REDACTED
- For Public Inspection -

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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

OPPOSITION OF COVAD COMMUNICATIONS COMPANY; ALPHEUS COMMUNICATIONS, L.P.; U.S. TELEPACIFIC CORP. AND MPOWER COMMUNICATIONS CORP., BOTH D/B/A TELEPACIFIC COMMUNICATIONS; FIRST COMMUNICATIONS, INC.; DELTACOM, INC.; TRUCOM LLC D/B/A CITYNET - ARIZONA; AND TDS METROCOM, LLC

Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
Philip J. Macres
BINGHAM MCCUTCHEN LLP
2020 K St., NW
Washington, DC 20006
T: 202.373.6000
F: 202.373.6001
andrew.lipman@bingham.com
russell.blau@bingham.com
josh.bobeck@bingham.com
philip.macres@bingham.com

Counsel for Covad Communications Company; Alpheus Communications, L.P.; U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications; First Communications, Inc.; Deltacom, Inc.; TruCom LLC d/b/a CityNet - Arizona; and TDS Metrocom, LLC

September 21, 2009

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The undersigned competitive carriers submit these comments in response to the Public Notice[1] seeking comment on the Petition of Qwest Corporation ("Qwest")[2] requesting forbearance from a broad range of its regulatory obligations under the Act.

I. INTRODUCTION AND SUMMARY

It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the Commission's forbearance standard, to recognize that its previous forbearance decisions were flawed and apply a new framework for analyzing petitions for forbearance from the Act's unbundling obligations. Upon applying this new analytical

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[1] *Pleading Cycle Established for Comments on Qwest Corporation's petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Public Notice, DA 09-1653 (rel. July 29, 2009). Comment date extended by *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, DA 09-1836 (rel. Aug. 20, 2009).

[2] 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 (filed March 24, 2009) ("Qwest Petition").

framework to Qwest's petition for Phoenix, the Commission should deny Qwest's bid to prematurely stifle competition in the Phoenix metropolitan statistical area ("MSA"). The Commission should not take the approach it did in the *Omaha Forbearance Order*[3] by prematurely deregulating Qwest's wholesale obligation leaving competitors and consumers captive to Qwest's significant market power.

Qwest remains the dominant telecommunication service provider and has a stranglehold over the ubiquitous bottleneck loop and transport facilities throughout the Phoenix MSA. Moreover, the competition relied on in Qwest's petition is neither significant enough nor ubiquitous enough to warrant forbearance. Facilities-based CLECs in Phoenix still only serve small pockets of the MSA with their own facilities, and other CLECs rely primarily on facilities (including UNEs, special access and UNE-P services offered under "commercial" agreements) in order to compete with Qwest. The wireline CLEC competitors cited in Qwest's petition primarily were able to enter into the Phoenix MSA because Qwest had to make UNEs available to them under Section 251(c)(3). Qwest offers no evidence that those competitors that do rely on their own facilities rather than Qwest's network can serve residential end user locations throughout the Phoenix MSA. A close look at the data Qwest submits regarding the level of wireline CLEC competition reveals that a significant number of Qwest's competitors in the Phoenix MSA are actually UNE-based. Consumers would be harmed by eliminating unbundling requirements because competitors that rely on Qwest's UNEs in the Phoenix MSA would be forced to pay excessive special access rates instead of TELRIC-based rates and, as a result, the

[3] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

prices for competitive services would increase and the competitive service provider would no longer be able to provide service.

Qwest continues to point to mobile wireless service as a "competitor," although the Commission has established this is not a substitute for the package of services demanded by consumers in the residential market and falls well short of the robust services business customers demand from wireline providers. And the cable competition provided by Cox alone is not enough to warrant forbearance since, at best, residential customers in Phoenix would be left with a duopoly between Cox and Qwest. As the experience in Omaha post-forbearance has demonstrated, that is a recipe for deterioration in the competiveness of the telecommunications market.

Similarly, Qwest has not shown robust and ubiquitous facilities-based competition in the business market to justify forbearance. To the extent Qwest's competitors are competing extensively using Qwest's special access services, the Commission has repeatedly recognized that the availability of UNEs is a competitive constraint on special access pricing and that many competitive carriers rely on special access because of anti-competitive obstacles the RBOCs — including Qwest — create to efficient access to UNEs. Additionally, Qwest's maps and statements of total fiber miles and buildings served provide absolutely no useful information in terms of identifying actual locations of competitive fiber that could provide service, or whether the owners of the competitive fiber offer a viable wholesale alternative.

Qwest must be required to show more than that the conditions for *potential* competition exist in a particular market segment. Qwest must demonstrate with specificity the existence of *actual* competition — that is, multiple competitors winning market share and providing services over their own networks. While Qwest attempts to show that some carriers are making wholesale services available to other carriers in portions of the Phoenix MSA, the data Qwest proffers is aggregated at too high a level to be informative of market conditions throughout the Phoenix MSA. The Commission's "predictive judgment" in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. Indeed, if anything, the lesson learned from the Omaha forbearance experiment is to not make the same mistake again.

Qwest's forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission's standards set forth in the *Omaha* and *Anchorage Forbearance Orders*. Because adequate competitive facilities-based alternatives to Qwest's bottleneck facilities have not developed in the Phoenix MSA, it would not be in the public interest to grant Qwest's forbearance petition as to Section 251(c)(3) unbundling. In the time since the Commission lifted Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

Lastly, the Commission must revisit its ruling in the *Omaha Forbearance Order* and establish a definition of "fully implemented" that is consistent with its view expressed in the *Local Competition Order*, or provide a complete justification for reversing course.

II. THE FCC MUST ADOPT A NEW FORBEARANCE STANDARD

On June 19, 2009, the U.S. Court of Appeals for the D.C. Circuit held that the FCC had erroneously denied Verizon's petitions for forbearance from UNE regulations in the Commission's *Verizon Six-MSA Order*.[4] It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the Commission's forbearance standard. The Commission should take this opportunity to recognize that its previous forbearance decisions were flawed and adopt a new framework for analyzing petitions for forbearance from the Act's unbundling obligations. This revised framework should respond to the issues raised by the Court's remand, remedy the serious deficiencies in the *Omaha Forbearance Order*[5] and faithfully adhere to the statutory test set forth in Section 10 to be consistent with the Act's impairment framework, sound competition policy and economics, and the statutory forbearance criteria.[6]

In separate comments on the Court's remand, the undersigned CLECs have laid out a new analytical framework for the Commission to employ in its UNE forbearance

4 *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. June 19, 2009).

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

6 It is well-established that the Commission is "entitled to reconsider and revise its views as to the public interest and the means to protect that interest," so long as it gives a reasoned explanation for the revision. *See, e.g., DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

analysis.[7] Our analysis of the deficiencies in Qwest's petition will reference the analytical framework we urge the Commission to adopt.

III. THE PETITION FAILS TO MEET THE STATUTORY FORBEARANCE STANDARD

A. Loop and Transport Unbundling Remains Necessary to Assure that Qwest's Rates Are Reasonable and Non-Discriminatory

The *Omaha Forbearance Order* utterly ignored the *Triennial Review Remand Order* ("*TRRO*")[8] by relying on the availability of Qwest special access services to justify the elimination of access to unbundled loops and transport. Having ruled in the *TRRO* that it would be a "hideous irony" to rely on special access—"the pricing of which falls largely within [ILEC] control"[9]—the *Omaha Forbearance Order* irrationally relied *primarily* on the availability of special access in determining that continued application of Section 251(c)(3) was no longer necessary to ensure just, reasonable and non-discriminatory rates or to protect consumers in the Omaha MSA.

The Commission should not take a similar approach when addressing Qwest's current petition. Without the essential cost-based UNE pricing safeguard, there is nothing to prevent Qwest from raising prices on wholesale services to something "close to or equal to" the retail rate, creating price squeezes. The Commission itself envisioned this scenario chilling competition. Thus, rather than sustaining a local competitive market, the

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[7] Comments of Covad Communications Company, *et al.*, WC Docket Nos. 06-172 & 07-97 (filed Sept. 21, 2009) A copy of these comments is appended as Attachment 1 and incorporated herein by reference.

[8] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2638 ¶ 193 n.508 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*TRRO*")

[9] *TRRO*, 20 FCC Rcd at 2567 ¶ 59.

elimination of Qwest's obligation to provide UNEs will ultimately destroy it by trusting Qwest to maintain competitive wholesale pricing even though the company has little incentive to do so.

1. Qwest's Petition Fails to Satisfy the Market Power Standard as Qwest Still Wields Considerable Power in all Telecommunications Markets in Phoenix

a. Qwest Remains the Dominant Provider in Phoenix for Residential Consumers

Qwest's Petition must be denied because its showing of competition is internally inconsistent, unexplained, incomplete, and fails to meet any rational interpretation of the statutory forbearance standard in numerous respects.

(1) Qwest has Failed to Provide Significant Reliable Evidence of Competition in the Telecommunications Market by Cable Operators

In its prior forbearance orders, the Commission reasoned that it would be appropriate to forbear from application of Section 251 unbundling obligations "only in wire centers where a competitor has facilities coverage of at least 75% of the end user locations accessible from a wire center"[10] with "coverage" defined as existing where a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of ser-

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[10] *See 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*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1977, ¶ 31 (2007) ("*Anchorage Forbearance Order*"), *appeals dismissed*, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *see also Petitions of Verizon Telephone Companies for Forbearance Pursuant to* 47 U.S.C. § 160 *in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21313 ¶ 37 (2007) ("*Verizon Six-MSA Forbearance Order*").

vices that are substitutes for the incumbent LEC's local service offerings."[11] Qwest has not made any showing at all of cable coverage.

Qwest's petition does not include any concrete factual information about the location or extent of actual facilities-based cable competitive presence. Instead, it relies on vague assertions of the existence of cable competition that are at best circumstantial. The only evidence of cable coverage that Qwest provides is a reference to Cox's website purporting to show that Cox offers telephony services throughout its service territory in the Phoenix MSA.[12] This type of information is too vague to permit any findings of actual cable competition in any location in Phoenix.

(2) Wireless Service is Not a Viable Substitute for Qwest's Last Mile Facilities

According to Qwest, it is experiencing a significant intermodal threat from wireless service because "[c]ompetition from wireless providers is flourishing in the Phoenix MSA and in Arizona as a whole."[13] Qwest further states that the number of wireless lines exceeds the total number of CLEC and Qwest lines, and that a substantial number of customers are "cutting the cord" to rely exclusively on wireless service.[14] Qwest thus contends that wireless service competition alone is sufficient to ensure that market forces

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[11] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444, n.156 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[12] Qwest Petition at 14.

[13] *Id.* at 16.

[14] *Id.* at 16-17.

will protect the interests of consumers even if the Commission forbears from unbundling obligations.[15]

Qwest mustered similar arguments in its Omaha Petition[16] and offered statistics purporting to show that wireless service is available throughout the Omaha MSA, wireless use was extensive, and that an increasing number of wireless users were substituting wireless service for wireline.[17] Despite the *Omaha Forbearance Order's* unequivocal rejection of Qwest's assertions,[18] Qwest surprisingly repeats them in its latest Petition. Qwest also uses general nationwide observations from industry analysts showing increases in wireless market share to support its arguments.[19]

General wireless penetration data of the type that Qwest has provided does not support forbearance. In the *Omaha Forbearance Order,* the Commission found that:

> Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless* and interconnected VoIP services to rationalize forbearance from unbundling obligations.[20]

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[15] Qwest Petition at 16-22.

[16] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, at 9 (filed June 21, 2004) ("Qwest Omaha Petition").

[17] Qwest Omaha Petition at 9-12.

[18] *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

[19] Qwest Petition at 17-18.

[20] *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

The Commission made a similar finding in the *Anchorage Forbearance Order,* noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area,[21] and it should not deviate from that precedent here.

Further, wireless service should not be counted as an intermodal competitor because major wireless carriers remain heavily dependent on ILEC special access and transport services and because wireless service is not a viable substitute for wireline last mile facilities. In the *TRRO*, the Commission recognized that "CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity."[22] This applies equally in both the residential and business markets. It also applies to fixed wireless, which the Commission found did "not … offer significant competition in the business loop market."[23] Nothing has changed since the *TRRO* that would allow the Commission to deviate from this decision.

In addition, at the present time, wireless service does not provide comparable, or in some cases any, broadband access to the Internet. At most, therefore, wireless contin-

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[21] *Anchorage Forbearance Order,* 22 FCC Rcd at 1976 ¶ 29.

[22] *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17119-20 ¶ 230 (2003) ("*TRO*"), aff'd in part, remanded in part, vacated in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) ("*USTA II*"), cert. denied sub nom. *Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S Ct 313, 316, 345 (2004).

[23] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2637-8 ¶¶ 193 n.508 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*TRRO*") (emphasis added).

ues to be a complement to wireline service, not a substitute for it.[24] If wireless is not a complete substitute for landline service, there is no basis for the Commission to find that the availability of wireless service is sufficient to protect consumers in the absence of unbundling obligations.

(3) The FCC Should Not Deviate from the *Verizon Six-MSA Order* Establishing that Over-the-Top VoIP Should Not be Included in Forbearance Analysis Because it is Not a Close Substitute

In the *Verizon Six-MSA Order*, the Commission did not include providers of "over-the-top" or nomadic VoIP services in its competitive analysis "because there are no data in the record that justify finding that these providers offer close substitute services."[25]

Qwest's assertions regarding competition from VoIP providers in the Phoenix MSA simply repeat claims the Commission expressly repudiated in both the *Omaha* and *Anchorage Forbearance* Orders. In the *Omaha Forbearance Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP and wireless services are substitutes to § 251(c)(3) loop and transport facilities, it did not rely on "intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations."[26] In addition, the Commission has repeatedly and correctly held that intermodal competition from wireless and

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[24] *See, e.g.,* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2 ("Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce chum, rather than the next leg in the company's growth.").

[25] *Verizon Six-MSA Order*, 22 FCC Rcd at 21305 ¶ 23.

[26] *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1976 ¶ 29 (concluding that "we do not include competition from wireless and interconnected VoIP services in [the] market analysis") .

VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an ILEC's wireline service.[27]

Over-the-top-VoIP providers are not equivalent substitutes to an ILEC's wireline service. In the *TRRO*, the Commission readily dismissed RBOC arguments that the existence of intermodal competition from VoIP providers justified limiting access to UNEs for the provision of local exchange service.[28] It found that broadband service, which is the essential underpinning to VoIP service, was not ubiquitous enough for VoIP to threaten wireline service.[29] It properly concluded that within the existing broadband market, DSL customers view VoIP service as a supplement to, rather than a replacement for, wireline service because VoIP requires an existing wireline connection.[30] It therefore held that VoIP should not be viewed as "a substitute for wireline telephony."[31]

Moreover, in many instances, the broadband connections on which the VoIP service rides is provided using a UNE loop. The Commission has held that forbearance from application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance.[32] The Commission cannot "engage in that type of circular justification."[33] Stated

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[27] *See, e.g.*, *TRRO*, 20 FCC Rcd at 2556-7 ¶ 39 n.118 & 2637-8 ¶ 193 n.508; *TRO*, 18 FCC Rcd at 17119-20 ¶ 230.

[28] *TRRO,* 20 FCC Rcd at 2556-7 ¶ 39 n.118.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Omaha Forbearance Order*, 20 FCC Rcd at 19450 ¶ 68 n.185.

differently, granting forbearance from Section 251(c)(3) unbundled loop obligations may restrict some carriers from continuing to participate in the broadband market in the Phoenix MSA, which would adversely affect the availability of VoIP services as well.[34] Hence, Qwest's claim that loop and transport unbundling forbearance is appropriate due to the "viable alternative to Qwest's traditional residential service"[35] is clearly wrong.

