Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)	WC Docket No. 06-172
	)	
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
	)	
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area	)	WC Docket No. 09-135

COMMENTS OF AT&T INC.

Gary L. Phillips
Paul K. Mancini
AT&T SERVICES, INC.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
202-457-3053 (phone)
202-457-3074 (facsimile)

Lynn R. Charytan
Jonathan E. Nuechterlein
Will T. DeVries
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-663-6000 (phone)
202-663-6363 (facsimile)

Attorneys for AT&T Inc.

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INTRODUCTION AND SUMMARY

Following the D.C. Circuit's remand of the Verizon and Qwest forbearance petitions, the Commission has asked "[w]hat evidence, beyond . . . market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted," and how "the existence of potential competition" should "affect the Commission's section 10 forbearance analysis."[1] AT&T submits these brief comments to explain why the Commission has always looked beyond static market share data in assessing competitive market dynamics and why it should continue to do so.

First, as discussed in Section I, competition-policy analysis has always recognized that the *threat* of competitive entry can be as effective as *existing* competition in protecting the interests of consumers in low prices and high service quality. Courts, antitrust authorities, and competition-policy scholarship thus uniformly hold that policymakers must take both actual and potential competition into account in determining the proper level of government intervention in the marketplace.

Second, as discussed in Section II, the Commission in particular has consistently followed that principle in many different contexts, and it has no basis for departing from it now. From forbearance, to nondominance determinations, to UNE impairment, to pricing flexibility, to merger review, the Commission has understood that potential competition can be as relevant as existing market share in determining the extent of an incumbent's market power. To take just one example, the Commission cited potential competition as a main reason for deeming AT&T Corp. non-dominant in the domestic and international long-distance markets in the mid-1990s

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[1] Public Notice, *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, DA 09-1835, at 3 (rel. Aug. 20, 2009) (internal alterations and quotation marks omitted).

even though AT&T still had a commanding 60-70% share of those markets. Any regulatory analysis that ignores the impact of potential competition would be not only inconsistent with Commission precedent, but patently arbitrary, unreasonable, and contrary to long-settled antitrust practice and economic theory.

DISCUSSION

I. A SINGLE-MINDED RELIANCE ON STATIC MARKET SHARE WOULD CONFLICT WITH CORE ECONOMIC AND ANTITRUST PRINCIPLES.

The D.C. Circuit observed in its remand decision that, until the forbearance orders at issue here, the Commission had "consistently considered both actual *and* potential competition in assessing whether a marketplace is sufficiently competitive to warrant UNE forbearance."[2] The Commission has been far from alone in considering "potential competition" as a key factor to consider within any competitive analysis. Courts, academic commentators, and antitrust authorities universally agree that policymakers must take the prospect of future competitive entry into account when deciding how much government intervention is appropriate in the market.

The core aim of competition policy is to protect the interests of consumers in low prices and high service quality.[3] Existing, mature competition among multiple providers is ordinarily a *sufficient* condition for protecting those interests. But it is not a *necessary* condition. If there is only one current manufacturer of widgets, that manufacturer's 100% market share may or may not signify anything about its ability to exercise market *power*: *i.e.*, the ability to maximize its

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[2] *See Verizon Tel. Cos. v. FCC*, No. 08-1012, slip op. at 16 (D.C. Cir. June 19, 2009) (emphasis in original).

[3] *See, e.g.*, 2B Philip E. Areeda, Herbert Hovenkamp, & John L. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 401 (3d ed. 2006) ("The central purpose of the federal antitrust laws is to preserve competition . . . . [C]ompetition is thought to yield the highest output and lowest prices consistent with competitors' ability to earn minimally profitable returns to their investments.").

profits by reducing output and unilaterally raising prices above competitive levels.[4] The widget manufacturer could not exercise such market power if other firms are capable of producing substitute widgets at competitive rates if the incumbent firm raises its prices. The application of these principles in the present context is clear. As Verizon and Qwest have explained, the massive investments that cable companies and others have made in laying telecommunications infrastructure throughout metropolitan areas will discipline the prices that ILECs can charge, whether the rivals decide to put this sunk investment to use tomorrow or two years from now.[5] Other technologies and providers may have a similar constraining effect.

