in parts of the Omaha MSA outweigh the benefits. One of Congress's primary goals in the 1996 Act was the creation of competitive local exchange and exchange access markets. To foster such competition, Congress gave new market entrants, which in 1996 lacked sufficient economies of scale and scope to compete effectively in the local exchange and exchange access markets, the right to compete with the incumbent LEC in these markets by leasing at cost-based rates key components (*i.e.*, UNEs) of the incumbent LEC's own telecommunications network.¹⁹⁸ Under this approach, a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers. Such regulatory intervention results in a number of costs, including reducing the incentives to invest in facilities and innovation, and creating complex issues of managing shared facilities.¹⁹⁹

77. While the costs of such regulatory intervention may be warranted in order to foster competitive entry into the local exchange and exchange access markets where such competition would not otherwise be generated, we find that these costs are unwarranted and do not serve the public interest once local exchange and exchange access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA. Specifically, we conclude that in the 9 wire center service areas in the Omaha MSA we identified above, the costs of unbundling under section 251(c)(3) are outweighed by the benefits of such unbundling in light of the vibrant emerging competition for local exchange and exchange access services. In addition to furthering the congressional goal of creating competitive local exchange markets, our decision today also furthers another of Congress's primary aims in the 1996 Act – to deregulate telecommunications markets to the extent possible.²⁰⁰ We act today in accord with Congress's clear intent in section 10 to sunset in a narrowly tailored fashion any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected.

78. *Second*, we conclude that our decision today will further the public interest by increasing regulatory parity in the telecommunications services market in the Omaha MSA. Some of the requirements of the Act and our regulations impose greater burdens on some carriers than others. The marketplace for local exchange services is a product of its history, and in order to develop and maintain competition in the local exchange markets, Congress established some obligations that apply only to incumbent LECs. Once the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities, we believe that it

¹⁹⁸ See 47 U.S.C. § 251(c).

¹⁹⁹ See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2559, para. 44 n.131 (justifying a finding of no impairment in certain cases in part due to the “known costs of unbundling, including reducing the incentives to invest in facilities and innovation and creating complex issues of managing shared facilities”); see also *USTA II*, 359 F.3d at 572 (stating that the Commission's impairment determinations may take into account the costs of unbundling, “such as discouragement of investment in innovation”); *Triennial Review Order*, 18 FCC Rcd at 17148, para. 284 (considering the costs of unbundling).

²⁰⁰ See *supra* note 61.

is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms. Even though Qwest and Cox each provide service over their own facilities to [REDACTED] narrowband customers in the Omaha MSA,²⁰¹ Qwest is subject to unbundling obligations while Cox is not. Our action today places Qwest and Cox on more equal footing in those wire center service areas where facilities-based competition is sufficiently developed such that taking this step to increase the level of parity in the local exchange market is appropriate.

79. We make a predictive judgment, based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0-, DS1-, or DS3-capacity facilities. We thus reject arguments that our decision today will strand competitive carriers' investments by denying those competitors the opportunity to use their own existing facilities in conjunction with Qwest facilities that cannot economically be duplicated.

80. To begin with, we note that a withdrawal of these loop and transport offerings would be impermissible under section 271, which requires Qwest to make its loop and transport facilities (among others) available to competitors at just and reasonable rates and terms.²⁰² In addition, Qwest offers similar special access services pursuant to tariffing or contract filing requirements, and cannot cease offering such services to customers without authority under section 214.

81. Moreover, given Cox's ability to absorb customers without any reliance on Qwest's local exchange facilities, Qwest will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so. Faced with aggressive “off-net” competition from Cox, we predict that Qwest will endeavor to maximize use of its existing local exchange network, providing service at retail *and at wholesale*, in order to minimize revenue losses resulting from customer defections to Cox's service. In short, Qwest will prefer that a customer be served by a wireline competitor using Qwest's facilities at wholesale rates above that customer's use of Cox's network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs.²⁰³

82. Indeed, our experience indicates that this is precisely what has happened in the past: When the D.C. Circuit called into question the Commission's rules requiring incumbent LECs to unbundle mass market local circuit switching, Qwest responded by introducing a commercial product designed to replace UNE-P – and to keep customers on its network – even in the absence of a legal mandate to do so. Qwest has entered into [REDACTED] commercially negotiated QPP arrangements in the MSA, of which [REDACTED] are in the 9 wire centers where we grant unbundling relief.

²⁰¹ See *supra* para. 28.

²⁰² See 47 U.S.C. § 271(c)(2)(B)(iv) (loops), (v) (transport); *Triennial Review Order*, 18 FCC Rcd at 17384-89, paras. 653-64 (requiring that facilities made available under section 271 be provided at section 201 rates).

