

In addition, the Commission should closely scrutinize whether and to what extent there are economic and operational barriers that preclude the Commenters and other competitive service providers from obtaining additional capacity in the Phoenix MSA through self-supply.

Established principles of market power analysis direct the Commission to consider how *existing competitors* are conducting business in the Phoenix MSA and may be impacted by a grant of forbearance to Qwest.

IV. APPLICATION OF A MARKET POWER STANDARD COMPELS DENIAL OF QWEST'S REQUEST FOR FORBEARANCE FROM UNE UNBUNDLING OBLIGATIONS

A. The Relevant Product Market And Geographic Markets

In defining product markets for purposes of a market power review, the general principle the Commission applies is to identify and aggregate consumers with similar demand patterns.⁷² More specifically, the Commission distinguishes product markets based on whether the services offered to one group of consumers are adequate or feasible substitutes for the services offered to the other group.⁷³ As stated by the Commission: "A relevant market includes 'all products that consumers consider reasonably interchangeable for the same purposes.'"⁷⁴ In addition, the Commission considers whether firms require different assets and capabilities to successfully target one group of consumers versus another group.⁷⁵

⁷² *Omaha Forbearance Order*, at ¶ 18.

⁷³ *SBC/Ameritech Order*, at ¶ 68.

⁷⁴ *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 39 (2005). *See also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 71 (2004).

⁷⁵ *Id.*

In its petition seeking forbearance in the Omaha MSA, Qwest proposed that the Commission adopt as a single product market the market for services provided under Section 251(c) within the boundaries of the Omaha MSA.⁷⁶ The Commission rejected Qwest’s broad proposal, finding that “such a wide scope of services in the proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers.”⁷⁷ The Commission instead delineated two product markets: the mass market (comprised of residential and small business customers) and the enterprise market (comprised of medium and large business customers).⁷⁸

The Commenters recommend that the Commission adopt two product markets for purposes of conducting its UNE forbearance analysis in the instant proceeding: the residential market and the business market.⁷⁹ Residential customers have different service needs and engage in a different decision-making process than do business customers.⁸⁰ Residential customers typically require basic voice capability and have lesser data demands, whereas business customers, on the whole, have higher volume, sophisticated voice and data needs. Residential customers are served through mass marketing techniques, including regional advertising, and typically do not enter into long-term agreements, while businesses of all sizes

⁷⁶ *Omaha Forbearance Order*, at ¶ 21.

⁷⁷ *Id.*

⁷⁸ *Id.*, at ¶ 22. *See also ACS Dominance Order*, at ¶ 17.

⁷⁹ As noted in the *Qwest 4-MSA Order*, the Commission to date has declined to “formally define product markets pursuant to a market power analysis for purposes of [its] UNE forbearance analysis ...” *Qwest 4-MSA Order*, at n.129.

⁸⁰ *SBC/Ameritech Order*, at n.146.

tend to be served under individual, multi-year contracts marketed and administered through direct sales contacts.

The network facilities, technological resources, and administrative capabilities needed to provide service vary considerably between residential and business customers. Consequently, service providers tend to focus their marketing efforts on one or the other group of customers and do not target both equally.⁸¹ Additionally, as an administrative matter, much of the competitive data that is so important to the Commission's UNE forbearance analysis is collected and compiled on a residential/business basis.⁸² Finally, the Qwest petition itself maintains a clear line between residential and business customers even though it uses the enterprise market and mass market nomenclature.

In short, the services purchased by residential and business customers, as well as the assets and capabilities necessary to serve them, are not substitutable. Thus, residential and business customers belong in different product markets for purposes of the Commission's Section 10 analysis.⁸³

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

⁸¹ They certainly do not market to both groups in a single campaign. Indeed, Qwest's website promoting its retail products maintains a clear distinction between residential and business customer services.

⁸² On a number of occasions, Commission staff has recognized this fact and requested that cable competitors produce line count information separately for their business and residential customers. *See, e.g.*, Letter from J.G. Harrington, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Jun. 17, 2008).

