

## STATEMENT REGARDING DEFERRED APPENDIX

Pursuant to D.C. Circuit Rule 30(c), the parties in this case have utilized the deferred-appendix option as described in Rule 30(c) of the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....i  
CORPORATE DISCLOSURE STATEMENT ..... ii  
STATEMENT REGARDING DEFERRED APPENDIX ..... iii  
TABLE OF AUTHORITIES.....v  
GLOSSARY ..... vii  
STATEMENT OF ISSUES ..... 1  
STATUTES AND REGULATIONS..... 1  
STATEMENT OF THE CASE AND FACTS ..... 1  
STANDARD OF REVIEW..... 1  
SUMMARY OF ARGUMENT..... 1  
ARGUMENT..... 3  
I. THE ORDER'S MARKET SHARE TEST REPRESENTS AN UNACKNOWLEDGED AND UNEXPLAINED DEPARTURE FROM FCC PRECEDENT..... 3  
II. THE FCC'S ADOPTION OF A MARKET SHARE TEST WAS UNLAWFUL..... 5  
A. THE ACT REQUIRES THAT DETERMINATIONS REGARDING UNBUNDLED ACCESS BE GOVERNED SOLELY BY WHETHER COMPETITION IS POSSIBLE ABSENT UNBUNDLING..... 6  
B. THE FCC IMPERMISSIBLY FAILED TO ACCOUNT FOR THE COMPETITIVE THREAT POSED BY VERIZON'S FACILITIES-BASED COMPETITORS..... 8  
C. THE FCC IMPERMISSIBLY FAILED TO ACCOUNT FOR THE ADDITIONAL DEPLOYMENT THAT WOULD FOLLOW REMOVAL OF UNBUNDLING OBLIGATIONS..... 10  
III. THE FCC'S REFUSAL TO SEEK TIMELY SUBMISSION OF INFORMATION REGARDING COMPETITIVE DEPLOYMENT VIOLATED THE ACT..... 13  
CONCLUSION ..... 16  
CERTIFICATE OF COUNSEL..... 17

\**Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Order, 22 F.C.C.R. 21293 (2007) .2, 5, 14

*Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 F.C.C.R. 18945 (2003)..... 11

*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978 (2003).....6

*Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533 (2005) .....7, 11

**Statutes**

47 U.S.C. § 403 ..... 14

**Treatises**

4 PHILIP E. AREEDA, HERBERT HOVENKAMP, AND JOHN L. SOLOW, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*.....9

**Other Materials**

Declaration of David L. Teitzel, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (Aug. 28, 2007)..... 12, 13

Letter from Daphne E. Butler, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (filed Dec. 18, 2007)..... 12, 13

Opposition of Affinity Telecom, Inc., et al., *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97 (filed Aug. 31, 2007) .....4

## GLOSSARY

[[Within Double Brackets]]	Indicates material submitted to the FCC or included in an FCC Order that is designated as Highly Confidential or Confidential
Act	Communications Act of 1934, 47 U.S.C. § 151 <i>et seq.</i>
Brief for Petitioners or Verizon's Brief	Brief for Petitioners The Verizon Telephone Companies, Verizon Telephone Companies v. FCC, No. 08-1012 (D.C. Cir. Jun. 3, 2008)
CLEC	competitive local exchange carrier
FCC or Commission	Federal Communications Commission
ILEC	incumbent local exchange carrier
LEC	local exchange carrier
MSA	Metropolitan Statistical Area
QC	Qwest Corporation
QCII	Qwest Communications International Inc.
Qwest	Qwest Corporation and Qwest Communications International Inc.
TELRIC	Total Elemental Long Run Incremental Cost
UNE	unbundled network element
Order	The order under review, <i>Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas</i> , Order, 22 F.C.C.R. 21293 (2007) (JA ___-___)

## STATEMENT OF ISSUES

Qwest incorporates by reference the Issue Presented in the Brief for Petitioners.

## STATUTES AND REGULATIONS

Pertinent statutes and regulations not already included in the Brief for Petitioners are set forth in the Addendum attached hereto.

