

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

<p>In the Matter of</p> <p>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</p> <p>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</p>	<p>WC Docket No. 06-172</p> <p>WC Docket No. 07-97</p>
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COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS COMPANY, NUVOX, AND XO COMMUNICATIONS, LLC

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COMMENTS

Broadview Networks, Inc., Covad Communications Company, NuVox, and XO Communications, LLC (hereinafter referred to jointly as “Commenters”), by their attorneys, hereby file their comments in response to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceedings on August 20, 2009.¹

I. INTRODUCTION AND SUMMARY

In the *August 20th Public Notice*, the Commission invited comment on remands by the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”) of two related Commission orders denying petitions seeking forbearance from Section 251(c)(3) unbundling obligations in ten Metropolitan Statistical Areas (“MSAs”) throughout the United States.² The Commenters

¹ *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, Public Notice, DA 09-1835 (rel. Aug. 20, 2009) (“*August 20th Public Notice*”).

² *Id.*, at 1.

were active participants in the Commission proceedings that resulted in the forbearance denial orders and they remain vitally interested in the remand dockets.

In many locations, the Commenters continue to be dependent on incumbent local exchange carrier (“ILEC”) unbundled network elements (“UNEs”) to provide service to their end user business customers. Increasingly, these services are broadband in nature. Thus, the premature elimination of Section 251(c)(3) unbundling obligations through the Section 10 forbearance process would have a significant negative impact on the Commenters’ continued ability to provide end user services, most notably, the broadband services so critical to our nation’s economic recovery.

The forbearance framework suggested by the Commenters below would provide the Commission and industry participants with a comprehensive roadmap for the conduct of UNE forbearance proceedings. Importantly, this proposed framework, which has been applied successfully by the Commission on past occasions to judge non-UNE forbearance requests, should result in forbearance being granted only in situations where the consequences would not be a diminution in narrowband or broadband competition.

Specifically, the Commenters encourage the Commission to embrace the market power analysis employed by the Commission in a variety of proceedings over the past twenty years to determine when forbearance from UNE obligations is appropriate. A market power analysis requires a robust assessment of the competitive environment in the product and geographic markets at issue and therefore should lead to forbearance awards only in situations where the elimination of UNE obligations would not negatively affect the nature and extent of competition or the availability or price of services offered to end user customers.

In the *August 20th Public Notice*, the Commission specifically requested comment on whether it should depart from recent precedent in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*.³ As shown herein, the Commenters believe the Commission should retire the Section 251(c)(3) forbearance standard used in those proceedings and instead should apply a market power-based analysis. A market power analysis would avoid the pitfalls of the *Omaha/Anchorage* UNE forbearance standard and would allow for a comprehensive assessment of whether forbearance is warranted.⁴

Under a market power standard, product and geographic markets must be specifically defined and a separate competitive analysis conducted for each. The Commenters and other interested parties repeatedly have warned the Commission of the shortcomings of the *Omaha/Anchorage* standard, which does not provide for the identification of individual product markets and does not require product market-specific competitive analyses of UNE forbearance requests.⁵

The Commission has asked for input on whether it should take potential competition into account in its UNE forbearance review and has invited comment on whether it should include any additional issues or factors in its analysis.⁶ The Commenters suggest that the appropriate response to the first question is yes, so long as potential competition is assessed in the context of the market power standard proposed herein. The answer to the second question

³ *August 20th Public Notice*, at 3-4.

⁴ Retirement of the standard applied in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* would be consistent with the Commission's statements in each of those proceedings that it did not intend to adopt rules of general applicability. See *Omaha Forbearance Order*, at n.47; *Anchorage Forbearance Order*, at ¶ 1.

⁵ See, e.g., Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 3, 2009) ("*April 3rd Ex Parte Letter*"), at 4-5, 8-9.

⁶ *August 20th Public Notice*, at 3-4.

also is yes. A market power oriented inquiry would begin with an evaluation of actual competition in the particular product and geographic market at issue (as measured by the petitioning ILEC's market share) but it would not end there. The market share possessed by the petitioning ILEC is just one of the factors that would be considered. The scope of the Commission's review would include an evaluation of the level of actual and potential competition on both the retail and the wholesale level in the particular market under consideration. It also would include other important factors alien to the *Omaha/Anchorage* analysis such as whether competitive carriers can easily obtain the facilities and services purchased from the ILEC seeking UNE forbearance from alternative sources on reasonable rates and terms. The petitioning ILEC's size, resources, and technical capabilities also would be relevant to the Commission's analysis.

As shown below, a market power based analysis repeatedly has been blessed by the courts. Thus, its adoption here would lend some much-needed stability and predictability to the UNE forbearance process after long years of litigation and uncertainty. The Commenters urge the Commission to apply a market power standard to evaluate the Verizon and Qwest remand dockets and all other petitions for forbearance from Section 251(c)(3) unbundling obligations.

II. BACKGROUND

The instant remand proceedings are the result of both the D.C. Circuit's decision on the merits in *Verizon v. FCC*⁷ and its summary reversal of the Commission's decision in *Qwest v. FCC*.⁸ In *Verizon v. FCC*, the Court considered a challenge to the December 2007 Commission order denying Verizon forbearance from loop and transport unbundling obligations

⁷ *Verizon v. FCC*, No. 08-1012, Slip Op. (D.C. Cir. Jun. 19, 2009).

⁸ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Aug. 5, 2009).

in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.⁹ In the underlying *Verizon 6-MSA Order*, the Commission had concluded that forbearance from UNE obligations was not justified in any of the six markets at issue because “Verizon is not subject to a sufficient level of facilities-based competition in the six MSAs to grant relief ...”¹⁰ In reaching this decision, the Commission stated that it was guided by its previous rulings in the *Omaha Forbearance Order*¹¹ and the *Anchorage Forbearance Order*¹² regarding the level of actual competitive activity necessary to meet the Section 10 forbearance criteria in a given market.¹³

Verizon’s challenge to the *Verizon 6-MSA Order* before the D.C. Circuit centered on its assertion that the Commission had not faithfully applied the precedent set in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* but instead had unlawfully departed from its prior standard and analyses to craft a new bright-line market share test.¹⁴ Verizon argued that the test applied by the Commission in the *Verizon 6-MSA Order* “has no basis in the

⁹ *Petition 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*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (“*Verizon 6-MSA Order*”).

¹⁰ *Verizon 6-MSA Order*, at ¶ 36.

¹¹ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”) *aff’d* *Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

¹² *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 (2007) (“*Anchorage Forbearance Order*”). It is worth noting that the Anchorage proceeding ultimately was resolved in a manner similar to a dispute between two parties. ACS and cable provider GCI agreed to post-forbearance rates for loops and certain subloops in the Anchorage study area “at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until commercially negotiated rates are reached.” *Anchorage Forbearance Order*, at ¶ 2 (footnote omitted).

¹³ *Verizon 6-MSA Order*, at ¶ 36.

¹⁴ See Brief for Petitioners the Verizon Telephone Companies, *Verizon v. FCC*, No. 08-1012 (D.C. Cir. filed Sept. 16, 2008) (“*Verizon 6-MSA Appeal Brief*”), at 34.