²⁰³ See Qwest July 25, 2005 *Ex Parte* Letter, Attach. at 2-3 (arguing that Qwest “has a powerful economic and market incentive to provide” wholesale products to its wireline competitors due to the intense competition in the Omaha MSA and that it would be “irrational economic behavior” for Qwest not to maximize the use of its existing network).

83. Here, too, we predict that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.²⁰⁴

2. Other Requirements of Section 251(c)

84. We decline to forbear from applying to Qwest the requirements of section 251(c) other than section 251(c)(3) (with an exception for certain collocation obligations). Specifically, we decline to forbear from the requirements of section 251(c) that Qwest negotiate in good faith the terms and conditions of its section 251(b) and section 251(c) obligations; provide other carriers with interconnection to its network at any technically feasible point; offer its retail services for resale at wholesale rates; provide reasonable public notice of changes in its network that would affect interoperability; and satisfy certain collocation obligations.²⁰⁵ These requirements facilitate existing and potential competition in this market and Qwest fails to provide sufficient evidence or justification for why these requirements are no longer necessary under the standards of section 10(a). We continue to believe the requirements of sections 251(c)(1)-(2) and (4)-(6) remain necessary to ensure just and reasonable and nondiscriminatory prices in the Omaha MSA and to protect consumers' interests. We also conclude that granting Qwest forbearance from these obligations would not be consistent with the public interest.

85. *Interconnection-Related Obligations.* We decline to grant Qwest forbearance from the application of sections 251(c)(2), (5) and (6) of the Act, with an exception discussed below.²⁰⁶ Qwest contends that the Commission should forbear from applying the obligations of section 251(c) that are uniquely imposed on incumbent LECs, because competition in the Omaha MSA has developed to the point where Qwest "is just one of several facilities-based competitors."²⁰⁷ Qwest in this context is using "facilities-based competitor" to mean a competitor that does not rely exclusively on Qwest's facilities to compete.²⁰⁸ But while a substantial portion of customers within the 9 wire centers at issue receive

²⁰⁴ To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. See *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, FCC 05-165 (rel. Sept. 8, 2005); see also *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21509, para. 26 n.85; *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004); *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998).

²⁰⁵ 47 U.S.C. §§ 251(c)(1) (duty to negotiate in good faith), (2) (interconnection), (4) (resale), (5) (notice of changes), (6) (collocation).

²⁰⁶ 47 U.S.C. §§ 251(c)(2), (5), (6).

²⁰⁷ Petition at 24.

²⁰⁸ Qwest clarifies that when it refers to competitors as "facilities-based," it means that the competitors have "placed fiber in portions of the Omaha MSA that 'overbuild' portions of Qwest's legacy network, primarily for purposes of interoffice transport and carriage of long distance traffic." Qwest Reply at 29.

service from a Qwest competitor not relying on a Qwest loop, a Qwest switch, or Qwest dedicated transport, *all* of its competitors in the Omaha MSA rely extensively on access to Qwest's network in order to exchange telecommunications traffic.²⁰⁹ Even Cox, which is the competitive LEC with the most extensive facilities-based coverage in Qwest's territory in the Omaha MSA, depends on Qwest for interconnection, collocation, and reasonable notice of changes in Qwest's network in order to exchange telecommunications traffic in the Omaha MSA. Cox reports that approximately [REDACTED] percent of all the traffic that it sends and receives in the Omaha MSA depends on section 251(c)(2) interconnection and collocation – the effectiveness of which depends in part on reasonable notice of network changes.²¹⁰ Other competitive LECs, which have less network coverage in this geographic market than Cox, presumably depend even more than Cox on Qwest's satisfaction of its section 251(c) obligations.

86. Qwest does not discuss collocation or its obligations with respect to providing reasonable notice of network changes in detail.²¹¹ Regarding interconnection, Qwest states that section 251(c)(2) direct interconnection at any technically feasible point is not necessary in the Omaha MSA because competitive LECs can still rely on the general duty of section 251(a)(1) that requires all telecommunications carriers to interconnect directly or indirectly.²¹² Qwest argues that competitive LECs' right to indirect interconnection is sufficient to protect the interests set forth in section 10(a) because Qwest's business interests will force it to negotiate agreements with wholesale providers of interconnection.²¹³ We reject Qwest's position on this issue. Forbearing from section 251(c)(2) interconnection and related section 251(c) requirements such as collocation likely would give Qwest, which is the only carrier in the Omaha MSA to have a ubiquitous network, the ability to exercise market power over interconnection in this market.²¹⁴ Due to the ubiquity of Qwest's network and its direct

²⁰⁹ See Nebraska PSC Reply at 2; Iowa Utils. Bd. Comments at 3; Cox Comments at 31-32; ALTS Comments at 3, 5-6; TWTC Comments at 2; McLeodUSA Comments at 8-9; Sprint Comments at 7; MCI Comments at 9, 11; CompTel Comments at 1; AT&T Comments at 32; Qwest Reply at 29.