## STATEMENT OF THE CASE AND FACTS

Qwest incorporates by reference the Statement in the Brief for Petitioners.

## STANDARD OF REVIEW

Qwest incorporates by reference the Standard of Review set forth in the Brief for Petitioners.

## SUMMARY OF ARGUMENT

Having witnessed first-hand the procompetitive forces that geographically targeted unbundling relief unleashes in affected markets, Qwest enjoys a unique perspective on the instant dispute. In 2004, Qwest sought relief from (among other things) the unbundling requirements arising from section 251(c)(3) of the Communications Act in the Omaha MSA. In December 2005, the FCC granted this request in nine Omaha wire centers. The *Omaha Order's* unbundling conclusions were based entirely on the facts that cable provider Cox Communications (1) operated voice-enabled cable plant reaching 75 percent of all end user locations within each affected wire center and (2) was posing a "substantial competitive threat" to Qwest. Examination of the *Omaha Order's* text makes plain that in removing unbundling obligations, the FCC did *not* rely on any specific market share loss in the nine wire centers. Rather, consistent with this Court's precedent, the Commission relied on a number of market factors in determining the extent of competition in Omaha.

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This Court upheld the *Omaha Order* and its rationale. The FCC applied the same standard in its subsequent *Anchorage Order*.

In the order on review here, the FCC changed its standard, determining that even in wire centers with competitive facilities reaching 75 percent of end users, forbearance from unbundling requirements is unwarranted unless the incumbent has already lost [REDACTED] percent or more of its market share. Notwithstanding this clear departure from its precedent, the FCC erroneously claimed that it was “continu[ing] to follow the approach that the Commission adopted in the [*Omaha Order*] and [*Anchorage Order*] for determining whether forbearance from unbundling obligations is warranted.”<sup>1</sup>

The *Order* is defective in at least three respects. First, the FCC’s refusal to admit that it was modifying its standard, and its failure to explain that modification, are legally impermissible. The *Omaha Order* adopted no market share test in the context of unbundling. The FCC must, at the very least, be required to justify its new framework.

Second, the FCC *cannot* justify its market share test, because that test is unlawful. As this Court has explained time and again, the Communications Act (the “Act”) permits unbundling requirements only where competition is *not otherwise possible*. The existence of a facilities-based competitor with 75 percent coverage and a nontrivial customer base demonstrates both *actual* and *potential* competition in the wire center, and under this Court’s precedent warrants relief from unbundling. The premise that even in these wire centers, competition against an incumbent cannot be deemed “possible” until the incumbent has already lost [REDACTED] percent of its market share is simply absurd. Indeed,

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<sup>1</sup> *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Order, 22 F.C.C.R. 21293, 21312 ¶ 36 (2007) (“*Order*”).

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reliance on existing market share as a bar against unbundling relief is especially perverse because this Court and the FCC have both found that unbundling obligations depress facilities investment by incumbents and competitors alike, and continued unbundling may therefore itself be keeping competitors' market shares from increasing.

Third, even aside from the above, the FCC has violated the Act by refusing to require production of the market data most relevant to the unbundling inquiry. The parties best able to document competitive deployment and entry are the competitors themselves, and the FCC is authorized to require them to produce information necessary to the performance of its functions. Here, however, the FCC first sought information more than a year after Verizon filed its petitions and just five weeks before the applicable statutory deadline; even then it limited its requests to only a subset of all facilities-based providers. This behavior is incompatible with the demands of the Act.

For the reasons described herein, and those set forth in the Petitioners' Brief, the Court should grant Verizon's petition for review and vacate the *Order*.

ARGUMENT

I. **THE ORDER'S MARKET SHARE TEST REPRESENTS AN UNACKNOWLEDGED AND UNEXPLAINED DEPARTURE FROM FCC PRECEDENT.**

The *Order* is doomed by the FCC's *sub silentio* shift from the "75 percent coverage plus substantial competitive threat" test employed in the *Omaha Order* and the *Anchorage Order* to the "75 percent coverage plus [ ] percent market share" test applied for the first time in the instant *Order*.