FCC's prior UNE forbearance orders, in which the FCC applied a 'coverage threshold test' for forbearance from UNE obligations ... and granted relief in every wire center where the incumbent cable operator's facilities met that test."¹⁵

On June 19, 2009, the D.C. Circuit granted Verizon's petition for review on the limited ground that, in light of agency precedent, the Commission had not adequately explained its decision to deny Verizon's petition on the basis of Verizon's retention of a specified percentage share of the retail market.¹⁶ The Court agreed with Verizon that the test applied by the Commission in the *Verizon 6-MSA Order* "departs from agency precedent by relying solely on actual, and not potential, marketplace competition."¹⁷ The Court took pains to note, however, that the Commission is free to depart from its precedent so long as it satisfactorily explains its reason for doing so.¹⁸ The Court explained:

In this case, the FCC changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace. The flaw is not in this change, but rather in the FCC's failure to explain it.¹⁹

In short, the Commission's fatal mistake in the *Verizon 6-MSA Order* was the failure to articulate an explanation for its decision to deny Verizon forbearance from UNE obligations on the basis of insufficient facilities-based competition. The Court remanded – but did not vacate – the *Verizon 6-MSA Order* to the Commission for such further explanation.²⁰

¹⁵ *Verizon 6-MSA Appeal Brief*, at 23.

¹⁶ *Verizon v. FCC*, Slip Op. at 12-18.

¹⁷ *Id.*, at 3.

¹⁸ *Id.*, at 12 ("If the FCC changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed.").

¹⁹ *Id.*, at 18.

²⁰ *Id.*, at 3, 18-19.

The Commission's December 2007 decision in the *Verizon 6-MSA Order* was followed seven months later with its decision on Qwest's petitions seeking forbearance from UNE unbundling obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs. In July 2008, the Commission issued an order denying Qwest the requested relief in all four markets.²¹ In reaching its decision, the Commission found – consistent with its finding in the *Verizon 6-MSA Order* – that “record evidence ... demonstrate[d] that Qwest is not subject to a sufficient level of facilities-based competition ... to grant relief under the Commission's precedent.”²²

Following in Verizon's footsteps, Qwest appealed the Commission's order denying its forbearance requests to the D.C. Circuit.²³ The central issue in Qwest's appeal was the same market share issue that had been raised by Verizon in its appeal six months earlier. Consequently, Qwest, in a consent motion, asked the Court to defer briefing in its case until after the Court issued a decision in the Verizon case.²⁴ In February 2009, the D.C. Circuit ordered Qwest's appeal to be held in abeyance and directed the parties to file motions to govern further

²¹ *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*, 23 FCC Rcd 11729 (2008) (“*Qwest 4-MSA Order*”).

²² *Id.*, at ¶ 35.

²³ *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. filed Jul. 29, 2008).

²⁴ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Qwest's Consent Motion for Extension of Time (filed Jan. 9, 2009). Qwest was not content, however, to let this issue play out in the context of its appeal of the *Qwest 4-MSA Order*. In late March 2009, while the Verizon and Qwest appeals were pending, Qwest filed a second petition seeking forbearance from UNE obligations in the Phoenix MSA. See *Petition of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135 (filed Mar. 24, 2009) (“*Second Phoenix Petition*”). That proceeding is pending at the Commission. On August 25, 2009, several of the Commenters filed a motion for summary denial of Qwest's *Second Phoenix Petition* on the grounds that the petition is unnecessary and would lead to the waste of precious agency and industry resources. See *Motion for Summary Denial*, WC Docket No. 09-135 (filed Aug. 25, 2009). The motion is pending.

proceedings in the case 30 days after its disposition of the Verizon case.²⁵ In light of the Court's June 2009 decision in *Verizon v. FCC*, the Commission filed a motion to the D.C. Circuit for voluntary remand of the Qwest case.²⁶ The Commission stated that a remand would "give the Commission the opportunity to reconsider its analysis and decision ..., enabling it to issue a ruling on the Qwest petitions in light of the Court's guidance provided by the Verizon decision."²⁷ Qwest consented to the Commission's motion.²⁸ And, on August 5, 2009, the Court granted the motion and remanded the case to the Commission.²⁹

The *August 20th Public Notice* is designed to seek input on what actions the Commission should take to satisfy the Court in both the Verizon and Qwest appeals. In an effort to develop the most useful record possible, the Commission has specifically requested input on:

1. Whether and to what extent the Commission should depart from recent precedent regarding marketplace analysis in forbearance petitions, including the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*.
2. What evidence beyond the petitioning carrier's market share for a particular product market is relevant to whether forbearance from unbundling obligations is warranted.
3. How should the existence of potential competition affect the Commission's forbearance analysis.
4. Are there additional issues or factors that the Commission should take into account in its analysis.
5. How, if at all, should changes in the marketplace or Commission actions since the time of the *Verizon 6-MSA Order* or the *Qwest 4-MSA Order* affect the Commission's remand decision.³⁰

²⁵ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Feb. 11, 2009).

²⁶ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Motion of the Federal Communications Commission for a Voluntary Remand (filed Jul. 17, 2009) ("*FCC Motion*").

²⁷ *FCC Motion*, at 5.

²⁸ *Id.*, at 1.

²⁹ *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Aug. 5, 2009).

³⁰ *August 20th Public Notice*, at 3-4.

The Commenters believe that the Commission is asking the right questions. As explained herein, these inquiries suggest that a robust market power analysis is the proper way to assess petitions for forbearance from UNE unbundling obligations.

III. THE PREMATURE ELIMINATION OF SECTION 251(c) UNBUNDLING OBLIGATIONS WOULD HAVE A CHILLING EFFECT ON THE DEPLOYMENT OF BROADBAND SERVICES

As the Commission has long recognized, robust competition among providers of high-speed services is essential to achieving high broadband penetration levels and ensuring affordable broadband rates. In its Fourth Report to Congress, the Commission reasoned as follows:

Having multiple advanced networks will [] promote competition in price, features, and quality-of-service among broadband-access providers. This price-and-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent the further deployment of new and next-generation networks and ever-more innovative services.³¹

In order to maximize broadband competition, however, the Commission must ensure that high-speed service providers have all the tools necessary to compete. A fundamental component of this toolbox is efficient access to last-mile facilities.³² All competitive providers must have a reasonable opportunity to reach end user customers on an economically rational and non-discriminatory basis.

³¹ *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, 20548 (2004).

³² In fact, numerous interested parties have urged the Commission to include access to last-mile facilities in its national broadband plan. *See, e.g.*, Comments of Covad Communications Company, WC Docket No. 09-51 (filed Jun. 8, 2009), at 10-11; Comments of XO Communications, LLC, WC Docket No. 09-51 (filed Jun. 8, 2009), at 4-6; Comments of Cbeyond, Inc. *et al.*, WC Docket No. 09-51 (filed Jun. 8, 2009), at 3-4.

In some limited cases, it is economically and practically feasible for high-speed service providers to supply their own last-mile facilities. In some other locations, there may be non-ILEC wholesale local loop products available for purchase on reasonable rates and terms. In most locations, however, ILEC loops continue to be the only viable means available to most high-speed service providers to reach end user customers. In those situations, access to unbundled loops under Section 251(c)(3) of the Act³³ is still essential to enable competition and the elimination of unbundling through the Section 10 forbearance process would have a chilling effect on broadband competition.

The Commenters today are using UNEs to provide a variety of creative broadband services to small, medium, and larger business customers. Next-generation VoIP, bonded T1s, Ethernet over copper, and high-definition video conferencing services are some of the innovative high-speed services being offered business customers today by the Commenters and other competitive carriers through use of ILEC unbundled loops and transport. The premature elimination of UNE obligations could seriously impede their ability to continue to offer these broadband (and other business) services. Thus, competitive carriers are vitally interested in ensuring that the Commission adopts the appropriate standard to analyze UNE forbearance petitions.