⁸³ Should the Commission decide to retain the mass market and enterprise market product market categories used in its previous analyses, however, the Commenters suggest that for purposes of its UNE forbearance review, the Commission define mass market to include only residential customers and the enterprise market to include all business customers.

the Omaha MSA.⁸⁴ In subsequent forbearance orders, the Commission followed the same course, holding that the petitioning ILEC's service territory within an MSA was the proper geographic market upon which to base its Section 10 analysis since "the record indicates [no] compelling reasons to narrow it."⁸⁵ The Commenters agree that, on remand, the *Verizon 6-MSA* and the *Qwest 4-MSA* forbearance reviews should be conducted on an MSA-wide basis and that the instant proceeding – and any subsequent dockets in which the ILEC seeks forbearance from UNE obligations in its service area within a particular MSA – also should be evaluated on that basis.

B. Relevant Data Must Be Collected From All Current And Potential Suppliers

Clearly, a comprehensive assessment of whether the petitioning party continues to possess market power in a specific product and geographic market cannot be made unless all data regarding market participants is presented for review and analysis. The petitioning party bears the burden of identifying and (to the extent possible) producing all such information that it deems relevant to the Commission's analysis.⁸⁶ It is vitally important that all actual and potential suppliers in a particular product and geographic market be identified at the commencement of a Section 10 forbearance proceeding and that all data necessary to evaluate each supplier's presence (or potential presence) in the market be placed in the record and made available to the Commission and interested parties in a timely manner.

⁸⁴ *Omaha Forbearance Order*, at ¶¶ 23-24.

⁸⁵ *Verizon 6-MSA Order*, at ¶ 22. See also *Qwest 4-MSA Order*, at ¶ 15; *ACS Dominance Order*, at ¶ 32.

⁸⁶ See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56 (rel. Jun. 29, 2009) ("*Forbearance Rules Order*"), at ¶ 20.

Recently, the Commission recognized the importance to its Section 10 analysis of complete, accurate and timely data regarding the nature and extent of competitive activity as well as the responsibility of the petitioning party to produce such information.⁸⁷ In formulating its new procedural rules for the conduct of forbearance proceedings, the Commission included a “complete-as-filed” requirement to ensure that a petitioner for forbearance produces all data or information it intends to rely on – including, importantly, data regarding all actual and potential competitors in a particular market – with its petition.⁸⁸ Moreover, to the extent a petitioner seeks to rely on information in the possession of third parties, the petitioner must identify the data or information sought and the parties that possess it.⁸⁹

In its petition and accompanying materials, Qwest has proffered a variety of general information on the entities it contends are competing today on the wholesale and/or retail level in the Phoenix MSA. As discussed in more detail below, Qwest’s showing suffers from a host of shortcomings. First, the data is largely anecdotal. Qwest urges the Commission to grant forbearance from UNE obligations on the basis of promotional materials, marketing statements, and broad generalizations concerning the state of competition in the Phoenix MSA. Reliance on this type of information to justify forbearance would result in a disposition of Qwest’s petition that is not properly grounded in reality.

Second, the limited empirical data that Qwest has actually produced is either too generic, too conclusory, or is not subject to verification. These defects render the data essentially useless to the Commission’s forbearance analysis and prove that Qwest has not made the required *prima facie* showing. For example, Qwest employed the research firm Harte-Hanks to

⁸⁷ See *Forbearance Rules Order*, *supra*.

⁸⁸ *Id.*, at ¶¶ 16-19. See also 47 C.F.R. § 1.55.

⁸⁹ *Forbearance Rules Order*, at ¶ 17.

provide business market share data for the Phoenix MSA. According to Qwest, “Harte-Hanks conducted extensive interviews with over 1,500 business customers in the Phoenix MSA to determine what telecommunications services the customers are purchasing, and which carrier(s) the customers are purchasing the services from.”⁹⁰ Qwest has produced the claimed results of the Harte-Hanks survey but those results consist of a single chart with no explanation or description of the methodology used to conduct the survey or compile the results.⁹¹ In addition, Qwest has produced data from GeoTel purportedly showing the general location of competitive fiber in the Phoenix MSA and the competitive fiber-lit buildings within the greater Phoenix area.⁹² Unfortunately, this data is not sufficiently disaggregated to be of any use.

Qwest notes that there is some relevant data that it “has no ability to obtain”⁹³ and it urges the Commission to seek such data “directly from the CLECs serving the Phoenix MSA – at a minimum from the largest CLECs serving the Phoenix MSA – Cox, AT&T, Verizon, Integra, tw telecom, PAETEC/McLeod and XO.”⁹⁴ The Commenters recognize the importance to the Commission’s UNE forbearance analysis of having complete, reliable, and up-to-date data on the precise nature, location, and extent of facilities-based competition in the product and geographic markets at issue. Where such information is not available to Qwest and is not offered voluntarily, the Commission should require the production of such data. In past UNE forbearance dockets, to the full extent they possessed such information, the Commenters have

⁹⁰ *Second Phoenix Petition*, at 27.