In the *Omaha Order*, the FCC based its decision to forbear from application of unbundling requirements on two facts. First, Cox operated voice-enabled cable plant that

reached 75 percent of end user locations in the wire centers where Qwest won relief.<sup>2</sup>

Second, Cox was “capable of competing very successfully” using this plant, and had attracted a sufficient number of customers to show that it posed a “substantial competitive threat” to Qwest in those wire centers.<sup>3</sup> The unbundling holdings were not based on any “specific market share finding. In fact, while the *Omaha Order* mentioned market share information in the *residential* market, the FCC expressly noted that the Omaha record was bereft of wire-center-specific market share data for the *enterprise* market – demonstrating conclusively that it could not have relied on such data in granting unbundling relief.<sup>4</sup>

Moreover, as if to highlight that it was not relying on a specific existing market share, the FCC stated that “[o]ur decision today also is based on other actual *and potential* competition, which we find either is present, *or readily could be present*....”<sup>5</sup>

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<sup>2</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 F.C.C.R. 19415, 19446 ¶ 62 (2005), *petitions for review dismissed in part and denied in part, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (“*Omaha Order*”).

<sup>3</sup> *Id.* at 19448 ¶ 66 (emphasis added).

<sup>4</sup> *See id.* at 19438 ¶ 50, 19448 ¶ 66.

<sup>5</sup> *Id.* at 19446 ¶ 62 (emphases added). Before the *Order*’s adoption, multiple competitive LECs – including intervenors Cavalier Telephone, LLC, McLeodUSA Telecommunications Services Inc., and TDS Metrocom, LLC – filed comments opposing pending Qwest petitions seeking similar forbearance in four MSAs. Tellingly, these comments acknowledged that “the test adopted by the Commission in the *Omaha Order* for forbearance from unbundling obligations was ‘coverage’ by an independent facilities-based provider” and made no mention of market share. *See Opposition of Affinity Telecom, Inc., et al, WC Docket No. 07-97, at 14* (filed Aug. 31, 2007), *available at* [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519721212](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519721212).

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The FCC's claim that the instant *Order* simply applied the *Omaha Order*'s approach is erroneous,<sup>6</sup> and its failure to acknowledge and justify its about-face is fatal.<sup>7</sup>

### II. THE FCC'S ADOPTION OF A MARKET SHARE TEST WAS UNLAWFUL.

Even if the FCC had admitted and attempted to explain its change in position, it could not have done so in a manner consistent with the Act. Time and again, this Court has explained that the Commission may not mandate unbundling where competition is possible without it. In the *Omaha Order*, the Commission recognized that a facilities-based provider with 75 percent coverage and a nontrivial customer base (*i.e.*, enough customers to show that its services are realistic substitutes for the incumbent's) posed a "substantial competitive threat" to the incumbent LEC, presenting both "actual and potential competition" and justifying the removal of unbundling obligations.<sup>8</sup> The instant *Order*, in contrast, suggests that neither *potential* competition nor *actual* competitive deployment is a sufficient prerequisite to unbundling relief; what is required, the FCC has now held, is the incumbent LEC's [REDACTED]. Left standing, this market share cutoff will ensure that unbundling requirements remain in place long after they are warranted in wire centers where successful competitors are ready,

<sup>6</sup> *Order*, 22 F.C.C.R. at 21312 ¶ 36 (stating that FCC was "continu[ing] to follow the approach that the Commission adopted in the in the [*Omaha Order*] and [*Anchorage Order*] for determining whether forbearance from unbundling obligations is warranted under the section 10 criteria.").

<sup>7</sup> See, e.g., *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

<sup>8</sup> *Omaha Order*, 20 F.C.C.R. at 19446 ¶ 62, 19448 ¶ 66.

willing and able to serve new demand, and where the removal of such obligations would most likely spur additional facilities deployment.