²¹⁰ See Cox June 30, 2005 *Ex Parte* Letter at 2; see also Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Aug. 24, 2005) (stating that "[e]ven though Cox uses its own network to provide competitive phone services to Omaha consumers, Cox still must rely on the rights granted it" as a competitive LEC for interconnection and other items under section 251(c)).

²¹¹ See, e.g., Qwest July 25, 2005 *Ex Parte* Letter, Attach. at 5-6 (arguing that Qwest has "fully implemented" section 251(c)(6) through its collocation policies); Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5 (filed Aug. 30, 2005) (Qwest Aug. 30, 2005 *Ex Parte* Letter) (noting that Cox has collocated in two Qwest offices for the purpose of interconnection). Indeed, some commenters assumed from the evidence Qwest provided that it was not seeking relief from section 251(c) obligations other than section 251(c)(3). See, e.g., Sprint Comments at 2, 8-9.

²¹² Petition at 26-27; see also 47 U.S.C. § 251(a)(1) (providing that each telecommunications carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers") (emphasis added).

²¹³ Qwest Reply at 32-33.

²¹⁴ See, e.g., AT&T Selwyn Decl. at 68-9 (arguing that in the absence of section 251(c)(2) interconnection obligations Qwest would no longer be obligated to provide efficient points of interconnection, thus driving up interconnection costs by forcing competitive LECs to incur substantial backhaul and transport costs).

connection obligations, competitive carriers have constructed their networks using direct interconnection with Qwest and collocation as a way to interconnect with all of the carriers in the Omaha MSA.²¹⁵ If we were to forbear from section 251(c)(2), we believe Qwest would be able to exercise market power by refusing directly to connect to its competitors and forcing them to reconfigure their networks in order to exchange traffic – an expensive proposition – or pay Qwest significantly higher interconnection fees. Qwest has not made any showing that alternative interconnection arrangements are available.²¹⁶ In the absence of any substantial record evidence to the contrary, we determine that forbearance from the obligations of sections 251(c)(2), (5) and (6) is not justified under any of the three prongs of section 10(a). We find that these interconnection-related obligations are necessary to ensure just, reasonable and nondiscriminatory prices and practices in the Omaha MSA, and necessary to protect competition and consumers. Consistent with and ancillary to our decision above to forbear from section 251(c)(3) loop and transport unbundling obligations, however, we forbear from section 251(c)(6) collocation obligations in the same 9 wire centers to the extent such collocation would be used to access UNEs, but not to the extent it is used to access interconnection.²¹⁷

87. *Good Faith Negotiation.* We also decline to grant Qwest forbearance from its section 251(c)(1) duty to negotiate in good faith the terms and conditions of agreements to fulfill its obligations under sections 251(b) and (c).²¹⁸ Qwest does not provide any compelling justification for why it should be exempt from this obligation, nor does it address the reciprocal nature of section 251(c)(1). Congress placed the duty to negotiate the agreements necessary under sections 251(b) and (c) in good faith not only on incumbent LECs such as Qwest, but also on the other parties to such agreements – *i.e.*, the requesting telecommunications carriers.²¹⁹ We do not believe it would be in the public interest to grant Qwest forbearance from this duty, particularly when the requesting telecommunications carrier would remain subject to the obligations of section 251(c)(1). Nor are we convinced that the other prongs of section 10(a) are satisfied. In the absence of evidence to the contrary, we believe that section 251(c)(1)

²¹⁵ See, e.g., Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1-2 (filed Aug. 12, 2005) (Cox Aug. 12, 2005 *Ex Parte* Letter) (reporting that Cox relies on Qwest for interconnection with about half of the other carriers in the Omaha market). See also Cox Comments at 26. It rarely would be efficient for each competitor in a market to interconnect directly to every other competitor, and carriers therefore generally interconnect directly only with those carriers with whom they exchange a significant amount of traffic. See Cox Comments at 27 (stating that “for more than half of the carriers to which Cox sends traffic, call volumes are simply too low to warrant direct interconnection and the same is true for carriers that send traffic to Cox”). Competitive carriers that do not directly connect to one another then rely on the incumbent LEC to provide a transit service to carry traffic between their points of connection with the incumbent LEC, which often are collocated. See, e.g., Cox Comments at 27.

²¹⁶ We reject Qwest’s Petition for the reasons above and are not convinced by Qwest’s argument that we should grant its Petition because no carrier opposing its Petition – and specifically, Cox – has explained why it could not interconnect with Qwest through an alternative means. See Qwest Aug. 30, 2005 *Ex Parte* Letter, Attach. 1 at 5. In any event, Cox has subsequently explained in detail why it believes interconnection and collocation are important to competition and why forbearance for these regulatory obligations should be denied. See Cox Sept. 14, 2005 *Ex Parte* Letter, Attach. at 2-5.