⁹¹ *Second Phoenix Petition*, Declaration of Robert H. Brigham Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area (“*Brigham Declaration*”), at ¶ 33 and Confidential Exhibit 6.

⁹² *Second Phoenix Petition*, at 30-31 and Confidential Exhibits 8A and 8B.

⁹³ *Second Phoenix Petition*, at 26.

⁹⁴ *Id.*, at 30.

willingly and voluntarily submitted it on the record.⁹⁵ In keeping with this approach, these comments include data from XO Communications, LLC, one of the CLECs named by Qwest in the instant petition regarding its facilities-based operations in the Phoenix MSA. The Commenters urge all other facilities-based competitors with relevant empirical evidence to make such information available to the Commission and interested parties as soon as possible.⁹⁶

C. The Commission Must Determine, Separately For Each Product Market, Whether Qwest Continues To Possess Market Power

Without question, the market power determination is the heart of the Commission’s analysis. Market power is assessed based on the state of competition in the product and geographic market at issue.⁹⁷ As shown in Section V below, Qwest has utterly failed to prove that there is sufficient facilities-based competition in any product market in the Phoenix MSA.

V. THE STATE OF FACILITIES-BASED COMPETITION IN THE ENTERPRISE MARKET IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER

In the course of seeking forbearance in the *Qwest 4-MSA* docket, Qwest failed to demonstrate that the various competitive providers it listed represented a sufficient measure of facilities-based competition to warrant relief under the Commission’s forbearance analysis. Despite the passage of two years, Qwest once again fails to make the case that there is a

⁹⁵ See, e.g., Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 23, 2008) (“*CLEC Data Ex Parte*”); Letter from Genevieve Morelli, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed May 20, 2008) (“*XO Data Ex Parte*”).

⁹⁶ Of course, this does not absolve Qwest from the burden to establish a *prima facie* case that forbearance is warranted, to produce all data in its control, and to identify all data from third parties that it believes is relevant to its case.

⁹⁷ See, e.g., *Omaha Forbearance Order*, at ¶ 25.

sufficient facilities-based competitive presence to justify forbearance from Section 251(c)(3) UNE unbundling obligations.

Qwest takes little care in distinguishing retail competition in general from facilities-based competition, either retail or wholesale. Yet the presence of facilities-based competition is the touchstone of the requisite forbearance analysis. To the extent there is some actual competition in Phoenix today (and the Commenters do not contend there is none), Qwest is largely silent regarding the extent to which the competitive entities that provide service are using their own facilities in contrast with depending heavily upon the very UNEs for which Qwest is seeking forbearance.⁹⁸ The Commission stated emphatically as early as the *Omaha Forbearance Order* that:

Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing “last mile” facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.⁹⁹

In 2008, when denying Qwest’s petition for forbearance from unbundling obligations in Phoenix and three other of its largest markets, the Commission repeatedly

⁹⁸ In the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest was “successfully providing local exchange and exchange access services *without relying on Qwest’s loops and transport.*” *Omaha Forbearance Order*, at ¶ 64 (emphasis supplied).

⁹⁹ *Omaha Forbearance Order*, at ¶ 60. In the *Anchorage Forbearance Order*, the Commission found the extent to which ACS’s competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to “those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a).” *Anchorage Forbearance Order*, at ¶ 21. See also *id.*, at ¶ 23 (“Forbearing . . . where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.”).

underscored the need for Qwest to demonstrate the presence of sufficient last-mile facilities deployed by its competitors in the geographic markets at issue (as well as its failure to do so). On the one hand, the Commission found that “[t]he evidence also shows ... that, in serving mass market and enterprise customers, [Qwest’s] intramodal competitors rely significantly on access to Qwest’s last-mile network facilities, including UNEs, and Qwest’s other wholesale services in all four MSAs.”¹⁰⁰ On the other hand, the Commission concluded that “the record [fails to] reveal that other competitors in these MSAs have deployed their own extensive last-mile facilities for use in serving the enterprise market.”¹⁰¹

The need for an ILEC to demonstrate actual facilities-based competition within the relevant geographic market is true when petitioning for forbearance from unbundling requirements regardless of the specific legal standard that is applicable. Under a market power analysis, as advocated herein, both actual and potential market analyses are required for both retail and wholesale markets. Nonetheless, Qwest provides scant empirical evidence regarding the existence of actual facilities-based (*i.e.*, non-UNE or Qwest wholesale services-based) last-mile competition in the relevant geographic market – the Phoenix MSA – for the business product market on either a retail or a wholesale basis. Qwest’s deficiency in data speaks volumes and demonstrates that forbearance is still not warranted.