**A. THE ACT REQUIRES THAT DETERMINATIONS REGARDING UNBUNDLED ACCESS BE GOVERNED SOLELY BY WHETHER COMPETITION IS POSSIBLE ABSENT UNBUNDLING.**

Prior to the FCC's 2004 *Triennial Review Remand Order* ("TRRO"), the Supreme Court and this Court struck down three successive FCC efforts to implement the 1996 Act's unbundling requirements, citing (among other things) the FCC's failure to consider potential competition in a particular market. In 1999, reviewing the Commission's first attempt to interpret the Act, the Supreme Court held that the FCC had impermissibly declined to impose any "limiting standard" on unbundling that was "rationally related to the goals of the Act."<sup>9</sup> In *USTA I*, reviewing the FCC's next attempt to craft unbundling rules, this Court found that the agency had unlawfully failed to account for the presence of competitive facilities. The Court questioned the FCC's legal authority to require unbundling where facilities, "though not literally ubiquitous," are "significantly deployed on a competitive basis."<sup>10</sup>

In its next attempt to interpret the 1996 Act's unbundling provisions, the FCC adopted a more nuanced approach than before.<sup>11</sup> In *USTA II*, however, this Court found

<sup>9</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

<sup>10</sup> *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*").

<sup>11</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978 (2003), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004) ("*USTA II*").

that the FCC had again failed to craft appropriately narrow unbundling requirements.<sup>12</sup> Among other things, the FCC had neglected to give appropriate weight to whether “competition is *possible*” in a given market.<sup>13</sup> “The fact that CLECs can viably compete without UNEs [in a market] ... precludes a finding that” unbundling is appropriate.<sup>14</sup>

In the *TRRO*, the FCC heeded this Court’s directives, repeatedly highlighting the substantial role that prospective competition played in its revised analysis. The Commission emphasized that it was “evaluat[ing] impairment ... in a manner that accounts for both actual and potential competition”<sup>15</sup> and that it had intentionally rejected approaches that “fail[ed] to account for areas of potential deployment.”<sup>16</sup> Reviewing the *TRRO* in *Covad*, this Court relied heavily on the FCC’s recognition that the relevant inquiry was whether “competition is possible.” Indeed, in the course of upholding the *TRRO*, the *Covad* decision cited some *fifteen* separate instances in which that order had emphasized the FCC’s reliance on potential (as opposed to existing) competition.<sup>17</sup>

This history appropriately informed the *Omaha Order*’s analysis. As noted above, the FCC emphasized in that order that its decision was based on “actual *and potential* competition,” which either was “present, *or readily could be present*” in the affected wire

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<sup>12</sup> *USTA II*, 359 F.3d at 574.

<sup>13</sup> *Id.* at 575 (emphasis added).

<sup>14</sup> *Covad Communications Co. v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006) (“*Covad*”), quoting *USTA II*, 359 F.3d at 593 (describing *USTA II* findings) (internal quotation marks deleted).

<sup>15</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533, 2586 ¶ 87 (2005), petitions for review denied, *Covad*, 450 F.3d 528 (“*TRRO*”).

<sup>16</sup> *Id.* at 2591 ¶ 98. See also *id.* at 2559 ¶ 43 (“[W]e adopt ... a regime that accounts for actual and potential deployment....”).

<sup>17</sup> See *Covad*, 450 F.3d at 540-41.

centers.<sup>18</sup> In affirming the *Omaha Order*, this Court rejected competitive LEC arguments that coverage by a facilities-based competitor was an insufficient basis for relief from unbundling obligations. The Court emphasized the importance of the FCC's finding that Cox posed "a 'substantial competitive threat'" to Qwest irrespective of its specific market share,<sup>19</sup> highlighting "Cox's extensive network coverage in the residential market and growing competitive presence in the enterprise market."<sup>20</sup> The Court saw "nothing unreasonable" about the factors the Commission relied upon "in forecasting an increase in competition."<sup>21</sup> Following this decision, the FCC again emphasized the ways in which cable deployments demonstrated existing and potential competition in its *Anchorage Order*.<sup>22</sup>