²¹⁷ For the sake of brevity, we incorporate here by reference the reasons for forbearance given above in Part III.D.1.

²¹⁸ See Petition at 22-29.

²¹⁹ See 47 U.S.C. § 251(c)(1).

remains necessary to ensure just and reasonable and nondiscriminatory pricing and practices in this market.

88. *Resale.* We deny Qwest's Petition to the extent it seeks forbearance from the resale obligations of section 251(c)(4).²²⁰ Qwest contends that competitors in the Omaha MSA no longer depend on section 251(c)(4) resale, and argues that to the extent such reliance remains necessary, its competitors could rely instead on resale offered pursuant to section 251(b)(1).²²¹ Qwest has not persuaded us that section 251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that consumers' interests and the public interest are protected under section 10(a). Particularly because we have determined to forbear from section 251(c)(3) loop and transport element unbundling obligations,²²² we conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.²²³ As Qwest itself states:

[R]esale of Qwest's existing retail services represents a non-capital intensive means for CLECs to enter the market and build a core customer base, albeit with profit margin potential lower than that available via delivery of service via CLEC-owned facilities or wholesale network facilities leased from Qwest. . . . [E]specially for new market entrants, resale remains a viable option as a means to quickly and with little investment enter any portion of the Omaha-Council Bluffs market to attract a customer base of sufficient size to justify further investment in CLEC-owned switches and facilities.²²⁴

²²⁰ See, e.g., Petition at 21, 23, and 26; see also Qwest Reply at 32; Petition at 24 ("It is clear that the Commission cannot maintain resale . . . [and other] 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.").

²²¹ See, e.g., Petition at iv (stating that "the competition in the Omaha MSA is mature and does not rely on resale"); *id.* at 26.

²²² See *supra* Part III.D.1.

²²³ Some competitors in the Omaha MSA currently rely on section 251(c)(4) resale to compete. For example, while McLeodUSA today has constructed some of its own facilities in the Omaha MSA, see Qwest May 20, 2005 *Ex Parte* Letter at Attach. 1, Tab 3. Map 3B (showing McLeodUSA fiber routes), McLeodUSA also relies on section 251(c)(4) resale in order to compete in this market. See McLeodUSA Comments at 8; Qwest Teitzel Aff. at 18; CompTel Comments at 3 (reporting that McLeodUSA competes in part through resale). In addition, we find that forbearing from section 251(c)(4) resale requirements likely would restrict the ability of new entrants to enter the telecommunications market in the Omaha MSA in the future. See *Local Competition Order*, 11 FCC Rcd at 15499, 15954, para. 907 (stating that "[r]esale will be an important entry strategy for many new entrants"); *cf. also* Petition at 16-17 ("With the adoption of the 1996 Act, Congress implemented a comprehensive system of market-opening provisions that benefit both facilities-based carriers and pure resellers. This flexibility allows competitive providers to increase their market presence through resale beyond the reach of their existing networks. It also allows them to increase their market share more quickly than would be possible solely through expansion of their own networks."); Qwest Teitzel Aff. at 5-6.

²²⁴ See Qwest Teitzel Aff. at 5-6.

89. We are not persuaded by Qwest's argument that section 251(c)(4) resale is unnecessary in the Omaha MSA because competitors would still have a right to resell Qwest's services pursuant to section 251(b)(1).²²⁵ Under the Act, all LECs must allow the resale of their telecommunications services and not place unreasonable or discriminatory conditions or limitations on that resale.²²⁶ However, unlike the section 251(c)(4) resale obligation, section 251(b)(1) has no wholesale pricing requirement. Despite the amount of retail competition in the Omaha MSA, particularly for narrowband voice services, Qwest has not demonstrated that resale at avoided-cost discount is no longer necessary to competition in the Omaha MSA. Unlike access obtained under a facilities unbundling regime, in a resale service situation the incumbent LEC continues to have control of the physical lines, making it difficult for competitive LECs to distinguish their resale offering from the offering of the incumbent LEC on the basis of innovative products or features. Hence, if a competitive LEC is unable to distinguish its resale service on the basis of price, the value of a resale option to the creation of competitive markets is diminished. In addition, because the incumbent LEC continues to receive a high percentage of the revenue from resale pursuant to section 251(c)(4), we find that resale does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3).²²⁷ Moreover, we granted Qwest forbearance from its section 251(c)(3) loop and transport unbundling obligations in part due to competitive LECs' continued right to access certain regulated wholesale services in the Omaha MSA, including resale pursuant to section 251(c)(4). We conclude that Qwest therefore has not shown that section 251(c)(4) is no longer necessary to protect consumers' interests or ensure just and reasonable and nondiscriminatory pricing, and has not shown that forbearing from section 251(c)(4) would enhance competitive market conditions.²²⁸