It is hardly controversial to conclude that the disciplining effects of such potential entry are relevant to competition policy analysis; indeed, that conclusion is a universally accepted truism. As the D.C. Circuit reminded the Commission just last month, whether a provider "can exercise 'bottleneck monopoly power' depends . . . 'not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition.'"[6] And the Seventh Circuit explains that it has been "many years since anyone knowledgeable about" competitive analysis "thought that concentration by itself imported a diminution in competition."[7]

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4 2B Areeda, Hovenkamp, & Solow at ¶ 501 ("Market power is the ability to raise price profitably by restricting output.").

5 *See, e.g.*, Brief for Petitioners the Verizon Telephone Companies, *Verizon Tel. Cos. v. FCC*, No. 08-1012, at 16 (D.C. Cir. June 3, 2008); Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 09-135, at 13-15 (filed Mar. 24, 2009).

6 *See, e.g.*, *Comcast Corp. v. FCC*, No. 08-1114, slip op. at 11 (D.C. Cir. Aug. 28, 2009) (emphasis in original) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001)).

7 *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994) (Posner, J.); *see also United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market share is imperfect measure because market must be examined in light of access to alternative supplies); *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it

The academic commentary uniformly supports this position. Preeminent antitrust scholar Herbert Hovenkamp observes, "as 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."[8] The leading antitrust treatise similarly notes that "a variety of circumstances may indicate that a firm's market share either overstates or understates its present or future competitive role."[9] One of those circumstances is the presence of potential competition:

> Suppose we observe a firm accounting for 100 percent of a well-defined market but charging a price at the competitive level. . . . Most likely, it has no market power: demand may be so responsive or entry so easy that lower output at higher prices would be immediately or quickly unprofitable.[10]

Likewise, economists Joseph Farrell and Carl Shapiro have written that "the link between market shares and competitive effects can be weak and/or confusing."[11] In sum, courts, economists and

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is not market share that counts, but the ability to *maintain* market share.") (emphasis in original); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (market share statistics "misleading" in a "volatile and shifting" market).

[8] Herbert J. Hovenkamp, *Analyzing Horizontal Mergers: Unilateral Effects in Product-Differentiated Markets*, U. Iowa Legal Studies Research Paper No. 09-12, at 21 (Mar. 13, 2009), *available at* http://ssrn.com/abstract=1359288; *see also* Herbert Hovenkamp, *Exclusive Joint Ventures And Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 72 (1995) ("Measuring market power is a highly inexact and expensive science[.]"). Lawrence H. Eiger, *Antitrust: Decisions Concerning Supplier-Dealer Relations And The Rule Of Reason*, 58 Chi.-Kent L. Rev. 251, 267 (1982) ("Market power is a function of many factors[.]"); Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3303 ¶ 57 (1995) ("*AT&T Nondominance Order*") ("It is well-established that supply and demand elasticities are properly considered in assessing whether a firm has market power in the relevant product and geographic markets.").

[9] 4 Areeda, Hovenkamp, & Solow at ¶ 950b.

[10] 2B Areeda, Hovenkamp, & Solow at ¶ 508.

[11] Joseph Farrell and Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, SSRN Research Papers, at 5 (Nov. 25, 2008), http://ssrn.com/abstract=1313782.

antitrust scholars uniformly agree that, while market share is obviously a key data point in any market analysis, it is not, standing alone, a defensible proxy for market power.[12]

For precisely this reason, consideration of potential competitive entry also plays a key role in the antitrust analysis of the Justice Department and Federal Trade Commission. Under the *Horizontal Merger Guidelines* promulgated by those two agencies, "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger" and must yield to evidence that the ease of future "entry into the market" would keep the merged parties from "profitably maintain[ing] a price increase above premerger levels."[13] The Justice Department recently applied this dynamic market analysis when it approved the merger of Whirlpool and Maytag, two leading makers of laundry appliances. The Department reasoned that, "despite the two companies' relatively high share of laundry product sales in the United States, any attempt to raise prices likely would be unsuccessful," given that "LG,

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12 *See, e.g.*, 2 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 14.4 (1989) ("Although relevant to monopoly power, market share cannot be the whole story, because even a very high market share confers no monopoly power if, for example, other firms could easily enter or expand existing output in response to an increase in price."); *id.* ("[M]odern courts make clear that market share evidence is never sufficient to establish market power; it is always evaluated in the context of other factors affecting market output."); Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 260-61 (2003) ("[A] market share test is problematic because high market shares may not indicate much ability to raise prices over competitive levels, which is the economic injury of concern."). *See also* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harvard L. Rev. 937, 947-51 (1981) (explaining relationship between market share and market power).