**B. THE FCC IMPERMISSIBLY FAILED TO ACCOUNT FOR THE COMPETITIVE THREAT POSED BY VERIZON'S FACILITIES-BASED COMPETITORS.**

As made clear above, this Court has consistently required the FCC to focus its unbundling inquiry on whether competition in a given market is "possible," not on whether the incumbent already has suffered economically significant market losses. But the *Order* dispensed with this Court's directives, disregarding both actual and potential competition

<sup>18</sup> *Omaha Order*, 20 F.C.C.R. at 19446 ¶ 62 (emphases added). See also *id.* at 19449 ¶ 68 (citing "the extensive facilities-based competition from Cox (both existing and potential)").

<sup>19</sup> *Qwest Corp.*, 482 F.3d at 479, quoting *Omaha Order*, 20 F.C.C.R. at 19448 ¶ 66.

<sup>20</sup> *Id.* at 479-81.

<sup>21</sup> *Id.* at 479.

<sup>22</sup> See, e.g., *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 F.C.C.R. 1958, 1985 ¶ 40 (2007) (subsequent history omitted) ("*Anchorage Order*") (unbundling unnecessary "in those areas of the Anchorage study area where [competitor] has deployed facilities capable of supporting competitive local exchange and exchange access offerings to at least 75 percent of all end users") (emphasis added); *id.* at 1972 ¶ 23.

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from providers with facilities covering 75 percent of end user locations in a given wire center and adopting a regime that demands an incumbent's [REDACTED] before affording unbundling relief, irrespective of other relevant factors. One might quibble about just how much of the market challengers must capture before being deemed to pose a "substantial competitive threat" to the incumbent, but the premise that competition cannot be deemed "possible" until challengers serve [REDACTED] percent of the market is clearly wrong as a matter of law as well as economics.

"[A]s any economist knows, a 'market share' is a relatively meaningless number unless accompanied by information concerning the cross-elasticities of demand and supply that the firms in the resulting market face."<sup>23</sup> Courts have repeatedly applied this insight in assessing the same question the FCC purported to answer below — the extent to which providers in a market can discipline the prices and terms offered by a larger competitor by credibly threatening to win over its customers. For example, this Court has held that what matters is not "only [a provider's] share of the market, but also ... the elasticities of supply and demand, which in turn are determined by the *availability* of competition."<sup>24</sup> Other courts have repeatedly agreed: "The true significance of market share data can be determined only after careful analysis of the particular market."<sup>25</sup> And the FCC, too, "has long held that market share is not the be-all, end-all of competition."<sup>26</sup>

<sup>23</sup> 4 PHILIP E. AREEDA, HERBERT HOVENKAMP, AND JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 914.

<sup>24</sup> *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (emphasis in original); see also *EarthLink v. FCC*, 462 F.3d 1, 10 (D.C. Cir. 2006).

<sup>25</sup> *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 128 (2d Cir. 1981).

<sup>26</sup> *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001), citing *Motion of AT&T Corp. to Be Declared Non-Dominant for International Service*, Order, 11 F.C.C.R. 17963,

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These authorities all recognize that even where a provider has a market share far higher than those at issue here, its behavior will be disciplined by smaller providers so long as they offer substitutable services and can readily accommodate increased demand. The *Order* turns this logic on its head, holding that a [REDACTED] percent market share is determinative even when competitors clearly offer a substitutable service over facilities covering 75 percent of end user locations. This approach is flatly incompatible with the Act.

C. THE FCC IMPERMISSIBLY FAILED TO ACCOUNT FOR THE ADDITIONAL DEPLOYMENT THAT WOULD FOLLOW REMOVAL OF UNBUNDLING OBLIGATIONS.

A determinative focus on existing market share is even *less* appropriate in the context of unbundling than it is elsewhere, because relief from unbundling obligations in the wire centers at issue will promote *additional* facilities deployment by incumbents and competitors alike.

In *USTA I*, this Court held that “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”<sup>27</sup> As the Court explained: “Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the

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(footnote continued)

17976 ¶ 34 (1996). (“[M]arket shares, by themselves, are not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions must be examined....”). See also *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) (“[T]he FCC has never viewed market share as an *essential* factor in the past, and the Commission does not assert to the contrary.”).

