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While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the MSA, . . . the *criteria for 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 . . .*

* * *

We tailor Qwest’s relief to specific thresholds of facilities-based competition from Cox.

Evidence of *actual* facilities-based competition is especially critical in light of recent post-forbearance experience in the Omaha MSA. In the *Omaha Forbearance Order*, the Commission found that “the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under section 251 and 271 from which we do not forbear, minimizes the risk of duopoly and or coordinated behavior or other anticompetitive conduct” in the Omaha MSA.⁶³ The Commission predicted that in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding a Qwest/Cox duopoly.⁶⁴

Unfortunately, the Commission’s predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”), a competitor in the Omaha MSA dependent on access to Qwest’s last-mile facilities, recently filed a petition for modification of the *Omaha Forbearance Order*, requesting that the Commission reinstate Qwest’s Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission’s “‘predictive judgment’ that Qwest

⁶³ *Id.*, at ¶ 71.

⁶⁴ *Id.*, at ¶ 67.

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would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c)(3) has proven incorrect.”⁶⁵ McLeodUSA detailed it has made repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and that “Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.”⁶⁶ McLeodUSA stated that if the Commission fails to reinstate Qwest’s Section 251(c)(3) unbundling obligations, it will be forced to exit the Omaha MSA.⁶⁷

There are several important lessons to be learned from what has occurred in the Omaha MSA since Qwest gained Section 251(c)(3) forbearance. First, it is clear that the Commission cannot rely here on the same predictive judgment it exercised in Omaha regarding Qwest’s future behavior and how that conduct would impact competition if forbearance is granted. Qwest’s conduct in the Omaha MSA proved the Commission’s predictive judgment to be incorrect. Second, in determining whether the actual competition that currently exists will survive a grant of forbearance, the Commission must take note of Qwest’s aggressive post-

⁶⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007), (“*McLeodUSA Petition*”), at 1.

⁶⁶ *Id.*, at 4.

⁶⁷ *Id.*, at 14. McLeodUSA is not the only competitor that has concluded the forbearance granted Qwest in the *Omaha Forbearance Order* forecloses it from competing in the Omaha MSA. Integra Telecom, Inc. recently explained that it has abandoned plans to enter the Omaha market as a result of the *Omaha Forbearance Order*. See *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Comments of Integra Telecom, Inc., WC Docket No. 06-172 (filed Mar. 5, 2007), at 4.

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forbearance attempts in Omaha to stifle competition that relies on continued use of its last-mile facilities.⁶⁸

Further, Commission precedent requires that Qwest provide evidence of actual facilities-based competition in wholesale as well as retail markets. Since Qwest seeks forbearance from the Section 251(c)(3) unbundling obligation for wholesale services, the Commission's analysis must consider the effects that a grant of forbearance would have on consumers of wholesale services as well as consumers of retail services. And, as the Commission correctly noted in the *Anchorage Forbearance Order*, “[c]ompetition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market (e.g., DS0 and high-capacity loops).”⁶⁹ Qwest has not attempted to make such a showing.⁷⁰

3. Qwest's line loss data does not support its request for forbearance from Section 251(c)(3) unbundling requirements.

Data showing declines in Qwest's residential switched access lines and business lines provide no evidence of the actual facilities-based competition that is a prerequisite to Section 251(c)(3) forbearance. In support of its Petitions, Qwest cites decreases (between 2000 and 2006) in its retail residential switched access lines and its business lines, contending that these line losses show that “various competitive alternatives are widely used in the [] MSA.”⁷¹

⁶⁸ Of course, as discussed in Section IV.A, *supra*, Section 10, and the Commission's prior Section 251(c)(3) forbearance decisions, require the Commission to ignore UNE-based competition in determining whether sufficient actual competition exists in a particular product and geographic market to warrant a grant of forbearance from loop and transport UNE unbundling requirements.

⁶⁹ *Anchorage Forbearance Order*, n. 82.

⁷⁰ See Section IV.B.5, *infra*.

⁷¹ Qwest Petition – Denver, at 2; Qwest Petition – Minneapolis-St. Paul, at 2; Qwest Petition – Phoenix, at 2; Qwest Petition – Seattle, at 2.

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In reality, these figures show nothing regarding the state of facilities-based competition in these MSAs. The Commission recognized this in the *Anchorage Forbearance Order* where it “reject[ed] ACS’s contention that the sheer fact of its line loss compels forbearance.”⁷² As the Commission correctly noted in the *Anchorage Forbearance Order*, line loss by an ILEC “does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.”⁷³ It also may indicate that the consumer has abandoned its wireline voice service in favor of a non facilities-based offering. Before Qwest can argue that line loss data should be included in the Commission’s forbearance analysis, it must show that decreases in its line counts are not attributable to consumers moving from one Qwest product to another Qwest service offering.⁷⁴ Qwest has offered no such evidence here.

B. Qwest Fails to Show Sufficient Facilities-Based Competition Exists In the Four MSAs at Issue

As further shown below, Qwest has failed to provide sufficient evidence of the actual wholesale or retail facilities-based competition that is the absolute prerequisite to a finding that the consumer protection requirements of Section 10(a) have been met and the grant of forbearance for any wire center in any of the four MSAs identified in its Petitions is justified.

1. Cable Competition

A principal foundational basis in each of Qwest’s Petitions is the presence of cable competitors in the relevant MSA. Although various cable companies may have upgraded

⁷² *Anchorage Forbearance Order*, n. 88.

