

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

In the Matters 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

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

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INTRODUCTION AND SUMMARY

The communications landscape for both mass-market and enterprise customers has changed dramatically since the Commission closed the record in its last unbundling proceeding in late 2004. As a result of those extraordinary changes — and the rapid expansion of intermodal competition from cable, wireless, and IP-based providers in particular — carriers such as Verizon find themselves having lost half or more of their mass-market customers in many areas. Regardless of the number of lines lost already, those same competitive forces are resulting in continuing line losses in many areas at a high single- or double-digit rate annually. Yet the Commission’s unbundling rules have not changed since early 2005, except in those few wire centers — 15 nationwide — where the Commission has granted forbearance. Therefore,

¹ The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

despite these fundamental changes, only incumbents, among the many competing providers in these areas, are subject to unbundling requirements.

On remand from *Verizon Telephone Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009), the Commission should establish a clear process for conforming its unbundling rules to current marketplace developments, consistent with the Commission’s long-standing recognition that UNE requirements should be “lifted as soon as competition eliminates the need for them.” *Local Competition Order*² ¶ 6. Regardless of whether that process utilizes forbearance petitions — as it stated it would in the *Triennial Review Remand Order*³ — or some other procedural mechanism, the Commission must have *some* process to bring its UNE rules into compliance with current market realities and to comply with the statutory impairment standard. The Commission, therefore, should identify clearly the process it will use and the standards and binding timelines that it will use for making a decision, so that carriers can apply for the elimination of UNE requirements where those standards are satisfied. Clarity as to the process, standards, and timelines will provide certainty to all parties and will address the moving target that resulted from the changing standards employed in the Commission’s previous forbearance decisions.

Regardless of whether the Commission is applying the forbearance criteria or the impairment standard, the Commission must consider both actual and potential competition, and both intermodal and intramodal competitors. Consistent precedent from the Supreme Court and

² First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”) (subsequent history omitted).

³ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

the D.C. Circuit — which the D.C. Circuit did not disturb in *Verizon* — compels that conclusion in the context of the impairment standard. The same is true in the forbearance context.

Although evidence that competitors now serve more lines than incumbents provides the Commission with a dispositive basis to grant forbearance, the Commission cannot stop there and deny forbearance whenever such an extreme market-share test is not satisfied. Instead, as the Commission has found in a long line of precedent and a variety of contexts, in a dynamic market with emerging intermodal competitors, the Commission must assess competitive conditions “in view of larger trends in the marketplace, rather than exclusively through . . . snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve.”⁴ In addition, in applying the forbearance criteria, the Commission must consider all sources of competition, intermodal and intramodal. All of these competing platforms constrain incumbents’ rates and protect consumers; forbearance from unbundling is also in the public interest, as it results in regulatory parity, which enhances competitive marketplace conditions.

DISCUSSION

I. **IN ITS *ORDER ON REMAND*, THE COMMISSION SHOULD SPECIFY THE PROCESS IT INTENDS TO USE TO ELIMINATE UNNECESSARY UNBUNDLING REQUIREMENTS**

Conditions in the marketplace today are far different from those that existed in December 2004, when the record closed in the *Triennial Review Remand* proceeding. The Commission has repeatedly acknowledged — starting with its first order promulgating UNE rules — that it should review unbundling mandates “*proactively*” so that “regulatory burdens are lifted *as soon as* competition eliminates the need for them.” *Local Competition Order* ¶ 6 (emphases added). On

⁴ *E.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 50 (2005) (“*Wireline Broadband Order*”).

remand, the Commission should clearly identify the process it will use to bring its nearly five-year-old unbundling rules into line with current marketplace evidence and the statutory impairment standard. That process can be forbearance proceedings or it can be some other process. In either case, the Commission should ensure that the process it selects provides clear standards, for the benefit of incumbents and competitors alike. The Commission should also ensure that the process includes binding timelines, so that unbundling mandates are brought into line with current marketplace facts as soon as possible.

A. The Extensive Competitive Marketplace Developments Since the *Triennial Review Remand Order* Are Not Reflected in the Commission’s Current UNE Rules

1. Mass-Market Customers

Since December 2004, incumbents’ mass-market customers have been increasingly switching to intermodal competitors — cable, wireless, and IP-based services providers. In many geographic areas, incumbent carriers have already lost half or more of the mass-market lines. Regardless of the number of lines lost, those same competitive forces are causing continuing line losses in many areas at a high single or double digit rate annually. Yet incumbents, alone among the many competitors in these areas, are saddled with costly unbundling obligations.

Cable Companies. Since December 2004, cable companies have invested heavily in deploying Voice-over-Internet Protocol (“VoIP”) capability throughout their cable networks, which are virtually ubiquitous.⁵ For example, the record on Verizon’s forbearance petitions showed that, as of December 2007, cable companies’ networks covered 75 percent or more of

⁵ See, e.g., U.S. Dep’t of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* at 47 (Nov. 2008) (“*November 2008 DOJ Study*”), available at <http://www.usdoj.gov/atr/public/reports/239284.pdf>.

the end-user locations in more than 80 percent of the wire centers in the six Metropolitan Statistical Areas (“MSAs”) for which Verizon sought forbearance.⁶ Overall, cable telephony is available to around 100 million households, or about 85 percent of all households nationwide.⁷ Cable companies are using those networks to compete extensively with incumbents, without purchasing unbundled elements. Indeed, the Commission’s own data show that, by June 2008, cable companies provided telephone service to more than 9.3 million customers, or more than two-and-a-half-times as many as in December 2004.⁸ Although those are the most recent Commission data, more current and comprehensive data show that cable companies have continued to win mass-market customers and now serve 20-21 million customers, as of the second quarter of 2009.⁹ By the end of 2010, cable companies are expected to serve 24 million residential voice subscribers.¹⁰ In sum, as the Department of Justice noted, cable companies are

⁶ See Memorandum Opinion and Order, *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*, 22 FCC Rcd 21293, ¶ 36 (2007) (“*Verizon Six MSA Order*”); Letter from Evan T. Leo to Marlene H. Dortch, FCC, at 2 & Attachs. A-B, WC Docket No. 06-172 (Nov. 30, 2007).