<sup>27</sup> *USTA I*, 290 F.3d at 427, citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part) (noting that “compulsory sharing can have significant administrative and social costs inconsistent with the Act’s purposes”).

successes, and avoid payment for the losers, the incentive to invest plainly declines.”<sup>28</sup> In *USTA II*, the Court again recognized that in markets where competition is otherwise possible, “[a]n unbundling requirement ... seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [facilities] and ILECs fearful that CLEC access would undermine the investments’ potential return.” In contrast, the “[a]bsence of unbundling” will “give all parties an incentive to take a shot at [a] potentially lucrative market.”<sup>29</sup>

The Commission has incorporated this analysis into its recent unbundling decisions. In 2003, the FCC recognized that “[t]o the extent that the application of our TELRIC pricing rules distorts our intended pricing signals by understating forward-looking costs, it can thwart one of the central purposes of the Act: the promotion of facilities-based competition.”<sup>30</sup> In the *TRRO*, the FCC further described the disincentive effects of unbundling in otherwise addressable markets. It observed that “facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs’ facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.” It further noted that “unbundl[ing] also creates disincentives for competitive LECs to use those competitive [facilities] that have been deployed.”<sup>31</sup>

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<sup>28</sup> *USTA I*, 290 F.3d at 424.

<sup>29</sup> *USTA II*, 359 F.3d at 584.

<sup>30</sup> *Review of the Commission’s Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 F.C.C.R. 18945, 18947 ¶ 3 (2003). See also *id.* at 18949 ¶ 6.

<sup>31</sup> *TRRO*, 20 F.C.C.R. at 2654-55 ¶ 220.

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Finally, in the *Omaha Order*, the FCC recognized that unbundling results in “in a number of costs, including reducing the incentives to invest in facilities and innovation.”<sup>32</sup>

Of course, if unbundling depresses investment, the removal of unnecessary unbundling obligations will spur new deployment and invigorate competition. Qwest’s experience in Omaha confirms this insight. In the year following the *Omaha Order*, Qwest’s rate of business line loss in the nine wire centers freed from unbundling [[REDACTED]] as compared against the prior year.<sup>33</sup> Whereas Cox was capturing [[REDACTED]] percent of total telecommunications dollars expended in Omaha in the fourth quarter of 2005 (when the *Omaha Order* was released), it was expected to capture over [[REDACTED]] percent of the total spend in each of the first three quarters of 2007. Competitor Windstream captured just [[REDACTED]] percent of all spending in the fourth quarter of 2005, but is expected to capture over [[REDACTED]] percent in both the second and third quarters of this year. Conversely, Qwest’s share of the total spend in Omaha has shrunk from [[REDACTED]] percent in the fourth quarter of 2005 to [[REDACTED]] percent or less in the second and third quarters of 2007.<sup>34</sup>

<sup>32</sup> *Omaha Order*, 20 F.C.C.R. at 19454 ¶ 76. See also *Anchorage Order*, 22 F.C.C.R. at 1987 ¶ 43.

<sup>33</sup> Declaration of David L. Teitzel, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 at 4 and Attachment A (filed Aug. 28, 2007) (appended as Exhibit 1). The information cited here was submitted to the FCC following release of the *Omaha Order*, in response to a competitive LEC petition asking the FCC to reinstate unbundling obligations in the Omaha MSA.

<sup>34</sup> Letter from Daphne E. Butler, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 at 13 (filed Dec. 18, 2007) (appended as Exhibit 2).

Moreover, these competitive market forces motivate Qwest to sell its services to competitors at wholesale. Qwest offers voice-grade loops at the very same rate that applied pre-forbearance.<sup>35</sup> It also sells wholesale access to the high-capacity facilities often used as inputs by other providers, and offers significant discounts for parties making term and/or volume commitments.<sup>36</sup> Cox, Verizon and AT&T also wholesale high-capacity transport within the MSA.<sup>37</sup>

These facts confirm the FCC's predictive judgment in the *Omaha Order* that where competitive facilities already reach 75 percent of more of end-user locations, unbundling requirements are inimical to deployment and to competition, and must be eliminated irrespective of market share.