As further shown below, Qwest has failed to provide sufficient evidence of the actual wholesale or retail *facilities-based* competition that is the absolute prerequisite to a finding that the consumer protection requirements of Section 10(a) have been met and the grant of forbearance in the Phoenix MSA is justified. The evaluation of Qwest’s request must be founded

¹⁰⁰ *Qwest 4-MSA Order*, at ¶ 16.

¹⁰¹ *Id.*, at ¶ 36.

upon facilities-based competition, and not simply on competition at the retail level in general, a tenet which Qwest conveniently forgets again and again, as detailed below. Thus, for example, Qwest's introductory reference to telephone survey results obtained on Qwest's behalf by the research firm of Harte-Hanks are completely beside the point. As Qwest explains, the survey indicated that Qwest is considered by business end users with five or more employees as the primary carrier between *****BEGIN CONFIDENTIAL***** *****END** **CONFIDENTIAL***** of the time.¹⁰² But the survey results as presented by Qwest, in addition to the deficiencies discussed in Section IV.B, *supra*, provide no insight whatsoever into the amount of facilities-based competition in the enterprise market, which is the proper focus of the Commission's analysis in considering Qwest's forbearance request.

As detailed below, Qwest fails to demonstrate the presence of adequate facilities-based competition to business customers to justify the UNE forbearance requested.

A. Cable Competition

Qwest relies heavily on the presence of cable competition in the Phoenix MSA.¹⁰³ While offering generalities regarding the scope of competition in the business market from Cox, Qwest largely fails to provide the Phoenix-specific, granular data necessary to measure and evaluate the presence of facilities-based competition in that market from this cable company. Instead, Qwest relies upon insufficient and overly-broad representations (and estimates) of competition by Cox *nationally*. This type of presentation makes it largely impossible to discern the extent of actual facilities-based competition from cable in the Phoenix MSA. For example, Qwest states generally that Cox "competes vigorously with Qwest in the business market,

¹⁰² *Second Phoenix Petition*, at 27. See also *Brigham Declaration*, Confidential Exhibit 6.

¹⁰³ *Second Phoenix Petition*, at 13-16, 26-27.

providing a broad range of business products to small business and enterprise customer of every size in the MSA.”¹⁰⁴ In support, Qwest points to the fact that Cox has apparently established a separate marketing division “focused specifically on the small, medium, and enterprise business market segments,”¹⁰⁵ but Qwest has no Phoenix-specific data to provide about the competition presented by Cox.

Significantly, in the end, Qwest has to concede that it is without hard data regarding the extent to which Cox serves customers in Phoenix using its own facilities or the numbers of commercial buildings that Cox has lit (let alone the extent to which Cox serves each of those buildings, *e.g.*, one customer, one or more floors, or the entire building).¹⁰⁶ Given the need to demonstrate actual competition on a facilities-basis and the dearth of information regarding effective facilities-based competition from Cox in Phoenix in the business market, the Commission cannot grant Qwest the requested forbearance from unbundling requirements based on the current record. The Commenters look forward to the opportunity to evaluate such data if and when it becomes available.

Qwest also fails to address the points made by Cox in its comments on Qwest’s earlier attempt to obtain forbearance in the Phoenix MSA. Cox explained that it is not franchised to provide cable services in the entire Phoenix MSA.¹⁰⁷ Qwest has offered no evidence that this situation has changed. Further, Cox noted that it does not provide telephone service throughout the entire MSA and questioned Qwest’s failure to identify in which of its wire centers Cox has

¹⁰⁴ *Id.*, at 27-28.

¹⁰⁵ *Id.*, at 28 (emphasis in original).