IV. THE *OMAHA* STANDARD FOR ASSESSING WHETHER FORBEARANCE FROM UNBUNDLING OBLIGATIONS IS WARRANTED FALLS SHORT OF MEETING THE REQUIREMENTS OF SECTION 10

The Commission granted Qwest forbearance from UNE unbundling obligations in 9 of Qwest's 24 wire centers in the Omaha MSA based upon its conclusion that cable provider Cox had substantially built out its network in those wire centers *and* that Qwest faced sufficient

³³ 47 U.S.C. § 251(c)(3).

facilities-based competition from Cox for residential customers in those locations to ensure that the interests of consumers and the goals of the Act are protected.³⁴ Its decision was further supported by its prediction 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 the development of a Qwest/Cox duopoly.³⁵ In sum, the Section 251(c)(3) forbearance standard developed in the *Omaha Forbearance Order* – and employed to judge subsequent UNE forbearance petitions – centered on the location and extent of retail residential competition from a single facilities-based competitor coupled with the Commission’s predictive judgment that the ILEC would continue to make just and reasonable wholesale last-mile offerings available to all competitors.³⁶ As shown below, this framework for assessing requests for forbearance from Section 251(c)(3) unbundling

³⁴ *Omaha Forbearance Order*, at ¶¶ 61-62.

³⁵ *Id.*, at ¶ 67.

³⁶ Both Verizon and Qwest erroneously contend that the standard applied in the *Omaha Forbearance Order* focused exclusively on the deployment of competitive last-mile facilities by Cox and did not take into account the extent of actual competition (as measured by Qwest’s market share) between Cox and Qwest in those wire centers where Cox had deployed last-mile facilities. *See, e.g., Verizon 6-MSA Appeal Brief*, at 35; *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007) (“*First Phoenix Petition*”), at 3-4. Verizon and Qwest erroneously contend further that the Commission departed from the *Omaha* standard in the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order* when it held that UNE forbearance was not justified in any of the MSAs requested because facilities-based competitors had not yet achieved a sufficient level of competitive activity. *See, e.g., Verizon 6-MSA Appeal Brief*, at 35-36; *First Phoenix Petition*, at 3-4. Verizon and Qwest misconstrue the *Omaha Forbearance Order*. The extent of actual facilities-based competition in the Omaha MSA was critical to the Commission’s decision-making in that docket. *Omaha Forbearance Order*, at ¶¶ 61-62 (“The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient 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.”). *See also id.*, at ¶¶ 57, 59, 64, 66. Indeed, in the *Verizon 6-MSA Order*, the Commission explicitly “reject[ed] Verizon’s suggestion that, in prior orders, the Commission granted forbearance based simply on cable coverage.” *Verizon 6-MSA Order*, at n.113.

obligations falls far short of meeting the requirements of Section 10 in a number of critical respects.³⁷

A. A Product Market-Specific Analysis Of Forbearance Requests Is Required

From the time of the *Omaha Forbearance Order*, the Commenters and other interested parties have warned the Commission of the various material shortcomings of the UNE forbearance standard developed in that docket.³⁸ Critical among these shortcomings is the failure to require a product market-specific UNE forbearance analysis. In the Omaha proceeding, the Commission generally acknowledged the importance of identifying the relevant product markets to be reviewed and the need to conduct a separate competitive analysis for each identified product market.³⁹ It determined that the mass market and the enterprise market⁴⁰ were the appropriate product markets for Commission review of whether forbearance from certain dominant carrier rules was warranted and it conducted its competitive analysis on that basis,⁴¹ yet its conclusions regarding forbearance from UNE unbundling rules were not grounded in a similar product-market specific analysis. Indeed, in the *Qwest 4-MSA Order*, the Commission

³⁷ The Commenters remind the Commission that in remanding the *Verizon 6-MSA Order* to the Commission for further proceedings, the D.C. Circuit explicitly stated that the Commission has discretion to depart from its UNE forbearance precedent so long as it articulates a satisfactory explanation for its action. *Verizon v. FCC*, Slip Op., at 17-19.

³⁸ See, e.g., Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Sept. 4, 2007) (“Sept. 4th Ex Parte Letter”).

³⁹ *Omaha Forbearance Order*, at ¶¶ 21-22.

⁴⁰ The Commission defined the mass market as including residential consumers and small business customers and the enterprise market as including medium-sized and large business customers. The Commission did not specify a definition of “small business customer.”

⁴¹ *Omaha Forbearance Order*, at ¶ 22.

acknowledged that it “has never formally defined product markets for purposes of its UNE forbearance analysis ...”⁴²

The reasons underlying the Commission’s failure to identify any specific product markets and to conduct a product-market specific analysis in any UNE forbearance docket to date remain unexplained⁴³ since the Commission has long recognized that identification of the particular product markets at issue is the appropriate first step in any credible analysis of the state of competition.⁴⁴ Unfortunately, the lack of product market differentiation in previous UNE forbearance cases has led to problematic results. In the *Omaha Forbearance Order*, the Commission’s reliance on data showing Cox’s success in the *retail residential* market formed the exclusive basis for its conclusion that forbearance from UNE obligations to serve *all* customers was appropriate.⁴⁵ As has been well-documented, the result has been a significant retrenchment of competition in the business market in the Omaha MSA.⁴⁶ Going-forward, any standard

⁴² *Qwest 4-MSA Order*, at n.129. See also *Anchorage Forbearance Order*, at ¶ 12.

⁴³ This shortcoming was recognized by Commissioners Copps and Adelstein in their concurring statement in the *Anchorage Forbearance Order*. They stated: “We concur also because this decision does not adequately address market differentiations, as between residential and business, making it difficult to conclude which market segments are actually receiving the benefit of emerging competitive choice.” *Anchorage Forbearance Order*, Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Concurring.

⁴⁴ See, e.g., *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746 (1999) (“*SBC/Ameritech Order*”); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18119 (1998).

⁴⁵ *Omaha Forbearance Order*, at ¶ 66.

⁴⁶ See, e.g., *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*”). The time to remedy this unfortunate result is now. The Commission should grant the McLeodUSA petition.

utilized by the Commission to determine whether forbearance from UNE obligations is appropriate must separately identify and assess the state of competition in individual product markets.

B. Multiple Active Facilities-Based Competitors Must Be Present

A second critical shortcoming of the UNE forbearance standard employed in the *Omaha Forbearance Order* and in subsequent forbearance dockets is its reliance on the activities of a single facilities-based retail competitor.⁴⁷ To ensure that the significant anti-competitive effects of a duopoly market do not occur, it is essential that multiple facilities-based competitors offering substitutable services are operating in the product market under review before forbearance is considered. If the ILEC faces a single facilities-based competitor in a particular market, the market by definition cannot be sufficiently competitive to protect against the risks of tacit collusion between the ILEC and the competitor that would necessarily lead to restricted service choices and higher prices for consumers.⁴⁸

As Commissioner Copps and former Commissioner Adelstein have consistently reminded the Commission since the *Omaha Forbearance Order*, “the statute contemplates more than just competition between a wireline and cable provider.”⁴⁹ As noted by Commissioner Copps in the *Verizon 6-MSA Order*, “the Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace.”⁵⁰

⁴⁷ See, e.g., *Omaha Forbearance Order*, at ¶ 59; *Anchorage Forbearance Order*, at ¶ 20.

⁴⁸ See, e.g., Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, *The Journal of Industrial Economics*, Vol. 26, No. 1 (Sept. 1977), at 21.

⁴⁹ *Omaha Forbearance Order*, Concurring Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, at 1.

⁵⁰ *Verizon 6-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 1.