⁷³ *Id.*

⁷⁴ See, e.g., *Qwest Reports Steady Second Quarter 2007 Results – Continued Improvement in Revenue, Cash Flow and Margin Trends* (Aug. 1, 2007), available at http://www.qwest.com/about/media/pressroom/1,1281,2160_archive,00.html (reporting “solid subscriber growth” by Qwest in consumer broadband and video markets).

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their cable plant to provide cable-based telephony and thus may provide some measure of facilities-based competition in each MSA, the Qwest Petitions simply fail to provide the granular data necessary for analysis of the presence of facilities-based competition in each product market. Instead, Qwest relies upon insufficient and overly-broad representations (and estimates) of competition by cable providers generally, making it largely impossible to ascertain the extent of actual facilities-based competition in any of the myriad wire centers in the four markets at issue.⁷⁵

a. Mass Market

Nowhere does Qwest identify the degree of facilities-based competition in the mass market from cable in any particular wire center. Instead, Qwest focuses simplistically on the geographic area served by cable competitors generally, presenting that information as a percentage of the total number of Qwest wire centers in the MSA. This is a far cry from demonstrating the retail market share (or, at a minimum, coverage potential) of any cable competitor *within* these wire centers. For example, in Denver, Qwest notes that “as of December 2006, Comcast was serving a geographic area encompassing Qwest wire centers that account for approximately *** of the Qwest retail residential lines in that MSA.”⁷⁶ Qwest says nothing regarding the actual telephony share – if any – of Comcast in the residential market within any of

⁷⁵ See, e.g., Qwest Petition – Denver, at 8 (“In sum, Comcast has extensive facilities in the Denver MSA capable of delivering mass market services.”); Qwest Petition – Minneapolis, at 7 (“[W]ith 1.2 million homes passed by Comcast in the Minneapolis-St. Paul MSA, if Comcast achieves its goal of a 20% CDV penetration by 2009, this would equate to over 200,000 Comcast Digital Voice (“CDV”) customers.”); Qwest Petition – Phoenix, at 7 (“Cox is the U.S. cable industry’s biggest overall provider of cable telephony, with 1.8 million circuit-switched and VoIP subscribers . . . It is aggressively expanding its base of telephone subscribers system-wide, and especially in the Phoenix MSA.”); Qwest Petition- Seattle, at 9 (“Comcast and Millennium have extensive facilities in the Seattle MSA capable of delivering mass market services.”).

⁷⁶ Qwest Petition – Denver, at 7.

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the Qwest wire centers in the Denver MSA.⁷⁷ The most specific data presented by Qwest is a “reasonable estimate[] of Comcast’s voice customer base rang[ing] from 103,000 (which is based upon Comcast’s system-wide voice penetration rate) . . . to 380,000 (which is based upon Comcast’s publicly-stated goal for its penetration rate in Spokane, Washington).⁷⁸ Clearly, generalized information of this nature is useless in determining whether Qwest has satisfied the prerequisites for Section 251(c)(3) forbearance in the four MSAs at issue.

Qwest also fails to demonstrate where, and the extent to which, the cable companies offer voice service to residential customers using their own upgraded facilities. As explained above, it is the degree of *facilities-based* competition that is of prime importance in a forbearance analysis. Without such data, the presence of secondary factors, such as competitors that rely on Qwest’s wholesale alternatives to provide retail services in competition with Qwest, must be presumed. Such secondary factors result in significantly weaker competitive environments which cannot justify forbearance. Before the Commission can rely upon Qwest’s claims regarding cable competition for mass market telephony services, therefore, Qwest must adequately demonstrate that each cable provider upon which Qwest relies (1) does not rely materially on Section 251(c)(3) UNEs or other Qwest wholesale facilities;⁷⁹ (2) is willing and able to use its facilities, including its own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for Qwest’s local service

⁷⁷ Similar representations were made by Qwest in support of forbearance in the Minneapolis-St. Paul, Phoenix, and Seattle MSAs. *See* Qwest Petition – Minneapolis-St. Paul, at 7; Qwest Petition, Phoenix, at 7; Qwest Petition – Seattle, at 7.

⁷⁸ Qwest Petition – Seattle, at 7.

⁷⁹ *See Omaha Forbearance Order*, at ¶ 64. Qwest ignores the issue of whether the cable providers at issue are ubiquitously present within their franchise areas. Nor does Qwest demonstrate that the cable providers’ franchise areas subsume or, at a minimum, reach a certain percentage of subscribers within each wire center.

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offerings to 75% of the end user locations accessible from each wire center;⁸⁰ and (3) has achieved a significant level of market penetration.⁸¹ Qwest has come woefully short of meeting these requirements.

Tellingly, Qwest reaches even beyond MSA-wide data in an effort to provide support for its requests. In an attempt to demonstrate how cable operators are growing in the relevant MSAs, Qwest offers *nationwide* projections of growth.⁸² These projections prove nothing about the geographic coverage of cable telephony facilities or the potential for subscriber or market share increases for telephony within the specific MSAs at issue, let alone in the wire centers within those MSAs. The Commission should completely disregard such data.

At bottom, Qwest offers no data regarding cable provider penetration for facilities-based telephony services in the mass market on a wire-center-by-wire-center basis. Yet Qwest brazenly quotes the *Omaha Forbearance Order* as support for its contention that the data it has provided “is, standing alone, ‘sufficient to justify forbearance’ from loop and transport unbundling regulations, and from dominant carrier regulation of switched access service.”⁸³ Based on the record Qwest has assembled, its attempt to rely on the Commission’s language regarding cable-based telephony competition must fall on deaf ears. Given the primary role assigned to cable-based competition in Qwest’s Petitions with reference to the mass market, the

⁸⁰ See *Omaha Forbearance Order*, at n. 156, ¶ 69.