At bottom, the extent of competitive alternatives for voice services from cable, VoIP, and wireless to Qwest's retail wireline voice services are by no means a barometer of the extent of competitive alternatives to Qwest's bottleneck loop and transport facilities. At most, Qwest's factual allegations, if true, would only demonstrate that forbearance relief is justified for Section 251(c)(3) voice grade switching.[36] Qwest has not shown that facilities-based competition exists for the full capabilities of its wireline Section 251(c)(3) loop and transport UNEs and that forbearance from this obligation is justified.

b. Qwest Offers No Evidence that Wireline CLECs Provide Significant Competition in the Residential Market

Qwest implicitly claims that it faces so much competition in the Phoenix MSA that it is essentially a non-dominant provider of loop and transport capacity. However, as demonstrated above, Qwest actually remains the dominant telecommunication service provider and has a stranglehold over these ubiquitous bottleneck loop and transport

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[33] *Id.*

[34] *See also* Letter from John F. Dudley, Counsel, Commonwealth of Virginia State Corporation Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-172, Attachment at 8 (filed Dec. 15, 2006).

[35] Qwest Petition at 24.

[36] The Commission has already granted such unbundling relief. *See TRRO*, 20 FCC Rcd at 2641-2 ¶ 199; *TRO*, 18 FCC Rcd at 17237 ¶ 419.

facilities throughout the MSA. The wireline CLEC competitors cited by Qwest do not alter this fact.[37] They primarily exist and were able to enter into the Phoenix MSA because Qwest had to make UNEs available to them on a under section 251(c)(3). As discussed in Section B.1, below, Qwest offers no evidence that those competitors that do rely on their own facilities rather than Qwest's network can serve residential end user locations throughout the Phoenix MSA. Indeed, of the ***Begin Confidential End Confidential*** wireline CLECs cited by Qwest, ***Begin Confidential End Confidential*** are either using Qwest's Local Services Platform ("QLSP") or reselling Qwest's services.[38]

While Qwest claims it meets the same competitive standard set forth in the *Omaha Forbearance Order*, it overlooks the fact that "competition based on UNE loops and transport ma[d]e up a minor portion of the competition in the Omaha MSA," so that the Commission did not have to consider UNE-based competition in its analysis.[39] The same cannot be said about the Phoenix MSA.

Even assuming Qwest could properly seek forbearance from loop and transport unbundling throughout the Phoenix MSA, it would still need to demonstrate the *actual*

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[37] Qwest Petition at 22-23.

[38] Qwest Petition at 23.

[39] *Omaha Forbearance Order*, 20 FCC Rcd at 19449-50 ¶ 68. In the *Anchorage Forbearance Order*, the Commission did not consider UNE-based competition because, *inter alia*, there was "*limited* retail market demand for high-capacity [DS-1 and above] telecommunications services in the Anchorage study area" and because GCI was actively migrating its existing customers to its "own last mile facilities." *Anchorage Forbearance Order*, 22 FCC Rcd at 1980-82 ¶ 36 (emphasis added) & n.84. Unlike Anchorage, there is unequivocal evidence of extensive demand for high capacity special access DS-1 and DS-3 services in the Phoenix MSA. *See, e.g.,* Qwest Petition at 28-30. Also, unlike Anchorage, there is no evidence that competitors are actively migrating all facilities purchased from Qwest to their own facilities.

geographic extent of competitive wireline facilities in the Phoenix MSA and the availability of residential services over such facilities for the Commission to make a finding as to whether the Section 10(a)(1) standard was actually satisfied throughout the Phoenix MSA.[40] Qwest has failed to do even that. It relies solely on generalized claims that the mere presence of wireline competitors in the residential and business market in the Phoenix MSA supports unbundling forbearance.

(1) An Elasticity Analysis Shows that Qwest Still Yields Significant Market Power in the Phoenix Residential Market.

The Commission has repeatedly found that residential customers are highly demand-elastic and willing to switch to or from their provider to obtain price reductions and desired features.[41] Qwest has not submitted any data or estimates regarding the price elasticity of demand or the elasticity of supply for its residential services. While, in passing, Qwest refers to the *Omaha Forbearance Order's* discussion on supply elasticity,[42] Qwest does not provide any evidence that would enable the Commission to find that residential services in the Phoenix MSA have high supply elasticity.

While some competitive facilities have been deployed in the Phoenix MSA for the provision of residential telephone service by cable operators, the Commission cannot find that the evidence matches the evidence of competition relied upon in previous orders granting forbearance. In the absence of comparable evidence of facilities-based competition, Qwest's suggestion that its market share in the Phoenix MSA is sufficient to justify

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40 *Omaha Forbearance Order*, 20 FCC Rcd at 19446, 19448 ¶¶ 62, 66.

41 *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3305, ¶ 63 (1995) ("*AT&T Reclassification Order*").

42 Qwest Petition at 16.

forbearance from dominant carrier regulation here is not persuasive. Indeed, where the Commission has found an incumbent carrier to be non-dominant in the provision of access services, it had a retail market share of less than ***Begin Confidential End Confidential*** *and* faced significant facilities-based competition.[43] It is significant that, in granting forbearance from dominant carrier regulation of residential switched access services in the *Omaha Forbearance Order* and *Anchorage Forbearance Order*, the Commission similarly emphasized the evidence of the competitive gains of facilities-based competitors, in conjunction with the incumbent LECs' overall market shares, in its marketplace analysis.

c. Qwest has Not Shown Sufficient Competition to Justify Forbearance in the Business Market

In the Phoenix MSA, Qwest has not shown robust and ubiquitous facilities-based competition in the business market. Qwest asserts generally that Cox's cable network is capable of reaching many business customers,[44] but ignores that "[e]ven where cable

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[43] *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Report and Order, 21 FCC Rcd 11506, 11519-21, ¶¶ 29-34 (declaring Qwest to be non-dominant in its provision of all interstate telecommunications services, including access services, in Terry, Montana, where a facilities-based competitor served between 85 and 93% of the access lines); *cf. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Market Entry and Regulation of Foreign-Affiliated Entities, IB Docket No. 95-22, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23959, ¶ 161 (1997) (establishing a presumption that foreign carriers with less than 50% market share in each of the relevant foreign markets, including the market for local access, lack sufficient market power to adversely affect competition in the U.S., and noting that "[a]s the authors of the 1997 edition of the American Bar Association Antitrust Law Developments publication recently concluded, '[c]ourts virtually never find monopoly power when market share is less than about 50 percent.'" (Quoting A.B.A. Section of Antitrust Law, Antitrust Law Developments at 235-36 (4th ed.) (1997))).

[44] Qwest Petition at 27-28.

television [copper coaxial] networks reach [] business customers," the networks "typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS-1 and higher speeds."[45] The record in the Commission's special access proceeding demonstrates cable operators, such as Cox, cannot offer sufficient service level guarantees to support competitive business services and have severe security and reliability concerns.[46]

Although Qwest asserts that Cox has "thousands" of fiber miles in the Phoenix MSA,[47] it fails to show precisely where Cox's purported fiber cable network is in relation to the business customers, if it is lit and operational, or how many customers or what percentage of customers in what wire centers actually have access to these fiber facilities. Qwest's references to a small number of Cox business customers fails to show that Cox is able to offer facilities-based competition to more than a handful of customer locations. Indeed, Qwest even admits that it does not have the ability to obtain a precise measurement of the market share of facilities-based business competitors in Phoenix.[48]

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[45] Comments of XO *et al.*, WC Docket No. 05-25, at Declaration of Ajay Govil, XO ¶ 24 (filed Aug. 8, 2007) ("Govil Delcaration").

[46] Govil Declaration at ¶ 22-24; Ad Hoc Comments, WC Docket No. 05-25, at 7 (filed Aug. 8, 2007).

[47] Declaration of Robert H. Brigham Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, at 23 ("Brigham Declaration") filed as an attachment to Qwest Petition.

[48] Qwest Petition at 26-27.

(1) Qwest's Claim of Competition Improperly Relies on Competition Provided over Facilities Qwest Owns and Controls

In addition to Cox, Qwest asserts there are a "wide-range" of competitors competing with Qwest in the business market in Phoenix.[49] This "wide-range" of competitors, however, encompasses CLECs that "use[] unbundled network elements (UNEs), particularly unbundled loops, … as [a] primary vehicle for serving and acquiring customers."[50] As the Commission stated in the *Omaha Forbearance Order*, forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance.[51] The Commission should again "decline to engage in that type of circular justification."[52]

Qwest contends that UNE forbearance is warranted because competitors in Cox's service territory in the Phoenix MSA are competing extensively using Qwest's special access services.[53] This reasoning is also circular. The Commission has "repeatedly recognized that the availability of UNEs is a competitive constraint on special access pricing."[54] The Commission has also observed that many competitive carriers rely on special access because of anti-competitive obstacles the RBOCs — including Qwest — create to efficient access to UNEs. The Commission previously has held that "competition that relies on [the RBOC's] own facilities is not a sufficient basis to grant forbear-

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49 Qwest Petition at 25.

50 *Omaha Forbearance Order*, 20 FCC Rcd at 19417 ¶ 2 n.4.

51 *Id.*, at 19450 ¶ 68 n.185.

52 *Id.*

53 Qwest Petition at 28-29.

54 *Omaha Forbearance Order*, 20 FCC Rcd 19433-4 ¶ 38.

ance from UNE requirements."[55] The Commission emphasized that it already had "eliminated UNE obligations for the exclusive provision of interexchange service or mobile wireless service based on the fact that competition for such services arose in the absence of UNEs." [56] The competitive triggers established in the *TRRO* establish a basis for relief from unbundling obligations in the Phoenix MSA. The Commission accordingly found that it would not be "in the public interest to grant additional relief from UNE obligations based on that same competition."

As the Commission is well aware, "special access" is not an "alternative" to ILEC loops and transport, but is simply an ILEC service — offered at higher prices — provided over these same network elements.[57] If the Commission deems special access as an alternative to itself and thereby immunized Qwest from cost-based pricing of elements on which competitors must rely, it would be putting the "cart before the horse" in a manner that would undermine the core purposes of the Act.

Thus the Commission should reject Qwest's claim that competition from carriers relying on Qwest's facilities provided under its special access tariffs have any role in the competitive analysis of a petition for forbearance from Qwest's unbundling obligations. As the Commission has acknowledged, it would be a "hideous irony" to rely on special

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[55] *Verizon Six MSA Forbearance Order*, ¶ 42.

[56] *Id.*, at ¶ 38.

[57] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9603 (2000) (stating that the conversion of special access circuits to UNE status "should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.").

access—"the pricing of which falls largely within [ILEC] control" to justify the elimination of UNEs.[58]

(2) Qwest's Claims Regarding Competition from Facilities-Based CLECs are Unreliable

Qwest also asserts that a "significant amount" of competitors in Cox's service territory in the Phoenix MSA are using their own or other alternative facilities to serve business customers.[59] It points to GeoTel data showing at least 25 unaffiliated providers that operate fiber networks within Cox's service territory in the Phoenix MSA.[60] The has Commission has consistently rejected outright the probity of this type of information in its forbearance analysis and held that "[w]e do not find persuasive any of the competitive fiber network data that [the RBOC] has filed in this docket, including … the number of route miles on these networks; the number of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors' web-sites describing their service offerings and territories."[61] The Commission emphasized that, "just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the impairment test, we also find that such data are not informative for identifying where any unbundling relief would be warranted." [62] The same conclusions should continue to

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58 *TRRO*, 20 FCC Rcd at 2567-8 ¶ 59.

59 Qwest Petition at 30.

60 *Id.* at 30.

61 *Verizon Six-MSA Forbearance Order*, 22 FCC Rcd 21316-7 ¶ 40.

62 *Id.*

apply. Accordingly, Qwest has not demonstrated the existence of sufficient competition in the business market to justify forbearance.

(a) The Existence of Some Fiber Networks in the MSA Does Not Alone Show Sufficient Competition to Warrant Forbearance

Qwest contends that there are extensive competitive fiber networks in the Phoenix MSA. According to Qwest, apart from cable, there are ***Begin Confidential End Confidential*** competitive providers that operate their own fiber networks in areas where business customers are concentrated in the Phoenix MSA, and competitors serve business customers in ***Begin Confidential End Confidential*** of Qwest's wire centers in the MSA.[63] It cites to number of Cox-provided fiber miles in the MSA, names fiber-based providers in the MSA, provides the number of building being served by competitive fiber in the MSA, and provides maps that purport to provide an overview of the location of competitive fiber and competitive fiber-lit buildings within the greater Phoenix area.[64]

Qwest's maps and statements of total fiber miles and buildings served provide absolutely no useful information in terms of identifying actual locations of competitive fiber that could provide service. None of the data provided shows CLEC facilities in any detail within the respective MSAs. The "confidential" maps submitted by Qwest consist of nearly illegible drawings which it claims show the "coverage" of competitive fiber throughout the MSA. Because of the scale of the maps, the drawings appear simply as a tangle of lines making it impossible to identify any particular streets or buildings. It is

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[63] Qwest Petition at 6.

[64] *Id.* at 30-31; Brigham Exhibits 8A & 8B.

impossible to determine whether any competitor has a relatively comprehensive network or whether the lines represent numerous providers, each of which have small fragments of coverage. Nor do the maps indicate whether the fiber is actually in a building or how long a lateral connection would be required to actually provide service to the building.

As the Commission found in the *TRRO*, such maps have "little probative value"[65] and their "value … is undermined by several shortcomings."[66] "Due to the wide variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy."[67] Indeed, among other things, maps fail to indicate "the capacity of service … along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities."[68] In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service."[69] Further, the Commission expressly has rejected the use of fiber-based collocators as

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65 *TRRO*, 20 FCC Rcd at 2635-6 ¶ 187.

66 *Id.*, at 2621 ¶ 158 n.445.

67 *Id.*, at 2583-4 ¶ 82.

68 *Id.*, at 2635-6 ¶ 187.

69 *Id.*, at 2636 ¶ 188.

providing any probative evidence of whether ILECs should be required on an MSA wide basis to offer unbundled access to loops and transport.[70]

Even if the Commission were to accept Qwest's fiber maps as informative, as explained elsewhere in this Opposition, even with this fiber competitive carriers rarely are able to find alternatives to BOC last mile facilities to most customer locations.[71] As the Commission recognizes, even where a carrier has installed a fiber ring, there are limited circumstances where the carrier can install a lateral to a building in order to connect the building to its network.[72] Accordingly, Qwest's maps purporting to show the presence of concerning competitively deployed fiber does not support forbearance.

(b) Qwest Places Too Much Emphasis on Potential Competition

To satisfy the requirements of Section 10 with respect to the "protection of consumers" and to "promote competitive market conditions,"[73] Qwest must be required to show more than that the conditions for *potential* competition exist in a particular market segment. Instead, Qwest must demonstrate — with specificity — the existence of *actual* competition — the presence of multiple competitors winning market share and providing

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[70] *See TRO*, 18 FCC Rcd at 17182-3 ¶ 341 (observing that the test proposed by Verizon "provides little, if any, indication that even [a collocated] competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area" and that even "the presence of a single [C]LEC's collocated transport facility ... is not sufficient evidence that facilities-based competitive entry into a market ... is economically feasible."); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 131-32, 3849, ¶ 341 n.673 (1999).

[71] *See, e.g., Omaha Forbearance Order*, 20 FCC Rcd 19448-9 ¶ 67 (concluding that Qwest was the only provider of wholesale access in MSA demonstrating the lack of alternatives to BOC last mile facilities.).

[72] *TRRO,* 20 FCC Rcd at 2615-20 ¶¶ 149-155.

[73] 47 U.S.C. § 160(a)(2) and (b).

services over their own networks.[74] Moreover, it does not follow from the mere fact that one company may be marketing the availability of services to business customers that the business market is indeed competitive.[75] Similarly, a showing of competitive investment in last mile facilities alone is not enough to show competition in a particular market segment and thereby justify forbearance relief under Section 10.[76] Certainly, these factors may constitute evidence that conditions are *promising* for competition to take root — for example because competitors are adding capacity or as a factor in evaluating barriers to entry — but they do not alone constitute specific evidence about the state of current competition in a given market as part of the required statutory analysis particularly where not coupled with other factors that show a market is competitive.