### III. THE FCC'S REFUSAL TO SEEK TIMELY SUBMISSION OF INFORMATION REGARDING COMPETITIVE DEPLOYMENT VIOLATED THE ACT.

The FCC has also violated the Act by refusing to require production of critical information by the parties who control that information. As detailed above, this Court and others have strictly limited the contexts in which unbundling is permissible. Whether under the *Omaha Order's* test or the instant *Order's* test, prevailing precedent requires the FCC to consider competitors' deployment and/or operations in assessing whether competition is possible without reliance on unbundled elements. This information is not generally available to the incumbent LEC petitioning for forbearance, as the FCC

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<sup>35</sup> See, e.g., *id* at 6.

<sup>36</sup> *Id.* at 11.

<sup>37</sup> Teitzel Decl. at 11.

expressly acknowledged in the *Omaha Order*.<sup>38</sup> It is available to the competitors themselves – the wireline competitive LECs, cable companies, wireless and voice over Internet protocol providers, and others who have deployed the facilities in question and are serving significant numbers of customers. But these providers often make some use of the incumbent LEC's network elements, and thus lack any incentive to volunteer sufficient information regarding the extent of their deployments.

Of course, the FCC possesses statutory authority to require competitors to provide it with such data, subject to appropriate confidentiality protections.<sup>39</sup> It has failed, however, to exercise this authority in the proceeding below. Although Verizon filed the petitions at issue on September 6, 2006, the FCC did not request any coverage information from competing providers until October 29, 2007, about five weeks before the statutory deadline for action on the petitions.<sup>40</sup> Even then, its requests were sent only to cable providers, not to other facilities-based competitors. In one case, the cable provider at issue never filed correct data in response to the FCC's inquiries, and the FCC failed to pursue the matter.<sup>41</sup>

The behavior outlined above is wholly incompatible with the FCC's statutory obligations. This Court and others have specified that the FCC may only permit unbundling where competition is not otherwise possible. The FCC has established

<sup>38</sup> *Omaha Order*, 20 F.C.C.R. at 19451 ¶ 69 n.187 ("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.").

<sup>39</sup> See, e.g., 47 U.S.C. § 403; see also *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942).

<sup>40</sup> The Chief of the FCC's Wireline Competition Bureau sent letters to each of the cable providers implicated by Verizon's petitions seeking relevant data on October 29, 2007. (JA \_\_\_)

<sup>41</sup> See, e.g., *Order*, 22 F.C.C.R. at 21308 ¶ 27 nn.89, 92.

standards requiring information regarding competitors' deployments, but has refused to demand production of all relevant information. Given that competitors have no reason to provide relevant data absent an FCC directive – and stand to gain from a denial of the relevant incumbent's request – the FCC's refusal demand production of the relevant information is arbitrary and capricious, and warrants vacatur of the *Order*.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for Petitioners, the Court should grant Verizon's petition for review and should vacate the *Order*.

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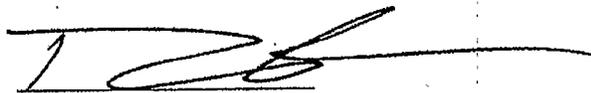
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June 17, 2008

**CERTIFICATE OF COUNSEL**

Pursuant to F.R.A.P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(3)(C), I hereby certify that the foregoing brief contains 4256 words, in accordance with the May 16, 2008 Order in this docket.



Travis E. Litman

June 17, 2008

**ADDENDUM**

**ADDENDUM CONTENTS**

STATUTORY PROVISIONS ..... 2

47 U.S.C. § 403 ..... 2

## STATUTORY PROVISIONS

47 U.S.C. § 403.

§ 403. Inquiry by Commission on its own motion.

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

\* \* \* \* \*

EXHIBIT 1