¹⁰⁶ *Id.*

¹⁰⁷ Comments of Cox Communications, Inc., WC Docket No. 07-97 (filed Aug. 31, 2007), at 21.

deployed facilities.¹⁰⁸ Qwest has taken no steps to address these deficiencies in its second petition.

In addition to Qwest’s failure to address the concerns described above, Qwest ignores other problems inherent to cable-based provision of services to the business market in Phoenix due to a lack of physical proximity, technical inability, or both.¹⁰⁹ To the extent Cox has deployed some amount of fiber or other infrastructure within the Phoenix MSA that can support high-capacity telecommunications services, they can only serve businesses within close proximity to their existing coaxial network,¹¹⁰ a current operational reality which cautions against any broad conclusions regarding the “vigor” of competitive business services offered by Cox without engaging in a more detailed analysis. What the New York State Department of Public Service Staff stated four years ago still holds true today:

[C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not ‘cabled-up’ (i.e. current cable-based services are television rather than voice driven) and larger businesses generally have T-carrier systems for their telecommunications needs . . .¹¹¹

Qwest offers no hard evidence that Cox is providing extensive facilities-based telephony services to business customers in Phoenix today. Instead, Qwest relies on Cox’s promotional materials and broad, non-market specific generalizations. As it did two years ago

¹⁰⁸ *Id.*

¹⁰⁹ Based on industry norms, business customers for standard “off-the-shelf” services expect to receive service within 30 calendar days.

¹¹⁰ Indeed, the Cox promotional material quoted at length in the *Brigham Declaration* makes clear the ability to provide T-1s at a reasonable cost where there is already a coaxial feed. *Brigham Declaration*, at ¶ 35.

¹¹¹ See *Department of Public Service Staff White Paper*, Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission, (Jul. 6, 2005) (“*NYS Staff White Paper*”), at 31.

when seeking relief in the *Qwest 4-MSA* proceeding, Qwest relies solely on the presence of the franchised cable networks in each MSA as evidence that the cable companies possess “the necessary facilities to provide enterprise services.”¹¹² Qwest presupposes that, should the Commission require Cox to provide data regarding its access lines and network, the data will make Qwest’s case for Qwest. There is no reason to presume this in advance.

To the extent that Cox relies on its hybrid fiber/coaxial cable system rather than other modes of delivery to provide telecommunications services to business customers, cable system technology still faces serious operational hurdles before it can be used to provide business-level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Indeed, based on information available to XO, the Commenters believe that Cox is providing business products on a facilities-basis to tenants in no more than about ***** BEGIN HIGHLY CONFIDENTIAL*****

*****END HIGHLY CONFIDENTIAL***** within Phoenix, out of the approximately 133,000 commercial buildings¹¹³ within the MSA, *well below* ***** BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** of commercial buildings.

Within many of those buildings Cox’s network does reach, Cox may only be serving, or be capable of serving without significant additional investment or securing of rights

¹¹² See *Qwest 4-MSA Petition –Phoenix*, at 21-22.

¹¹³ Information obtained by the Commenters from GeoResults for these comments identifies 133,435 commercial buildings in the Phoenix MSA. This information updates data obtained from GeoResults in April 2008 for WC Docket No. 07-97, which identified 127,763 commercial buildings in the Phoenix MSA. See Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed April 23, 2008) (“*April 23rd Letter*”).

from the owner or landlord, a small subset of tenants, and only certain floors. In order to provide business-level telephony services on a scale which might warrant serious consideration of a forbearance request, the Commenters submit that it is probable that Cox would first have to make significant additions to its network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of business-level services they can accommodate and the competitive presence that they represent.

Cox's business level services are subject to other constraints. The services to a building have a limited capacity if provided over Cox's core cable network. Based on the Commenters' experience with cable operators nationally, and XO's experience with Cox in the Phoenix MSA in particular, Cox's present hybrid fiber/coaxial network cannot readily support more than a T-1 level of capacity over a given access line. Moreover, the extent of competition Cox can bring to any building from cable-based T-1 service is based on the number of such lines present on the lateral build. There is limited capacity through any such facility and while a T-1 may, if it is not competing for that capacity with other customers, perform near that level, the service quickly becomes degraded as other customers whose service relies on the same node or head end use their service simultaneously.¹¹⁴

Thus, whereas business customers might try Cox services where they are available, they are not necessarily a first choice if provided in this manner, which does not ensure business customers have designated facilities and capacity. More information is required from Cox before the Commission and interested parties can ascertain the extent to which Cox offers