E. Forbearance from 271(c)(2)(B) Checklist Requirements

90. For the reasons discussed below, we decline pursuant to section 10(a) to forbear from the requirements of section 271(c)(2)(B) as they apply to Qwest in the Omaha MSA with the exception of section 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth what commonly are referred to as the competitive checklist requirements. Before a BOC lawfully may provide interLATA services in a state, it must demonstrate that it satisfies these competitive checklist items.²²⁹ In addition, after a BOC has obtained such authority, it must continue to satisfy the competitive checklist requirements of section 271(c)(2)(B).²³⁰ Because Qwest is a BOC that has received section 271 authority in Nebraska and Iowa,²³¹ it is subject to the section 271 competitive checklist requirements.

²²⁵ See Petition at 26; see also Qwest Reply at 32-33; 47 U.S.C. §§ 251(b)(1), (c)(4).

²²⁶ 47 U.S.C. § 251(b)(1).

²²⁷ See *Telecommunications Competition Survey for Retail Local Voice Services in Iowa*, Iowa Utils. Bd. January 2004 Report, at 12 (reporting that in Iowa Qwest receives 89.73 percent of its tariffed retail rate when a competitive LEC resells Qwest's residential basic exchange access lines).

²²⁸ In light of other relief the Commission recently has given for broadband services, it is likely that we could find the obligation to offer resale of broadband services under section 251(c)(4) unnecessary on a more developed record.

²²⁹ 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."); see also *id.* § 271(d).

²³⁰ 47 U.S.C. §§ 271(c)(2)(B) (competitive checklist requirements), (d)(6) (ongoing nature of requirements).

²³¹ See *Qwest IA/NE Section 271 Order*, 17 FCC Rcd 26303 (2002).

91. We conduct our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.²³² The Commission previously has considered "the statutory language, the framework of the 1996 Act, its legislative history, and Congress's policy objectives," to conclude that the Act "directs [the Commission] to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."²³³ The statutory language and framework of the 1996 Act, along with other factors, also reveal that with regard to legacy elements, which already are ubiquitously deployed, Congress's primary aim is to foster a competitive marketplace for telecommunications services provided over those facilities. Our analysis below is informed by and remains faithful to the direction we have received from Congress. The Commission already has granted Qwest substantial forbearance relief from obligations arising under section 271 related to certain broadband facilities; we decline to grant Qwest comparable relief it now seeks related to certain legacy elements.

1. Forbearance Analysis

92. Section 10(a) of the Act requires that we forbear from applying the section 271(c)(2)(B) checklist requirements to Qwest if we determine that each of three statutory forbearance criteria is satisfied. Qwest seeks forbearance from seven of the fourteen competitive checklist items contained in section 271(c)(2)(B), namely checklist items 1 through 6 and 14. In our analysis below, we group these requirements into three categories. The first category consists of checklist items 1, 2, and 14, which each incorporate obligations of section 251(c) by reference. The second category consists of checklist item 3, which incorporates the obligations of section 224 by reference. The third category consists of checklist items 4 through 6, which are independent obligations under the Act. Except as specifically provided below, we conclude with respect to all three categories and based on the current record that forbearance is not warranted.

a. Checklist Items 1, 2 & 14 (Interconnection, UNEs & Resale)

93. We conclude that Qwest has demonstrated that it is entitled to forbearance from its obligations to provide interconnection, UNEs and resale pursuant to section 271(c)(2)(B)(i), (ii), and (xiv) (*i.e.*, checklist items 1, 2, and 14) only to the same extent that it has demonstrated that it is entitled to forbearance from the requirements of sections 251(c)(2)-(4).²³⁴ Therefore, we grant Qwest's

²³² See Preamble to the 1996 Act, 110 Stat. 56, 56 (1996); *see also* Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

²³³ *Advanced Services Order*, 13 FCC Rcd 24012, 24047, para. 77 (1998) (discussing the relationship between section 10 and section 706).

²³⁴ Checklist item 1 requires Qwest to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i). Checklist item 2 requires Qwest to 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). Checklist item 14 requires Qwest to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. § 271(c)(2)(B)(xiv); *see also Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17519-30, 17542, paras. 17-44, 67 (2001) (*Verizon Pennsylvania Section 271 Order*).

Petition to the extent it seeks forbearance from checklist item 2 as that requirement applies to UNE loops and transport in the 9 wire centers where we have granted relief from the analogous section 251(c)(3) obligation. In all other respects, we decline to grant Qwest forbearance from the application of checklist items 1, 2, and 14.