⁷ See *November 2008 DOJ Study* at 17.

⁸ See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2008*, Table 5 (July 2009) (“*Local Competition Report June 2008*”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292193A1.pdf.

⁹ See Todd Rethemeier & Jeff Wlodarczak, Hudson Square Research, *Cable & Satellite, Telecom Services: 2Q09 Video, Voice and Data Industry Review*, at 9, Fig. 8 (Aug. 13, 2009) (19.6 million subscribers); Jessica Reif Cohen & David W. Barden, Bank of America/Merrill Lynch, *Battle For The Bundle: The Internet goes negative*, at 13, Table 12 (Aug. 19, 2009) (21 million subscribers).

¹⁰ See Jessica Reif Cohen & David W. Barden, Bank of America/Merrill Lynch, *Battle For The Bundle: The Internet goes negative*, at 13, Table 12 (Aug. 19, 2009) (estimating 24.2 million subscribers by the end of 2010).

“well positioned to offer facilities-based competition,” have already had “considerable success,” and are “rapidly increasing their telephony business.”¹¹

Mobile Wireless Carriers. Mobile wireless carriers have also continued investing heavily in their networks, rolling out third- and fourth-generation wireless broadband services, among other innovative services. Like cable companies, these wireless carriers compete against incumbents for mass-market customers without using unbundled elements of incumbents’ networks. The Commission’s data show that, by June 2008, wireless carriers had more than 255 million subscribers, reflecting a roughly 140-percent increase from December 2004.¹² The Commission’s data also show that, while wireless subscribership is increasing, wireline switched access lines are declining annually; incumbents had at least 18 million fewer residential switched access lines in June 2008 than in December 2004.¹³ Moreover, consumers are increasingly abandoning their wireline phones for wireless phones: according to the Centers for Disease Control (“CDC”), as of December 2008, 20.2 percent of households have cut the cord, a more than 330-percent increase from December 2004.¹⁴ By the end of 2009, the percentage of

¹¹ *November 2008 DOJ Study* at 15, 17.

¹² *Local Competition Report June 2008* at Table 14.

¹³ *See id.* at Tables 2, 14.

¹⁴ *See* Stephen J. Blumberg & Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, CDC, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008*, at 1, 5 (Table 1) (May 6, 2009) (“*CDC NHIS Report December 2008*”), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf>; Stephen J. Blumberg & Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, CDC, *Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July-December 2006*, at 4 (Table 1) (May 14, 2007), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf>.

households to have cut the cord is expected to reach 27 percent.¹⁵ In addition, as of December 2008, another 14.5 percent of households use a wireless phone, rather than a wireline phone, for all or almost all of their calls, a percentage that is also increasing.¹⁶ This is consistent with data showing that, by the end of 2008, annual wireless minutes of use had risen to more than 2.2 trillion, an increase of approximately 47 percent from 2005.¹⁷

IP-Based Service Providers. In addition, mass-market customers can choose from numerous IP-based services, many of which did not exist in December 2004 and all of which today provide superior voice quality and additional features and capabilities. Vonage, the largest over-the-top VoIP competitor, already serves 2.5 million subscribers, a 625-percent increase from December 2004.¹⁸ Clearwire is offering voice and Internet bundles over its 4G WiMAX network, already has approximately 500,000 subscribers, and is slated to roll out service to areas covering 30 million people by the end of 2009.¹⁹ Skype has seen its “SkypeOut” service — which customers use to make VoIP-originated calls to wireline and wireless phones, and for which Skype charges a fee — grow from 4.1 billion minutes in 2006 to 10.6 billion minutes in

¹⁵ See Jessica Reif Cohen & David W. Barden, Bank of America/Merrill Lynch, *Battle For The Bundle: Telcos take broadband net add lead*, at 13 (Mar. 16, 2009).

¹⁶ See CDC NHIS Report December 2008, at 3.

¹⁷ See CTIA, *Wireless Quick Facts: Year End Figures*, at <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (visited Sept. 17, 2009) (reporting 2.2 trillion minutes in 2008, up from 1.5 trillion minutes in 2005).

¹⁸ See Vonage Press Release, *Vonage Holdings Corp. Reports Second Quarter 2009 Results* (Aug. 5, 2009), available at <http://pr.vonage.com/releasedetail.cfm?ReleaseID=401240>; Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), available at <http://pr.vonage.com/releasedetail.cfm?ReleaseID=194545>.

¹⁹ See Clearwire Press Release, *Clearwire Reports Second Quarter 2009 Results* (Aug. 11, 2009), available at <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1319733&highlight=>.

the last 12 months for which data are available (June 2008 through June 2009).²⁰ In the *Triennial Review Remand Order*, the Commission described these IP-based services as providing only “limited intermodal competition,” a characterization that is plainly untrue today. *TRRO* ¶ 39 n.118.

Wholesale (Non-UNE) Competition. Finally, competitors continue to serve mass-market customers over incumbents’ networks, but without using unbundling. These include “commercial product[s]” that incumbents “designed to replace UNE-P . . . even in the absence of a legal mandate to do so.” *Omaha Order*²¹ ¶ 82. Verizon, for example, has commercial agreements, entered into through arm’s-length negotiations, with more than 165 competitors, which provide them with access to Verizon’s network at market rates and enable them to provide service to mass-market customers.