The Commission has repeatedly expressed concerns in other contexts about the anticompetitive consequences of duopolies. In the *UNE Remand Order*, for example, the Commission concluded that an ILEC/cable duopoly does not constitute sufficient competition to realize the local market-opening goals of the 1996 Telecom Act. The Commission noted:

We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be “impaired” within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.⁵¹

The Commission went on to state that a standard that would be satisfied by the existence of a single competitor “would not create competition among multiple providers of local service that would drive down prices to competitive levels” and that “such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market.”⁵² Similarly, in reviewing proposed mergers among competing satellite television providers, the Commission recognized that a merger resulting in duopoly “create[s] a strong presumption of significant anticompetitive effects.”⁵³ There is no valid justification for departing from this precedent.

In the *Omaha Forbearance Order*, the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly on the ground that “the actual and potential competition from established competitors

⁵¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3726 (1999) (“*UNE Remand Order*”).

⁵² *Id.*

⁵³ *In the Matter of Application of EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002).

which can rely on the wholesale access rights and other rights they have under sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct” in the Omaha MSA.⁵⁴ 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 the development of a Qwest/Cox duopoly.⁵⁵

As has been well-documented, the Commission’s predictive judgment that Qwest would offer wholesale access to dedicated facilities at reasonable rates, terms and conditions has proven to be incorrect. In its petition seeking reinstatement of Qwest’s Section 251(c)(3) unbundling obligation in the Omaha MSA, McLeodUSA detailed its repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and Qwest’s consistent refusal to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.⁵⁶ McLeodUSA pointed out that Qwest’s refusal to negotiate wholesale rates following the grant of forbearance not only defies the Commission’s predictive judgment regarding Qwest’s behavior once Section 251(c)(3) obligations were lifted, but it also violates Qwest’s obligation under Section 271(c)(2)(B) to provide unbundled access to local loops and transport at just and reasonable rates.⁵⁷

At the same time, Cox has not offered a meaningful wholesale loop and/or transport product to McLeodUSA and other competitive carriers. In the face of the post-forbearance market behavior of the only two carriers with last-mile facilities in the nine Omaha

⁵⁴ *Omaha Forbearance Order*, at ¶ 71.

⁵⁵ *Id.*, at ¶ 67.

⁵⁶ *McLeodUSA Petition*, at 4.

⁵⁷ *McLeodUSA Petition*, at 10.

wire centers where Qwest was granted unbundling forbearance (*i.e.*, Qwest and Cox), McLeodUSA was forced to exit the Omaha MSA.

The lesson learned from Omaha is that if the ILEC and a single competitor control the only last-mile facilities available to reach customers in a particular geographic area, a wholesale market will not develop, and the retail market behavior of the two facilities-based carriers will be unconstrained by competitive pressures. Thus, the Commenters maintain that the *Omaha* precedent should be rejected and an ILEC seeking forbearance from Section 251(c)(3) unbundling obligations should be required to show that multiple competitive carriers (*i.e.*, non-ILECs), using their own facilities (including their own loops), are successfully providing a full range of services that are substitutes for the ILEC's offerings in each relevant product market. A market power-based approach would encompass this type of proof.

C. Wholesale Market Competition Must Be Considered

Another material defect in the UNE forbearance standard articulated in the *Omaha Forbearance Order* concerns its treatment of wholesale services. Since the Section 251(c)(3) unbundling obligation applies to the wholesale services provided by ILECs, the Commission's analysis necessarily must separately consider the effects that a grant of forbearance would have on consumers of those wholesale services as well as the consumers of retail services offered using those inputs.⁵⁸ It is insufficient and illogical for the Commission to limit its UNE forbearance analysis to competition in the retail market. Indeed, vibrant facilities-based competition in the wholesale market is necessary to preserve strong retail competition in the wake of unbundling as well as a strong indication of its existence.

⁵⁸ 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.” *Anchorage Forbearance Order*, at n. 82.

The Commission acknowledged the importance of “significant alternative sources of wholesale inputs” in the *Omaha Forbearance Order*, but concluded that “Qwest’s own wholesale offerings will continue to be adequate without unbundled loop and transport offerings.”⁵⁹ The aftermath of the *Omaha Forbearance Order* has demonstrated the inaccuracy of the Commission’s predictive judgment however. As discussed above, McLeodUSA has petitioned the Commission to reinstate Qwest’s Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission’s “‘predictive judgment’ that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect.”⁶⁰ McLeodUSA has been forced to exit the Omaha market as a direct result of Qwest’s post-forbearance unwillingness to offer wholesale access to loops and transport at reasonable rates, terms and conditions.

Further, in the *Omaha Forbearance Order*, the Commission implicitly assumed that although wholesale market competition did not exist at the time forbearance was sought, a viable wholesale market could develop later. This assumption was incorrect. Wholesale market competition is interdependent on the existence of non-incumbent retail market competitors. The more non-incumbent retail carriers operate in a market, and the more successful they become in generating retail demand, the more likely it is that wholesale offerings will emerge to serve such carriers. A single company (such as a cable company) with facilities in a market over which it provides a retail bundled product is unlikely to evolve into a wholesale carrier unless would-be purchasers remain in the market and continue to grow. This reality was demonstrated in the Omaha MSA. There, eliminating UNEs did not foster the development of alternative offerings

⁵⁹ *Omaha Forbearance Order*, at ¶ 67 (footnote omitted).

⁶⁰ *McLeodUSA Petition*, at 1.

by Cox, the cable provider. Instead, it removed potential wholesale customers such as McLeodUSA from the market, thereby removing any motive for Cox to create such offerings.

The Commenters urge the Commission to learn from the *Omaha* experience and to adopt an analytical framework in the instant remand dockets that considers the existing wholesale alternatives in each product and geographic market in which an ILEC seeks forbearance from unbundling obligations. Forbearance should not be granted in any market that does not have meaningful wholesale as well as retail competition.

D. The *Omaha* Test Appropriately Addresses Several Important Components Of The Section 10 Forbearance Standard

Notwithstanding the material shortcomings in the *Omaha* UNE forbearance test described in the preceding sections, there are several elements of the *Omaha* UNE forbearance analysis that are important to any consideration of whether forbearance from Section 251(c)(3) unbundling rules is warranted. The Commission should incorporate those elements, described below, into its market power based UNE forbearance analysis going forward.

1. Competitors Must Offer Substitutable Services

An ILEC seeking forbearance from Section 251(c)(3) unbundling requirements under the *Omaha Forbearance Order* framework must prove that its facilities-based competitors are providing a “full range of services that are substitutes” for the ILEC’s local service offerings.⁶¹ This requirement is critical to ensure that the ILEC is facing enough facilities-based competition to guarantee that the interests of consumers and the goals of the Act are protected.⁶²

Although substitutability cannot be known with certainty, it can be estimated on the basis of the level of penetration facilities-based competitors have been able to achieve, for if

⁶¹ *Omaha Forbearance Order*, at n. 156.

⁶² *Id.*, at ¶ 61.

the competitors' local service offerings are true substitutes for the ILEC's services, it can be expected that an appreciable percentage of users who previously obtained local service from the ILEC will choose to purchase service from the competitors. Conversely, a purported facilities-based competitor that has not been successful in achieving a significant level of market penetration cannot be assumed to be offering the full range of services that are substitutes for the ILEC's local service offerings. Of course, as explained above, market penetration must be measured on a product market-specific basis. Competitive inroads by facilities-based competitors in one product market proves nothing regarding the substitutability of competitors' services in a different product market.