13 Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* 18, 25 (1997), http://www.usdoj.gov/atr/public/guidelines/hmg.pdf ("*Horizontal Merger Guidelines*"). The Guidelines define entry as "easy" if it is "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." *Id.* at 25-26. In this context, "timely" means that potential competitors can be in the market within two years. *Id.* at 27.

Samsung, and other foreign manufacturers could increase their imports into the U.S.," and "[e]xisting U.S. manufacturers have excess capacity and could increase their production."[14]

II. THE COMMISSION SHOULD CONTINUE LOOKING BEYOND STATIC MARKET SHARE WHEN ASSESSING COMPETITIVE CONDITIONS IN ORDER TO ACCOUNT FOR ALL FACTORS THAT CONSTRAIN INCUMBENT MARKET POWER.

As the D.C. Circuit found in its remand decision, the Commission offered no reasoned justification in the *Verizon 6-MSA Order* for departing from this universal consensus by looking only to market shares in analyzing whether to forbear from network-element unbundling requirements.[15] The Court further observed that the Commission had previously relied "on an assessment of existing *and potential* competition,"[16] both in the forbearance context[17] and in its underlying analysis of which elements should be subject to unbundling requirements under Section 251.[18] In fact, this is an understatement. In context after context, the Commission has always understood that the only reasonable way to determine if a provider has sufficient market power to sustain a non-competitive increase in prices is to examine *both* the pressure from current competition *and* the prospect that additional competition would emerge if prices rise above efficient levels. The Commission could not reasonably conclude otherwise now.

Forbearance. The Commission made clear in the *Omaha Order*[19]—the precedent that still guides the forbearance analysis—that static market share alone is an insufficient indicator of

14 Dept. of Justice, Press Release, *Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag* (Mar. 29, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm.

15 *Verizon v. FCC*, No. 08-1012, slip op. at 18.

16 *Id.* at 16 (emphasis in original).

17 *See id.* (citing Memorandum Opinion and Order, *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19,446 (2005) ("*Omaha Order*")).

18 *See id.* at 17 (citing *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 540 (D.C. Cir. 2006)).

19 *Omaha Order*, 20 FCC Rcd 19415.

market power, with respect to both forbearance from unbundling rules and forbearance from dominant carrier regulation. While not bound by a "stand-alone market power inquiry," the Commission's Section 10 forbearance test for both UNEs and dominant carrier rules nevertheless centers on an analysis of competitive conditions.[20] Market share data are an important part of that analysis, but the Commission based its *Omaha* decision on the presence of actual *and* potential competition. For example, defending its decision to forbear from its unbundling rules against charges that Qwest and Cox could act as an uncompetitive duopoly, the Commission noted that "potential competition from established competitors" in addition to Cox would limit "the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market."[21]

The Commission was even clearer on this point in its analysis of Qwest's request for forbearance from dominant carrier regulation. To determine if Qwest had sufficient market power "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable,"[22] the Commission looked both at current market share *and* at supply elasticity—"the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price."[23] Consideration of this potential competition is necessary to "to determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such carrier raised the price of its service by a small but

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[20] *See id.* at 19425 ¶ 17 n.52 (nondominance); *id.* at 19444 ¶ 59 (unbundling).

[21] *Id.* at 19452 ¶ 71. *See also Verizon v. FCC*, No. 08-1012, slip op. at 16-17 (listing four other examples in the *Omaha Order* of the Commission's reliance on factors other than market share to determine that conditions were sufficiently competitive to justify forbearance).

[22] *Omaha Order*, 20 FCC Rcd at 19426 ¶ 18 n.54 (quoting Fourth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C. 2d 554, 558 ¶ 8 (1983)).

[23] *Id.* at 19432 ¶ 35.

significant amount and its customers wished to change carriers in response."[24] The theme of the *Omaha Order* is clear: the only economically rational test to determine competitive conditions looks both to existing market shares and the extent to which potential competition will constrain anticompetitive behavior of the incumbent.