¹¹⁴ In fact, the disclaimer on Cox's website for Business Internet(SM) service states that "Cox cannot guarantee uninterrupted or error-free Internet service or the speed of your service ... Actual modem speeds vary. Number of users or network management needs may require Cox to modify upstream and/or downstream speeds. Other restrictions apply." See <http://ww2.cox.com/business/northernvirginia/data/business-internet.com>.

its business services using non-dedicated facilities. Based upon the record developed by Qwest, the Commission cannot find that there is sufficient competition from cable companies in the business market to support forbearance from UNE obligations in the Phoenix MSA.

B. Competition From CLECs

Qwest attempts to justify UNE forbearance in the business market within Phoenix on the purported existence of “at least 30 unaffiliated CLECs actively competing with Qwest for business customers in the Phoenix MSA.”¹¹⁵ Qwest provides some data regarding the scale of access lines served by its competitors. Significantly, however, Qwest fails to provide any data regarding the extent of competition in the business market from CLEC-owned last-mile facilities. Indeed, Qwest acknowledges that its data “*excludes* access lines served via (1) entirely CLEC-owned network facilities, (2) network facilities leased from non-Qwest providers, and (3) the purchase of Special Access service from Qwest.”¹¹⁶ “Entirely CLEC-owned network facilities” and “network facilities leased from non-Qwest providers” serving the last mile are the very data needed by the Commission to evaluate Qwest’s petition for forbearance from unbundling obligations. Consequently, Qwest’s petition fails to demonstrate that CLECs do not remain heavily dependent on unbundled network elements, especially unbundled loops and EELs. This is definitely the case for XO, one of the Commenters, as detailed further below.

In fact, the petition actually provides a strong demonstration just how important continued provision of UNEs is to maintaining the current levels of competition in Phoenix. Qwest notes that it provides competitors with “over *****BEGIN HIGHLY**

¹¹⁵ *Second Phoenix Petition*, at 28.

¹¹⁶ *Id.*, at 28-29 (emphasis in original).

CONFIDENTIAL*** ***** END HIGHLY CONFIDENTIAL***** equivalent business lines,”¹¹⁷ the overwhelming number of which are unbundled facilities.

Qwest acknowledges that only *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** of the CLECs, or *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** of the number that Qwest touts, serve at least some of their business customers using their own facilities.¹¹⁸ Yet Qwest’s petition provides none of the critical, and significantly more relevant, information regarding the extent to which these competitors are using their own loop facilities to reach business customers as opposed to Qwest facilities. This showing is absolutely critical if Qwest is to meet its burden in seeking forbearance of its unbundling requirements. And although Qwest contends that *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** of the CLECs use Qwest QLSP finished wholesale services and *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** resell Qwest’s finished services, the data Qwest includes with its petition makes clear the minimal impact on retail competition these two wholesale alternatives have made relative to unbundled facilities. Highly Confidential Exhibit 7 to Qwest’s petition demonstrates that, as of December 31, 2008, resale by CLECs accounted for only *****BEGIN HIGHLY CONFIDENTIAL***** **CONFIDENTIAL*****

***** END HIGHLY CONFIDENTIAL***** On the other hand, this same Exhibit shows that *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** incorporate unbundled loops or EELs.

¹¹⁷ *Id.*, at 29.

¹¹⁸ *Id.*, at 28-29.

Qwest absolutely fails to address the extent to which the *****BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** CLEC fiber networks reach, and can support, the offering of a full range of services, within a commercially reasonable period of time, to individual customer locations in the Phoenix MSA. Qwest erroneously assumes that merely passing a customer location with backbone fiber facilities necessarily enables the owner of competitive fiber to provide service at that customer location.¹¹⁹ This would explain Qwest’s excessive reliance in the petition on the number of fiber miles deployed by the various competitors.¹²⁰ While some competitive carriers have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings. Carriers must construct building “laterals” to serve customers located in those commercial buildings. The construction of laterals, even of relatively short length, is extremely difficult, time consuming, and costly. According to XO, the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3’s of capacity.¹²¹

Qwest claims that competitive fiber is now in place in over ***** BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** commercial buildings in the Phoenix MSA. Not only is this fewer than ***** BEGIN HIGHLY**

¹¹⁹ See, e.g., *Second Phoenix Petition*, at 31; *Brigham Declaration*, Confidential Exhibits 8A and 8B.