2. Only Competitive Loop-Based Competition Is Properly Included In The UNE Forbearance Analysis

In the *Omaha Forbearance Order*, the Commission properly 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*.⁶³ Any competitive activity that is the result of continued use of the ILEC's local loops (*i.e.*, ILEC wholesale services, UNEs, and special access) therefore is not properly included in the analysis. Lines served via unbundled network element platform ("UNE-P") replacement services, Section 251(c)(4) resold lines, and over-the-top VoIP lines must be excluded since, by definition, they rely on use of ILEC-provided loop facilities. As the Commission correctly understood in the *Omaha Forbearance Order*, any failure to limit a market penetration showing to facilities-based (*i.e.*, competitive loop-based) competitive activity represents an end-run around the requirements of Section 10.⁶⁴

⁶³ *Omaha Forbearance Order*, at ¶ 64.

⁶⁴ *Id.*

Unfortunately, the Commission's position on this important issue has been called into question by some arguably confusing language in the *Verizon Forbearance Order*. In addressing the level of competitive activity present in the six MSAs at issue in that docket, the Commission stated that “*even including* wireless ‘cut the cord’ competition and competition from section 251(c)(4) resale and Verizon’s Wholesale Advantage service,” Verizon’s MSA-wide mass market shares are not sufficient “to support the grant of forbearance from UNE obligations.”⁶⁵ Verizon and Qwest contend that the quoted language proves that the Commission now considers non-competitive loop based competition appropriate to include in its assessment of competitive activity in a particular market.⁶⁶

The more consistent and credible reading of the Commission’s language in the *Verizon Forbearance Order* is that it was chosen to highlight just how far competitors in the MSAs at issue are from achieving the competitive penetration levels required by Section 10. The Commission’s intent was to show that *even if* one includes *all* competitive activity, even activity from sources that are not legitimately part of the Commission’s analysis because they rely on continued use of Verizon facilities and services, Verizon’s market share is still so high as to require denial of its UNE forbearance requests. In order to dispel any confusion and controversy regarding the Commission’s language in the *Verizon Forbearance Order*, however, the Commission should reiterate in these remand dockets that it has not deviated from the *Omaha Forbearance Order* requirement that only competitive loop-based competition be included in its UNE forbearance analysis.

⁶⁵ *Verizon 6-MSA Order*, at ¶ 37 (emphasis supplied).

⁶⁶ See, e.g., *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24 (filed Feb. 14, 2008) (“*Verizon Rhode Island Petition*”), at 13; *Second Phoenix Petition*, at 22-23.

V. THE FORBEARANCE STANDARD ESTABLISHED IN OMAHA AND UTILIZED IN SUBSEQUENT FORBEARANCE DOCKETS SHOULD BE RETIRED IN FAVOR OF AN ASSESSMENT OF WHETHER THE PETITIONING CARRIER POSSESSES MARKET POWER

As the D.C. Circuit noted in *Verizon v. FCC*, Congress “did not prescribe a ‘particular mode of market analysis’ or otherwise dictate how the FCC must make predictive judgments ‘within [its] field of discretion and expertise,’ such as those required under § 10 of the Act.”⁶⁷ The Commission is free to apply its experience and expertise to fashion whatever approach to UNE forbearance requests it deems appropriate so long as it “provid[es] a satisfactory explanation when it has not followed such approaches in the past.”⁶⁸

The Commenters suggest that the Commission adopt a market power approach to UNE forbearance requests. This approach incorporates appropriate elements from the standard developed in the *Omaha Forbearance Order* while avoiding several material shortcomings of that standard. A market power analysis has the additional benefit of having been perfected through development and application in a number of varied proceedings over the past twenty years, including proceedings in which ILECs have sought forbearance from dominant carrier rules and regulations.

A. The History Of The Dominance/Market Power Analysis

Between 1979 and 1985, the Commission conducted the *Competitive Carrier* proceeding, in which it examined whether and how its regulations should be adapted to promote competition in telecommunications markets.⁶⁹ In a series of orders in that proceeding, the

⁶⁷ *Verizon v. FCC*, Slip Op., at 17, quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006), at 8, 12.

⁶⁸ *Id.*, at 18.

⁶⁹ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further

Commission identified two types of carriers – those with market power (dominant carriers) and those without market power (non-dominant carriers).⁷⁰ The Commission relaxed its regulation of non-dominant carriers based on its conclusion that non-dominant carriers could not charge rates or engage in practices that violate the requirements of the Communications Act of 1934, as amended (“Act”) since customers always had the option of taking service from a dominant carrier whose rates and terms remained subject to regulation. In determining whether an entity possessed market power (and was therefore dominant), the Commission focused on certain identifiable market features, including “the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services,” and whether the firm controlled “bottleneck facilities.”⁷¹

In its *Fourth Report and Order*, the Commission, more specifically defined market power alternatively as “the ability to raise prices by restricting output” and as “the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.”⁷² In addition, the Commission recognized that, in order to

Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied MCI v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the “*Competitive Carrier*” proceeding).

⁷⁰ *First Report and Order*, 85 FCC 2d at 20-21. The Commission’s current rules define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (*i.e.*, one that does not possess market power). 47 C.F.R. §§ 61.3(q), 61.3(y).

⁷¹ *Id.*

⁷² *Id.*, at 558 (citing A. Areeda & D. Turner, *Antitrust Law* 322 (1978) and W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981)).

assess whether a carrier possesses market power, the relevant product and geographic markets first must be defined.⁷³

In its 1995 *AT&T Reclassification Order*, the Commission determined whether AT&T continued to possess market power in the interstate, domestic, interexchange market.⁷⁴ The Commission applied “well-accepted principles of antitrust analysis” to focus on: (1) AT&T’s market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T’s customers; and (4) AT&T’s cost structure, size, and resources.⁷⁵ This analytical approach has been followed by the Commission in a number of subsequent proceedings in which the question of whether a particular entity or entities should continue to be subject to dominant carrier regulation was at issue.⁷⁶

B. Application Of The Market Power Analysis To Address Forbearance From Dominant Carrier Regulations

The Commission also has applied the market power principles outlined above in assessing petitions seeking forbearance from dominant carrier rules and regulations under Section 10 of the Act.⁷⁷ In 1998, US West Communications, Inc. (“US West”) petitioned the Commission for forbearance from dominant carrier rules governing its provision of certain

⁷³ *Id.*, at 562.

⁷⁴ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 (1995) (“*AT&T Reclassification Order*”).

⁷⁵ *Id.*

⁷⁶ *See, e.g., Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, 11 FCC Rcd 17997 (1996) (“*AT&T International Non-Dominance Order*”); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, 12 FCC Rcd 15756 (1997) (“*LEC Classification Order*”); *COMSAT Corp. 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 14118 (1998) (“*COMSAT Reclassification Order*”).

⁷⁷ As the Commission has noted, a request for forbearance from specific dominant carrier rules is substantively different from a request for reclassification as a non-dominant carrier. *See, e.g., Omaha Forbearance Order*, at ¶ 17.

special access and high capacity dedicated transport services in the Phoenix, Arizona MSA.⁷⁸

After US West filed its petition, US West, the SBC Companies (“SBC”), the Bell Atlantic Telephone Companies (“Bell Atlantic”) and the Ameritech Operating Companies (“Ameritech”) filed several additional forbearance petitions seeking pricing flexibility in the provision of certain special access and high capacity dedicated transport services in many markets throughout the United States for substantially the same reasons proffered by US West in its Phoenix petition.⁷⁹

The Commission addressed the petitions on a consolidated basis. In doing so, it considered the petitioning Bell Operating Companies’ (“BOCs”) assertions and evidence “that they no longer possess market power in the provision of special access and high capacity dedicated transport services in the specified market(s) because there is sufficient competition to prevent them from raising prices above competitive levels.”⁸⁰

The Commission denied each of the requests for forbearance, concluding that the record in the proceedings concerning the state of competition in the market for special access and high capacity dedicated transport services was not sufficiently developed to support a conclusion

⁷⁸ *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 (filed Aug. 24, 1998).