⁸¹ See *Omaha Forbearance Order*, at ¶ 66; *Anchorage Forbearance Order*, at ¶ 28.

⁸² See, e.g., Qwest Petition – Minneapolis-St. Paul, at 7 (“At a national level, Comcast expects its telephone subscriber base to grow by over 200% between 2007 and 2009 (from 2.5 million to 8 million).”). See also Qwest Petition – Denver, at 7; Qwest Petition – Phoenix, at 7-8; Qwest Petition, Seattle, at 7. Significantly, the cable providers whose national growth rates are cited by Qwest provide service in wide geographic areas well beyond the boundaries of the MSAs for which Qwest seeks forbearance.

⁸³ Qwest Petition – Seattle, at 9, quoting *Omaha Forbearance Order*, at ¶ 69 (footnotes and citations omitted).

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Commission should conclude on this basis alone that the Section 10(a) standard has not been met and that forbearance is not warranted.

b. Enterprise Market

Qwest similarly fails to meet its burden of proof regarding cable-based telephony competition in the enterprise market. Unlike the mass market, the medium-sized and large businesses that comprise the enterprise market generally require more sophisticated services than traditional voice-grade DS0s, such as DS1 services, fractional DS1s, and other high capacity services. Qwest fails to demonstrate that cable competitors are able – or will be able within a commercially reasonable period of time – to adequately serve such customers with their current cable plant. Qwest also ignores problems inherent to cable-based provision of services to the enterprise market due to a lack of physical proximity, technical inability, or both.⁸⁴ To the extent cable companies have deployed some amount of fiber or other infrastructure within the relevant MSAs that can support high-capacity telephony services, they can only serve businesses within close proximity to such infrastructure, an operational reality which cautions against broad conclusions regarding the availability of competitive enterprise services without engaging in a more detailed analysis as required by the Commission. As succinctly stated by the New York State Department of Public Service Staff:⁸⁵

[C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not ‘cabled-up’ (i.e. current cable-based services are television rather than voice driven)

⁸⁴ Based on industry norms, enterprise customers for standard “off-the-shelf” services expect to receive service within 30 calendar days. The time frame for mass market customers is between 10-14 calendar days.

⁸⁵ See *Department of Public Service Staff White Paper*, Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission, (Jul. 6, 2005) (“*NYS Staff White Paper*”), at 31.

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and larger businesses generally have T-carrier systems for their telecommunications needs . . .

Qwest offers no evidence that cable companies are providing extensive facilities-based telephony services to enterprise customers today. Instead, Qwest focuses solely on the presence of the franchised cable networks in each MSA as evidence that the cable companies possess “the necessary facilities to provide enterprise services.”⁸⁶ According to Qwest, because cable companies in the four MSAs at issue have “had strong success in the mass market” and possess “a nearly ubiquitous network,”⁸⁷ they pose a “substantial competitive threat” that should be considered relevant to the Commission’s determination of whether forbearance is warranted in the enterprise market.⁸⁸

All indications are that cable providers *operating their cable-technology facilities* still do not occupy a meaningful position in the business marketplace, at least one sufficient at this time to support forbearance from Section 251(c)(3) unbundling obligations. In the *Triennial Review Remand Order*, the Commission found that cable transmission facilities are not used to serve business customers to any significant degree.⁸⁹ More recently, in support of their merger application, AT&T and BellSouth claimed that competition from cable operators for small and medium-sized businesses may only become prevalent toward the end of this decade.⁹⁰ In November 2006, when reporting on the state of the cable industry, UBS focused solely on results

⁸⁶ See Qwest Petition – Denver, at 22; Qwest Petition – Minneapolis-St. Paul, at 23; Qwest Petition – Phoenix, at 21-22; Qwest Petition – Seattle, at 22.

⁸⁷ Qwest Petition – Denver, at 22.

⁸⁸ *Id.*, at 21.

⁸⁹ *Triennial Review Remand Order*, ¶ 193.

⁹⁰ *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No. 06-74, at 81.

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among residential consumers (*i.e.*, households), declining to mention any business services.⁹¹ It may be that some cable providers recently have announced plans to expand their focus on business services or have begun to make modest inroads with very small businesses, but it is difficult (and highly speculative) to anticipate the degree to which they will be successful in the near-term, despite their boasts regarding availability and speed of delivery. Thus, suggestions by Qwest in its Petitions that cable operators provide a significant competitive threat in the enterprise market remains more fantasy than reality.

To the extent that cable companies intend to rely on their traditional cable systems rather than other modes of delivery to provide telephony to enterprise customers, cable system technology still faces serious technical and operational hurdles before it can be used to provide enterprise level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems.⁹² While CableLabs, the recognized standards body for the cable industry, issued specifications in May 2006 to address the timing/clocking problems in part, full commercial deployment is expected no sooner than mid-2008.⁹³ In order to provide enterprise-level telephony services, even if the timing/clocking problems are solved, cable systems must make

⁹¹ UBS Investment Research, *Wireline Postgame Analysis 14.0, Recap of Third Quarter 2006 Results*, 22 November 2006, at 6, 35.

⁹² *See, e.g.*, Letter from John Nakahata, Counsel for General Communication Inc. (“GCI”), to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (Nov. 14, 2006), at 9 (“*GCI Nov. 14 Ex Parte*”); Comments of GCI on ACS of Anchorage, Inc. Forbearance Petition, WC Docket No. 05-281, (Aug. 11, 2006), at 14-15, 17.