2. *Enterprise Customers*

Cable Companies. In the *Triennial Review Remand Order*, the Commission concluded that the “record before [it] contain[ed] little evidence that cable companies are providing service at DS1 or higher capacities” to enterprise customers. *TRRO* ¶ 193. The Commission could not reach that conclusion today, as cable companies have spent the past five years investing heavily in their ability to offer high-capacity services to enterprise customers over their cable networks.²²

²⁰ See eBay Inc., Form 10-Q at 20 (SEC filed July 29, 2009) (data for minutes in 1H09 and 1H08); eBay Inc., Form 10-K at 51 (SEC filed Feb. 20, 2009) (data for 2006 and 2008).

²¹ Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005) (“*Omaha Order*”), *petitions for review dismissed in part and denied in part, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

²² See US Telecom, *High-Capacity Services: Abundant, Affordable, and Evolving* at 9-10 & Table 1, 11-13 (July 2009) (“*US Telecom Report*”), attached to Letter from Glenn T. Reynolds, US Telecom, to Marlene Dortch, FCC, WC Docket No. 05-25 & GN Docket No. 09-51 (July 16,

Cable companies are also deploying fiber networks through affiliates or business units dedicated to serving enterprise customers.²³ Using these cable and fiber networks, cable companies are competing aggressively for the small and medium-sized businesses that are the primary retail purchasers of incumbents' DS-1 and DS-3 special access services.²⁴ The top five cable companies in particular have had extensive success to date and claim to serve, collectively, nearly 1 million business customers and to generate annual business revenues of approximately \$3 billion, which are growing by 15-20 percent or more annually.²⁵ Cable companies thus unquestionably pose a "substantial competitive threat" in the enterprise segment, are "actively marketing" their services to enterprise customers, and have "succeeded in attracting a large [and growing] number" of such customers. *Omaha Order* ¶ 66.

Fixed Wireless Providers. Fixed wireless is another service that the Commission, in the *Triennial Review Remand Order*, found did not then "offer significant competition in the enterprise" segment. *TRRO* ¶ 193 n.508. The Commission similarly could not reach that same conclusion today. Fixed wireless providers have acquired significant amounts of spectrum across the country, and there are now more than a dozen such providers offering service and expanding into new markets, including markets outside the top 50 MSAs.²⁶ These providers offer high-speed connections ranging from DS-1 to Gigabit Ethernet to OCn, and also offer speeds that are in between incumbents' standard DS-1 and DS-3 offerings, while offering the

2009), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019916044.

²³ See *id.* at 10, 11 & Table 2.

²⁴ See *id.* at 15-16.

²⁵ See *id.* at 9.

²⁶ See *id.* at 17-19 & Tables 4, 5.

same kind of high-level service guarantees, specifically to appeal to businesses with needs that fall within this range.²⁷ These providers are aggressively targeting enterprise customers, have signed up thousands of such customers, and are growing rapidly.²⁸ Moreover, fixed wireless providers also market their services to competitive fiber carriers, which are using the service to replace leased wireline circuits in their networks: FiberTower, for example, provides service to both Verizon Business and Qwest, while XO is replacing leased wireline circuits with wireless solutions from its Nextlink subsidiary.²⁹

Fiber-Based Competitors. Traditional, fiber-based competitors have also continued to deploy fiber networks into new areas and to add additional lit buildings to their existing networks, even during the recent economic downturn.³⁰ These new deployments are in addition to the more than 100,000 route miles of fiber that competitive carriers have already deployed within those areas in which demand for high-capacity services is concentrated, with an average of six known fiber-based providers within each of the top 50 MSAs.³¹ Even beyond the tens of thousands of buildings already connected to those networks, fiber-based competitors recognize that their networks pass nearby, and are capable of reaching, a significant number of the buildings with special access demand in incumbents' territories. For example, Level 3 recently told investors that “[o]ver 100,000 enterprise buildings [are] within 500 [feet] of [Level 3’s] US

²⁷ *See id.* at 20.

²⁸ *See id.* at 22-23.

²⁹ *See id.* at 22.

³⁰ *See id.* at 28 & Table 8.

³¹ *See id.* at 24-25 & Table 7, App. A.

network.”³² Statements such as these demonstrate that, when competing carriers evaluate their own competitive significance in the marketplace (as opposed to when they file legal and regulatory pleadings), they focus on the “reach” of their networks, and not on the number of buildings to which those networks are already connected.

Incumbents’ Tariffed Services. Finally, prices paid to incumbents for both DS-1 and DS-3 special access services have declined steadily since 2001, when the Commission first began granting pricing flexibility, and such declines have continued through 2008. Indeed, data recently submitted by US Telecom show that, between 2005 and 2008, average revenue per unit for DS-1 and DS-3 services decreased in real terms for one major incumbent by 23 percent and 19 percent, respectively, and for another by 11 percent and 13 percent, respectively.³³ The availability of these tariffed special access services — as well as services from fiber-based competing carriers, which both self-supply and offer wholesale services to other competing carriers³⁴ — enables robust retail competition for enterprise customers by a wide range of competitors, including national and regional competitive carriers, network integrators and managed service providers, international carriers, and equipment manufacturers and value-added resellers.³⁵

³² *Id.* at 27 (quoting Level 3 Communications, *Informational Investor Presentation*, at 7 (May 7, 2009), at http://files.shareholder.com/downloads/LVLT/410073203x0x296047/425b109c-bb88-4e29-82be-95e94218b23c/Investor%20Presentation_Mid%20May%202009.pdf) (first and fourth alterations in original); *see also id.* at 27-28 (cataloging similar statements).