⁷⁹ *Petition of the SBC Companies for Forbearance from Regulation as a Dominant Carrier for High Speed Dedicated Transport Services in Specified MSAs*, CC Docket No. 98-227 (filed Dec. 7, 1998); *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington MSA*, CC Docket No. 99-1 (filed Dec. 30, 1999); *Petition of the Bell Atlantic Companies for Forbearance from Regulation as Dominant Carrier, in Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Washington, D.C., Vermont and Virginia*, CC Docket No. 99-24 (filed Jan. 20, 1999); *Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA*, CC Docket No. 99-65 (filed Feb. 5, 1999).

⁸⁰ *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd 19947, 19959 (1999) (“*US West Forbearance Order*”).

that the BOC petitioners lack market power, and thus qualify for forbearance.⁸¹ US West appealed the Commission's decision to the D.C. Circuit, charging that the Commission erred in focusing exclusively on market share and in not considering evidence of supply and demand elasticity in its forbearance analysis.⁸² In response, the Commission argued that market share data is critical to a *prima facie* showing of competition.⁸³ The D.C. Circuit remanded the case to the Commission, holding that the Commission's conclusion that market share data is essential for a *prima facie* showing of competition "simply is not consistent with the agency's earlier decisions" which also considered "supply substitutability, elasticity of demand, and the cost structure, size and resources of the carrier" in assessing market power.⁸⁴ Importantly, the Court did not suggest that it would be unlawful for the Commission to apply a forbearance standard that focused initially (or principally) on market share. Should the Commission decide to do so, however, it must explain its decision. The Court held:

The FCC's new policy that market share data is essential to evaluate a carrier's market power may well be reasonable, but until the Commission has adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act.⁸⁵

More recently, the Commission has applied traditional market power principles to assess whether separate petitions by Qwest, ACS of Anchorage, Inc., and Verizon for forbearance from various dominant carrier tariffing requirements, price cap regulations, and Section 214 rules for acquiring and discontinuing lines and for assignment or transfers of control

⁸¹ *US West Forbearance Order*, at 19953.

⁸² *AT&T Corp. v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001).

⁸³ *Id.*

⁸⁴ *Id.*, at 736.

⁸⁵ *Id.*, at 737.

should be granted in certain geographic markets.⁸⁶ The Commission has carefully noted that because it is conducting a *forbearance* analysis and not a *dominance* analysis, “the four-factor [market power test] does not bind” its determinations.⁸⁷ At the same time, in each case it has applied established market power criteria to assess whether forbearance should be granted.

C. The Elements Of A Market Power Standard

The components of a market power analysis are well-established and straightforward. Under this framework, the Commission: (1) delineates the relevant product and geographic market(s) for examination; (2) identifies the firms that are current or potential suppliers in that market; and (3) determines whether the carrier under evaluation possesses individual market power in that market.⁸⁸

1. The Commission Must Identify Individual Product Markets

In defining product markets for purposes of a market power review, the general principle the Commission applies is to identify and aggregate consumers with similar demand patterns.⁸⁹ More specifically, the Commission distinguishes product markets based on whether the services offered to one group of consumers are adequate or feasible substitutes for the services offered to the other group.⁹⁰ As stated by the Commission: “A relevant market includes

⁸⁶ See *Omaha Forbearance Order*, at ¶ 17; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, 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, ¶ 26 (2007) (“*ACS Dominance Order*”); *Verizon 6-MSA Order*, at ¶¶ 20, 27; *Qwest 4-MSA Order*, at ¶ 13.

⁸⁷ *Omaha Forbearance Order*, at n.52.

⁸⁸ *Id.*, at ¶18 (citing *LEC Classification Order*, at 15776, 15782).

⁸⁹ *Id.*

⁹⁰ *SBC/Ameritech Order*, at ¶ 68.

‘all products that consumers consider reasonably interchangeable for the same purposes.’”⁹¹ In addition, the Commission considers whether firms require different assets and capabilities to successfully target one group of consumers versus another group.⁹²

In its petition seeking forbearance in the Omaha MSA, Qwest proposed that the Commission adopt as a single product market the market for services provided under Section 251(c) within the boundaries of the Omaha MSA.⁹³ The Commission rejected Qwest’s broad proposal, finding that “such a wide scope of services in the proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers.”⁹⁴ The Commission instead delineated two product markets: the mass market and the enterprise market.⁹⁵

The Commenters recommend that the Commission adopt two product markets for purposes of conducting its UNE forbearance analysis in the instant remand dockets and in future Section 10 proceedings: the residential market and the business market.⁹⁶ Residential customers have different service needs and engage in a different decision-making process than do business customers.⁹⁷ Residential customers typically require basic voice capability and have lesser data

⁹¹ *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 39 (2005). See also *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 71 (2004).

⁹² *Id.*

⁹³ *Omaha Forbearance Order*, at ¶ 21.

⁹⁴ *Id.*

⁹⁵ *Id.*, at ¶ 22. See also *ACS Dominance Order*, at ¶ 17.

⁹⁶ As noted in the *Qwest 4-MSA Order*, the Commission to date has declined to “formally define product markets pursuant to a market power analysis for purposes of [its] UNE forbearance analysis ...” *Qwest 4-MSA Order*, at n.129.

⁹⁷ *SBC/Ameritech Order*, at n.146.

demands, whereas business customers normally have higher volume, sophisticated voice and data needs. Residential customers are served through mass marketing techniques, including regional advertising, and typically do not enter into long-term agreements, while businesses tend to be served under individual, multi-year contracts marketed and administered through direct sales contacts.

The network facilities, technological resources, and administrative capabilities needed to provide service vary considerably between residential and business customers. Consequently, service providers tend to focus their marketing efforts on one or the other group of customers and do not target both equally. Additionally, as an administrative matter, much of the competitive data that is so important to the Commission's UNE forbearance analysis is collected and compiled on a residential/business basis.⁹⁸

In short, the services purchased by residential and business customers, as well as the assets and capabilities necessary to serve them, are not substitutable. Thus, residential and business customers belong in different product markets for purposes of the Commission's Section 10 analysis.⁹⁹

2. The Commission Must Establish The Geographic Market For Review

In the *Omaha Forbearance Order*, the Commission concluded that the appropriate geographic market for its forbearance analysis was the Qwest service territory within

⁹⁸ On a number of occasions, Commission staff has recognized this fact and requested that cable competitors produce line count information separately for their business and residential customers. *See, e.g.*, Letter from J.G. Harrington, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Jun. 17, 2008).