Thus, the Commission should make clear in addressing Qwest's latest Petition that it will refrain from considering — and that Qwest and future petitioners are not entitled to rely upon — predictive judgments about *the potential for competition* in a

[74] *Verizon v. FCC*, at 13; *Verizon Six-MSA Order*, 22 FCC Rcd at 21313, ¶ 37. *See also*, *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd 24648, 24958 ¶ 24 (2003) (stating that in "pursuing relief through the vehicle of forbearance, . . . the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards"). *See also Omaha Forbearance Order*, 20 FCC Rcd at 19477, ¶ 64 and n. 177 (specifically finding that Cox had already "captured [a substantial portion] of the residential voice market in the Omaha MSA").

[75] Qwest Petition at 6, 14, 25, 28, 34.

[76] *Id.* at 38-39. This fails to satisfy even the relatively low standard for the "coverage threshold" test employed in the *Omaha Forbearance Order*, wherein it stated that the test would be satisfied by a showing that a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Omaha Forbearance Order*, 20 FCC Rcd at 19444, n. 156. As discussed herein, it is also worth noting that the "coverage threshold" test thus relies upon a problematic "predictive judgment" analysis to some degree as well.

particular market segment or arguments about how other forbearance factors may serve as indicia of potential competition in a particular market segment. Instead, the Commission should clarify that, pursuant to the burden of proof imposed by Section 10, Qwest and any other petitioner seeking forbearance with respect to unbundling obligations must demonstrate *with specificity* the current existence of "robust" actual competition *in each affected market segment* as of the date that the petition is filed.[77]

d. Qwest Fails to Demonstrate Sufficient Competition to Justify Forbearance in the Wholesale Market

The D.C. Circuit determined that the Commission's analysis of facilities-based competition for wholesale customers "played no meaningful role in the FCC's determination"[78] in the *Verizon Six MSA Order*.[79]

Under the more rigorous standard proposed in the Comments of the undersigned CLECs included as Attachment A hereto, the Commission should separately and meaningfully consider the state of wholesale competition. While it is theoretically possible that competition sufficient to justify forbearance could exist in a market where there is no wholesale competition, but robust retail competition, that market does not exist in Phoenix.

While Qwest attempts to show that some carriers are making wholesale services available to other carriers in portions of the Phoenix MSA, the data Qwest proffers is

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[77] *See Anchorage Forbearance Order*, 22 FCC Rcd at 1975, ¶ 28; *see also Verizon Six-MSA Order*, 22 FCC Rcd at 21313 ¶ 37 (noting record evidence demonstrating the "comparatively limited role of the cable operators in serving enterprise customers in these [metropolitan statistical areas] today").

[78] *Verizon v. FCC*, at 14.

[79] *Id.* at 15 (internal citations omitted).

aggregated at too high a level to be informative of market conditions throughout the Phoenix MSA. For example, to the extent Qwest seeks to introduce evidence that competitors advertise various wholesale services on their website,[80] the Commission has already found that "such evidence lacks the specificity needed to grant forbearance."[81] Qwest also cites to the number of route miles offered by other carriers,[82] and number of lit buildings served by others carriers in the Phoenix MSA.[83] Just as the *TRRO* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the Commission's unbundling rules,[84] the Commission has also found that such data has limits for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center.[85] Contrary to Qwest's assertions, that various carriers may serve "pockets" of the Phoenix MSA does not provide the Commission with the level of specificity needed to conclude that the wholesale services are ubiquitously offered throughout the MSA. Moreover, Qwest does not provide any comparative data

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[80] Brigham Declaration, ¶ 51.

[81] *In the Matter of Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11758 ¶ 39 n.145 (2008) ("*Qwest 4-MSA Order*").

[82] Brigham Declaration, ¶¶ 53 - 56, 62.

[83] *Id.* ¶¶ 38-39.

[84] *TRRO*, 20 FCC Rcd at 2597, ¶ 110 ("These data are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions.").

[85] *Qwest 4-MSA Order*, 23 FCC Rcd at11757-8 ¶ 39.

for the number of buildings with demand for high-capacity services that Qwest serves, and the percentage of commercial buildings reached by wholesale competitors.

Qwest makes no showing that sufficient competition exists to ensure that it will continue to offer loops and transport that competitors may not duplicate at wholesale on terms and conditions that will permit competition. The record must support the conclusion that the ILEC has "very strong market incentives" to continue offering loops and transport on a wholesale basis to competitors on reasonable terms and conditions that would permit competition despite the elimination of UNEs.[86] This very strong incentive will not exist unless there is an independent facilities-based provider of loops that could absorb wholesale customers that would migrate from Qwest's network if Qwest fails to make reasonable wholesale offerings.[87] Without such a competitive showing, and in the absence of a regulatory compulsion, there is no incentive for Qwest to offer its own last mile facilities at competitive rates and terms—as has already been proven in Omaha.[88]

In this case, because Qwest has not alleged, much less shown, significant independent facilities-based wholesale competition for copper, DS0, DS1 and DS3 services, the Commission cannot find that Qwest has strong incentives to make reasonable wholesale offerings. Nor has Qwest attempted to show that the rates, terms and conditions for wholesale services that it offers or intends to offer as substitutes for unbundled network elements, including copper, DS0, DS1 and DS3 loop and transport facilities and dark

[86] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 81; *Anchorage Forbearance Order*, 22 FCC Rcd at 1983-87 ¶¶ 39-42.

[87] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 81.

[88] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223, at 4-12 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

fiber transport, are just and reasonable and will promote competitive market conditions in the Phoenix MSA.[89]

The Commission's "predictive judgment" in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. The Commission should consider UNE forbearance, assuming other requirements are met, only if there is an actual, robustly competitive and ubiquitous wholesale market in existence at the time a Petition is filed and the ILEC demonstrates that its rates and terms for Section 251(c)(3) alternatives are just and reasonable. This approach will eliminate the potential for erroneous predictive judgments and the attendant risk of harming competition.

B. Forbearance Would Harm Competition Because Loop and Transport Unbundling Remains Necessary to Protect Consumers

The Commission has repeatedly found that access to these inputs as UNEs under Sections 251 and 271, particularly UNE loops and transport, is critical to competition. Even Qwest acknowledges that much of the retail competition it relies upon in its request for relief is currently based on the use of UNEs. The Commission has further found that "commercial" offerings of these inputs, in the form of special access services, do not suffice to support robust retail competition. Lastly, the Commission has expressly rejected consideration of the level of retail competition as the predicate for denial of access to UNEs in its Triennial Review proceedings.

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[89] *See* Comments of Access Point *et al.*, WC Docket No. 07-267, at 27-28 (filed March 24, 2008).

1. UNE-Based Competition is Significant in Phoenix

A close look at the data Qwest's submits regarding the level of wireline CLEC competition reveals that a significant number of Qwest's competitors in the Phoenix MSA are actually UNE-based competition. According to Qwest, over *****Begin Confidential End Confidential***** unaffiliated CLECs are currently competing with Qwest for residential customers within the Phoenix MSA.[90] Of these *****Begin Confidential End Confidential*****, *****Begin Confidential End Confidential***** are UNE-based, using Qwest's QLSP finished wholesale services, while *****Begin Confidential End Confidential***** were reselling Qwest retail services. Put another way, *****Begin Confidential End Confidential***** of all independent CLECs cited by Qwest in the Phoenix MSA cannot independently provide service to consumers without using Qwest's facilities.

Even Qwest's proclamation that *****Begin Confidential End Confidential***** CLECs are serving residential customers using non-Qwest network facilities is not entirely accurate, as Qwest even admits. Qwest attempts to rectify its intentionally misleading statement in the text of its petition, by deliberately concealing an explanation in the footnotes that "some" of the *****Begin Confidential End Confidential***** CLECs that are purportedly "using non-Qwest network facilities," actually do, in fact, "purchase some UNEs from Qwest."[91] The Commission should not be fooled by Qwest's cheap attempt at obfuscation and see Qwest's data for what it really is – that *****Begin Confidential End Confidential***** of *all* independent CLECs cited by Qwest in the

[90] Qwest Petition at 23.

[91] *Id.* at 23 n.79.

Phoenix MSA cannot independently provide service to consumers without using Qwest's facilities.

2. Forbearance Would Harm Consumers

Consumers would be harmed by eliminating unbundling requirements because of the significant amount of competitors that rely on Qwest's UNEs in the Phoenix MSA would be forced to pay excessive special access rates instead of TELRIC-based rates and, as a result, the prices for competitive services would increase.

Under Section 10(a)(2) of the forbearance analysis, the Commission must find that access to Section 251(c)(3) loop and transport UNEs is no longer needed to protect consumers in the six MSAs at issue.[92] In the *Omaha Forbearance Order*, the Commission concluded that access to such Section 251(c)(3) UNEs was no longer necessary because existing competition from Cox in the local exchange and exchange access markets, combined with wholesale access rights and other rights CLECs have under Sections 251(c) and 271, were enough to ensure the existence of a competitive market in the Omaha MSA.[93] This decision was based on the Commission's belief that Cox used its own network in competing with Qwest and did not "rely[] on Qwest's loops and transport."[94] While the record associated with the *Anchorage Forbearance Order* indicated

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[92] 47 U.S.C. § 160(a)(2).

[93] *Omaha Forbearance Order*, 20 FCC Rcd at 19452, 19453 ¶ 71 & 73; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1990 ¶ 48 (finding that the "251(c)(3) access obligation for UNE loop and transport elements and section 252(d)(1) pricing obligation is no longer necessary to protect consumers [in five wire centers] in part because sufficient alternative facilities and facilities access obligations exist to ensure competitive market conditions.").

[94] *Omaha Forbearance Order*, 20 FCC Rcd at 19453 ¶ 73.

that GCI did rely on ACS for UNEs,[95] the Commission's decision was heavily based on GCI's "announced plans to convert its local exchange service customer base to its own facilities" and the Commission's finding that GCI "credibly demonstrated that it perceives financial and business incentives to reduce as fast as possible its dependence on ACS-provided UNE loops."[96] Because these orders relied heavily on this evidence in concluding that Section 10(a)(2) was satisfied, the Commission should not grant Qwest's request for forbearance from § 251(c)(3) loop and transport unbundling here because there is no similar evidence that competitors are using their own networks to compete or have "credibly demonstrated" their plans to do so.[97] Even if Qwest provided such evidence, forbearance would not be appropriate because competitors continue to rely heavily on Qwest's facilities. Hence, the continued availability of § 251(c)(3) loop and transport facilities in the Phoenix MSA at issue remains necessary to promote and protect competition in these markets, ensure customers in each of them have, and continue to have, competitive choices. Thus, Qwest cannot demonstrate that Section 10(a)(2) is satisfied.

3. Forbearance Would Create a New Barrier to Entry

a. CLECs are Impaired in Phoenix Without Unbundled Access to UNEs Because of Higher Costs and Lower Margins

Past Commission orders have first determined whether a requesting carrier is impaired without access to an element of the ILEC's network *at any price.*[98] If impairment

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[95] *Anchorage Forbearance Order*, 20 FCC Rcd at 1976-7 ¶ 30.

[96] *Id.* at 1975 ¶ 28 n.84, 1981 ¶ 38 n.118.

[97] *Id.* at 1981 ¶ 38 n.118.

[98] Even the *USTA II* court agreed that price is not a factor. "The question is … what the relevant benchmark is for assessing whether entry is "impaired" if non-ILECs don't have access to UNEs (*at whatever rate the Commission might choose to prescribe*)." (emphasis supplied). *USTA II,* 359 F.3d at 577.

is found, then that element must be unbundled at cost-based rates pursuant to Section 252(d)(1).[99] This ordering is accordance with the Act, which prescribes an "if impairment – then TELRIC" analysis. The Act instructs the Commission to require unbundling of network elements where "*the failure to provide access* would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[100] Where competitors are impaired *without any access to the ILEC networks*, then in order to drive down retail telecommunications prices toward actual cost, Congress intended competitors to be assured such access at cost-based rates [*i.e.* TELRIC]."[101] Only this formula can assure that, where competition relies on access to the legacy incumbent networks, the prices paid by *consumers* do not remain inflated as a result of incumbent pricing (whether retail or wholesale) that does not reflect the incumbent's actual ongoing costs.

C. Forbearance Would Not Serve the Public Interest

Under the third prong of the forbearance analysis, Section 10(a)(3), the Commission should conclude that competitive access to Section 251(c)(3) loop and transport UNEs in the Phoenix MSA remains vital to the public interest.[102] Section 10(b) states that before arriving at a contrary conclusion as Qwest asks, the Commission must find that the

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[99] As Commissioner Copps stated, "impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit." Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16827-8, Separate Statement of Commissioner Copps (2004)

[100] 47 U.S.C. § 251(d)(2)(B) (emphasis added).

[101] 47 U.S.C. § 252(d)(1).

[102] 47 U.S.C. § 160(a)(2).

requested forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[103]

In the *Omaha Forbearance Order*, the Commission concluded that "granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by Section 10(b)."[104] It further held that "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits."[105] The Commission explained that forbearance in Omaha was in the public interest because regulatory intervention results in reduced incentives to innovate and invest in facilities as well as creating the complex regulations governing the sharing of facilities.[106] It stated that the high degree of regulatory intervention required by the Telecommunications Act of 1996 to generate competition is no longer justified where "local exchange markets are sufficiently competitive," such as in the nine Omaha wire centers where Qwest was granted forbearance, and that forbearance would also serve the public interest by increasing regulatory parity in the Omaha telecommunications services market.[107]

In the *Anchorage Forbearance Order*, the Commission concluded that relieving ACS from the Section 251(c)(3) access obligations and Section 252(d)(1) pricing obligations for loop and transport elements, subject to the condition it adopted, was in the

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[103] *Id.* at § 160(b).

[104] *Omaha Forbearance Order*, 20 FCC Rcd at 19453 ¶ 75.

[105] *Id.,* at 19454 ¶ 76.

[106] *Id.*

[107] *Id.*, at 19454-5 ¶ 78.

public interest under Section 10(a)(3).[108] It explained that the factors upon which its conclusions under Sections 10(a)(1) and (2) were based also convinced it that this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by Section 10(b).[109]

Even if these determinations were valid, the same cannot be said of the Phoenix MSA. As shown below, Qwest's forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission's standards set forth in the *Omaha* and *Anchorage Forbearance Orders.*

First, the Section 10(a)(1) considerations discussed above demonstrate that Qwest's request for unbundling relief is not in the public interest. Second, as shown in Section III.A.1.b above, granting Qwest's request will not enhance [and] … promote competition among providers of telecommunications services" as Section 10(b) requires.[110]

Third, there is no evidence that Qwest's competitors have facilities that cover a percentage of the end user locations accessible from each of the wire centers in the Phoenix MSA comparable to the market shares the Commission used as competitive thresholds in the *Omaha* and *Anchorage Forbearance Orders*.[111] The Commission has emphasized that the public interest in establishing regulatory parity between competitive carriers and ILECs is *not* served until "the benefits of competition are sufficiently real-

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[108] *Anchorage Forbearance Order*, 22 FCC Rcd at 1991 ¶ 49.

[109] *Id.*

[110] 47 U.S.C. § 160(b).

[111] *Omaha Forbearance Order*, 20 FCC Rcd at 19450-1 ¶ 69; *see also Anchorage Forbearance Order,* 22 FCC Rcd at 1977 ¶ 31.

ized and competitive carriers have constructed their own last mile facilities and their own transport facilities."[112] Qwest has not satisfied this evidentiary burden and, as demonstrated above, it still remains the dominant provider of business and residential telecommunications services. Nor has Qwest shown that competitive wireline loop and transport facilities to end users ubiquitously exists throughout each of the Phoenix MSAs.[113] Because adequate competitive facilities-based alternatives to Qwest's bottleneck facilities have not developed in the Phoenix MSA, it would not be in the public interest to grant Qwest's forbearance petition as to § 251(c)(3) unbundling.