94. The scope of the requirements of checklist items 1, 2, and 14 is coextensive with specific requirements set forth in section 251(c) and section 252(d). Specifically, under checklist items 1, 2, and 14, a BOC must provide interconnection, UNEs and resale “in accordance with the requirements of” the relevant subsections of 251(c) and 252(d).²³⁵ As a result, as the Commission and reviewing courts previously have stated, if a BOC must provide interconnection, UNEs or resale pursuant to sections 251(c)(2)-(4), it must also provide interconnection, UNEs or resale pursuant to checklist items 1, 2, and 14 of section 271(c)(2)(B).²³⁶ Therefore, it would not make sense for the Commission to forbear from sections 271(c)(2)(B)(i), (ii), and (xiv) while the obligations of sections 251(c)(2)-(4) remain in effect. Similarly, it would not make sense for the Commission to deny forbearance from sections 271(c)(2)(B)(i), (ii), and (xiv) if a carrier has no corresponding obligations under sections 251(c)(2)-(4).

95. With the exception of Qwest’s obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3) discussed separately just below, Qwest remains subject to the requirements of sections 251(c)(2)-(4). We therefore find it would not make sense for us to forbear from the obligations of checklist items 1, 2, and 14 except for the obligation to provide unbundled access to loops and transport, and we decline to do so for the reasons we state below. Our decision also is based on the section 10(a) analysis that we explained above regarding sections 251(c)(2)-(4), which is relevant to and also supports our decision regarding 271(c)(2)(B)(i), (ii), and (xiv).²³⁷ In addition, again due to the linkage between these two sets of statutory provisions, even if the Commission were to grant Qwest forbearance from the application of checklist items 1, 2 and 14 other than as applied to narrowband loops, Qwest would not obtain any material regulatory relief today. Qwest has not identified a single action it takes or obligation it incurs pursuant to sections 271(c)(2)(B)(i), (ii) or (xiv) that it would no longer need to perform or incur if we were to grant forbearance relief from the application of those checklist items if we did not also grant Qwest forbearance relief from requirements arising under section 251(c)(2)-(4). We therefore deny Qwest’s request for forbearance from checklist items 1 and 14, and checklist item 2 except as discussed below.

96. *Unbundled Loops and Transport Under Checklist Item 2.* Unlike network elements for which the Commission has found impairment and that Qwest must continue to provide on an unbundled basis under section 251(c)(3), loops and transport are a special case because the Commission has found

²³⁵ See 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiv).

²³⁶ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4742, n.374 (2005) (seeking comment on whether the statutory language regarding the duty to interconnect directly or indirectly under section 251(a) should be read to encompass an obligation to provide transit service and stating that “a determination that incumbent LECs have a transiting obligation pursuant to section 251(c)(2) would also trigger an obligation to provide such a service under section 271(c)(2)(B)(i)”); see also *Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (stating that some of the section 271(c)(2)(B) “requirements are simply incorporations by reference of obligations independently imposed on the BOCs by §§ 251-52 of the Act”).

²³⁷ For the sake of brevity, we do not restate our section 10(a) analysis in full here.

impairment but in today's Order we determine not to apply to Qwest the section 251(c)(3) obligation to unbundle these elements in the Omaha MSA. Because checklist item 2 incorporates and is coextensive with section 251(c)(3), we grant Qwest forbearance from checklist item 2 requirements for loops and transport.²³⁸ Just as it would not make sense to forbear from this checklist item if Qwest's correlative obligation in section 251(c)(3) remains in effect, now that we have forbore from section 251(c)(3) as applied to loops and transport, it also would not make sense to decline to forbear from checklist item 2. As explained above, the scope of these obligations is identical because checklist item 2 simply requires Qwest to provide UNEs in accordance with the requirements of sections 251(c)(3) under the applicable pricing requirement set forth in section 252(d)(1). We stress, however, that Qwest remains subject to the obligation to provide wholesale access to loops as required by checklist item 4 and to provide wholesale access to transport as required by checklist item 5. As we discuss below, the scope of checklist items 4 and 5 and the pricing requirements that apply to those obligations differ from the scope and pricing standard of checklist item 2. In addition, part of the reason we are able to grant Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport is because a comparable wholesale access obligation exists under section 271(c).

b. Checklist Item 3 (Poles, Ducts, Conduits, and Rights of Way)

97. We deny Qwest's Petition for forbearance to the extent it seeks relief from its obligations arising under checklist item 3 in the Omaha MSA, which requires Qwest to provide nondiscriminatory access to the poles, ducts, conduits, and rights of way it owns or controls at just and reasonable rates in accordance with the requirements of section 224.²³⁹ Qwest has not asked for relief from section 224 or section 251(b)(4),²⁴⁰ or any regulations promulgated pursuant to those statutory provisions, and we decline at the present time to grant such relief *sua sponte*.²⁴¹ Because Qwest's obligations under checklist item 3 incorporate the obligations of section 224 by reference, and are mirrored in section 251(b)(4), even if the Commission were to grant Qwest relief from its obligations under checklist item 3, Qwest would not obtain any material regulatory relief today in the absence of comparable relief under section 224 and section 251(b)(4). It therefore would not make sense for the Commission to grant such relief and we decline to do so.