⁹⁹ Should the Commission decide to retain the mass market and enterprise market product market categories used in its previous analyses, however, the Commenters suggest that for purposes of its UNE forbearance review, the Commission define mass market to include only residential customers and the enterprise market to include all business customers.

the Omaha MSA.¹⁰⁰ In subsequent forbearance orders, the Commission followed the same course, holding that the petitioning ILEC's service territory within an MSA was the proper geographic market upon which to base its Section 10 analysis since "the record indicates [no] compelling reasons to narrow it."¹⁰¹ The Commenters agree that, on remand, the *Verizon 6-MSA* and the *Qwest 4-MSA* forbearance reviews should be conducted on an MSA-wide basis and that any subsequent dockets in which the ILEC seeks forbearance from UNE obligations in its service area within a particular MSA also should be evaluated on that basis.¹⁰²

3. All Current And Potential Suppliers Must Be Identified

Clearly, a comprehensive assessment of whether the petitioning party continues to possess market power in a specific product and geographic market cannot be made unless all pertinent data regarding all market participants is presented for review and analysis. The petitioning party bears the burden of identifying and (to the extent possible) producing all such information that it deems relevant to the Commission's analysis.¹⁰³ It is vitally important that all actual and potential suppliers in a particular product and geographic market be identified at the commencement of a Section 10 forbearance proceeding and that all data necessary to evaluate each supplier's presence (or potential presence) in the market be placed in the record and made available to the Commission and interested parties in a timely manner.

¹⁰⁰ *Omaha Forbearance Order*, at ¶¶ 23-24.

¹⁰¹ *Verizon 6-MSA Order*, at ¶ 22. *See also Qwest 4-MSA Order*, at ¶ 15; *ACS Dominance Order*, at ¶ 32.

¹⁰² Those proceedings include the pending petition by Qwest for forbearance in the Phoenix MSA. *See Second Phoenix Petition*, at 1.

¹⁰³ *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56 (rel. Jun. 29, 2009) ("*Forbearance Rules Order*"), at ¶ 20.

Recently, the Commission recognized the importance to its Section 10 analysis of complete, accurate and timely data regarding the nature and extent of competitive activity as well as the responsibility of the petitioning party to produce such information.¹⁰⁴ In formulating its new procedural rules for the conduct of forbearance proceedings, the Commission included a “complete-as-filed” requirement to ensure that a petitioner for forbearance produces all data or information it intends to rely on – including, importantly, data regarding all actual and potential competitors in a particular market – with its petition.¹⁰⁵ Moreover, to the extent a petitioner seeks to rely on information in the possession of third-parties, the petitioner must identify the data or information and the parties that possess it.¹⁰⁶ These new procedural rules should help ensure that the Commission has access to all information in a timely fashion regarding market participants necessary to make an informed market power assessment.

4. An Evaluation Of Individual Market Power Must Be Undertaken

Once the relevant product and geographic markets are established and all relevant suppliers are identified, attention must turn to whether a petitioning party possesses market power. This determination is made based on a comprehensive assessment of the state of competition in the individual product and geographic markets at issue.¹⁰⁷ Under well-established principles of antitrust analysis, the Commission must review: (1) the petitioner’s market share; (2) the demand elasticity of the petitioner’s customers; (3) the supply elasticity of the market; and (4) the petitioner’s cost structure, size, and resources.¹⁰⁸

¹⁰⁴ See *Forbearance Rules Order*.

¹⁰⁵ *Id.*, at ¶¶ 16-19. See also 47 C.F.R. § 1.55.

¹⁰⁶ *Forbearance Rules Order*, at ¶ 17.

¹⁰⁷ See, e.g., *Omaha Forbearance Order*, at ¶ 25.

¹⁰⁸ See, e.g., *AT&T Reclassification Order*, at ¶ 38; *AT&T International Non-Dominance Order*; at ¶¶ 39-41.

a. Market share.

An assessment of the petitioner's market share in the product and geographic markets at issue is the initial step in the Commission's analysis. Whether sufficient competition has been found to exist – as measured by the petitioner's market share – has been an important factor in various Commission decisions where market power was at issue.¹⁰⁹ Specifically, in determining that forbearance from certain dominant carrier rules and Section 251(c)(3) unbundling obligations was not warranted in the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order*, the Commission found in both cases that the petitioning ILEC's market shares in the MSAs at issue were “sufficiently high to suggest that competition in [those] MSAs is not adequate to ensure that the ‘charges, practices, classifications, or regulations ... for [] or in connection with that ... telecommunications service are just and reasonable and are not unreasonably discriminatory’ absent the regulations at issue.”¹¹⁰

At the same time, the Commission has made clear on several occasions – including in the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order* – that market share is an important, but not sufficient, element of its market power review.¹¹¹ As noted in the *Verizon 6-MSA Order*, when conducting a market power analysis, “the Commission does not limit itself to market share alone, but also looks to other factors including supply substitutability, elasticity of demand, and firm, cost, size, and resources.”¹¹² One or more of those factors may result in a

¹⁰⁹ See, e.g., *AT&T Reclassification Order*, at 3307.

¹¹⁰ *Verizon 6-MSA Order*, at ¶ 27 (citation omitted). See also *Qwest 4-MSA Order*, at ¶ 27.

¹¹¹ *Verizon 6-MSA Order*, at ¶ 28 (citation omitted). See also *Qwest 4-MSA Order*, at ¶¶ 13, 28.

¹¹² *Verizon 6-MSA Order*, at ¶ 28 (citation omitted).

particular market share resulting in a finding of market power in one proceeding and a finding of no market power in a second proceeding.¹¹³

b. Market elasticities and structure.

As noted above, market share cannot be evaluated in a vacuum. While not controlling, factors such as demand and supply elasticities, and the cost, structure, size and resources of the carrier under review are of relevance to the Commission's market power analysis. Demand elasticity refers to the willingness and ability of a carrier's customers to switch to another provider or otherwise change the amount of services they purchase in response to a change in price or quality of the service at issue.¹¹⁴ High firm demand elasticity indicates significant customer willingness and ability to switch to another provider in order to obtain price reductions or desired features. Supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price.¹¹⁵ As noted by the Commission in the *Omaha Forbearance Order*:

[T]wo factors determine supply elasticity: (1) whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.*, government imposed restrictions), economic (*e.g.*, capital costs, economies of scale), technological (*e.g.*, a new innovation protected by a patent), or operational (*e.g.*, lack of skilled workers).¹¹⁶

¹¹³ *Id.*, at ¶¶ 30-31.

¹¹⁴ *COMSAT Reclassification Order*, at 14120.

¹¹⁵ *Id.*, at 14123.

¹¹⁶ *Omaha Forbearance Order*, at ¶ 35 (citation omitted).

Whether the carrier under review has sufficiently lower costs, size, superior resources, financial strength or technological capabilities as to “preclude the effective functioning of a competitive market”¹¹⁷ may also bear on the Commission’s market power determination.

The Commission routinely has recognized that market share alone does not determine whether a carrier possesses market power. As seen in various Commission orders, other factors, such as the number of facilities-based competitors present in a market and the extent to which the carrier under review controls bottleneck facilities, may have a profound influence on whether a carrier with a particular market share possesses market power. For example, in the *AT&T Reclassification Order*, the Commission found that AT&T lacked overall market power in the long-distance services market notwithstanding AT&T’s market share of 60 percent.¹¹⁸ The Commission’s conclusion was based on its assessment of several market characteristics including, importantly, extensive evidence of actual and potential facilities-based competition from three carriers with competing national networks as well as dozens of regional facilities-based carriers, all of which collectively possessed significant excess capacity, and several hundred smaller wholesale carrier customers that used that capacity to offer competing domestic long-distance services.¹¹⁹

The Commission’s determination fifteen years earlier that AT&T possessed market power rested, in part, on the fact that AT&T controlled local access facilities for over 80 percent of the nation’s telephones.¹²⁰ In reversing that determination in the *AT&T Reclassification Order*, the Commission found that “conditions in the market are far different ...

¹¹⁷ *AT&T Reclassification Order*, at 3309, ¶ 73.