³³ *See US Telecom Report* at 43.

³⁴ *See id.* at 30, 31-32 (Table 9) (demonstrating that “most competitive fiber suppliers do in fact offer service on a wholesale basis”).

³⁵ *See id.* at 48-53.

3. *Incumbents' Unbundling Requirements Have Not Kept Pace with Marketplace Developments*

Despite the extensive intermodal competition for mass-market customers that has developed since December 2004 — with the result that, in some areas, incumbents now serve fewer mass-market lines than competitors — incumbents still must unbundle DS-0 loops nationwide. The only exceptions are the handful of wire centers across the country where the Commission has granted forbearance: nine in Omaha, five in Anchorage, and one in the small town of Terry, Montana (population 544).³⁶

Similarly, incumbents' DS-1 and DS-3 loop and transport unbundling requirements remain largely unchanged, despite the significant advances by intermodal competitors such as cable and fixed-wireless providers. For example, in 2007 and 2008, only a handful of additional Verizon wire centers met the Commission's triggers for eliminating DS-1 and DS-3 loop and transport unbundling.³⁷ That is not because competition to provide high-capacity services at those levels to business customers has stagnated — on the contrary, as shown above, that competition is even more robust today than ever. Instead, it is because competition has developed in ways not captured by the Commission's triggers, which exclude competitors, such

³⁶ See *Omaha Order* ¶ 59; Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶ 21 (2007) (“*Anchorage Order*”); Memorandum Opinion and Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, 23 FCC Rcd 7257, ¶¶ 17-18 (2008); <http://www.city-data.com/city/Terry-Montana.html>.

³⁷ During that period, no wire centers have met the Commission's criteria for DS-1 loops, only two have met the criteria for DS-3 loops, only two have been classified as “Tier 1” wire centers, and only six have been classified as “Tier 2” wire centers. See Verizon's Supplemental Wire Centers Exempt from UNE Hi-Cap Loop and Dedicated Transport Ordering, *available at* <http://www22.verizon.com/wholesale/attachments/supplemvzwirecentersexempt2008.xls> and <http://www22.verizon.com/wholesale/attachments/supplemvzwirecentersexempt2007.xls>.

as cable companies and fixed wireless providers, that serve customers “directly” and “wholly bypass[] incumbent LEC facilities.” *TRRO* ¶ 95 (internal quotation marks omitted).

Because unbundling is not “an unqualified good” and “inflict[s]” significant costs “on the economy,” *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (“*USTA I*”) — “discourag[ing] . . . investment in innovation” by incumbents and competitors, *USTA v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004) (“*USTA II*”), and creating “complex issues of managing shared facilities,” *Omaha Order* ¶ 76 — it is essential that the Commission eliminate the discrepancies between current marketplace facts and its nearly five-year-old UNE rules, also bringing those rules into compliance with the statutory impairment standard. Whether the Commission does so through forbearance or another procedure, it should provide carriers with clear standards and clear timelines for eliminating those UNE rules in those areas where marketplace developments have rendered them unnecessary and, therefore, harmful to the further development of competition.

B. The Commission Has Consistently Recognized that It Needs a Process for Eliminating Unnecessary Unbundling Requirements

The Commission has repeatedly held that it is “essential that [it] retain the ability to revise [its unbundling] rules as circumstances change.” *Local Competition Order* ¶ 246. As the Commission explained, absent such authority, rules that the Commission found justified at one point in time “might impede technological change and frustrate the 1996 Act’s overriding goal of bringing the benefits of competition to consumers of local phone services.” *Id.* The Commission, therefore, committed in August 1996 to “review and revise [its] rules as necessary.” *Id.* ¶ 248.

Although the Supreme Court’s vacatur of the Commission’s initial set of unbundling rules first gave rise to the need to revisit those rules, the Commission’s subsequent UNE orders specified the procedure it would follow in further reviews of its unbundling rules. In the *UNE*

Remand Order,³⁸ the Commission decided to “revisit [its] unbundling rules in three years,” to account for “changes in the market and new technologies.” *UNE Remand Order* ¶ 130. The Commission explained that “[o]nly by periodically reevaluating the availability of alternative network elements outside the incumbent’s network can we truly determine whether the incumbent’s network should be unbundled in order to meet the requirements of section 251 and the goals of the Act.” *Id.* ¶ 149. The Commission, moreover, decided that a triennial review rulemaking was preferable to “[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances.” *Id.* ¶ 150.

Having completed the triennial review process — in which it also responded to a vacatur of its second set of unbundling rules — the Commission decided not to “commit[] to a further *de novo* triennial review” rulemaking. *TRO*³⁹ ¶ 710. Instead, the Commission decided to “rely on the biennial review mechanism established in section 11 of the Act,” as it “does with all of its other rules,” “to assess[] whether documented market changes merit modifications in [its unbundling] rules.” *Id.* However, since 2002, the Commission has not completed a biennial review under § 11 and, as a result, never eliminated an unbundling requirement through that process.

In the *Triennial Review Remand Order*, the Commission again recognized that it would need to update the unbundling rules it promulgated in that order, in particular to account for the increasing competitive significance of cable companies and wireless providers. *See TRRO* ¶¶ 36,

³⁸ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”) (subsequent history omitted).

³⁹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*” or “*TRO*”) (subsequent history omitted).