In the *Omaha Forbearance Order*, the Commission made a "predictive judgment" that Qwest would not strand competitive investments by curtailing access to its analog, DS-0, DS-1, or DS-3-capacity facilities.[114] It postulated that Cox's ability to absorb customers onto its proprietary network would supply enough competitive pressure to force Qwest to "maximize use of its existing local exchange network, providing service at retail *and at wholesale*."[115] The Commission predicted this because Cox had its own loops and transport connected to a certain percentage of Qwest's end-users in the nine wire centers in Omaha, and thus the potential existed that Cox would absorb customers into its proprietary network. The Commission made similar findings in the *Anchorage Forbearance Order* with respect to the five wire centers where forbearance relief was

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[112] *Omaha Forbearance Order*, 20 FCC Rcd at 19454-5 ¶ 78; *see also Anchorage Forbearance Order*, 22 FCC Rcd at 1975-6 ¶ 28.

[113] Furthermore, for the reasons stated in section IV.C above, intermodal competition from VoIP and Wireless providers are not substitutes for wireline services. For this reason, the Commission should not consider wireless or VoIP competition in determining whether Qwest's requested forbearance relief is in the public interest.

[114] *Omaha Forbearance Order*, 20 FCC Rcd at 19455 ¶ 80.

[115] *Id.,* at 19455 ¶ 81.

granted.[116] However, as noted throughout this Opposition, unlike Omaha and ACS, Qwest has not attempted to demonstrate that its competitors have facilities deployed to a substantial portion of the end users throughout each of the wire centers in the Phoenix MSA and can absorb customers without any reliance on Qwest's facilities. Lacking such evidence, the Commission cannot conclude that Qwest would face similar competitive pressure and thus there is no reason to believe Qwest will not curtail competitive access to its facilities.

Similarly, it would be a mistake for the Commission to conclude that Qwest's existing obligations to offer special access or Section 271 loop and transport facilities are sufficient alternatives to Section 251(c)(3) facilities. The Commission's prediction to that effect in Omaha has been proven wrong by experience.[117] Further, market pressures in the Phoenix MSA have not forced Qwest to reduce its special access rates; rather, it has increased them. The simple fact is that Section 251(c)(3) loop and transport forbearance will harm competition in any MSAs where Qwest seeks it. Qwest has failed to satisfy the

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[116] *See Anchorage Forbearance Order*, 22 FCC Rcd at 1988, 1991 ¶¶ 44 & 49. The Commission emphasized that given "GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so." *Id.*, at 1991 ¶ 49. "Faced with aggressive 'off-net' competition from GCI," the Commission predicted that "ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service." *Id.*

[117] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA "will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities").

standards set in the *Omaha Forbearance Order*, much less demonstrate that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[118] Rather, removing Qwest's unbundling obligations will thwart competition by forcing competitive carriers with no other options to purchase loops and transport at above-market prices. This will undermine their ability to compete, which runs contrary to the public interest standard.

Furthermore, a duopoly is not sufficient justification to grant Qwest's Petition and does not meet the requirements of Section 10(a). Absent compliance with the market opening provisions of the Act, it would not be in the public interest to substantially deregulate incumbent LECs because there would be no assurance that they could not engage in conduct that would thwart competition, such as by denying competitors access to bottleneck facilities. Accordingly, the Commission must deny Qwest's request for forbearance.

1. The Experience of Omaha Shows that Qwest Will Not Offer Reasonable Terms and Conditions for Wholesale Service

Events in Omaha since 2005 vividly illustrate the consequences of "life after forbearance." In the time since the Commission lifted Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

As the most impacted CLEC in the Omaha market, McLeodUSA has made it clear that the forbearance granted to Qwest in the Omaha market has made it extremely difficult for McLeodUSA to remain viable in that market and has severely devalued the

[118] 47 U.S.C. § 160(b).

investment in its network facilities.[119] Qwest's conduct in the post-forbearance Omaha market plainly contravenes the Commission's prediction that "market incentives" would motivate Qwest to continue to make reasonable wholesale offerings of loops and transport available to competitors notwithstanding forbearance from Section 251(c) UNE obligations.[120] Qwest has likewise failed to comply with its obligation to offer "just and reasonable prices" to competitors under Section 271. Rather than having incentives to set prices at competitive levels, Qwest has been very opportunistic in its pricing decisions in the absence of Section 251(c) obligations and has taken advantage of the fact that it is the only wholesale loop provider in Omaha. With respect to McLeodUSA, Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers. Instead, Qwest has only offered to replace high-capacity UNEs with special access services from its FCC Tariff No. 1, at vastly higher rates for both recurring and non-recurring charges.[121] Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than what the identical network facilities could be purchased for if available as UNEs.[122]

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[119] McLeodUSA has submitted extensive analyses to the Commission regarding Qwest's failure to offer just and reasonable post-forbearance offerings in the Omaha MSA. In the interest of brevity, those previously filed analyses are incorporated herein by reference. *See, e.g.,* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[120] *See Omaha Forbearance Order*, 20 FCC Rcd at 19456 ¶ 83.

[121] McLeodUSA Petition for Modification, Declaration of Don Eben, McLeodUSA Telecommunications Services, Inc., ¶ 5 ("Eben Declaration").

[122] It is also noteworthy that McLeodUSA has approached Cox on at least two occasions regarding its willingness to entertain a commercial arrangement for

With regard to DS1 and DS3 loops, Qwest has offered to "discount" its tariffed special access rates in the context of a "Regional Commitment Program" ("RCP") offering, but only if McLeodUSA binds itself, and is able to comply with, term and volume commitments for obtaining such facilities.[123] Because the RCP is footprint-wide, it extends outside of the nine wire centers affected by the *Omaha Forbearance Order* and in areas where McLeodUSA is legally entitled to obtain such facilities as UNEs at significantly more economical cost-based rates. The scope of Qwest's bundled offer is, therefore, excessive, and it is apparent that, absent any relief from the Commission, McLeodUSA will be forced to replace the loops and transport formerly available as UNEs by leasing such facilities from Qwest at a combination of prohibitive special access rates and premium DS0 "commercial" rates.

McLeodUSA's repeated good faith attempts to negotiate wholesale replacement arrangements for loops and transport with Qwest following release of the *Omaha Forbearance Order* have been met with Qwest's steadfast refusal to negotiate any wholesale pricing for the affected wire centers that deviates from its special access and RCP pricing. Qwest is exercising monopoly power by refusing to change its position on key points since it knows McLeodUSA has no alternative supplier of network elements. There simply is no market force constraining Qwest from offering a "take it or leave it" proposal. Of course, forcing competitive carriers out of the market means that those carriers'

McLeodUSA to lease from Cox last mile network facilities. McLeodUSA was rebuffed on both occasions. *See* McLeodUSA December 2006 Letter at 2.

[123] McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 10-11.

customers will be forced to go back to Qwest, thereby increasing the margin Qwest will realize from directly serving these end users.[124]

While Qwest has made commercial pricing for DS0 loops available for some time in Omaha, a review of the associated agreement reveals numerous unacceptable and onerous terms. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates, and has specifically excluded all wholesale performance standards from Qwest's service offering, including Section 271 performance metrics.[125] Moreover, the commercial pricing for stand alone DS0 loops confirms the anticompetitive nature of Qwest's wholesale pricing. Qwest offers CLECs a lower-cost DS0 loop if the CLEC combines that loop with Qwest local switching. The identical loop facility is nearly 30% more expensive when purchased without Qwest local switching attached. Clearly, there is no cost justification for the significantly higher price point. Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative. There is no "market incentive" since Qwest has no competition in the wholesale market for DS0 loops. This price discrimination is wholly inconsistent with the Commission's prediction that Qwest would offer network facilities

[124] While it may be true that residential customers may choose to switch to Cox, *see Omaha Forbearance Order*, 20 FCC Rcd at 19448 ¶ 66, business customers, and in particular, small and medium sized customers served with T1 services, will not have a choice of facilities-based providers unless Cox is directly connected to each affected customer's premise with their own connection. The evidence in the Omaha docket did not indicate that Cox had actual connections to each business customer location, but only that Cox's network passed by in certain wire centers.

[125] *See* McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 20, 24-25, and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1). According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.html.

at competitive rates for use in conjunction with a "competitor's own services and facilities."[126] Qwest's price discrimination appears to be intentionally designed to drive facilities-based competitors out of the market.

Another egregious illustration of Qwest's refusal to negotiate wholesale pricing involves the exorbitant non-recurring charges ("NRCs") that it seeks to impose for high capacity circuits. For example, to install a UNE DS1 loop and cross connect in Nebraska, the cost-based NRC is $136.15.[127] For the Omaha MSA central offices where it has pricing flexibility, Qwest has set the NRC at $626.50.[128] That amounts to a 360% increase in NRCs that has resulted from the grant of forbearance.

Monthly recurring charges ("MRCs") also increase significantly in the forbearance wire centers. UNE DS1 loops in Zone 1 increase from $76.42 to a "price flex" rate of $182.22, a 138% increase.[129] The prospect of these enormous cost increases have already led McLeodUSA to significantly limit its Omaha operations. CLECs simply cannot be viable carriers in Omaha unless the wholesale pricing regime is significantly modified.[130]

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[126] *Omaha Forbearance Order*, 20 FCC Rcd at 19456 ¶ 83.

[127] McLeodUSA Petition for Modification, Eben Declaration, ¶ 27.

[128] Qwest has been granted pricing flexibility in all nine Omaha wire centers affected by the forbearance. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 7363 (WCB Apr. 24, 2002) (granting Qwest Phase II pricing flexibility in the Omaha MSA, among other MSAs). This has permitted Qwest to *increase* its pricing for high capacity circuits. *See* McLeodUSA Petition for Modification, Eben Declaration, ¶ 9. It therefore appears that Qwest's response to the grant of special access pricing deregulation was a better indicator of what Qwest would do once Section 251(c) UNEs were eliminated.

[129] McLeodUSA Petition for Modification, Eben Declaration, ¶ 6.

[130] To date, Qwest has continued to invoice McLeodUSA in the affected Omaha wire centers at UNE pricing. However, it is Qwest's position that it is entitled to re-rate

Qwest's persistent refusal to negotiate wholesale rates following the *Omaha Forbearance Order* contravenes not only the Commission's predictive judgment regarding Qwest's conduct once forbearance was granted for Section 251(c)(3) loops and transport, but its Section 271 obligation to provide wholesale access to local loops, transport, and other network elements "at just and reasonable prices."[131] Because the Commission's predictive judgment was premised in part on Qwest's compliance with Section 271 pricing requirements, Qwest's flouting of this obligation provides further reason for the Commission to deny forbearance in any other MSA at this time.

Given all of this, there is no foundation for a "predictive judgment" that CLECs would be able to obtain competitive prices for wholesale access in a forborne environment. The necessity for, and the benefit of maintaining Qwest's UNE obligations is patent – it provides for robust competition in a given market. The predictive judgment of competitive prices in the *Omaha Forbearance Order* was little more than wishful thinking and speculation. The Commission should avoid the same error in connection with Qwest's latest Petition.

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all network elements in the affected wire centers to the March 2006 effective date of the *Omaha Order* and backbill McLeodUSA. Accordingly, for planning and financial purposes, McLeodUSA has had to operate as if the higher costs resulting from the loss of UNEs are already in effect. McLeodUSA is particularly disadvantaged because, in contrast to the *Anchorage Forbearance Order*, where the Commission's grant of forbearance was conditioned on ACS's continued provision of local "legacy" loops pursuant to the existing rates, terms and conditions between ACS and GCI in Fairbanks, Alaska, until such time as commercial agreements were concluded, the *Omaha Order* contains no affirmative steps to establish interim pricing pending the negotiation of commercial replacement arrangements. *See Anchorage Forbearance Order*, 22 FCC Rcd at 1983-7 ¶¶ 39-42.

[131] *Omaha Forbearance Order*, 20 FCC Rcd at 19466-7 ¶ 103.

D. Forbearance Would be Unlawful

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented."[132] Although the *Omaha Forbearance Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that was inconsistent with past Commission rulings, and without explaining the inconsistency. Its ruling that "fully implemented" means no more than initial rulemaking contradicted previous statements that saw the adoption of unbundling rules as the beginning, not the end, of implementation of Section 251(c).[133] In fact, when the Commission initially adopted its Section 251(c) rules in the *Local Competition Order*, it explained that these rules are merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252."[134] The *Omaha Forbearance Order* ignored these previous findings and failed to explain its reason for abandoning precedent.[135] It should not repeat this mistake by granting Qwest's Petition based on the *Omaha Forbearance Order* definition of "fully implemented."[136]

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[132] 47 U.S.C. §160(d).

[133] *See* Opposition of ACN *et al.*, WC Docket No. 06-172, at 52-58 (filed Mar. 5, 2007) ("March 5, 2007 Opposition of ACN *et al.*, Docket No. 06-172").

[134] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order 11 FCC Rcd 15499, ¶ 6 (1996) (emphasis added) ("*Local Competition Order*"). The Commission found that Section 251 involves an "allocation of responsibilities" between itself and the states. *Id.*, at 15520 ¶ 41. Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251. *Id.*, at 15527 ¶ 53.

[135] *See AT&T v. FCC,* 236 F.3d 729, 734 (D.C. Cir. 2001). The finding of *USTA II* that the FCC in its *TRO* had unlawfully delegated authority to the states to establish,

Although this issue was raised in the appeal of the *Omaha Forbearance Order*, the D.C. Circuit declined to rule on the inconsistency between the Commission's current interpretation of Section 251(c) and the Commission's prior rulings because the Commission never had an "opportunity to pass" on these arguments.[137] Since the arguments are now squarely presented, the Commission must revisit its ruling in the *Omaha Forbearance Order* and establish a definition of "fully implemented" that is consistent with its view expressed in the *Local Competition Order*, or provide a complete justification for reversing course.[138]

The *Omaha Forbearance Order* also improperly decoupled Section 10 forbearance from Section 251(d)(2) impairment,[139] and, while noting that Qwest still remains obligated to make special access, § 271 and § 251(c)(4) resale offerings available, it failed to consider the significant open proceedings before the Commission that are

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pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

[136] Other arguments demonstrating why the Commission's interpretation of "fully implemented" in the *Omaha Forbearance Order* was unlawful are set forth in the attached March 5, 2007 Opposition of ACN *et al.* and are incorporated herein by reference. *See* March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 53-58.

[137] *Qwest*, 482 F.3d at 478.

[138] *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (FCC must explain its reasons for reversing its course; enumerate factual differences between similar cases; and explain the relevance of those differences to the purposes of the Act); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

[139] Rather than repeat those arguments, they are incorporated by reference. *See* March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 49-51.

addressing problems with these non-UNE offerings.[140] The Commission should not repeat the same mistakes in addressing Qwest's Petition.

IV. CONCLUSION

For the foregoing reasons, Qwest's Petition for Forbearance should be denied.

/s/

Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
Philip J. Macres
BINGHAM MCCUTCHEN LLP
2020 K St., NW
Washington, DC 2006
T: 202.373.6000
F: 202.373.6001
andrew.lipman@bingham.com
russell.blau@bingham.com
josh.bobeck@bingham.com
philip.macres@bingham.com

Counsel for Covad Communications Company; Alpheus Communications, L.P.; U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications; First Communications, Inc.; Deltacom, Inc.; TruCom LLC d/b/a CityNet - Arizona; and TDS Metrocom, LLC

[140] *Id.* at 58-66.