¹²⁰ See *Second Phoenix Petition*, at 30 (“According to GeoTel, approximately ***** BEGIN CONFIDENTIAL***** 3000 *****END CONFIDENTIAL***** miles of fiber, owned by approximately 25 unaffiliated providers is now in place in the Phoenix MSA.”); see generally *id.*, at 31-38.

¹²¹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at ¶19 (“*Govil Declaration*”).

CONFIDENTIAL*** *****END HIGHLY CONFIDENTIAL***** of the more than 133,000 commercial buildings in the Phoenix MSA, this is a gross overstatement of reality. XO, in its efforts to obtain fiber from alternate sources, has obtained confidential information subject to non-disclosure arrangements regarding what it believes are the seven largest competitive networks in the Phoenix MSA, plus its own network,¹²² and the number of lit commercial buildings is, in the aggregate, no more than on the order of ***** BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** buildings.¹²³ Further, even this number is an overstatement in that it double-counts those buildings to which two or more competitors have brought fiber.

The GeoResults data for the Phoenix MSA reveals that only a few hundred commercial buildings in the Phoenix MSA, out of more than 133,000 commercial buildings, are “CLEC Lit Commercial Buildings.”¹²⁴ More specifically, the data shows that only 0.19% of commercial buildings are lit by CLECs, which amounts to fewer than 270 buildings. The GeoResults data also examines the question of whether the limited number of buildings served by CLECs account for a disproportionate percentage of total demand. Even assuming any CLEC has the ability to serve the total demand in any commercial building to which it has any facilities (an unrealistic assumption), there are no wire centers in the Phoenix MSA where CLECs have Addressable Demand Market Share in excess of 10%. In addition, the GeoResults data shows

¹²² XO currently has lit at least a portion of ***** BEGIN HIGHLY CONFIDENTIAL***** ***** END HIGHLY CONFIDENTIAL***** buildings within the Phoenix MSA.

¹²³ The principal reason for the discrepancy, the Commenters submit, is that Qwest’s number likely includes apartment buildings and other residential multi-unit dwellings (“MDUs”) served by the cable operator.

¹²⁴ A “CLEC Lit Commercial Building” is defined as any Commercial Building that has fiber-enabled network office equipment that has been placed there by one or more CLECs, which generally indicates that a CLEC has deployed its own fiber or has a long-term lease of dark fiber to that building. See *April 23rd Letter, supra*.

that in 55 of the 72 wire centers in the Phoenix MSA, CLECs have Addressable Demand Market Share of less than 1%.

In reality, however, the lighting of a commercial building by a competitive provider does not mean that all tenants within a building can be accessed by the competitive fiber that has been brought to the property. Competitors often, if not predominantly, bring fiber to a building to serve particular tenants. This means that the fiber typically is not available to other CLECs wishing to serve separate commercial tenants within the same building. Thus a CLEC, even if it can use another competitor's fiber to get to a point on the property, will have to obtain the rights from the property owner to access the particular floor or premise it seeks to serve and make the additional investment needed to reach that space. In contrast, the ILEC historically has more commonly wired the entire building and can support competitive access to any tenant through unbundled loops without additional investment.

Qwest, cognizant of the shortcomings of the CLEC-related data it has presented to the Commission, asks the Commission to seek access line data from CLECs serving the Phoenix MSA.¹²⁵ Specifically, Qwest suggests that the Commission obtain information regarding the number of business customers each serves and the number of access lines. The Commenters submit that these particular categories of data would not be particularly meaningful or helpful to address Qwest's request for forbearance. Instead, the Commission should request information from CLECs regarding the number of commercial lit buildings served (with business-level customers) and the business lines provided to business level customers using self-provisioned last-mile connections.

¹²⁵ *Second Phoenix Petition*, at 30.