The Commission's subsequent forbearance orders followed this precedent and adopted the same rationale. In its *Anchorage UNE Order*, the Commission explained that the incumbent carrier, ACS, would have proper incentives to offer wholesale access at competitive rates because of "the very high levels of retail competition that, *going forward*, will not rely on ACS's facilities[.]"[25] The Commission understood that "emerging competition" from intermodal competitors "would 'pressure the BOCs to . . . offer [wholesale] customers reasonable rates and terms[.]'"[26] Indeed, the Commission found that, even with respect to customers that were not yet located next to last-mile competitive facilities, the mere threat of competitive entry (combined with residual regulatory obligations) would itself serve as an effective "check on ACS engaging in supra-competitive pricing."[27]

In the *Anchorage Nondominance Order*, which addressed forbearance from dominant-carrier regulation rather than UNE obligations, the Commission similarly found "adequate

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[24] *Id.* at 19432 ¶ 35 (quoting Order and Notice of Proposed Rulemaking, *Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14123 ¶78 (1998) ("*Comsat Order*")).

[25] Memorandum Opinion and Order, *In re 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*, 22 FCC Rcd 1958, 1988 ¶ 45 (2007) (emphasis added) ("*Anchorage UNE Order*").

[26] *Id.* at 1988 ¶ 45 n.144 (quoting Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21508 ¶ 26 (2004)).

[27] *Id.* at 1979 ¶ 34.

supply elasticity in [the market for mass-market switched access] for competitors to respond to any price increase ACS might attempt."[28] Reviewing the market for broadband transmission services, the Commission was even more explicit that "potential competition by intermodal and intramodal competitors" would act to prevent anticompetitive pricing.[29]

Unbundling requirements. Quite apart from its forbearance analysis under 47 U.S.C. § 160, the Commission has always looked at both actual and potential competition in a given wholesale market to determine which network elements should be subject to Section 251 unbundling requirements in the first place. Upholding the Commission's *Triennial Review Remand Order* over objections that the order improperly ignored situations in which "competition is possible," the D.C. Circuit noted *fifteen instances* in which the order emphasized the importance of potential competition.[30] Indeed, one of the principal goals of the *Triennial Review Remand Order* was to clarify that unbundling is unnecessary *both* in the presence of actual competition and where conditions indicate that "reasonably efficient competitive LECs are *capable* of duplicating the incumbent LEC's network."[31]

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[28] Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, 16324 ¶ 41 (2007) ("*Anchorage Nondominance Order*").

[29] *Id.* at 16325-26 ¶ 47.

[30] *Covad* , 450 F.3d at 540-41 (discussing Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*")).

[31] *Triennial Review Remand Order*, 20 FCC Rcd at 2586 ¶ 87 (emphasis added). *See also Omaha Order*, 20 FCC Rcd at 19418 ¶ 6 ("In February 2005, the Commission released the *Triennial Review Remand Order*, . . . in which it . . . modified its unbundling framework by making impairment determinations in part by drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets.").

Nondominance determinations. When considering whether a carrier should be classified as "dominant" or "nondominant" for purposes of traditional common carrier regulation, the Commission has always looked beyond static market shares to potential competitive entry. For example, in 1995, the Commission deemed AT&T Corp. nondominant in the market for domestic long distance services even though AT&T then had a commanding market share of approximately 60%.[32] The Commission explained that, despite its majority share of the market, "AT&T's competitors . . . have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable."[33] The Commission added:

> Although several parties argue that AT&T's overall market share of 60 percent is inconsistent with a finding that AT&T lacks market power, we disagree. *It is well-established that market share, by itself, is 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 to determine whether a particular firm exercises market power in the relevant market.[34]

The Commission drove this point home the following year when it concluded that AT&T should also be treated as nondominant in the international long distance market, where AT&T's share was even higher—over 70% for calls to some countries.[35] In this context, too, the Commission concluded that "potential competition can ensure that prices continue to remain just and reasonable, and we believe that it will do so."[36]

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[32] *AT&T Nondominance Order*, 11 FCC Rcd at 3305 ¶ 62.

[33] *Id.* at 3303 ¶ 58 (emphasis added).

[34] *Id.* at 3307 ¶ 68 (emphasis added); *see also WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001) (same).

[35] Order, *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963, 17976 ¶ 35 (1996) ("*AT&T International Nondominance Order*").

[36] *Id.* at 17963 ¶ 96.