98. In addition, we find that enforcement of checklist item 3 in the Omaha MSA remains necessary under the standards of sections 10(a)(1) and (2). Qwest has not submitted evidence in this proceeding to show why this provision is no longer necessary to ensure that Qwest's charges and practices for access to its poles, ducts, conduits and rights of way are just, reasonable and nondiscriminatory or that this provision is unnecessary for the protection of consumers, nor does any

²³⁸ In accord with our decision above, we do not forbear from checklist 2 requirements with respect to 911 and E911 databases or operations support systems. *See supra* note 150.

²³⁹ *See* 47 U.S.C. § 271(c)(2)(B)(iii).

²⁴⁰ 47 U.S.C. § 251(b)(4) (providing that all LECs have the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224"); *see also* Qwest July 27, 2005 *Ex Parte* Letter, Attach. 1, at 1 (stating that Qwest "is not seeking relief from the normal rules applicable to other LECs . . . under Section 251(b)").

²⁴¹ *See, e.g.*, 47 C.F.R. §§ 1.1401-18; *see also* 47 U.S.C. § 160(a) (granting the Commission authority to grant forbearance if certain criteria are satisfied).

commenter support Qwest's Petition in this regard.²⁴² Particularly because the Commission has never granted forbearance from requirements to make poles, ducts, conduits and rights of way available – obligations closely linked to the creation of facilities-based competition – we believe it is incumbent on Qwest to explain in detail why the Commission should forbear from those sections. In the absence of record evidence to the contrary, we continue to believe that the requirements of checklist item 3 remain necessary in the Omaha MSA to ensure that Qwest's charges and practices are just and reasonable and are not unjustly or unreasonably discriminatory, as well as being necessary for the protection of consumers.

99. Furthermore, we believe that such a grant would be contrary to the public interest under section 10(a)(3) and would be harmful to competition among telecommunications services providers in this market. As amended by the 1996 Act, Congress in section 224 intended to ensure, *inter alia*, that incumbent LECs' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services and certain other services.²⁴³ It therefore amended section 224 in 1996 to give competitive LECs and cable operators a right of access to utility poles, ducts, conduits and rights of way, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable. We do not believe, as Qwest seems to assume, that the presence of some retail competition in the Omaha MSA necessarily demonstrates that it would enhance competition to grant Qwest forbearance relief from its obligation to provide competitors nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates. In the absence of evidence to the contrary, we find that facilities-based competition depends on access to poles, ducts, conduits, and rights-of-way at reasonable rates to reach customers and provide competition in the provision of telecommunications services. Qwest has not submitted any evidence nor provided any explanation to show that granting such relief would be consistent with the public interest as required by section 10(a)(3), or that shows how forbearance would promote competitive market conditions.²⁴⁴

²⁴² 47 U.S.C. § 160(a)(1), (2); *see also, e.g.*, Sprint Comments at 4; CompTel Comments at 10; AT&T Comments at 32.

²⁴³ As initially enacted in 1978, Congress in section 224 sought to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. The 1996 Act amended section 224 in important respects. As amended by the 1996 Act, section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a). The 1996 Act, however, specifically excluded incumbent LECs from the definition of telecommunications carriers with rights as pole attachers. *See* 47 U.S.C. § 224(a)(5). Because an incumbent LEC is a utility and not a telecommunications carrier for purposes of section 224, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though an incumbent LEC has no rights under section 224 with respect to those of other utilities. This is consistent with Congress's intent that section 224 promote competition by ensuring the availability of access to new telecommunications entrants. *See* Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113.

²⁴⁴ 47 U.S.C. §§ 160(a)(3), (b).

c. Checklist Items 4-6 (Loops, Transport and Switching)

100. We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (*i.e.*, checklist items 4-6).²⁴⁵ In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 to provide unbundled access to such elements.²⁴⁶ We conclude that Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory, nor unnecessary to ensure that consumers' interests are protected.²⁴⁷ We instead conclude that granting Qwest's Petition would not be in the public interest and would likely harm competition in the provision of telecommunications services in the Omaha MSA.²⁴⁸