39. In deciding how best to update those rules, the Commission reversed its prior policy against individual carrier petitions to remove unbundling requirements. The Commission pointed favorably to Qwest’s then-pending petition “seek[ing] forbearance from the application of [the Commission’s] unbundling rules in” the Omaha MSA, and it “encourag[ed] other incumbent LECs to file similar petitions.” *TRRO* ¶ 39. The Commission thus decided not to “initiat[e] a number of separate proceedings to address, case-by-case, situations where the Commission’s impairment findings did not perfectly match local market realities,” but instead “invited incumbent LECs to seek forbearance from the application of the Commission’s unbundling rules.” *Anchorage Order* ¶ 5.

Verizon accepted that invitation, filing petitions for forbearance from unbundling obligations in six MSAs in September 2006. Verizon submitted evidence showing that competitors — including, but not limited to, cable companies and wireless providers — had the capability both to deploy facilities and to use those facilities to compete without unbundling; therefore, Verizon argued, competitors in those MSAs were not impaired without unbundled access to Verizon’s networks and the Commission was required to eliminate Verizon’s unbundling obligations in those MSAs. The Commission, however, refused to apply the statutory impairment standard in the course of deciding Verizon’s petition and, moreover, changed the standard it had applied in prior forbearance petitions from one that “considered *both* actual and potential competition” to one that “zeroed in on Verizon’s market share as the dispositive factor.” *Verizon*, 570 F.3d at 301, 303.

C. The Commission Should Specify the Process It Will Use To Eliminate Unbundling Requirements Where Competitors Are Not Impaired

In view of the fundamental marketplace changes since the *Triennial Review Remand Order*, and consistent with the precedent discussed above, the Commission must have *some*

process, whether forbearance petitions or otherwise, for conforming its UNE rules to those marketplace changes and the statutory impairment standard. As courts have recognized, “unbundling is not an unqualified good,” but instead “comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.” *USTA I*, 290 F.3d at 429. Where there is “no reason to think [mandating unbundling] would bring on a significant enhancement of competition” — as here, where there is already extensive and growing competition for mass-market and enterprise customers from intermodal and non-UNE intramodal providers — “nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs” associated with unbundling. *Id.*

Therefore, in the course of responding to the D.C. Circuit’s remand, the Commission should identify the process that it intends to use to bring its unbundling rules into line with the realities of today’s communications marketplace. As explained above, in the *Triennial Review Remand Order*, the Commission appeared to select forbearance petitions — “[r]ather than” rulemakings or other types of petitions — as the procedural vehicle it would use to act on evidence that its “impairment findings,” and the UNE rules based on those findings, no longer “perfectly match local market realities,” because competitors are capable of competing in those “specific geographic markets” without unbundling. *Anchorage Order* ¶ 5 (describing *TRRO* ¶ 39). Nothing in the D.C. Circuit’s decision in *Verizon* precludes the Commission from deciding again that forbearance petitions are the proper procedural vehicle for aligning its prior “impairment findings” with “local market realities” in “specific geographic markets.” *Id.* The court simply held that the Commission was not compelled to revisit the question of impairment in the context of a forbearance petition. *See Verizon*, 570 F.3d at 300-01 (holding that the

Commission’s decision not to do so “was reasonable”). Forbearance petitions thus remain a viable means of conforming UNE rules to current marketplace conditions, irrespective of whether (or even if) competitors continue to be impaired.⁴⁰

No matter which processes the Commission selects as its means to conform its unbundling rules to current marketplace evidence and the impairment standard — and, as the Commission has repeatedly acknowledged, it must have *some* such mechanism⁴¹ — the Commission should inform the industry of its preference, so that interested parties can pursue that mechanism without fear that they will learn at the end of that process that they made the wrong procedural choice. The Commission should also ensure that the process it selects provides clear standards so that incumbents and competitors alike know what evidentiary showing is necessary to eliminate unbundling obligations. Incumbents can then file petitions where marketplace facts satisfy that evidentiary standard, without concern that, as in prior forbearance proceedings, changing standards will result in a moving target for the incumbent to meet. The Commission should also ensure that any process includes clear, binding, and prompt timelines, analogous to those in the forbearance statute, so that unbundling obligations keep pace with the rapidly changing communications marketplace.

⁴⁰ See *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (“Congress . . . established [forbearance] as a viable and independent means of seeking” relief from regulatory obligations); Memorandum Opinion and Order, *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, 21 FCC Rcd 11125, ¶ 9 n.23 (2006) (“*Fones4All Order*”) (explaining that “removing [an incumbent LEC’s] section 251(c)(3) unbundling obligation d[oes] not require any affirmative finding” that competitors are not impaired), *petition for review denied*, *Fones4All Corp. v. FCC*, 550 F.3d 811 (9th Cir. 2008).

⁴¹ See, e.g., *Local Competition Order* ¶¶ 6, 246, 248; *UNE Remand Order* ¶¶ 130, 149; *TRO* ¶ 710; *TRRO* ¶ 39.

II. IN DETERMINING WHETHER TO ELIMINATE UNBUNDLING REQUIREMENTS, THE COMMISSION SHOULD CONSIDER THE FULL RANGE OF COMPETITIVE CIRCUMSTANCES: BOTH ACTUAL AND POTENTIAL COMPETITION, AND INTERMODAL AND INTRAMODAL COMPETITORS