In other contexts as well, the Commission has given the prospect of future competition dispositive significance in conducting its dominance analysis. Another example was the Commission's 1998 decision to deem Comsat nondominant in the provision of certain satellite communications services. The Commission acknowledged that "[t]he record still lacks specific data regarding Comsat and its competitors' market share[s.]"[37] But the Commission nonetheless concluded that Comcast should be treated as nondominant in the provision of the relevant services because, no matter what Comcast's market share might have been at the moment, rival satellite systems "should be able to offer [competing] service[s] *in the future*."[38]

Pricing Flexibility. Even in contexts where the Commission has retained some degree of dominant-carrier regulation, it has long considered prospects for future competitive entry as a key factor in relaxing certain aspects of such regulation. One prominent example is found in the Commission's "pricing flexibility" rules, which remove certain restraints on the prices ILECs may charge for special access services. In that context, the Commission has granted ILECs pricing flexibility when they can show that competitors have "collocated" their own equipment within ILEC central offices as a means of providing current or future services. Such collocation is treated as a proxy for competitive checks on an ILEC's pricing practices whether or not the collocators have already succeeded in winning substantial market shares from the ILEC. The Commission reasons that, even if it is *currently* unused, the collocated equipment "remains available and *capable* of providing service in competition with the incumbent" and thereby "makes exclusionary pricing behavior costly and highly unlikely to succeed."[39]

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[37] *Comsat Order*, 13 FCC Rcd at 14139 ¶ 111; *see also AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) (discussing same).

[38] *Comsat Order*, 13 FCC Rcd at 14139 ¶ 111 (emphasis added).

[39] Order, *In re Access Charge Reform*, 14 FCC Rcd 14221, 14264 ¶ 80 (1999) (emphasis added); *see generally WorldCom*, 238 F.3d at 458.

Merger review. Finally, like the analysis performed by the Department of Justice and the Federal Trade Commission, the Commission's own approach to merger review includes a broad discussion of market power that incorporates both existing and potential competition. For example, in the AT&T/Dobson merger, the Commission wrote:

> if our count of the number of rival service providers and our scrutiny of their spectrum holdings and network coverage indicates that *the response of rival service providers* will likely be sufficient to limit the ability and incentive of the combined entity to raise prices unilaterally, we would find that the transaction is not harmful to competition in a specific market *even in the presence of a relatively high post-transaction market share* of the combined entity.[40]

Similarly, in considering mergers in the wireless market as a general matter, the Commission looks not only at existing market shares but also the potential of available, unused spectrum to add additional competitive pressure. The Commission has explained that wireless "markets where spectrum is available on the secondary market" are particularly ripe for additional competitive entry, and so a merger of two carriers poses less competitive threat.[41]

All of this FCC precedent confirms a proposition so simple that it has never been subject to serious dispute: in considering whether regulation is needed to protect consumers in the absence of current competition, policymakers cannot look only to current market shares; they must also take potential competition into account. Although the D.C. Circuit gave the Commission broad discretion on remand to develop any "reasoned" policy approach that

[40] Memorandum Opinion and Order, *In re Applications of AT&T Inc. and Dobson Commc'ns Corp.*, 22 FCC Rcd 20295, 20323 ¶ 52 (2007) (emphasis added).

[41] Memorandum Opinion and Order, *Applications of Western Wireless Corp. and ALLTEL Corp.*, 20 FCC Rcd 13053, 13083 ¶ 78 (2005). *See also* Order, *AT&T Mobility Spectrum, LLC; Application for 700 MHz Band Licenses, Auction No. 73*, 23 FCC Rcd 18409, 18416 ¶ 13 (2008) ("[I]f a current provider in any of these markets is capacity constrained, or if a new entrant would like to enter these markets, then there is sufficient unused spectrum available that could be obtained in the secondary market.").

comports with its statutory obligations,[42] no approach in this area *could* be reasoned if it rejects this universal premise of competition policy.

CONCLUSION

The Commission should clarify that both actual and potential competition are factors in the Section 10 forbearance analysis.

Respectfully Submitted,

By: /s/ Lynn R. Charytan

Gary L. Phillips
Paul K. Mancini
AT&T SERVICES, INC.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
202-457-3053 (phone)
202-457-3074 (facsimile)

Lynn R. Charytan
Jonathan E. Nuechterlein
Will T. DeVries
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-663-6000 (phone)
202-663-6363 (facsimile)

Attorneys for AT&T Inc.

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42 *See Verizon v. FCC*, No. 08-1012, slip op. at 18-19.