⁹³ *Id.*

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significant upgrades to their network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of enterprise-level services they can accommodate.⁹⁴

There is no evidence offered in the Petitions which shows that cable systems are currently offering significant levels of facilities-based telephony services to enterprise customers in any of the relevant MSAs, let alone the wire centers comprising those MSAs. Indeed, Credit Suisse recently noted that the country's largest cable operator, Comcast (a relevant cable operator in the Denver, Minneapolis-St. Paul, and Seattle MSAs), "is still in the early stages of starting up its commercial telecom business. . . . It's going to take some time to develop business plans, establish operations (e.g., product development, customer support, field operations, and sales), and to then ramp up the business throughout Comcast's footprint."⁹⁵ Moreover, while cable operators are reportedly venturing into the business arena, they are typically targeting smaller businesses, not large enterprises.⁹⁶ As reported last October, "[c]able operators generally avoid the large business, or 'enterprise,' market. Those customers, from regional banks to giant corporations – have complicated demands and locations in multiple cities."⁹⁷ And Comcast itself recently projected that cable-supported business services will be a new growth engine for cable operators, but "in 5-plus years."⁹⁸

⁹⁴ The Commission acknowledged these issues in the *Anchorage Forbearance Order*, where it referenced GCI's statements that "it will need to undertake a 'large-scale upgrade of its network capacity before it can provide all business customers with DS1 services over its [cable] plant.'" *Anchorage Forbearance Order*, at n. 137.

⁹⁵ Credit Suisse, *More Upside in Comcast: Comcast Report*, 8 (Sept. 22, 2006).

⁹⁶ See Peter Grant, "Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf," *Wall Street Journal*, Jan. 17, 2007, at A1, A17.

⁹⁷ John M. Higgins, *Cable's Next Big Thing*, *Broadcasting & Cable*, Oct. 9, 2006, at 18.

⁹⁸ *Comcast May Eventually Provide Phone, Broadband, and Video Services Wirelessly*, *Communications Daily*, Sept. 21, 2006, at 11.

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In short, the provision of competitive facilities-based telephony to enterprise customers using cable technology is several years in the future, at the least. Such competition is not present today, and every indication is that it will not be available in a reasonable timeframe. This is especially true for large business customers.⁹⁹ Accordingly, there is not sufficient competition from cable companies in the enterprise market to support forbearance relief in any of the four MSAs that are the subject of Qwest's Petitions.

2. Competition from Mobile Wireless Services

Like competition from cable-based services, any competition Qwest currently experiences from wireless services does not support the forbearance Qwest requests. Indeed, wireless services are not relevant to the present forbearance analysis because, as the Commission recognized in the *Omaha Forbearance Order*, wireless penetration data generally is not available to support a granular forbearance analysis. In the *Omaha Forbearance Order*, the Commission found that:

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.*¹⁰⁰

The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study

⁹⁹ Comcast, for example, sees its growth in business focused primarily in the small and medium-sized business sector, which it views as a separate market. *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at p. 10.

¹⁰⁰ *Omaha Forbearance Order*, at ¶ 72 (emphasis supplied).

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area.¹⁰¹ The conclusion reached by the Commission in the Omaha and Anchorage forbearance proceedings is equally applicable here, since Qwest has failed to offer any data differing from (or more substantial than) the data provided by the petitioning party in the Omaha or Anchorage dockets.

To the extent wireless competition is considered by the Commission in its forbearance analysis (which it should not be), wireless competition does not come anywhere close to tipping the scales in favor of forbearance. At the outset, Qwest's Petitions offer no evidence, and indeed no discussion whatsoever, regarding mobile wireless service as a competitor in the enterprise market. Qwest therefore has absolutely failed to meet its burden of proof in this regard, and further discussion regarding wireless competition in the enterprise market is not necessary.¹⁰²

Qwest does not fare much better when considering wireless competition in the mass market. As an initial matter, wireless service, standing alone, cannot currently be considered a true substitute for wireline service in the mass market. Qwest's overreaching suggestion to the contrary is predicated on a faulty telephony-centric assumption.¹⁰³ Today, wireline service gives consumers not only access to other end users for "telephone" calling but also provides access to the Internet, whether through a broadband or dial-up connection. While there are fledgling data services currently available over mobile phones, wireless access today is

¹⁰¹ *Anchorage Forbearance Order*, at ¶ 29.

¹⁰² In its comments, the UTC points out that evidence regarding inter-modal competition "from cable TV, wireless carriers, and VOIP providers in the residential telephone market" is not "sufficient to remove regulations designed to promote competition for enterprise customers. Broadly construed data regarding residential competition throughout Washington cannot and do not substitute for the more granular data on which the UTC based its deregulatory orders." *UTC Comments*, at 9.

¹⁰³ See, e.g., Qwest Petition – Denver, at 12 ("Wireless service subscribers are undeniably using wireless service as a direct substitute for traditional wireline telephone services.").

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simply incapable of offering the sort of quality service that customers demand and have come to expect. Currently, these critical features can only be provided by telephone companies or cable providers, a fact which Qwest completely overlooks.

While a small and slowly-increasing percentage of households have become wireless-only for their voice services, the vast majority of those consumers still access the Internet using a wireline connection, which remains an essential component of their communications needs. Indeed, a recent analysis concluded that “Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce churn, rather than the next leg in the company’s growth.”¹⁰⁴ As such, wireless service today cannot substitute completely for wireline access lines – it is merely complementary. This shortcoming is particularly critical in the current context, where the Commission has been asked to forbear from enforcing Qwest’s obligation to provide the UNEs required by many wireline service providers. Accordingly, the Commission should totally ignore the information proffered by Qwest regarding wireless services, as it did in the Omaha and Anchorage forbearance proceedings.