ATTACHMENT 1

Comments of Covad Communications Company; Alpheus Communications, L.P.; U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications; First Communications, Inc.; Deltacom, Inc.; TruCom LLC d/b/a CityNet - Arizona; and TDS Metrocom, LLC

Filed in WC Docket Nos. 06-172 and 07-97 (September 21, 2009)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF
COVAD COMMUNICATIONS COMPANY; ALPHEUS COMMUNICATIONS, L.P.; U.S. TELEPACIFIC CORP. AND MPOWER COMMUNICATIONS CORP., BOTH D/B/A TELEPACIFIC COMMUNICATIONS; FIRST COMMUNICATIONS, INC.; DELTACOM, INC.; TRUCOM LLC D/B/A CITYNET - ARIZONA; AND TDS METROCOM, LLC

Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
Philip J. Macres
BINGHAM MCCUTCHEN LLP
2020 K St., NW
Washington, DC 20006
T: 202.373.6000
F: 202.373.6001
andrew.lipman@bingham.com
russell.blau@bingham.com
josh.bobeck@bingham.com
philip.macres@bingham.com

Their Attorneys

A/73142214.5

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COMMENTS

The undersigned competitive carriers submit these comments in response to the Public Notice seeking comment on the remand of recent decisions from the United States Court of Appeals for the D.C. Circuit.[1]

I. INTRODUCTION AND SUMMARY

On June 19, 2009,[2] the U.S. Court of Appeals for the D.C. Circuit held that the Commission had erroneously denied Verizon's petitions for forbearance from UNE regulations in the Commission's *Verizon Six-MSA Order*.[3] In remanding the *Verizon Six-*

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

[2] *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. June 19, 2009).

[3] *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC

MSA Order, the Court found that the Commission's reliance on the extent of *actual* competition as measured by the incumbent carrier's market share, while excluding consideration of *potential* competition, was an unexplained departure from FCC precedent. The Court also criticized the Commission for finding that the six Verizon markets were insufficiently competitive in light of the lack of alternative sources for wholesale inputs. In previous UNE forbearance orders, the Commission found that such a lack of wholesale alternatives did not prevent forbearance. The Court, however, accepted as reasonable the Commission's approach that Section 10 requires a separate analysis from that conducted under Section 251 for impairment and rejected the RBOC argument that "unnecessarily conflate[d]" the two independent statutory provisions.[4]

On remand, the Commission must reconsider how to apply factors other than market share in its forbearance analysis. The D.C. Circuit criticized the Commission's previous forbearance analysis because it "zeroed in on ... market share as the dispositive factor."[5] The Commission had argued that in addition to market share it considered competition in the business market and competition for wholesale services.[6] The Court, however, found that facilities-based competition for business and wholesale customers "played no meaningful role in the FCC's determination" that the metropolitan statistical

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Rcd 21293 (2007) ("*Verizon Six-MSA Order*"). On August 5, 2009, the Court, on the FCC's own motion, remanded the decision in *In the Matter of Petitions of the 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 (July 25, 2008).

4 *Verizon Tel. Cos. v. FCC*, slip op. at 11.

5 *Id.* at 13.

6 *Id.* at 14.

areas ("MSAs") at issue in the *Verizon Six--MSA Order* were not competitive enough to warrant forbearance.[7] As it explained:

> In the *Omaha* [*Forbearance*] *Order*, the FCC relied on evidence that the CLEC had already had success attracting ... business customers and had "emerging success in the enterprise market" to support its conclusion that certain areas within the MSA were sufficiently competitive for UNE forbearance. The FCC also noted that the CLEC "possess[ed] ... the necessary facilities to provide enterprise services," and had "sunk investments in network infrastructure." *Id.* And yet, in the [*Verizon Six-MSA*] *Order* under review, the FCC found similar evidence submitted by Verizon *insufficient* to support a finding of competitiveness in the six MSAs.[8]

In both the *Omaha* and *Anchorage Forbearance Orders*, the FCC found that the record did not "reflect any significant alternative sources of wholesale inputs for carriers" in either the Omaha or Anchorage MSAs,[9] yet it determined in both cases that forbearance was warranted. The Court found:

> The fact that these factors were applied similarly but yielded opposite results renders them meaningless in the analysis. Removing these factors from the analysis, the only distinguishing factor between the *Omaha* and *Anchorage Orders*, in which the FCC granted forbearance, and [the *Verizon Six-MSA*] *Order*, in which the FCC denied forbearance, is that the ILECs in the *Omaha* and *Anchorage Orders* no longer possessed [*redacted*] percent of the marketplace, whereas in this case Verizon has not yet lost that same percentage in the six MSAs at issue.[10]

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[7] *Verizon v. FCC*, at 14.

[8] *Verizon v. FCC*, at 14 (internal citations omitted).

[9] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19448 (2005) ("*Omaha Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *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, 1977 (2007).

[10] *Verizon v. FCC*, at 15.

Because the Court found that the Commission could not "convincingly argue that these factors now prevent Verizon's petition for UNE forbearance when the same factors did not prevent forbearance in the *Omaha* and *Anchorage* Orders," the Court concluded that Verizon's market share was the "dispositive and essential factor" in the Commission's conclusion to deny Verizon's UNE forbearance petitions, and "not merely one of several factors in its determination."[11] It held that the Commission's shift lacked a sufficient explanation and was thus arbitrary.[12]

The Court also held that the *Verizon Six-MSA Order*, by employing a bright line market share test focusing solely on actual competition, departed from its forbearance and impairment precedent that also considered an assessment of potential competition.[13]

Importantly, the Court did not conclude that any part of the FCC's analysis was inconsistent with its authority under Section 10. Instead, the Court explained that "it may be reasonable in certain instances for the [Commission] to consider an ILEC's possession of … [a] … particular percentage of the marketplace as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete."[14] Similarly the Court held, "[i]t may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition."[15] In other words, the "flaw [in the *Verizon Six-MSA Order*] is not in this change,

[11] *Id.* at 15-16 (internal citation omitted).

[12] *Id.*

[13] *Id.* at 16-17.

[14] *Id.* at 17-18.

[15] *Id.*

but rather in the FCC's failure to explain it."[16] On remand, the Court's command was simply for the Commission to explain its departure or remedy the failure in analysis.

It is incumbent upon the Commission to take this opportunity to adequately explain and enhance the forbearance standard. It should recognize that its previous forbearance decisions were flawed and adopt a new framework for analyzing petitions for forbearance from the Act's unbundling obligations. This revised framework should respond to the issues raised by the Court's remand, remedy the serious deficiencies in the *Omaha Forbearance Order* and faithfully adhere to the statutory test set forth in Section 10 to be consistent with the Act's impairment framework, sound competition policy and economics, and the statutory forbearance criteria.[17]

The Commission's prior UNE forbearance decisions have not rationally focused on the presence of actual facilities-based competitors in deciding whether to forbear from the Act's central market opening measure. The Commission need only look to Qwest's anti-competitive behavior in the Omaha MSA post-forbearance as reason to revise its forbearance standard. The Commission should employ an analytical framework similar to its traditional market power analysis, that examines market share, supply elasticity, barriers to entry and demand elasticity. in analyzing competition under its traditional market power framework the Commission should emphasize competition from wireline competitors that have deployed their own last mile loop facilities because competition from wireless (whether fixed or mobile), satellite, VoIP and broadband over powerline is

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[16] *Id.*

[17] It is well-established that the Commission is "entitled to reconsider and revise its views as to the public interest and the means to protect that interest," so long as it gives a reasoned explanation for the revision. *See, e.g., DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). *See also FCC v. Fox Television Stations, Inc. et al.*, 556 U.S. ___, slip op. 10-11 (2009).

neither currently significant nor capable of disciplining the incentive of the cable and RBOC incumbents to tend toward duopolistic behavior. The Commission should further recognize that duopoly markets are unduly concentrated and therefore not competitive.

As part of its analysis, the Commission should examine competition from competitors that have deployed their own loop facilities in distinct product markets. Initially, the Commission's product market analysis should distinguish between wholesale and retail product markets as well as between the residential and business market. Lastly, the Commission should establish the MSA as the appropriate geographic area in which to analyze requests for forbearance filed pursuant to Section 10.

II. THE OMAHA FORBEARANCE STANDARD HARMS CONSUMERS AND COMPETITION BY SUBJECTING THEM TO A DUOPOLY

Although one way of addressing the Court's remand would simply be to revert to the earlier *Omaha Forbearance Order* analysis and apply it to the Verizon and Qwest petitions, that approach would ignore substantial record evidence of serious deficiencies in the *Omaha Forbearance Order* methodology. The first of these deficiencies is the *Omaha Forbearance Order*'s failure to acknowledge the dangers of duopoly even in the face of FCC precedent and antitrust jurisprudence emphasizing such dangers.

In evaluating previous RBOC forbearance petitions requesting relief from the Act's unbundling provisions, the Commission has, over the objection of wireline competitors, granted forbearance in markets where only one viable competitor to the incumbent is providing facilities based competition,[18] and where there is no serious prospect of additional facilities-based entry. The resulting market reality, characterized by a cable-

[18] It is important to note that the single facilities-based competitor was providing such competition on a limited basis to a particular market segment and geographic area.

RBOC duopoly in the residential market and significantly more limited competition in the business market has — as competitors correctly warned — chilled investment, marginalized or wholly driven out competitors and allowed the entrenched incumbents to raise prices.[19] As discussed in Section II.A herein, the Commission need only look to Qwest's anti-competitive behavior in the Omaha MSA post-forbearance. One of the largest competitors to Qwest and Cox in Omaha has exited the market as a direct result of the forbearance order because of its inability to secure wholesale inputs at prices that allow it to remain competitive.[20] Other CLECs that planned to enter the market did not because of the change in market conditions.[21] Indeed, the Commission has repeatedly found that a duopoly does not give rise to effective competition.[22] As shown below, the weaknesses of such competition are well established.

In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant level of competition than that which local exchange markets currently exhibit. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS

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[19] *See, e.g.,* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No 04-223, at 4, 8 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

[20] *See* McLeodUSA Petition for Modification at 4-12. *See also "Verizon Seeks Forbearance in All of Rhode Island,"* xchange Magazine, Feb. 15, 2008 (available at http://www.xchangemage.com/articles/525/verizon-seeks-forbearance-in-all-of-rhode-isl.html) (visited Mar. 25, 2008). This also highlights again the perils of engaging in predictive judgment as to the state of competition in a particular market in lieu of reliance upon an analysis of actual competition.

[21] *See, e.g.,* Letter from Dudley Slater, CEO, Integra Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-233 (filed Sept. 14, 2005).

[22] *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc. Transerors, to AOL Time Warner Inc. Transferee,* Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617 ¶ 163 (2001).

providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.[23] The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

> the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring. The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. … Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[24]

The Commission found "that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices" and, therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.[25] Similarly, in considering ILEC petitions for forbearance, the Commission should consider broadly the long-term competitive development of the wireline local exchange market, not just a snapshot of market share.

A. The Commission's Predictive Judgment About Wholesale Competition Has Been Proven To Be Mistaken

The failed Omaha experiment is evidence that a cable-RBOC duopoly does not benefit consumers. For one, wireline competitors have largely abandoned the Omaha

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[23] *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 21 (1998) ("Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source").

[24] *Id.* at ¶ 22.

[25] *Id.* at ¶ 24.

market. McLeodUSA, previously the largest facilities-based CLEC operating in pre-forbearance Omaha, ceased selling services to new customers and continues the costly process of exiting from the Omaha market due to the *Omaha Forbearance Order*. This withdrawal from Omaha was directly caused by the absence of any enforceable unbundling rule which deprived competitors of reasonable access to the loop facilities that are essential to competition.[26]

In the *Omaha Forbearance Order*, the Commission rendered a "predictive judgment" that Qwest would have an incentive to offer commercially reasonable wholesale alternatives to Section 251(c)(3) obligations. The Commission's prediction was wrong. Instead of being incented to offer its largest wholesale customer in the market reasonable prices to continue accessing Qwest's deregulated network facilities, as predicted by the FCC, Qwest's "negotiations" consisted of offering McLeodUSA take it or leave it terms featuring a 30% price increase on DS0 loops and its standard special access offerings on high capacity loops and transport.[27] The complete lack of incentive for Qwest to offer CLECs a reasonably priced "commercial" wholesale option created by the limited presence of Cox in Omaha could not be clearer than the fact a CLEC can get exactly the same commercial special access pricing in other Qwest markets as in Omaha. The alleged

[26] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008).

[27] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008). *See also*, Letter from Andy Lipman, *et al.*, Counsel to Affinity Telecom, Inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008).

competition from Cox has caused Qwest to do absolutely nothing to keep wholesale customers in Omaha as opposed to what it offers in markets that have less retail competition.

It should come as no surprise that the Commission's predictive judgment has been proven incorrect — antitrust law has for decades operated under the premise that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."[28] As the D.C. Circuit has explained, in a market "characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions."[29] Despite this principle, one that the Commission has applied in other contexts, it adopted a forbearance test predicated on a contrary prediction that robust wholesale competitive behavior would emerge between two firms, one of which, *i.e.*, Cox, was not even capable of or willing to offer a comparable wholesale service in the vast majority of locations required by competitors. The FCC's failure to give due weight to the incontrovertible fact that Cox was not a wholesale provider of last mile access to nearly all non-residential end user locations meant its prediction was doomed to fail.

In a highly concentrated market where there are two dominant suppliers and high barriers to entry, each of the two market participants has an incentive to foreclose other competitors' access to critical inputs that would facilitate entry. In the absence of any

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[28] *F.T.C. v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

[29] *Federal Trade Commission v. H.J. Heinz Co. et al.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 227 (1993)).

regulatory compulsion to offer that access, such as through unbundling, it is not surprising that neither the RBOC nor the cable operator offers wholesale access on terms that allow meaningful competition to develop. In hindsight, it is inconceivable how anyone could rationally have predicted that Qwest, which so enthusiastically sought to avoid providing UNEs under Section 251(c)(3) at cost-based rates that granted it a reasonable return on its investment, would have been incented to turn around and provide reasonable wholesale access anyway, when in fact Qwest could achieve higher revenues by recapturing its wholesale customers' end users and serving those same customers on a retail basis after driving those competitors out of the market.

In addition, the Omaha forbearance standard failed to recognize the importance of wholesale competition to the development of meaningful retail competition. The *Omaha Forbearance Order*, while acknowledging the lack of any alternative for wholesale supply of loops, simply ignored the consequences of this lack of wholesale competition. In highly concentrated markets such as local telephone markets, the owners of the critical last mile connections have no incentive to offer access that provides a means for competitors to enter the market where entry barriers would ordinarily preclude such competitive entry. The mere presence of retail competition from a single cable competitor, which was incapable of offering a wholesale access alternative to the vast majority of end user locations, proved unable to create further competition. As demonstrated in Omaha, in fact, forbearance led to further concentration and less competition.

B. Duopoly Markets Are Contrary to the Public Interest

Duopoly markets are unduly concentrated and therefore not competitive. The Commission's Omaha forbearance framework was predicated on the supposition that competition from cable companies was sufficient to check the ILEC's market power in local telephone markets where the cable company achieved certain levels of market share and facilities coverage. This proposition ignored the uniformly held view of economists, antitrust law and the Commission itself, as well as ample practical experience, that duopoly markets are not competitive. Under antitrust doctrine, "the more plausible theories and the evidence suggest strongly that oligopoly pricing departs from competitive norms, often substantially."[30] Other parties in similar UNE-forbearance proceeding have explained that economic analysis shows that duopolies lead to supracompetitive prices.[31]

Until the *Omaha Forbearance Order*, the Commission itself consistently had held that duopoly markets are insufficiently competitive because duopolists tend to collude, even if tacitly, so as to achieve supracompetitive rates and restrict product offerings. For example, it explained that a merger resulting in duopoly carries a "strong presumption of significant anticompetitive effects."[32] In his separate statement, Chairman Powell emphasized "[a]t best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less

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[30] Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 404b (2d edition 1998-2006 and supp. Sep. 2006).

[31] *See, e.g.,* Opposition of Telecom Investors to Verizon New England's Petition, WC Docket No. 08-24, at 20-33 (filed March 28, 2008) ("Telecom Investors Rhode Island Opposition"); Opposition of Telecom Investors to Verizon's Petition, WC Docket No. 08-49, at 21-34 (filed May 13, 2008).