A. The Commission Should Consider Actual and Potential Competition

Regardless of whether the Commission, in conforming its UNE rules to current marketplace evidence, is applying the forbearance criteria or the impairment standard, the Commission should consider both actual and potential competition. In the context of the statutory impairment standard, this is beyond dispute. The statutory standard expressly refers to the “ability” of competitors to compete without UNEs. 47 U.S.C. § 251(d)(2). Relying on that language, the Commission has rejected claims that it should “determine impairment based on . . . whether certain thresholds of retail competition have been met.” *TRO* ¶ 114. The D.C. Circuit has likewise held that competitors are not impaired when “competition is possible” without UNEs, *USTA II*, 359 F.3d at 575, and that the Commission must consider the “potential for competition” before requiring unbundling, *Covad Communications Co. v. FCC*, 450 F.3d 528, 541-42 (D.C. Cir. 2006). Indeed, the D.C. Circuit found that the Commission “repeatedly justify[ed] its unbundling determinations [in the *Triennial Review Remand Order*] on the basis of both actual *and potential* competition,” and cited more than a dozen instances in that order in which the Commission did so. *Covad*, 450 F.3d at 540-41. The D.C. Circuit did not disturb any of these prior holdings in *Verizon*, “emphasiz[ing]” that it was “not consider[ing] whether § 251 foreclose[d] the FCC from mandating unbundling” on the evidence Verizon compiled in support of its forbearance petition, a question that the court held “was not at issue in th[e] appeal.” 570 F.3d at 300.

Although the D.C. Circuit left open the possibility that the Commission could justify a different approach in the forbearance context, a long line of Commission precedent in a variety

of contexts holds that the Commission will not limit its assessment of competitive marketplace conditions in a dynamic and rapidly changing marketplace to actual competition, as measured by an incumbent's market share. The same is true in the context of eliminating UNE rules, where the D.C. Circuit found that the Commission had "consistently considered *both* actual and potential competition" in determining whether the three criteria in § 10 were satisfied. *Verizon*, 570 F.3d at 303. In responding to the court's remand, which requires the Commission to "consider whether and how the existence of potential competition would affect its § 10 forbearance analysis" as opposed to considering market share as the dispositive factor, *id.* at 305, the Commission should find that it is required to consider potential competition under the forbearance criteria, just as in the context of the statutory impairment standard.

As an initial matter, however, market share can provide dispositive evidence that UNE requirements should be eliminated: at a minimum, where competitors are already serving half or more of the mass-market lines in a geographic area, there is no basis for imposing unbundling requirements on the incumbent LEC, which is only one of many competitors. That is happening in more and more areas around the country, as incumbents' mass-market customers increasingly switch to the cable, wireless, and IP-based services described above. Where competitors serve more lines than incumbents, there can be no justification for imposing UNE requirements on only one of the many marketplace competitors. In such circumstances, eliminating unbundling mandates "is in the public interest" because it "place[s] intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms." *Omaha Order* ¶ 78. Leveling the regulatory playing field where competitors have already made such extensive inroads ensures that competition in these areas will continue to develop undistorted by the "costs of unbundling," which include "reducing the incentives to

invest in facilities and innovation, and creating complex issues of managing shared facilities.”
Id. ¶ 76.

But the Commission cannot stop its analysis at market share, as a long line of Commission precedent — not before the D.C. Circuit in *Verizon* — makes clear. Consistent with standard economic analysis, the Commission held in those decisions that it must consider both actual *and potential* competition when assessing competitive marketplace conditions in a rapidly changing and developing marketplace. Thus, the Commission held that, where new technologies and new providers are emerging, competition “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve.” *Wireline Broadband Order* ¶ 50. Snapshots of an incumbent’s market share necessarily are “premised on data that are both limited and static” because they “fail to recognize the dynamic nature of the marketplace forces,” including the growth of and investment in “existing and developing platforms.” *Id.*⁴²

In particular, market-share analysis “may misstate the competitive significance of existing firms and new entrants.” *Verizon-MCI Merger Order*⁴³ ¶ 74. The Commission has recognized further that “the presence and capacity of other firms matter more for future

⁴² See also Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 FCC Rcd 7872, ¶ 26 (1995) (“evidence concerning dynamic factors” such as “[g]rowth and investment” is a “more persuasive market indicator than evidence concerning static factors” such as “prices or rates of return”); Second Report and Order, *MTS-WATS Market Structure Inquiry*, 92 F.C.C.2d 787, ¶ 133 (1982) (“Regulatory policy must take cognizance of the dynamic factors existing in the marketplace. It should not be based solely on static conditions existing today.”).

⁴³ Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (2005) (“*Verizon-MCI Merger Order*”).

competitive conditions than do current subscriber-based market shares.” *AT&T/Cingular Wireless Merger Order*⁴⁴ ¶ 148. The Commission has similarly found that assessing “the level of competition for LEC services based solely on a LEC’s market share at a given point in time would be too static and one-dimensional.”⁴⁵ Therefore, the Commission has held that it will “consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.” *Id.* ¶ 41. The Commission has applied these principles not only in its UNE forbearance rulings, as the D.C. Circuit found, but also in a host of other contexts where, as here, there are dynamic and emerging competitors with effects not reflected in a static market-share analysis.⁴⁶

The Commission’s findings are also consistent with the Department of Justice and FTC *Horizontal Merger Guidelines*, which state that market shares should “be calculated using the

⁴⁴ Memorandum Opinion and Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522 (2004) (“*AT&T/Cingular Wireless Merger Order*”).

⁴⁵ Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, ¶ 143 (1995).