Even assuming, *arguendo*, that wireless service is capable, in theory, of serving as a complete substitute for mass market wireline service today or in a reasonably short time frame (which it is not), Qwest has still failed to meet its burden. In the merger proceeding involving AT&T and BellSouth, the merger applicants contended that wireless competition provided a material check on any potential competitive abuse resulting from their merger. Qwest, in its Petitions, contends that the Commission’s analysis of the wireless services industry conducted in connection with the *AT&T-BellSouth Merger Order* “supports including wireless services in the

¹⁰⁴ See UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2.

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forbearance analysis.”¹⁰⁵ In reality, the Commission was very guarded in its reliance upon *wireless mobile services in any sort of competitive analysis. Indeed, only a small percentage of wireless subscribers, at most, were even deemed relevant to the Commission’s evaluation. Specifically, the Commission concluded that mobile wireless services should be included within the product market for local services only with respect to the very limited number of customers who rely on mobile wireless service as a complete substitute for, rather than a complement to, wireline service.*¹⁰⁶

Here, where the Commission is being asked to consider forbearance from statutory unbundling requirements in the mass market,¹⁰⁷ there are even less compelling reasons to include wireless service in the competitive analysis. Qwest has offered no concrete evidence that wireless service has become an adequate substitute for wireline voice and broadband service. That is because it is not. Qwest does not offer any data regarding complete wireless substitution in the MSAs at issue.¹⁰⁸ While intermodal competition between wireline and mobile wireless services likely will increase in the future, wireless services do not yet enjoy the ubiquity,

¹⁰⁵ See, e.g., Qwest Petition – Denver, at 12.

¹⁰⁶ See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74 (rel. Mar. 26, 2007) (“*AT&T-BellSouth Merger Order*”), at ¶ 96. See also *Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) (“*Verizon-MCI Merger Order*”), at ¶ 91. Moreover, in its merger proceeding involving Verizon and MCI, the New York Department of Public Service Staff noted that evidence that consumers view wireless as a substitute for traditional wireline service is mixed. See *NYS Staff White Paper*, at 23.

¹⁰⁷ As explained above, Qwest does not even proffer wireless competition as a basis for forbearance in the enterprise market.

¹⁰⁸ Qwest Petition – Denver, at 10-14; Qwest Petition – Minneapolis-St. Paul, at 11-15; Qwest Petition – Phoenix, at 10-14; Qwest Petition – Seattle, at 11-14.

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capability, or the service quality to qualify as a suitable substitute for wireline service offerings.¹⁰⁹

Significantly, Qwest offers no data at all regarding the number of small business users that have abandoned their wireline phone in favor of wireless services, and so therefore completely ignores this important component of the mass market. Because Qwest makes its case regarding the mass market's use of wireless alternatives based solely on residential wireless use, should the Commission consider wireless usage in the mass market in its forbearance analysis (which it should not), it should require Qwest to put forth its evidence regarding wireless substitutability among small business users and bifurcate the mass market and address small businesses and residential subscribers as separate markets for all purposes.¹¹⁰

In sum, wireless service, because of its inherent limitations, simply cannot substitute for wireline service today. At best, it remains a complement to wireline services. Qwest has failed to provide any concrete data that suggests otherwise. Moreover, even should the Commission find that wireless is a substitute for wireline service for mass market customers (which it should not), Qwest has provided inadequate information to permit the Commission to take wireless competition into account in conducting its Section 251(c)(3) forbearance analysis.

¹⁰⁹ See, e.g., *Triennial Review Order*, at ¶ 445.

¹¹⁰ The Commenters believe that residential and small business customers constitute separate markets. It is particularly appropriate to treat small business customers as a separate market since they are increasingly purchasing larger bandwidth circuits that are symmetric and have guaranteed service levels to meet their data requirements. Even if the Commission does not separate these two classes of customers, Qwest has the burden of producing evidence of facilities-based competition for both residential and small business customers, which it has not done.

3. Competition from Over-the-Top VoIP Providers

In addition to cable and wireless services, Qwest points to over-the-top VoIP services (“O/VoIP”) in its attempt to demonstrate sufficient competition to warrant forbearance in the mass market.¹¹¹ These services are simply not a source of facilities-based competition, however, because, by definition, they ride the facilities of another provider, which in many cases is likely to be Qwest itself.¹¹² Qwest contends that O/VoIP services “represent[] an additional form of competition that bypasses Qwest” because O/VoIP calls “do not rely on Qwest’s switched network.”¹¹³ Yet Qwest fails to admit that O/VoIP calls rely on an underlying broadband connection that in many cases is obtained from Qwest.¹¹⁴

¹¹¹ See, Qwest Petition – Denver, at 14-16; Qwest Petition – Minneapolis-St. Paul, at 15-17; Qwest Petition – Phoenix, at 14-16; Qwest Petition – Seattle, at 14-16. As with wireless services, Qwest does not rely on O/VoIP services to demonstrate competition in the enterprise market. While a number of carriers are beginning to integrate VoIP into their overall package of business services, these offerings are typically facilities-based and part of the larger service bundle demanded by business customers which stand-alone VoIP providers simply cannot match. Moreover, integration of such IP-enabled capabilities into a larger suite of business services is needed to meet the complex and diverse needs of an increasing number of small and medium-sized businesses in addition to enterprise business customers to ensure that they receive the quality of service they demand.