[32] *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20604-05, ¶¶ 99, 102 (2002) ("*Echostar*").

innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[33]

When considering the marketplace for wireless services, the Commission has held that "the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition"[34] and that "duopoly cellular market" is "imperfectly competitive."[35] Overall, the Commission has observed that only "a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market."[36]

Even when addressing the marketplace for instant messaging, the Commission stated:

> From among all entrants into the IM business, AOL points especially to Microsoft as a significant rival. AOL claims that Microsoft's presence, and especially its recent growth in the market, demonstrates that AOL does not dominate IM. ... However, Microsoft has not always been able to leverage its control of the Windows desktop into dominance of other applications. In addition, in IM today, AOL benefits from network effects and first mover advantages; and, as we discuss below, the proposed merger would give AOL significant, additional advantages over Microsoft, Yahoo!, and smaller IM providers. *And even if Microsoft's NPD did grow to rival AOL's, the result would be merely a duopoly, not the healthy com-*

[33] *Id.*, 17 FCC Rcd at 20684, Separate Statement of Chairman Michael K. Powell.

[34] *Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1730, ¶ 47 n.67 (1991).

[35] *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18470, ¶ 27 (1996).

[36] *2002 Biennial Review — Review of the Commission's Broadcast Ownership Rules Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13731, ¶ 289 (2002).

petition that exists today in electronic mail and that we hope will exist in new IM-based services and AIHS in particular.[37]

And as the Commission explained in regard to ILEC/cable duopolies:

> 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. A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are "impaired" under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.[38]

The Commission's policy of prohibiting duopoly markets is consistent with antitrust law. As the D.C. Circuit explains, in the context of approving the FTC's rejection of a merger to duopoly, "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices … above competitive levels"[39] and that "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[40] Thus under *Heinz*, there is a "presumption" that a duopoly market such as in *Heinz* would "lessen competition." Indeed, courts continue to uphold the FTC's

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[37] *Applications of Time Warner Inc. and America Online, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617, ¶ 163 (2001) (emphasis supplied).

[38] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, ¶ 55 (1999).

[39] *H.J. Heinz Co.*, 246 F.3d at 725.

[40] *Id.* at 724.

application of the D.C. Circuit's analysis in *Heinz* barring undue concentration in markets where there are two principal competitors.[41]

The Department of Justice has likewise prohibited mergers to duopoly, most notably in the complaint it filed to block the merger of WorldCom and Sprint. In that complaint, the DOJ found that in a number of telecommunications markets there were three competitors that controlled over 80% of the market share. While the applicants Sprint and WorldCom were second and third in market share, the DOJ determined that the post merger Herfindahl-Hirschman Index ("HHI") would lead to an unduly concentrated market with two principal participants — in other words a duopoly.[42] This duopoly then would have "facilitate[d] coordinated or collusive pricing or other anticompetitive behavior by the" duopolists.[43] The duopolists would also "be able to raise prices without losing sufficient sales" to fringe competitors to offset the increased revenues.[44] This fringe competition was therefore "insufficient to prevent coordinated pricing or other anticompetitive behavior" by the two principal players in the market.[45]

Experience in the cable market unfortunately bears out the Commission's and the antitrust agencies' concern with duopolies. For example, on November 1, 2008, Comcast increased its rates for its standard service by 6.4 percent throughout the Richmond, VA

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41 *See FTC v CCC Holdings*, 2009 WL 723031 *7, 15 (D.D.C. 2009) (upholding FTC's injunction to prevent merger from 3 to 2 competitors in the market for software used to estimate costs to repair damaged vehicles).

42 *United States v. WorldCom, Inc. and Sprint Corp.*, Complaint, ¶¶ 62, 90, 107 (June 26, 2000) ("DOJ Complaint").

43 *Id.* ¶ 69.

44 *Id.* ¶ 70.

45 *Id.* ¶ 71. The DOJ reached similar conclusions regarding the other markets it found would exist as post-merger duopolies. *See id*, ¶¶ 94-95, 112, 134.

metropolitan region, notwithstanding Verizon's presence in the cable television market in the region.[46]

One senior policy analyst with the Consumers Union conjectured that the companies do not plan to compete over price, but instead over bundled services.[47] If so, this is contrary to the public interest as expressed by former Chairman Martin when commenting about the lack of choice inherent in bundling. According to former Chairman Martin, "[c]able companies explain away their skyrocketing prices by saying they are giving you more and more channels. At no time, however, have the cable companies actually asked if you want those additional channels. You have to pay for them whether you want them or not."[48] It stands to reason that the benefits of unbundled availability would also extend to other services, like telephone and broadband. Otherwise, customers will not be able to avail themselves of lower prices for one service, *e.g.*, Internet access, without purchasing services that they do not want, *e.g.*, video or phone. Moreover, a customer that has to change all three services — phone, broadband and video — in order to switch providers for one service will find it much more burdensome. Former Chairman Martin argued that "the solution to high cable bills isn't price controls or additional government regulation. It is more competition and more choice."[49] However, it is increasingly evident that a cable-telco duopoly provides neither for phone nor for cable services.

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[46] Emily C. Dooley, *Comcast's Cable Rates to Increase Nov. 1: company cites higher costs and says average bill will rise 3.7 percent*, RICHMOND TIMES DISPATCH, Oct. 8, 2008.

[47] *Id.*

[48] John McCain and Kevin Martin, *Make Cable Go A La Carte*, LOS ANGELES TIMES, May 25, 2006.

[49] *Id.*

Former Chairman Martin's concerns were confirmed when the Commission reported that average cable rates actually *increased* from one year to the next in markets that had a single wireline competitor to the incumbent cable operator. Communities with a single wireline competitor have seen greater cable rate increases than the overall market since 2004. In those areas, cable rates increased 5.3% to $35.94 in 2004,[50] 2.5% to $36.85 in 2005, 4.2% to $38.45 in 2006, 6.7% to $42.59 in 2007, and 5.5% to $44.92 in 2008.[51] Similar evidence of the danger of a deregulated duopoly is provided by the steady rate increases in California following the California's Public Utility Commission's ("CPUC") decision to lift price caps for the state's dominant ILECs. In August 2006, the CPUC found that the ILECs "no longer possess market power" based on "the demonstrated presence of competitors throughout their service territories" and that competition would protect the interest of consumers.[52] In support of its decision, the CPUC "relied heavily on the conclusion that wireless mobility services are a close substitute for wireline telephone service."[53] However, the latest analysis conducted in California demonstrates that many consumers will "find it difficult to substitute wireless for wireline service."[54]

[50] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087, Table 1 (2006).

[51] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 24 FCC Rcd 259 (2009).

[52] D.06-08-30 at 132 and 275.

[53] *See*, Trevor R. Roycroft, Ph.D., "Why 'Competition' is Failing to Protect Consumers - Full Report," The Utility Reform Network, at ii (March 25, 2009) ("TURN Study").

[54] *Id.*, at 18.

Consequently and instead of price competition, "California consumers have experienced a staggering stream of rate hikes."[55] The TURN Study accordingly concluded that, "that wireless service is not a 'close substitute' for wireline for most customers" and that "[w]ireless substitution is unlikely to provide a pricing constraint on local telephone company services."[56] The TURN Study further found that cable alternatives also have "substantial limitations on the ability of these services to constrain telephone company price increases."[57] In addition, since release of the *Qwest 4-MSA Order,* both the DOJ and, the telecommunications regulatory authority in the United Kingdom, Ofcom, "have conducted rigorous analyses and released reports that conclude, based on the widely accepted methodology for defining relevant product markets, that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services."[58]

At bottom, the Commission cannot find that an ILEC-cable duopoly would protect against anticompetitive behavior. As the above fully shows, duopoly markets do not encourage competitive behavior but rather facilitate price increases and other anticompetitive conduct. Such a duopoly, as demonstrated by the failed experiment in Omaha, is

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[55] *Id.*, at C-2.

[56] *Id.* at 15.

[57] *See* TURN Study at 4.

[58] Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-49, at 2 (filed April 20, 2009). *See also*, Letter from Thomas Jones, Counsel to One Communications Corp. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-24, at 7-11 (filed Dec. 3, 2008).

the exact opposite of the competitive conditions that would satisfy the public interest test of Section 10 requiring forbearance to "promote" competition.

C. The Omaha Forbearance Framework Fails to Recognize Distinctions Between Relevant Product Markets

The Commission's competition analysis in the *Omaha Forbearance Order* failed to take separate residential and business markets into account — both in analyzing deployment of competitive loop facilities and in evaluating competitors' market share. In considering whether facilities based competitors had deployed their own loop facilities[59] to 75% of all end user locations in the geographic market, the Commission did not differentiate between residential locations and business locations. Thus it could have granted forbearance for UNEs used in business markets even if *no* business locations were actually served by the facilities based cable provider. The Commission simply failed to examine whether and to what extent competitors had actually deployed loop facilities in the business market. The Commission was instead apparently content to assume that cable competitors would extend their networks serving residential customers to business markets in a reasonable period of time, without any data to support its assumption.

With respect to market share, the Commission limited its analysis to residential market share and "predicted" that competitors would make similar inroads in the business market. The Commission further erred by not analyzing the extent to which competitors,

[59] The Commission further compounded its error in its coverage test by only considering whether Cox facilities "passed by" a certain percentage of end user premises. As discussed *infra*, there are significant physical and economic barriers that make this coverage test an unreasonable measure of deployed "loop facilities." *See* Section III.A.1, below.

including Cox Cable in Omaha, were actually serving business customers that demand the kind of robust and reliable services that competitors use UNEs to provide.

D. The Existing Framework For Analyzing "Facilities-Based Competition" In UNE Forbearance Proceedings Is Irrational

The Commission's UNE forbearance decisions have not rationally focused on the presence of actual facilities-based competitors in deciding whether to forbear from the Act's central market opening measure. In past UNE forbearance decisions, the Commission included resale as the equivalent to facilities based competition, despite the fact that resellers obviously rely on the ILEC's facilities to provide service. Similarly, the Commission has treated so called "commercial agreement" UNE-P replacement services as facilities based competitors, although competitors using these services obtain loops and local switching from the ILEC. Moreover, the record in the Omaha docket shows that many competitors that had resorted to commercial UNE-P arrangements in fact no longer compete in the market. This confirms that relieving an ILEC of its unbundling obligations does not promote competition but instead, permits the ILEC to drive its competition out of the market.

The Commission cannot rationally base its forbearance decision on competition that relies on the RBOCs' loops as a basis for eliminating access to those same loops because they do not constitute independent facilities-based competition. In addressing this precise issue, the Commission has held that "[g]ranting forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to Section 251(c)(3) would undercut the very competition being used to justify the forbearance," and it properly "decline[d] to engage in that type of circular justification."[60]

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[60] *Omaha Forbearance Order*, 20 FCC Rcd at 19450, ¶ 68 n.185.

More importantly, the Commission's forbearance decisions under Section 10(a) must consider whether regulation is prospectively "necessary" to ensure reasonable prices and to protect consumers. The RBOCs' arguments in favor of forbearance assert that UNE regulation is unnecessary because their market conduct will be constrained by competition even if UNEs are no longer available. To the extent that that "competition" is dependent on the RBOC's choice to offer resold services or underlying facilities on "reasonable" terms, however, it cannot rationally be expected to serve as a substitute for regulatory constraints. If the RBOC's retail pricing were being challenged by competition from resellers or special-access based carriers, the RBOC could simply increase the costs of the inputs it provides those competitors as much as it feels necessary to allow it to set retail prices as desired.

E. The Past Geographic Analysis Ignores Marketplace Realities

The Commission's previous decisions have been based on an inconsistent analysis of geographic markets. While the Commission has evaluated market share on an MSA wide basis, it has looked at facilities coverage on a wire center basis. This approach ignores how competitors make investment and entry decisions. If the competitor cannot obtain reasonably priced loop facilities throughout the geographic areas needed to achieve minimum viable scale it is unlikely to be able to enter any part of the market.

The Omaha experience serves as a prime example of the problems with the *Omaha Forbearance Order*'s geographic market analysis. Although the Commission only granted forbearance in 9 of Omaha's 24 wire centers, they were the 9 wire centers with the highest concentration of revenue opportunity. CLECs can still obtain UNEs in the other 15 wire centers, but the revenue opportunity in those markets would not allow it to recover the investments and expenses necessary to maintain its network that was designed and constructed to compete across the entire MSA, including the wire centers where the Commission granted forbearance. Accordingly, CLECs were forced to make a business decision to forego serving residential and small and medium business customers throughout the Omaha MSA.

F. The Omaha Test Does Not Identify Locations Where Competitors Have Facilities Available to Serve Customers

The *Omaha Forbearance Order* found that forbearance could be granted where a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offering" to at least 75 percent of end user locations in a wire center.[61] Rather than relying on *actual* geographic reach of facilities, this approach is speculative and engages in a predictive judgment as to whether a competitor may be "willing and able" to deliver substitute services "within a commercially reasonable time." Consistent with the D.C. Circuit's holding in *Verizon v. FCC,* a more reasonable standard is whether the competitor holds its services out as currently available to the relevant locations.

The current facts in Omaha debunk the prior predictive judgments used to justify deregulation before robust facilities-based competition is actually in place. While it is true that Cox has continued to extend its network facilities to more business locations in the Omaha MSA, it has done so on a very incremental basis. Accordingly, its limited network coverage is nowhere near the levels required for true wholesale competition to exist. Indeed, since McLeodUSA last filed data supporting its Petition for Modification of the *Omaha Forbearance Order* in 2007, Cox's network connectivity to business end user

[61] *Omaha Forbearance Order*, 20 FCC Rcd at 19444, ¶ 60 n.156.

locations has not increased meaningfully beyond its prior reach. And, taking advantage of the absence of competitive pressure from Cox and the lack of competition from UNE-L CLECs in the business market, Qwest reportedly has instructed its sales agents not to present *any* competitive pricing offers (*i.e.* reduced pricing in exchange for entering a new term agreement) to business customers in the Omaha market, even to customers seeking to renew expiring customer-specific contract offers. Qwest's reported directive to its agents is compelling evidence that the grant of forbearance has eliminated competition in Omaha to the detriment of Omaha business customers, which is exactly what CLECs had themselves predicted in opposing the forbearance petition.

It is now five years since the Commission predicted that Cox would expand its network to business locations, and it has not done so anywhere to the degree necessary to sustain a competitive market in Omaha in the absence of competition from UNE-based CLECs. Nor has Cox's presence in the market prompted Qwest to reduce the prices for wholesale alternatives to 251(c)(3) UNEs. The "commercially reasonable time" that the Commission used as its justification for its predictive judgment has come and gone.

III. THE COMMISSION SHOULD EMPLOY AN ANALYTICAL FRAMEWORK SIMILAR TO ITS TRADITIONAL MARKET POWER ANALYSIS

While the FCC previously found that it was not necessary to use its traditional market dominance analytical framework in evaluating UNE forbearance,[62] the failed Omaha experiment proves that a more nuanced analysis that focuses on specific product and geographic markets is warranted and the clear failure of the Commission's prediction for Omaha provides the necessary justification for departing from that unfortunate precedent. Further, the Commission has explicitly recognized "the strong relationship

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62 *See Omaha Forbearance Order*, 20 FCC Rcd at 19425, ¶ 17 n.52.

between the statutory forbearance criteria and the Commission's dominance analysis,"[63] particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers through dominant carrier regulations. Specifically, the Commission acknowledged that "section 10(a)'s mandate to forbear for a 'telecommunications service, or class of … telecommunications service' in any or some of a carrier's 'geographic markets' closely parallels the Commission's traditional approach under its dominance assessments."[64]

There should be no question that the Commission may adopt this market analysis for UNE forbearance petitions despite its previous reluctance. While the Commission recognized the differences between its statutory impairment analysis and a traditional market power analysis in the *Triennial Review Order*,,[65] those differences simply do not matter here. Here the Commission is not undertaking an impairment analysis.[66] If it were, it would certainly find, as it did in the *Triennial Review Remand Order* ("*TRRO*"), that competitors are impaired without loop and transport elements even where cable competi-

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63 *Anchorage Forbearance Order*, 22 FCC Rcd at 16318 ¶ 26.