⁴⁶ *See also, e.g.*, First Report and Order and Further Notice of Proposed Rule Making, *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 16 FCC Rcd 4096, ¶ 298 (2000) (noting that market share of direct broadcast satellite (“DBS”) firms in multichannel video programming distribution market “may understate their competitive importance” given the “fast growth of DBS”); Report and Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, ¶ 103 (1995) (rejecting California commission’s static analysis of wireless market because it did “not fairly reflect the speed at which [the commercial mobile radio services] market structure conditions affecting cellular services are evolving”).

best indicator of firms' *future* competitive significance."⁴⁷ The *Guidelines* also provide for the consideration not merely of existing competitive success, but also of those "entry alternatives that can be achieved within two years from initial planning to significant market impact."⁴⁸ Similarly, the leading antitrust treatise observes that "a variety of circumstances may indicate that a firm's market share" does not accurately indicate its "present or future competitive role."⁴⁹ Relevant "competitive forces" include the "threat of new entrants" and the "presence of close substitute products," which can "limit[] the price competitors can charge [even] without [actually] inducing substitution."⁵⁰ As the Department of Justice has recognized, new "[e]ntry is more likely" in the case of intermodal competitors, which "can differentiate their products" and compete on available service features, where "enough consumers find the products sufficiently substitutable."⁵¹

In short, the Commission has consistently and correctly refused to limit its analysis of competitive conditions in a dynamic marketplace with new and rapidly growing intermodal competitors to the incumbent's market share. There is no basis for the Commission to depart from these well-reasoned decisions, which preclude the Commission from limiting its assessment of whether "a marketplace is . . . sufficiently competitive" to lift particular unbundling requirements solely to determining whether the incumbent's market share has fallen below a particular level. *Verizon*, 570 F.3d at 304. Therefore, although the Commission can use market

⁴⁷ U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* § 1.41 (rev. 1997) (emphasis added).

⁴⁸ *Id.* § 3.2.

⁴⁹ 4 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 950b, at 270 (3d ed. 2009).

⁵⁰ Michael E. Porter, *The Competitive Advantage of Nations: With a New Introduction* 35 (1998).

⁵¹ *November 2008 DOJ Study* at 34.

share as dispositive evidence that forbearance should be granted, it should continue to “consider[] *both* actual and potential competition” in deciding whether to grant forbearance from its UNE rules. *Id.* at 303.⁵²

B. The Commission Should Consider Intermodal and Intramodal Competitors

As shown above, a wide variety of intermodal providers are currently competing for mass-market and enterprise customers. These competitors have grown dramatically since December 2004, when the record closed in the *Triennial Review Remand* proceeding, and are poised to continue growing rapidly in the future. Consistent with Supreme Court and D.C. Circuit precedent, the Commission considered the evidence of intermodal competition at that time in promulgating its UNE rules in the *Triennial Review Remand Order*. *See, e.g., TRRO* ¶¶ 39, 95, 215. In doing so, the Commission noted that it was acting pursuant to D.C. Circuit rulings; that court had twice held that the “Commission cannot ignore intermodal alternatives” in assessing impairment. *USTA II*, 359 F.3d at 572-73; *see USTA I*, 290 F.3d at 429; *TRRO* ¶ 8 & n.16. Those D.C. Circuit holdings followed from the Supreme Court’s holding that the Commission cannot, “consistent with [§ 251(d)(2)], blind itself to the availability of elements

⁵² To the extent the D.C. Circuit’s reference in *Verizon* to the Commission “ensur[ing] competitors’ abilities to compete” is understood as a reference to the impairment standard — which considers competitors’ “ability” to compete without UNEs, 47 U.S.C. § 251(d)(2)(B) — the Commission has previously held correctly that § 251(d)(2) “requires [it] to ask whether requesting carriers are ‘impaired,’ not whether certain thresholds of retail competition have been met.” *TRO* ¶ 114 (quoting 47 U.S.C. § 251(d)(2)). The court’s reference to “competitors’ abilities to compete” could also be understood — so as not to contradict its holding at the outset of its opinion that the Commission had no obligation to “apply its § 251 impairment standard” in the context of a petition for forbearance from unbundling obligations, *Verizon*, 570 F.3d at 301 — as a gloss on Congress’s concern, in § 10(b), with “whether forbearance . . . will promote competitive market conditions,” 47 U.S.C. § 160(b). In that event, as explained above, the Commission has repeatedly and correctly refused to limit its analysis of those marketplace conditions to competitors’ actual success to date, as measured by market share.

outside the incumbent's network," which includes intermodal alternatives. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

In applying § 10 to petitions for forbearance from UNE rules, matters are no different. As explained below, the Commission must take into account all of these intermodal competitors, as well as traditional, intramodal competitors, just as it does under the impairment standard.

First, competition from intermodal competitors, no different from intramodal competitors, ensures that incumbents' rates remain just and reasonable. A firm "in an innovative industry faces competition" where "competitors with different technologies and resources compete on the basis of product attributes and performance as well as price."⁵³ Indeed, incumbents offer numerous discounts on mass-market services and tariffed DS-1 and DS-3 services in an effort to keep customers' business.⁵⁴

Second, intermodal competition protects consumers. As Justice Breyer explained, "meaningful competition" will emerge "in the *un* shared, not in the shared, portions" of networks, *Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part), making intermodal alternatives a particularly important source of competition. It is for this reason that courts have "reaffirm[ed]" that the Commission "cannot ignore intermodal alternatives" to incumbents' networks when addressing unbundling. *USTA II*, 359 F.3d at 572-73.

⁵³ Jerry Ellig, ed., *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues 2* (2001).

⁵⁴ *See, e.g.*, Eric A. Taub, *Talk Is Cheap, if You Ask*, NYTimes.com (Apr. 29, 2009) ("[t]o keep customers from deserting their landlines, the traditional phone companies like AT&T and Verizon offer a slew of discounts"), available at <http://www.nytimes.com/2009/04/30/technology/personaltech/30basics.html>; Reply Comments of Verizon at 61 n.126, WC Docket No. 06-172 (FCC filed Apr. 18, 2007) (discussing Verizon's numerous special access discount pricing plans).