¹¹² Indeed, Qwest is enjoying the benefits of the growth occurring in the high-speed Internet access market. The Commission’s most recent report cites 26% nationwide growth in high-speed lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in at least one direction) and 15% growth in advanced services lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in both directions) during the first half of 2006. *High Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at 2-3 (Jan. 2007). The same report shows that in the six-month period from December 2005 to June 2006, high-speed lines increased by approximately 280,000 (from 882,669 to 1.166 million) in Colorado, by over 200,000 (from 855,753 to 1.058 million) in Minnesota, by more than 350,000 (from 1.04 million to 1.39 million) in Arizona, and by over 355,000 (from 1.22 million to 1.575 million) in Washington State. *Id.*, Table 10. The report shows that ADSL lines are growing significantly faster than cable modem lines, and that the vast majority of ADSL lines are provided by Qwest and other Regional Bell Operating Companies (“RBOCs”).

¹¹³ Qwest Petition – Denver, at 14.

¹¹⁴ Qwest cites Commission data showing that broadband access lines in each of the four states where the MSAs for which Qwest is seeking forbearance are located have grown significantly from December 2000 to June 2006, but Qwest fails to identify the number of

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Qwest's claim that O/VoIP providers still should be considered as a source of competitive discipline on Qwest is baseless. In essence, because O/VoIP providers either use transport and loops provided by Qwest itself, other LECs, or cable companies, Qwest has accounted for these lines somewhere else in its Petitions. In short, to include VoIP in the analysis would be double-counting. Moreover, as pointed out by the Virginia State Corporation Commission ("VCC") in response to Verizon's request for Section 251(c)(3) loop and transport unbundling forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs,¹¹⁵ granting forbearance from Section 251(c)(3) unbundling obligations would restrict the ability of carriers that rely on copper loops obtained from the ILEC to offer broadband services to their customers from participating in the broadband market.

Qwest has provided no empirical data regarding the extent to which O/VoIP services are being provided over Qwest's facilities versus the facilities of other facilities-based carriers in the relevant geographic markets.¹¹⁶ In both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission did not consider interconnected VoIP service in its analysis because data was not available that would allow it to refine its wire center analysis, as discussed above.¹¹⁷ Qwest's Petitions do not try to remedy this shortcoming. Thus, the Commission should not (and cannot) include the retail market presence of O/VoIP providers in

those broadband access lines it serves. *See* Qwest Petition – Denver, at 14; Qwest Petition – Minneapolis-St. Paul, at 15; Qwest Petition – Phoenix, at 14-15; Qwest Petition – Seattle, at 15.

¹¹⁵ *See* Comments of the Virginia State Corporation Commission, WC Docket No. 06-172, p. 7-8 (filed Dec. 15, 2006) ("*VCC Comments*").

¹¹⁶ Without knowing the extent to which Qwest's (or other wireline providers') lines are being used to support the O/VoIP providers, it is meaningless for Qwest to cite, in support of its Petitions, analyst reports which discuss the extent to which O/VoIP will displace local telephone access lines. *See, e.g.*, Qwest Petition – Denver, at 14 ("Industry experts forecast exponential VoIP growth through at least 2010.").

¹¹⁷ *Omaha Forbearance Order*, at ¶ 72. *See also Anchorage Forbearance Order*, at ¶ 29.

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its analysis of whether there is sufficient facilities-based competition to warrant forbearance from Section 251(c)(3) unbundling obligations in the mass market or the enterprise market in any wire center in any of the four MSAs that are the subject of Qwest's Petitions.¹¹⁸

4. Alternative Transport Facilities

Qwest attempts to justify forbearance in the enterprise market within the four MSAs at issue on the purported existence of the "extensive competitive fiber networks" deployed by competitors.¹¹⁹ Qwest's "proof" consists of figures purporting to represent the number of competitive fiber networks in each MSA. According to the data cited by Qwest, between "approximately 20" and "approximately 45" competitors operate fiber networks within the MSAs that are the subject of Qwest's Petitions.¹²⁰ Qwest offers maps purporting to show

¹¹⁸ Moreover, even if the Commission were to conclude that O/VoIP competition should be taken into account in its Section 251(c)(3) forbearance analysis – which it should not – recent market difficulties and ongoing legal issues confronting the O/VoIP industry call into significant question the effectiveness and sustainability of O/VoIP-based competition. SunRocket, the nation's second-largest O/VoIP provider after Vonage, abruptly ceased operation in July 2007. *See, e.g.,* Matt Richtel, "Facing Much Bigger Competitors, Internet Phone Start-Up Closes," *Washington Post*, Jul. 16, 2007 ("The development underline[s] the struggles of start-ups trying to make a business out of providing Internet-based phone service . . . The companies face enormous pressure from the biggest competitors in the industry, both cable and traditional phone service providers."). Meanwhile, Vonage remains engaged in litigation brought by Verizon for patent infringement related to VoIP technology. Vonage's potential liability is in the hundreds of millions of dollars and industry analysts question the company's ability to survive. Marguerite Reardon, "Vonage to Pay \$58 Million in Verizon Patent Case," *CNETNews.com*, Mar. 8, 2007, posted at http://news.com.com/2100-1036_3-6165747.html; Jim Duffy, "Vonage's Future Questioned After Latest Setback," *Network World*, Apr. 6, 2007, available at <http://www.networkworld.com/news/2007/040607-vonage-on-brink.html?page=1>.