64 *Omaha Forbearance Order*, 20 FCC Rcd at 19424 ¶ 17.

65 Even in the *Triennial Review Order*, the Commission recognized that a market power analysis would be useful in the context of an impairment decision, to determine "whether an [ILEC] could raise its retail prices unchecked." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17051, ¶ 109 (2003) ("*TRO*"), aff'd in part, remanded in part, vacated in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) ("*USTA II*"), cert. denied sub nom. *Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S Ct 313, 316, 345 (2004)..

66 *Verizon Tel. Cos. v. FCC*, slip op. at 11.

tors can deploy their own loops, because of the historical advantages possessed by such companies compared to a reasonably efficient competitor.[67]

But, as the D.C. Circuit recognized,[68] these are forbearance petitions, not impairment decisions, and the text of the statutory forbearance criteria in Section 10(a)(1) requires the Commission to assess whether it can "ensure" that the Petitioner's "rates" will be "just," "reasonable" and "non-discriminatory" if the request for forbearance were granted. Because the focus of the statutory forbearance criteria involves analysis of the RBOC's "charges" and "practices" and whether they are "just and reasonable," it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted. In the *Omaha Forbearance Order*, the Commission "recognize[d] the strong relationship between the statutory forbearance criteria" that "closely parallels" the Commission's market power analysis used in its dominance cases.[69]

Neither *Verizon v. FCC* nor *EarthLink v. FCC*[70] limits the FCC's discretion to incorporate a market power analysis in its forbearance analysis. While *EarthLink* held that "on its face" Section 10 "imposes no particular mode of market analysis,"[71] it also held that "the agency reasonably interpreted the statute to allow the forbearance analysis to

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[67] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2644 ¶ 206 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*TRRO*").

[68] *Id.* at 6.

[69] *Omaha Forbearance Order*, 20 FCC Rcd at 19425 ¶ 17.

[70] 462 F.3d 1, 8, (D.C. Cir. 2006)

[71] *EarthLink*, 462 F.3d at 8.

vary depending on the circumstances."[72] Similarly the D.C. Circuit in *Verizon*, while finding fault with the Commission's analysis in the *Verizon Six-MSA Order*, specifically acknowledged that the FCC could revise its test as long as it provides a reasoned basis for doing so. This is consistent with the Supreme Court's explanation of the discretion available to the Commission in *FCC v. Fox Television Stations Inc.*,[73] where the Court held that the Commission need not demonstrate "to a court's satisfaction" that the new standard is "better" than the old one,[74] instead, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better."[75] In short, the Commission has ample discretion to "tailor the forbearance inquiry to the situation at hand."[76]

As explained in these Comments there are numerous sound reasons for revising the Commission's forbearance analysis: i) to respond to the Court's remand in *Verizon v. FCC* (and *Qwest v. FCC*); ii) to harmonize the forbearance analysis with the text of Section 10(a)(1); and iii) to improve the test to make sure that competition is not thwarted through premature deregulation, as occurred as result of the *Omaha Forbearance Order*.

In response to the D.C. Circuit's remand it is obvious that a more robust test that does not rely on market share alone is appropriate. Further, the Court's critique of the Commission's previous reliance on a per se market share test can be addressed, in part,

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[72] *Id.*

[73] 556 U.S. at ____, slip op. 10-11.

[74] *Id.* at 11.

[75] *Id.* (emphasis in original).

[76] *EarthLink*, 462 F.3d at 9.

with a more nuanced analysis that focuses on specific product and geographic markets, and considers other relevant factors, as discussed below, in addition to market share.

Antitrust law and other Commission precedent establish how the Commission should assess whether a carrier possesses market power. Market power is typically defined as a firm's ability to "exclude competition or control prices."[77] The law makes clear that the assessment of whether an ILEC has market power does not rest solely on market share, although high market share can be indicative of market power.[78] The Commission "has never viewed market share as an essential factor.[79]

Rather, as the Commission and the courts have explained, the Commission must make a broader inquiry.[80] The Commission's market power analysis typically considers demand and supply elasticities; that is, how consumers could substitute other services for the service in question, or how new entrants and existing competitors could add capacity to serve consumers that would seek alternatives to overpriced ILEC broadband. The Commission's traditional market power analysis focuses on (a) "identifying the relevant product and geographic markets;" (b) "identifying the market participants" and (c) determining whether the incumbent retains market power.[81]

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[77] *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

[78] *See United States v. General Dynamics*, 415 U.S. 486, 498, (1974); *see also AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

[79] *AT&T v. FCC*, 236 F.3d at 729.

[80] *Id.* at 737.

[81] *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*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14098 ¶ 24 (1998) ("*Comsat Non-Dominance Order*")..

A. Market Share Analysis

Market share is an important component of the Commission's market power analysis because it examines the level of concentration in a market, and "concentration in the relevant markets is one indicator" of the potential for anti-competitive conditions.[82] The Commission's UNE forbearance decisions have consistently focused on "facilities-based competitors.[83] This remains an important principle from which the Commission should not deviate.

1. The Commission Should Require the Presence of Two Facilities Based Wireline Competitors Before Granting Forbearance

The presence of two competitors to the ILEC in a particular market is absolutely critical to avoiding the dangers of a duopoly which, for consumers and competition, is scarcely better than a monopoly. By incorporating a requirement that there be multiple facilities-based competitors in a market — in addition to the ILEC— the Commission can fix the flaw in its Omaha analysis that led to premature elimination of unbundling. As a result of the premature action in Omaha, the presence of a single competitor operating only in the retail market left the incumbent Qwest free to raise its rivals' costs and impede entry, eventually driving out competition to the detriment of consumers.

Furthermore, the Commission has found that a lone competitor with unique market access cannot ensure reasonable pricing. In the *TRRO*, the Commission clarified, and the D.C. Circuit affirmed, that the impairment analysis is to be conducted from the vantage point of a "reasonably efficient competitor". In other words, the Commission will

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[82] *See Echostar*, 17 FCC Rcd at 20614 ¶ 133.

[83] *Verizon Six-MSA Forbearance Order*, 23 FCC Rcd at 21312 ¶ 36 (finding Verizon not subject to sufficient level of facilities based competition.).

allow unbundling only where the reasonably efficient competitor is impaired without access to UNEs.[84] The converse is that where a *reasonably efficient competitor* could compete to locations over its own facilities, then the Commission should not require unbundling.

The Commission has squarely rejected BOC arguments that cable companies are the reasonably efficient hypothetical competitor envisioned under the impairment standard and determined that they are not. Instead, the FCC established that its impairment standard assumes no minimum set of network assets or capabilities.[85]

The Commission explicitly rejected BOC arguments seeking to preclude impairment in markets where cable competed because it recognized the significant advantages cable companies enjoy as a result of their existing customer base and their existing cable television infrastructure. Therefore, cable's presence in the cable modem market did not mean that new entrants were unimpaired, because cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any facilities at all."[86] The Commission explained that "[c]able telephony and cable modem service ... developed because cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and

84 When evaluating whether lack of access to an ILEC network element "poses a barrier or barriers to entry ... that are likely to make entry into a market uneconomic," the FCC makes that determination with regard to a "reasonably efficient competitor." *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22. Specifically, in analyzing entry from the perspective of the reasonably efficient competitor, the Commission "do[es] not attach weight to the individualized circumstances of the actual requesting carrier. Thus, we do not presume that a hypothetical entrant possesses any particular assets, ... even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances." *Id.* at 2548, ¶ 26.

85 *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22.

86 *TRO*, 18 FCC Rcd at 17046, ¶ 98.

therefore have first-mover advantages and scope economies not available to other new entrants, which lowers their incremental costs of providing the additional services."[87]

In analyzing whether to forbear from its unbundling rules, it would be inappropriate for the Commission to eliminate unbundling based entirely on deployment by a single competitor, the legacy cable operator, that possessed significant advantages in overcoming the barriers to entry faced by more typical entrants. In such cases, as in Omaha, the presence of competition from the legacy cable operator says nothing about the ability of subsequent, reasonably efficient competitors — lacking cable's legacy advantages — to enter and compete successfully in the market in the absence of UNEs.

2. The Proposed Two-Competitor Test is a Reasonable Measure to Guard Against Dangers Inherent in Highly Concentrated Markets

The Commission's *Omaha Forbearance Order* assumed, in the face of enormous evidence otherwise, that competition from cable competitors alone would be sufficient to discipline monopolistic behavior in the absence of unbundling.

As an initial matter, requiring that there be two facilities based competitors to the ILEC is consistent with the Commission's determination in the Section 271 *Broadband Forbearance Order* that Section 10(a) does not require a perfectly competitive market. This proposal does not require a perfectly competitive market nor anything remotely close to it.

Under the horizontal merger guidelines, a market of three competitors is highly concentrated. The DOJ considers any market with an HHI above 1800 to be highly concentrated under the guidelines. Where the incumbent has 70% of the market and its

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[87] *Id.*

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two competitors each have 15%, the HHI would be $70^2 + 15^2 + 15^2 = 4900 + 225 + 225 = 5350$. Admittedly, this is an extreme case (in the real world, both competitors are unlikely to have exactly the same market shares), but even if the ILEC share were reduced to 60% or 50% the market would still be well above the threshold of a highly concentrated market.[88] The goal of the proposed market share analysis is not to identify a perfectly competitive market. It is instead, consistent with the purpose of Section 10, to identify when a market is competitive enough that the market opening measure of requiring the ILEC to provide unbundled access to its network is no longer necessary to protect consumers against the harm of an unchecked monopoly. Consistent with this Commission's precedent, and settled law from the realm of antitrust, a duopoly does not provide that assurance. The analysis proposed in these Comments provides far more comfort that enduring competition has firmly taken root and that eliminating unbundling — and the competition reliant on unbundled access to the ILEC's legacy loop infrastructure — will not harm consumers.

By recognizing that forbearance from unbundling does not require a perfectly competitive market, the market power analysis is also consistent with *USTA II*, and the Commission's impairment rules adopted in the *TRRO*, in particular the need to take potential competition into account in its forbearance analysis. Adopting a framework that provides for the possibility of eliminating unbundling, even where markets are highly concentrated, is consistent with the D.C. Circuit's command that the Commission's impairment analysis account for potential competition even in geographic markets where

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[88] Even at the other extreme, where each of three competitors had a 33% market share, the HHI would be $33^2 \times 3 = 3267$, which is still "highly concentrated."

competition is not yet fully developed, but the indicia of competition are similar to markets where more robust competition occurs.[89]

3. The FCC Should Limit the Analysis to Facilities-Based Competitors to the ILEC

Unlike the Commission's existing framework that includes purported competition from non-facilities based competitors such as resellers or UNE based competitors, and non-substitutable services such as wireless, the competitors' proposed standard rationally addresses competition from other wireline competitors, as only these competitors offer services that are substitutable for the services provided by the ILEC.

The Commission's market share analysis should also focus on wireline competition because competition from wireless (whether fixed or mobile), satellite, and broadband over powerline is currently insignificant and not capable of disciplining the incentive of the two principal competitors to tend toward duopolistic behavior.[90]

4. The Commission's Market Power Analysis Should Give More Weight to Actual Than Potential Competition

While the plain language of Section 10 "imposes no particular mode of market analysis or level of geographic rigor,"[91] the market-dominance approach described herein should give more weight to actual competition than to potential competition. As noted by the D.C. Circuit, the Commission was not concerned with "whether CLECs had shown the capability for potential competition," but rather it "applied a market share-based

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89 *See, e.g., TRRO*, 20 FCC Rcd at 2558-60, ¶¶ 43-45; *USTA II*, 359 F.3d at 575.

90 We emphasize that this test is based on current marketplace realities, and is not intended to blind the Commission to technological change. If at some future time the Commission finds that competition from a non-wireline technology is sufficiently pervasive to impose real market discipline on ILEC pricing behavior, then it should modify the standard accordingly.

91 *Verizon v. FCC*, at 11.

approach that it used to determine whether to grant Verizon's request for forbearance from dominant carrier regulations."[92] Indeed, the Commission recognized that the "[m]ost important" factor in its competitive analysis was "successful" facilities-based competition.[93] As directed by the D.C. Circuit, the Commission should now explain why evidence of actual "successful" competition, *i.e.*, existing market share percentages, is properly given far greater weight in the Commission's UNE forbearance analysis than existence of potential competition.

Consistent with this approach, the market share analysis should be based on services the petitioner provides to retail customers and not inflated by including wholesale services provided to other carriers. Specifically, the market share of non-ILEC facilities-based competitors should not include carriers that use ILEC transmission facilities; *e.g.* special access, UNEs, commercial agreements, or resale. As discussed above, it is irrational to include resale-based competition under the umbrella of facilities-based competitors. Resale does not provide meaningful competition, as competitors have no ability to differentiate their products from those offered by the ILECs.

Nor should the Commission include UNE loop based competition or so-called "wholesale" UNE-P replacement services under the facilities based competitor umbrella. A competitor using a UNE-P replacement service is entirely at the RBOC's mercy. The RBOCs claim they have no regulatory duty to offer these services and can impose whatever rates, terms and conditions they decide are warranted. If so, the RBOCs can also withdraw these services whenever they deem it necessary. The Commission has held that "forbearance from application of section 251(c)(3) on the basis of competition that

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92 *Verizon v. FCC*, at 11 citing *Verizon Six-MSA Order* at 21313, 21314, n.116

93 *Verizon v. FCC*, at 13 citing *Verizon Six-MSA Order* at 21314.

exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance."[94] It would be illogical to eliminate UNE loop based competition in markets where the "competition" on which the decision is based comes from those very same loops.

a. Section 10 focuses on present day market realities

The text of the statutory forbearance criteria in Section 10(a)(1) requires the Commission to assess whether it can "ensure" that Qwest's "charges" and "practices" will be "just and reasonable" and not "unreasonably discriminatory" if the request for forbearance were granted. Because the focus of the statutory forbearance criteria involves analysis of the ILEC's "charges" and "practices" and whether they are "just and reasonable," it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted. In the *Omaha Forbearance Order*, the Commission "recognize[d] the strong relationship between the statutory forbearance criteria" that "closely parallels" the Commission's market power analysis used in its dominance cases.[95] For example, the Commission's forbearance analysis in the *Omaha Forbearance Order*,[96] begins with an examination of the market and the allocation of market share between Qwest and Cox.[97]

As discussed in the *Omaha Forbearance Order*,[98] Section 10(a)(1) certainly provides a reasoned basis for the Commission to consider market power. This is especially

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94 *Omaha Forbearance Order*, 20 FCC Rcd at 19450 ¶ 68 n.185.

95 *Id.* at 19425, ¶ 17.

96 *Id.* at 19448-49, ¶¶ 66-67.

97 *Id.* at 19448, ¶ 66 (discussing Cox share of residential market in Omaha).

98 *Id.* at 19425, ¶ 17.

appropriate for UNE forbearance, where the Commission's previous failure to apply a more "nuanced" analysis in the *Omaha Forbearance Order* has prompted competitors to exit the market rather than compete.[99]

b. Potential competition is already incorporated in the impairment standard and FCC should limit its weight

Under the Commission's rules, "impairment" is determined by applying the standard set forth in Rule 317(b), which specifically states that impairment exists where:

> taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a *reasonably efficient competitor* uneconomic. (emphasis supplied).

In adopting Rule 317(b), the Commission explicitly rejected the argument that competition from cable operators alone demonstrates non-impairment. In the broadband market, for example, it found that cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any facilities at all."[100] The Commission emphasized that the impairment standard assumes no minimum set of network assets or capabilities.[101] Thus, its unbundling decisions took into account competition from cable companies but gave it little weight because it has little bearing on whether a reasonably efficient competitor, that lacks the built-in advantages of the cable provider, is impaired without access to UNEs.