Third, intermodal competition informs the inquiry into whether forbearing from UNE rules is in the public interest. As the D.C. Circuit has held, the “purpose of the [1996] Act” — which helps define the meaning of “public interest” in the context of forbearance from duties imposed in that Act — “is not . . . to guarantee competitors access to ILEC network elements” as UNEs, but instead “to stimulate competition — preferably genuine, facilities-based competition.” *Id.* at 576. Thus, intermodal competition, which relies on alternative, facilities-based platforms, rather than synthetic competition using UNEs, is precisely the type of competition Congress sought to foster.

In sum, the forbearance criteria are consistent with the basic antitrust principle that government regulation of the marketplace is “for the protection of *competition* not *competitors*.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted). As the Commission has recognized, forbearance thus reflects Congress’s recognition that “competition is the most effective means of ensuring” just-and-reasonable rates, protecting consumers, and furthering the public interest. *US WEST Order*⁵⁵ ¶ 31. The Commission, therefore, must incorporate all sources of competition in its forbearance inquiry.

In particular, the Commission cannot exclude competitors from its analysis on the ground that — as some have contended with respect to mass-market wireless services — it is too difficult to compile relevant data. Indeed, the D.C. Circuit recently rejected the Commission’s rationale for refusing to assess competition from an intermodal competitor on the ground that doing so is “difficult,” explaining that such difficulties “may indicate a need to make some simplifying assumptions,” but cannot “justify ignoring altogether a variable so clearly relevant

⁵⁵ Memorandum Opinion and Order, *Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252 (1999) (“*US WEST Order*”).

and likely to affect” the agency’s analysis. *Comcast Corp. v. FCC*, – F.3d –, No. 08-1114, 2009 WL 2633763, at *6 (D.C. Cir. Aug. 28, 2009). The Commission in the past has made such simplifying, though unduly conservative, assumptions in assessing the competitive threat from wireless services,⁵⁶ further precluding any claim that it is too difficult to measure the competitive effects of wireless services.

Nor can the Commission exclude intermodal competitors from its analysis on the ground that — again, as some have contended with respect to mass-market wireless services — the intermodal alternative is not a perfect substitute for wireline service. Here, too, the D.C. Circuit recently rejected the Commission’s attempt to ignore an intermodal competitor (satellite television) on the ground that the intermodal service competes not just on price but also on available service features. The court specifically noted the absence of “any evidence tending to show [that] these inframarginal customers” — that is, those that would base a decision not to switch services on the available features — “are numerous enough” to render the intermodal competition insufficient to constrain the “supposed . . . power” of cable companies. *Id.* at *5.

In the specific context of mass-market wireless services, moreover, the Commission has already recognized that, although “mobile wireless service and wireline telephone services are not perfect substitutes” for *all* customers, they are substitutes for *some* customers: at a minimum, for those who have already cut the cord.⁵⁷ Evidence shows that a large and growing

⁵⁶ See, e.g., *Verizon Six MSA Order* ¶ 27 & n.89, App. B (limiting its analysis to wireline customers that both have already cut the cord and have switched to a wireless carrier unaffiliated with Verizon).

⁵⁷ Memorandum Opinion and Order, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, ¶ 20 (2008) (“*Qwest Four MSA Order*”); see also *Verizon-MCI Merger Order* ¶ 91 (“Even if most segments of the mass market are unlikely to rely upon mobile wireless services in lieu of wireline local services [in late 2005], . . . our

percentage of customers view mobile wireless services as a substitute for wireline services: nearly 35 percent of households at the end of 2008 had cut the cord completely or relied on wireless phones for all, or almost all, of their calls; that number is sure to grow, as nearly 60 percent of adults aged 25-29 relied exclusively or almost entirely on wireless phones at the end of 2008.⁵⁸ The Department of Justice has concluded from such evidence that “[s]ubstantial information . . . demonstrate[s] that substitution from landline to mobile telecommunications services is having a noticeable effect on the number and usage of residential lines served by incumbent landline carriers.”⁵⁹ As in *Comcast*, therefore, there is no “evidence tending to show [that any] inframarginal customers” who do not view wireline and wireless as substitutes “are numerous enough” to prevent wireless services from constraining retail prices for mass-market services. *Comcast*, 2009 WL 2633763, at *5.

CONCLUSION

In responding to the D.C. Circuit’s remand, the Commission should identify the process it will use to conform its UNE rules to current marketplace evidence and the statutory impairment

product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis.”); Report and Order and Memorandum Opinion and Order, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 22 FCC Rcd 16440, ¶ 45 (2007) (citing evidence that “customers are willing to shift usage to wireless . . . in response to changes in relative prices”).

⁵⁸ See *CDC NHIS Report December 2008*, at 1, 3, 7 (Table 2), 10 (Table 3).

⁵⁹ *November 2008 DOJ Study* at 61. To the extent the report went on to compare wireless and wireline prices, however, the analysis in the report is incomplete because, among other things, it excluded prices for bundled local and long-distance service, even though that is how a large and rapidly growing percentage of wireline customers purchase local service today. See *id.* at 66. With respect to substitution, the report also places considerable weight on evidence — namely the Rodini, Ward, and Woroch data, see *id.* at 66 n.364 — that the Commission has previously rejected on numerous grounds. See *Qwest Four MSA Order* ¶ 20 n.73; see generally Letter from Rashann Duvall, Verizon, to Marlene H. Dortch, FCC, at 18-20, WC Docket Nos. 08-24 & 08-49 (May 1, 2009) (discussing the *November 2008 DOJ Study* in greater detail).

standard, and should set forth clear standards and binding timelines that will apply when doing so, consistent with the foregoing comments.

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