¹¹⁹ *See* Qwest Petition – Denver, at 26; Qwest Petition- Minneapolis-St. Paul, at 26; Qwest Petition – Phoenix, at 26; Qwest Petition, - Seattle, at 26.

¹²⁰ *Brigham/Teitzel Declaration - Denver*, at ¶ 34 (approximately 20 competitive fiber networks); *Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 37 (approximately 45 competitive fiber networks); *Brigham/Teitzel Declaration – Phoenix*, at ¶ 34 (approximately 24 competitive fiber networks); *Brigham/Teitzel Declaration – Seattle*, at ¶ 37 (approximately 20 competitive fiber networks).

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these fiber routes within each MSA,¹²¹ and represents that “these fiber facilities can be used to *directly bypass a number of Qwest mass market and enterprise services.*”¹²²

There are numerous fundamental problems with Qwest’s competitive fiber route data. Specifically, Qwest does not present the data on a sufficiently granular basis to provide meaningful input to the Commission. For example, it merely claims that there is “[a]t least one fiber-based competitor [that] has facilities in [Begin Proprietary] [End Proprietary] of Qwest’s wire centers in the Denver MSA, and these wire centers contain [Begin Proprietary] [End Proprietary] of Qwest’s residential lines and [Begin Proprietary] [End Proprietary] of Qwest’s retail business lines in the MSA.”¹²³ Further, Qwest does not indicate how many competing fiber providers operate in each wire center, and it does not identify the fiber providers it claims are operating each route.¹²⁴

Qwest also does not meet the Section 10 requirement that it identify which, if any, of these fiber networks reach, and can support the offering of a full range of services, within a commercially reasonable period of time, to individual customer locations. Qwest fails to acknowledge that merely passing a customer location does not necessarily enable the owner of competitive fiber to provide service at that customer location. While some competitive carriers

¹²¹ See, e.g., *Brigham/Teitzel Declaration - Denver*, at Confidential Exhibit 4.

¹²² *Brigham/Teitzel Declaration - Denver*, at ¶ 38. See also *Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 38; *Brigham/Teitzel Declaration – Phoenix*, at ¶ 35; *Brigham/Teitzel Declaration – Seattle*, at ¶ 38.

¹²³ Qwest Petition – Denver, at 26.

¹²⁴ Indeed, Qwest’s is not even specific regarding the precise number of competitive fiber providers in each MSA. See *Brigham/Teitzel Declaration - Denver*, at ¶ 34 (approximately 20 competitive fiber networks); *Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 37 (approximately 45 competitive fiber networks); *Brigham/Teitzel Declaration – Phoenix*, at ¶ 34 (approximately 24 competitive fiber networks); *Brigham/Teitzel Declaration – Seattle*, at ¶ 37 (approximately 20 competitive fiber networks).

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have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings and the carriers must construct building “laterals” to serve customers located in those commercial buildings. The construction of laterals is extremely difficult, time consuming, and costly. According to XO Communications, LLC (“XO”), the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3’s of capacity.¹²⁵ Finally, Qwest fails to identify whether (and to what extent) the competitive fiber on its route maps is being used to provide telecommunications services (versus fiber being put to private use) and also fails to differentiate between fiber transport and fiber being used to provide local exchange access.

In the absence of this detail, there is no way to verify Qwest’s representations or to substantiate its claims. In light of these myriad shortcomings, Qwest’s representations regarding competitive fiber deployment should be ignored.

5. Wholesale Service Offerings

Qwest further attempts to justify its forbearance requests for the mass market and the enterprise market on the basis of wholesale alternatives to the use of its Section 251(c)(3) network elements.¹²⁶ Qwest’s attempt to ground a Section 251(c)(3) forbearance determination on the purported existence of “attractive” wholesale alternatives – whether offered by itself or a third party – is impermissible. In the *Triennial Review Remand Order* the Commission firmly

¹²⁵ See *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at 10.

¹²⁶ See Qwest Petition – Denver, at 16-17, 23-24; Qwest Petition- Minneapolis-St. Paul, at 17, 24-25; Qwest Petition – Phoenix, at 16, 24-25; Qwest Petition, - Seattle, at 16-17, 23-24.

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established that the availability of wholesale alternatives should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use the wholesale alternative to enter a market.¹²⁷ In the words of the Commission: “It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs.”¹²⁸

Qwest cites the *Omaha Forbearance Order* as support for its position,¹²⁹ but fails to acknowledge that non-Section 251(c)(3) wholesale offerings were irrelevant to the Commission’s conclusions in that proceeding. In the *Omaha Forbearance Order*, the Commission firmly grounded its forbearance determinations on the existence of sufficient *facilities-based* competition by Cox in certain of Qwest’s wire centers in the Omaha MSA.¹³⁰ Indeed, the Commission expressly concluded that “the record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.”¹³¹ While the Commission found “that Qwest’s own wholesale offerings will continue to be adequate without unbundled loop and transport offerings,”¹³² this conclusion was not material to its decision to grant partial forbearance in the Omaha MSA.¹³³

¹²⁷ *Triennial Review Remand Order*, at ¶ 48.

¹²⁸ *Id.*

¹²⁹ *See, e.g.*, Qwest Petition – Denver, at 16; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 16.

¹³⁰ *Omaha Forbearance Order*, at ¶ 64.

¹³¹ *Id.*, at ¶ 67.