99 Letter from Andrew D. Lipman *et al.*, Counsel to Access Point, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-29, at 2 (filed April 23, 2009).

100 *TRO*, 18 FCC Rcd at 17384, ¶ 98.

101 *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22.

As previously discussed in Section III.A.2 above, *USTA II* and the Commission's impairment rules adopted in the *TRRO* already take potential competition into account. Therefore, little weight, if any, should be given to potential competition in evaluating if Section 10 forbearance of a UNE obligation is appropriate.

Potential competition is also addressed in the examination of supply elasticity and entry barriers and thus a separate analysis would be superfluous.

B. The Commission Should Consider Supply Elasticity

As noted above, market power analysis must look beyond market share to consider both supply and demand elasticities.[102] 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."[103] The Commission examines supply elasticity to "determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such a carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[104] The Commission examines two factors in assessing supply elasticity, first the "supply capacity of existing competitors" — in other words whether competitors "have or can relatively easily acquire significant additional capacity" — and second, "entry barriers" that indicate whether new competitors can easily enter the market even where existing competitors lack spare capacity.[105] Where entry barriers are low, supply elasticity is high, which in turn suggests the market is competitive.

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[102] *See, e.g., United States v. General Dynamics*, 415 U.S. at 498.

[103] *Comsat Non-Dominance Order*, 13 FCC Rcd at 14123 ¶ 78.

[104] *Id.*

[105] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) ("*AT&T Non-Dominance Order*").

1. Ability To Add "Significant Additional Capacity"

Supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period.[106] The cost structure of the facilities-based local telecommunications market, however, is marked by the pervasive fixed and sunk costs and economies of density and scale necessary to compete and serve customers in local markets. Serving local telecommunications markets requires significant investments in infrastructure, particularly in last mile facilities to bring services to business and residences. Given this complex economic backdrop, RBOC claims regarding their competitors' ability to add significant additional capacity in a short time period, must be carefully scrutinized. The Commission should not consider generalized claims and anecdotal evidence that facilities-based wireline competitors have the ability to rapidly add significant capacity.

2. Ability to Overcome Entry Barriers

The Commission examines entry barriers to determine whether a new entrant could efficiently enter the market and begin serving customers fleeing the incumbent's service, if the incumbent raised its prices above a certain threshold. Indeed, one of the fundamental reasons Joint CLECs have an interest in this proceeding is because they know that high entry barriers preclude competitors from deploying their own loops to most customers, and require UNE loops to reach the vast majority of their customers. The Commission has found that deployment of loops is a "costly and time consuming"

[106] *Motion of AT&T Corp. to be Declared Non-Dominant for International* Services, Order, 11 FCC Rcd 17963, 17980-1 ¶ 48 (1996) ("*AT&T International Non-Dominance Order*").

undertaking.[107] The lack of a robust third pipe further confirms the high entry barriers in deploying last mile facilities.

Entry barriers are high in the local exchange market despite the entry of cable competitors into the residential market. Competitive entry by cable providers, who have unique access to customer premises, is not predictive of potential entry by other sellers.[108]

C. The Commission Should Consider Demand Elasticity.

Demand elasticity refers to "the willingness and ability" of ILEC "customers to switch to another … service provider or otherwise change the amount of services they purchase … in response to a change in the price or quality of … service."[109] High demand elasticity indicates that the incumbent's customers are willing and able to switch to a competitor in order to obtain a better price or better service, and that the market is subject to competition.[110] Competitors have provided the Commission with evidence that switching providers can be problematic, particularly in the business market where the incumbents lock customers into long term contracts with steep termination penalties thus

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[107] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17107 ¶ 205 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) *vacated in part, remanded in part on other grounds, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[108] This is especially true since standard cable plant used to serve residential customers is based on coaxial cable, which is not a viable substitute for the dedicated high capacity broadband connectivity demanded in the business market.

[109] *Comsat Non-Dominance Order*, 13 FCC Rcd at 14120 ¶ 71.

[110] *See id.*

requiring high costs to change providers.[111] These high costs of changing make it less likely that consumers faced with anticompetitive pricing or practices would choose another competitor.[112]

IV. THE FCC SHOULD EXAMINE COMPETITION IN DISCRETE PRODUCT AND GEOGRAPHIC MARKETS

As discussed above, the Commission's previous UNE forbearance standard improperly conflates product markets, particularly the residential and business markets, and utterly ignores the need for separate evaluation of wholesale and retail markets. Further, the Commission should clarify that the MSA is the basic geographic market to be analyzed.

A. Product Markets Must Be Defined Based on Sound Economic Criteria

The Commission, consistent with recognized principles of antitrust law, determines appropriate product markets in a competition analysis. It makes its assessment of the appropriate product markets "from the perspective of customer demand."[113] The Commission has typically recognized that "competition depends on consumers having choices between products that are fairly good substitutes for each other."[114] In markets where such choices exist "a single provider cannot raise its prices above a competitive level because consumers will switch to a substitute."[115]

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[111] *See e.g., id.* at 14121 ¶ 73 (suggesting presence of large volume of long term contracts would indicate low demand elasticity.)

[112] *AT&T Reply Comments*, WC Docket 04-36, at 43 (filed July 14, 2004).

[113] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18336 ¶ 83 (2005) ("*SBC/AT&T Merger Order*").

[114] *Echostar*, 17 FCC Rcd at 20603 ¶ 97.

[115] *Id.*

Under these principles, a specific service or specific set of services represents a distinct product market if a hypothetical monopoly provider of those specific services could profitably sustain a nontransient, nontrivial price increase — that is, if the monopolist's profits after the price increase would exceed the monopolist's profits before the price increase.[116] If the price increase caused enough buyers to shift their purchases to a second product to render the increase unprofitable, then the second product should be considered to be part of the same product market. Moreover, absent a quantitative determination of whether two services are part of the same product market, courts have generally included products in the same market if they are "reasonably interchangeable" in their use.[117] Thus where "one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market."[118]

The Commission has previously determined that wholesale and retail markets for wireline services constituted separate product markets.[119] It has also separately analyzed competition in residential and business markets.[120] It has recognized the substantial

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[116] 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, at 20,572 § 1.0 (defining the relevant product market as "a product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price").

[117] *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

[118] *Echostar*, 17 FCC Rcd at 20606 ¶ 106.

[119] *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5676-79, ¶¶ 27-33 (2007) ("*AT&T/BellSouth Merger Order*");*SBC/AT&T Merger Order*, 20 FCC Rcd at 18304-21, ¶¶ 24-55; *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18447-63, ¶¶ 24-55 (2005) ("*Verizon/MCI Merger Order*").

[120] *See, generally, TRO.*

differences in the services demanded by business customers and residential customers.[121] As the Commission recognized, "bandwidth, security and other technical limitations" render cable modem service an "imperfect substitute" for services competitors typically provide to business customers using UNE loops.[122] It has also separately addressed business and residential markets in its review of RBOC mergers.[123]

1. Separate Analyses of Wholesale and Retail Competition

Under the market power framework proposed in these Comments, the Commission should separately assess whether wireline competitors that have deployed their own loop facilities offer *wholesale substitutes* for the specific network elements available under the Commission's rules — namely DS0 loops, dry copper loops (including conditioning), DS1 loops, DS3 loops; DS1 transport, and DS3 transport – and whether they do so ubiquitously within the MSA.

When the Commission applies its analytical framework in the retail market, it would examine the level of competition for services competitors typically provide retail customers by using UNE loops. It is logical that the analysis would consider competition for downstream retail services provided via UNE loops separately from wholesale competition for the provision of those inputs. In other words, when applying the analytical framework proposed in these Comments, the Commission should examine retail competition and wholesale competition separately, and, since UNEs are wholesale inputs,

[121] *TRRO*, 20 FCC Rcd at 2638, ¶ 193 ("most business that cable companies serve, or are likely to serve, are home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities.").

[122] *Id.*

[123] *See AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5727, ¶¶ 27-121; *SBC/AT&T Merger Order*, 20 FCC Rcd 18304-50, ¶¶ 24-107; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-93, ¶¶ 24-108.

it should not grant forbearance in any market where the RBOC continues to be dominant in the wholesale market.

2. Separate Analysis of Residential and Business Markets

In considering the different retail product markets competitors serve using UNE loop and transport inputs, the Commission should recognize the substantial differences between residential and business services. The networks, services, features and customer care necessary for competitors to function in business markets, even for very small business customers, is vastly different than that needed to provide residential service.[124] The Commission has recognized these distinctions and has regularly distinguished its competitive analysis for residential and business customers.[125]

In other words, when applying the retail test, residential and business retail product markets should be examined separately with each of the product markets broken down by the retail services that could be provided to these retail customers over UNE loops and transport.

3. Products That Most Consumers Do Not View As A Substitute (*e.g.*, wireless) Are Not In The Same Product Market, Even If A Subset Of Consumers Do Substitute Them

As discussed above, regulatory authorities have found that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services. In addition, at the present

[124] Letter from Thomas Jones, Esq., Counsel to One Comm. *et al.*, WC Docket Nos. 08-24 and 08-49, at 13-15 (filed April 14, 2009).

[125] *See, e.g.*, *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5727, ¶¶ 27-121; *SBC/AT&T Merger Order*, 20 FCC Rcd 18304-50, ¶¶ 24-107; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-93, ¶¶ 24-108; *TRO*, 18 FCC Rcd at 17109-17182 ¶¶ 209-341; *TRRO*, 20 FCC Rcd at 2641-58 ¶¶ 199-225.

time, wireless service does not provide comparable, or in some cases any, broadband access to the Internet. At most, therefore, wireless continues to be a complement to wireline service, not a substitute for it.[126] If wireless is not a complete substitute for landline service, there is no basis for the Commission to find that the availability of wireless service is sufficient to protect consumers in the absence of unbundling obligations. At bottom, the extent to which consumers have "cut-the-cord" and the extent of competitive alternatives for *voice services alone* from wireless to an RBOC's retail wireline voice services are by no means a barometer of the extent of competitive alternatives to that RBOC's bottleneck loop and transport facilities and all the different and unique services that can be provided over those facilities, and thus should not be considered in the same product market.

Similarly, the Commission need not consider fringe competition from so-called nascent services, such as Wi-Max, fixed wireless or satellite, nor should it consider wireline carriers with negligible market shares that are unlikely to expand outside of an isolated market niche. Although incumbents cry "wolf" at nascent services such as fixed wireless, satellite and broadband over powerline, the market shares of these competitors is infinitesimally small. As the DOJ has recognized, because none of these services has ever been shown to generate a "substantial share" of the market, it is likely that their presence in the market will not impede the ILEC's "ability to raise prices without losing sufficient sales."[127] In addition to their lack of substantial market presence, the lack of

[126] *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2 ("Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce churn, rather than the next leg in the company's growth.").

[127] *See* DOJ Complaint, ¶ 70.

brand presence by these competitors and the "superior capacity and coverage" of the incumbent networks, renders these "fringe" competitors unlikely to "prevent coordinated pricing or other anticompetitive behavior" likely to occur in a duopoly market.[128]

The DOJ's findings regarding the residential long distance market are equally applicable in the local market. The strength of the brand names of the cable company and the ILEC in their markets, and their superior network capacity and coverage, give them enormous advantages over nascent services and niche wireline competitors, just as WorldCom, AT&T and Sprint possessed enormous advantages over smaller long distance competitors at the time of the DOJ's complaint to block the WorldCom/Sprint merger.

B. The Commission Should Standardize the MSA as the Appropriate Geographic Market for Analyzing the Statutory Forbearance Criteria

The Commission has previously defined a geographic market for purposes of analyzing competition as the market "in which the seller operates, and to which the purchaser can practicably turn for supplies."[129] The Commission should establish the MSA as the appropriate geographic area in which to analyze requests for forbearance filed pursuant to Section 10. This approach would prevent forbearance petitioners from picking and choosing any area, defined by any criteria it wishes, for requesting forbearance, as Verizon attempted to do in Rhode Island and Virginia Beach. Otherwise, forbearance petitioners could potentially seek forbearance for a street, a building, or perhaps the area served by a particular cell site, if it thinks that arbitrary area could meet the market share threshold that the Commission previously applied on an MSA-wide basis. The Commission should therefore insist on the selection of a geographic market that has

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[128] *Id.* at ¶ 71.

[129] *Echostar,* 17 FCC Rcd at 20609, ¶ 117 *citing US v. Grinnell Corp.*, 384 U.S. 563, 588-89 (1966) and *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

a basis rooted in rational economic analysis and then apply the appropriate forbearance test in that market.

An MSA, as determined by the U.S. Bureau of the Census and the Office of Management and Budget ("OMB"), is not a random aggregation of political jurisdictions. It is defined as a metropolitan area comprised of a large population nucleus, together with adjacent communities having a "high degree of social and economic integration[.]"[130] Because an MSA has a high degree of internal economic and social coherence, it is more likely that any estimation of competition, or application of a single competitive test to the entire area, if otherwise accurate, will be correct anywhere in the MSA.

The Commission has found that:

> MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition. Because competitive LECs generally do not enter new markets on a state-wide basis, we reject proposals to define the geographic scope of pricing flexibility on the basis of states or study areas.[131]

And, the Commission found that using MSAs

> appears to meet the requirements of clarity and ease of use. MSAs are precisely defined and easily understood by both technical and non-technical personnel. Equally important, MSA information enjoys wide distribution, is used for many different purposes, and is periodically updated. This attribute is very attractive because it does not require expenditure of any additional resources on the part of the Commission or the industry to implement....[132]

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[130] The most recent OMB definition of metropolitan areas is contained in OMB Bulletin No. 07-01 (Dec. 18, 2006). *See* http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf.

[131] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14260, ¶ 72 (1999) (citations omitted).

[132] *Definition of Congested Areas in the Broadcast Auxiliary Services and the Cable Television Relay Service*, Notice of Proposed Rulemaking, 5 FCC Rcd 6687, 6687, ¶ 5 (1990).

An MSA, therefore, is reasonable for use as an area in which the Commission may consider forbearance.

To consider forbearance on an area smaller than an MSA, without any valid economic rationale for subdividing the MSA, makes no sense at all. Forbearance in only part of an MSA would likely lead to marketplace dysfunctions because critical economic inputs to competitive telecommunications services would be unavailable in part of an area that otherwise has a high degree of social and economic integration. This could lead to pricing distortions and dislocations within the MSA and potentially result in significant harms including reductions in growth and productivity. As a result of the Commission's error in Omaha, it is apparent that it is not economically feasible for a competitor to provide service in only those wire centers in an MSA to which unbundling forbearance does not apply.[133] Forbearance in pockets of an otherwise cohesive economic unit would constitute undue government interference in marketplace dynamics. The Commission acknowledged related concerns in the *Verizon Six-MSA Forbearance Order*.[134]

V. CONCLUSION

For the foregoing reasons, the Commission should adopt a new forbearance analytical framework that more closely resembles its traditional market power analysis in response to the D.C. Circuit's remand of the Six MSA Order and the Qwest 4 MSA Order.

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[133] Declaration of Pritesh D. Shah, McLeodUSA Telecommunications Services, Inc., July 23, 2007, ¶ 8, attached to Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No, 04-223, filed July 23, 2007.

[134] *Verizon Six-MSA Order*, n.102.

Respectfully submitted,

/s/

Andrew D. Lipman
Russell M. Blau
Joshua M. Bobeck
Philip J. Macres
BINGHAM MCCUTCHEN LLP
2020 K St., NW
Washington, DC 20006
T: 202.373.6000
F: 202.373.6001
andrew.lipman@bingham.com
russell.blau@bingham.com
josh.bobeck@bingham.com
josh.bobeck@bingham.com
philip.macres@bingham.com

Counsel for Covad Communications Company; Alpheus Communications, L.P.; U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications; First Communications, Inc.; Deltacom, Inc.; TruCom LLC d/b/a CityNet - Arizona; and TDS Metrocom, LLC