¹¹⁸ *Id.*, at 3307, ¶ 68.

¹¹⁹ *Id.*, at 3308, ¶ 70.

¹²⁰ *Id.*, at 3308, ¶ 69.

AT&T has not controlled local bottleneck facilities for over ten years”¹²¹ and “virtually all customers today ... have numerous choices ...”¹²²

Conversely, in the *Verizon 6-MSA Order*, the Commission determined that Verizon possessed market power in the six MSAs for which it sought forbearance (and therefore should be denied forbearance) notwithstanding the fact that Verizon’s overall market share in none of those markets reached the level enjoyed by AT&T at the time of the *AT&T Reclassification Order*. The Commission based its decision on the conclusion that the record in the Verizon proceeding did not show “comparable evidence of facilities-based competition.”¹²³ The Commission determined that the market characteristics present in the AT&T proceeding “presented much more compelling evidence of the competitiveness of the marketplace ... than we find for the 6 MSAs based on the record here.”¹²⁴

The Commenters suggest that in conducting the instant remand proceedings and in evaluating other ILEC requests for forbearance from Section 251(c)(3) unbundling obligations, the Commission carefully consider these additional factors, especially the extent to which supply elasticities may be low. Specifically, the Commission should evaluate the extent to which competitive service providers – including the Commenters and other wireline CLECs – either possess their own last-mile facilities or can easily obtain wholesale facilities and services (most importantly, last-mile facilities) from non-ILEC sources at reasonable rates and terms. To the extent that such facilities and services (including, most importantly, last-mile capabilities) are not owned by CLECs and cannot easily be purchased elsewhere on reasonable rates and terms,

¹²¹ *Id.*

¹²² *Id.*, at 3308, ¶ 71.

¹²³ *Verizon 6-MSA Order*, at ¶ 30.

¹²⁴ *Id.*, at ¶ 28.

the Commission should recognize that ILEC market power may be present. In addition, the Commission should closely scrutinize whether and to what extent there are economic and operational barriers that preclude the Commenters and other competitive service providers from obtaining additional capacity through self-supply. Established principles of market power analysis direct the Commission to consider how *existing competitors* are conducting business and may be impacted by a grant of forbearance.

VI. THE COMMISSION SHOULD BASE ITS REMAND DECISIONS ON THE STATE OF THE FACTUAL RECORDS IN THE 6-MSA AND 4-MSA DOCKETS AT THE TIME ITS INITIAL DECISIONS WERE RENDERED

In the *August 20th Public Notice*, the Commission asked “[t]o what extent should any changes in the marketplace or Commission actions since the time the Commission issued the *Verizon 6 MSA Forbearance Order* affect the Commission’s decision?”¹²⁵ The Commission asked the same question with respect to the *Qwest 4-MSA Order*.¹²⁶ The Commenters maintain that the Commission should base its remand decision in each docket on the factual record as it existed at the time the original forbearance determination was made. The Commission should not reopen the factual record in either docket.

The D.C. Circuit’s decisions to remand the Verizon and Qwest proceedings to the Commission did not in any way relate to the Commission’s treatment of the facts in either case.¹²⁷ The Court did not determine that the Commission failed to obtain or consider relevant facts, find that one or more of the factual predicates for the Commission’s action was not supported by sufficient evidence, or in any way challenge the Commission’s application of the

¹²⁵ *August 20th Public Notice*, at 3.

¹²⁶ *Id.*, at 4.

¹²⁷ The D.C. Circuit remanded *Qwest v. FCC* to the Commission in response to a motion for voluntary remand by the Commission. Thus, the Court did not issue a decision on the merits in that case.

facts to the Section 10 standard. To the contrary, the D.C. Circuit's opinion in *Verizon v. FCC* focused strictly on the legal standard applied to the factual record by the Commission. The Court determined that the Commission applied a Section 10 UNE forbearance standard to Verizon's petitions that departed from the standard it had applied in previous UNE forbearance dockets and the Court remanded the case to the Commission to provide a reasoned explanation for that departure.¹²⁸ On remand, the Commission's task is to provide such legal justification or to adopt a different standard that comports with the requirements of Section 10 and explain why it has done so.¹²⁹

When, as here, a judicial decision to remand a case to the Commission is "based on inadequate agency reasoning to support the action," the Commission has complete discretion to "supplement its statement of reasons, with or without reopening the record to receive additional evidence."¹³⁰ The D.C. Circuit repeatedly has affirmed this principle.¹³¹

The Commenters suggest that it is particularly appropriate for the Commission to base its remand decisions on the records as they now stand in light of several factors. First, the petitioning parties would not be prejudiced in any manner by Commission decisions based on the existing factual records. Under Section 10 of the Act, an ILEC is free to file a petition requesting forbearance at the time of its choosing.¹³² Thus, both Verizon or Qwest may initiate forbearance

¹²⁸ *Verizon v. FCC*, Slip. Op., at 3.

¹²⁹ *Id.*, at 19 ("On remand, the FCC must either consider whether competition might be established by some evidence other than simply whether the ILEC has met a particular market share benchmark, or justify its departure from its precedent.").

¹³⁰ 3 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 18.1 (4th Ed. 2002).

¹³¹ *See, e.g., Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888-89 (D.C. Cir. 2000) ("The FCC retains discretion to commence a new rulemaking, or to reopen the record ... but it is not compelled to do so."). *See also AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095 (D.C. Cir. 2004).

¹³² The Commenters suggest that this is not an unlimited right. The Commission should not permit an entity to file a Section 10 forbearance petition while it is pursuing judicial

dockets containing whatever new marketplace evidence they deem relevant whenever they choose to do so. Indeed, Qwest has already availed itself of this opportunity. In March 2009, it filed a second petition requesting UNE forbearance in the Phoenix MSA which includes new data that Qwest contends proves that the “intermodal competition Qwest faces in the Phoenix MSA is even more pronounced than it was on July 25, 2008 when this Federal Communications Commission ... found Qwest on the cusp of meeting the standards for forbearance in certain Phoenix wire centers.”¹³³

Second, as the Commission has acknowledged on several occasions, forbearance proceedings have become increasingly complex and resource-intensive, creating a burden that is “especially onerous for smaller companies which may be affected severely by grants of forbearance to large companies.”¹³⁴ The Commenters suggest that the Commission avoid adding to the burden on smaller companies – as well as the resource burdens on the Commission – presented by forbearance dockets by addressing the Verizon and Qwest forbearance petitions on remand here based on the factual records as they now stand.¹³⁵

review of an earlier Commission decision denying forbearance for the same product and geographic markets.

¹³³ *Second Phoenix Petition*, at 1. Verizon also exercised its right to file whatever forbearance petition it chooses at whatever time it considers appropriate by filing second petitions for forbearance in the state of Rhode Island and the Virginia Beach MSA while review of the *Verizon 6-MSA Order*, which denied forbearance in those markets, was pending. *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24 (filed Feb. 14, 2008); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 08-49 (filed Mar. 31, 2008). Both petitions were later withdrawn.

¹³⁴ See, e.g., *Forbearance Rules Order*, at 7-8.

¹³⁵ These burdens have been recognized on a number of occasions by Commissioner Copps. See Letter from Michael J. Copps, Acting Chairman, to Hon. Henry A. Waxman, *et al.* (Jun. 5, 2009); *Verizon 6-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 1; *Qwest 4-MSA Order*, Concurring Statement of Commissioner Michael J. Copps, at 2.

VII. CONCLUSION

For all of the foregoing reasons, the Commission should adopt the UNE forbearance standard proposed by the Commenters herein.

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