¹³² *Id.*

¹³³ In the *Anchorage Forbearance Order*, the Commission likewise found the absence of “any significant alternative sources of wholesale inputs for carriers in the Anchorage study area,” thus concluding that “continued access to [ACS’s] loop facilities is important

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Importantly, as discussed in Section IV .A, *supra*, in the *Omaha Forbearance Order*, the Commission established the requirement that sufficient *facilities-based* competition be present in each product and geographic market for which Section 251(c)(3) forbearance is sought¹³⁴ and the Commission defined a facilities-based competitor for purposes of its Section 251(c)(3) forbearance analysis as a carrier that can successfully provide local exchange and exchange access services *without relying on the ILEC's loops or transport (i.e., its wholesale network offerings)*.¹³⁵ The Commission specified that Section 251(c)(3) forbearance is warranted “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).”¹³⁶ Consequently, any competitive inroads in any of the four MSAs at issue here made possible through the use of Qwest wholesale offerings is, by definition, not relevant to the Commission’s forbearance analysis. Qwest’s failure to provide any market-specific evidence of facilities-based competition and its focus on purported competition that is dependent on continued use of its wholesale facilities and services is an attempt to end-run the Commission’s forbearance requirements that should not be countenanced by the Commission.

Over the past seven years, Qwest has sought and been granted substantial deregulation of its retail business services by the Washington Commission. In the words of the

even in wire centers there already is extensive competition.” *Anchorage Forbearance Order*, at ¶ 30.

¹³⁴ *Omaha Forbearance Order*, at n. 156, ¶ 69. See also *Anchorage Forbearance Order*, at ¶ 21.

¹³⁵ *Omaha Forbearance Order*, at ¶ 64.

¹³⁶ *Omaha Forbearance Order*, at ¶ 61 (emphasis supplied). Likewise, in the *Anchorage Forbearance Order*, the Commission limited the grant to ACS of relief from Section 251(c)(3) unbundling obligations to those “portions of its service territory . . . where a facilities-based competitor has substantially built out its network.” *Anchorage Forbearance Order*, at ¶ 1.

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Washington Commission, “it was the presence and scope of UNE-based competition from CLECs that was the primary basis for granting Qwest’s competitive classification requests which effectively put the regulatory classification and treatment of Qwest’s retail business services on equal footing with Qwest’s competitors in Washington.”¹³⁷ In its Petitions, as in Washington State, Qwest has touted the presence of UNE-based CLEC competition as justification for deregulation, yet if Qwest’s Petitions were granted, the foundation for this competition (*i.e.*, the availability of UNEs) would cease to exist. Qwest cannot have it both ways.

a. Mass Market

Qwest has not presented any concrete, market-specific evidence of alternative sources of wholesale local services being offered by third parties to carriers that utilize Qwest’s Section 251(c)(3) network elements to serve mass market customers in the four MSAs at issue. Qwest merely represents that it “has in fact made attractive wholesale offerings available even when it has no obligation to do so.”¹³⁸ As discussed above, the wholesale alternatives proffered by Qwest are not relevant to the Commission’s forbearance analysis because they enable competition that is reliant on the ILEC’s loops and transport.

Even if Qwest’s wholesale products and services were relevant to the Commission’s forbearance determinations (which they are not), Qwest has not provided the detailed empirical data necessary for the Commission to take these alternatives into account in conducting its forbearance analysis.¹³⁹ Qwest’s sole evidence regarding the “attractiveness” of

¹³⁷ *UTC Comments*, at 7.

¹³⁸ Qwest Petition – Denver, at 16; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 16.

¹³⁹ Notably, one of the two wholesale services Qwest mentions is its offerings pursuant to the resale provisions of Section 251(c)(4) of the Act. *See* Qwest Petition – Denver, at 17; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest

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its wholesale offerings consists of two figures from December 2006 regarding the number of voice-grade equivalent lines using its resale and its Qwest Platform Plus/Qwest Local Service Platform (“QPP/QLSP”) products.¹⁴⁰ This evidence is essentially meaningless. Qwest merely provides the number of voice-grade equivalent residential lines using its QPP/QLSP services and its Section 251(c)(4) resale offerings as of December 2006. Qwest fails to provide any data which shows whether the number of lines utilizing each product is increasing or decreasing.¹⁴¹ This data – which is the sum and total of Qwest’s proof regarding wholesale competition in the mass market – suffers from the same defect as the other data provided by Qwest to support its Petitions, *i.e.*, it is not sufficiently granular to be considered by the Commission.

If it were permissible to consider Qwest’s QPP/QLSP services and its Section 251(c)(4) resale offerings in determining whether the Section 10(a) forbearance standard has been met by Qwest for the mass market, the relief Qwest requests must be denied because, notwithstanding Qwest’s blanket statements regarding the appeal of these options as alternatives to the use of Qwest’s Section 251(c)(3) UNEs to serve mass market customers, the fact is that these wholesale services do not represent economically-viable alternatives for CLECs.

With the elimination in the *Triennial Review Remand Order* of the ability to obtain TELRIC-based local switching,¹⁴² many competitive carriers were left with few viable

Petition, - Seattle, at 17. Clearly, Qwest is under a statutory obligation to make those offerings available.

¹⁴⁰ Qwest’s Qwest Platform Plus (“QPP”) and Qwest Local Service Platform (“QLSP”) are Qwest’s unbundled network element platform (“UNE-P”) replacement products. *See* Qwest Petition – Denver, at 16-17; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 17. *See also* Highly Confidential Exhibit 2.

¹⁴¹ As shown below, the level of mass market competition from carriers utilizing Qwest’s wholesale facilities and services is steadily decreasing.

¹⁴² *See Triennial Review Remand Order*, at ¶¶ 199-228.