101. As an initial matter, we clarify that the scope of our inquiry in this section is limited. The analysis below pertains only to loop, transport and switching elements that need not be unbundled pursuant to section 251(c)(3) and for which we have not already forbore from section 271 access obligations. *First*, we deny Qwest's forbearance Petition to the extent it seeks relief from obligations to provide access to loops, transport and switching under section 271 when Qwest also has an obligation to provide the same network elements – for example, loops in those wire centers where we have neither forbore from section 251(c)(3) in this Order nor found non-impairment in the *Triennial Review Remand Order* – pursuant to section 251(c). For this class of network elements, even if we were to forbear from sections 271(c)(2)(B)(iv)-(vi), which require just and reasonable pricing under sections 201 and 202, Qwest would still be obligated to provide access to these network elements pursuant to section 251(c)(3) at more specific TELRIC prices.²⁴⁹ To the extent that section 271(c)(2)(B) imposes an obligation no greater than section 251(c)(3), and where that section 251(c)(3) obligation still applies, we deny Qwest's

²⁴⁵ Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.” 47 U.S.C. § 271(c)(2)(B)(iv). Section 271(c)(2)(B)(v) requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.” 47 U.S.C. § 271(c)(2)(B)(v). Section 271(c)(2)(B)(vi) requires a BOC to provide “[l]ocal switching unbundled from transport, local loop transmission, or other services.” 47 U.S.C. § 271(c)(2)(B)(vi); *see also Verizon Pennsylvania Section 271 Order*, 16 FCC Rcd at 17532-536, paras. 48-56.

²⁴⁶ *See Triennial Review Order*, 18 FCC Rcd at 17384, para. 653; *see also Implementation of the 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, 3905, para. 471 (1999) (*UNE Remand Order*). As the Commission previously has explained, this interpretation of the Act best comports with the plain meaning of the statute and avoids other problems of statutory construction. The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. *See Triennial Review Order*, 18 FCC Rcd at 17385, para. 655.

²⁴⁷ 47 U.S.C. § 160(a)(1)-(2).

²⁴⁸ *Id.* at § 160(a)(3).

²⁴⁹ *See Triennial Review Order*, 18 FCC Rcd 17386, para. 656.

Petition for the reasons articulated above.²⁵⁰ *Second*, after Qwest filed its Petition in the present proceeding, the Commission in the *Section 271 Broadband Forbearance Order* granted forbearance petitions filed by Qwest and the other BOCs to the extent they sought relief from section 271 unbundling obligations applicable to the broadband network elements that the Commission, on a national basis, relieved from section 251(c)(3) unbundling obligations in the *Triennial Review Order* and subsequent reconsideration orders.²⁵¹ These elements include FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.²⁵² Because the Commission already has granted Qwest forbearance from its section 271 obligations for such broadband elements, its Petition to that extent is moot.

102. In the remainder of this section, therefore, we address only loops, switching and transport elements not subject to unbundling requirements pursuant to section 251(c)(3) that Qwest must provide pursuant to sections 271(c)(2)(B)(iv)-(vi), which for convenience we refer to in this order as “legacy elements.”²⁵³ The legacy elements encompassed by the discussion below include network elements that the Commission has determined do not require unbundling pursuant to section 251(c)(3). Such network elements include, among other elements, local circuit switching; transport in wire centers in cases in which the impairment measurements set forth in the *Triennial Review Remand Order* are not satisfied; and loops and transport in the 9 wire center service areas where we forbear from applying Qwest’s section 251(c)(3) unbundling obligations today.²⁵⁴

(i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

103. We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from Qwest’s wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi). We find that while section 10(a) is satisfied with respect to forbearance from certain section 251(c)(3) unbundling requirements for loops and transport, that measure of deregulation is predicated upon the availability of other regulatory protections that function as a backstop to prevent harm to competition – including, most notably here, section 271(c). In the absence of sufficient competition, we are concerned that the telecommunications services available to customers might not be offered on just, reasonable and nondiscriminatory terms. This concern is heightened because the Commission has determined that the appropriate pricing inquiry for network elements made available pursuant to section 271 is to assess whether they are priced on a just, reasonable and not

²⁵⁰ See *supra* Part III.E.1.a (explaining that it would not make sense to forbear from a section 271 obligation when the same obligation applies under a different provision of the Act).

²⁵¹ See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19; see also *MDU Reconsideration Order*, 19 FCC Rcd 15856 (extending FTTH rules to MDUs that are predominantly residential); *FTTC Reconsideration Order*, 19 FCC Rcd 20293 (2004).

²⁵² See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19.

²⁵³ We clarify that our use of the terms “legacy elements” and “legacy services” are intended simply as a shorthand to help explain our reasoning in the present case. We are not defining legacy services to be a new regulatory category and our use of “legacy elements” and “legacy services” in this order has no application beyond the scope of the present order.

²⁵⁴ See generally *Triennial Review Order*; *Triennial Review Remand Order*.