C. Competition from VoIP Providers

In addition to cable and wireless services, Qwest points to VoIP services (“VoIP”) in its attempt to demonstrate sufficient competition to warrant forbearance in the business market.¹²⁶ In its request for forbearance in the *Qwest 4-MSA* proceeding, the ILEC did not look to competition from VoIP providers to support its request. In the instant petition, Qwest fails to provide any meaningful data that circumstances have changed and VoIP providers in the Phoenix MSA provide actual *facilities-based* last-mile alternatives to Qwest. Moreover, Qwest fails to provide take rates or any other specifics regarding the success of stand-alone VoIP providers within the Phoenix MSA, and with business customers in particular. Instead, Qwest merely refers to nationwide promotional literature of several VoIP providers to substantiate its claims that VoIP providers make a meaningful contribution to competition in the Phoenix MSA for purposes of a forbearance analysis.¹²⁷ Thus, the Commission should exclude VoIP providers as contributors to facilities-based last-mile competition in Phoenix.

Further, while a number of carriers serving the business market in Phoenix, including XO, are beginning to integrate VoIP into their overall package of business services, these VoIP offerings typically are part of a larger service bundle of the type increasingly demanded by business customers and which stand-alone VoIP providers simply cannot match. As such, these carriers’ VoIP services do not provide a separate source of facilities-based competition from their fiber networks accounted for elsewhere, as complemented by wholesale offerings, including UNEs, purchased from Qwest. Moreover, in the business market, stand-alone VoIP providers are not material to the forbearance analysis because customers interested in

¹²⁶ See *id.*, at 32. As with wireless services, Qwest does not rely on over-the-top VoIP (“O/VoIP”) services to demonstrate competition in the business market.

¹²⁷ See *Brigham Declaration*, at ¶¶ 46-48 and nn.105-113.

IP-enabled capabilities need to integrate them into a larger suite of business services to meet their complex and diverse requirements. As such, stand-alone VoIP services are simply not an independent source of facilities-based competition.

Moreover, Qwest has provided no empirical data regarding the extent to which VoIP services are being provided over Qwest's facilities versus the facilities of other facilities-based carriers in Phoenix. Thus, the Commission should not (and cannot) include the retail market presence of VoIP providers in its analysis as a separate source of information regarding, or basis for, whether there is sufficient facilities-based competition to warrant forbearance from Section 251(c)(3) unbundling obligations in the business market in the Phoenix MSA.¹²⁸

D. Wholesale Market Alternatives

Qwest also attempts to justify its forbearance requests for the business market on the basis of purported wholesale alternatives to the use of its Section 251(c)(3) network elements.¹²⁹ Several Commissioners noted in the *Verizon 6-MSA Order* that a duopoly environment founded on competition between a cable operator and the ILEC is not adequate to

¹²⁸ O/VoIP should not factor into any forbearance analysis where unbundling regulations are at issue. By definition, O/VoIP rides the facilities of another provider, which in many cases is likely to be Qwest itself. More specifically, O/VoIP calls rely on an underlying broadband connection that in many cases is obtained from Qwest. Therefore, to include any O/VoIP in a forbearance analysis of competition would be double-counting. Were the Commission to rely on competition from such providers, it could lead to the anomalous and unsound result that a grant of forbearance from Section 251(c)(3) unbundling obligations would undermine the ability of O/VoIP providers to continue to operate, by restricting the ability of carriers that rely on ILEC copper loops to offer broadband services to their customers from participating in the broadband market. *See, e.g.,* Comments of the Virginia State Corporation Commission, WC Docket No. 06-172 (filed Dec. 15, 2006), at 7-8.

¹²⁹ *See Second Phoenix Petition*, at 33-39. Qwest does not contend, as it did in its earlier 4 MSA petition, that forbearance from Section 251(c)(3) unbundling requirements is appropriate in the business market in Phoenix because competitors are using Qwest's special access services to serve enterprise customers.

ensure sustainable competition in the absence of regulation.¹³⁰ Experience has shown that the presence of multiple wholesale facilities-based alternatives independent of the ILEC is a vital component of ensuring that a competitive market will be maintained if a decision is made to forbear from enforcing an ILEC’s unbundling obligations is made. In the *Omaha Forbearance Order*, the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly in the Omaha MSA.¹³¹ The Commission predicted that, in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.¹³²

Unfortunately, the Commission’s predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”), a former competitor in the Omaha MSA dependent on access to Qwest’s last-mile facilities, has petitioned the Commission to reinstate Qwest’s Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission’s “‘predictive judgment’ that Qwest would offer wholesale access to dedicated facilities on reasonable terms

¹³⁰ See Statement of Commissioner Michael J. Copps, Concurring, *Verizon 6-MSA Order* (“The Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace.”); Statement of Commissioner Jonathan S. Adelstein, Concurring, *Verizon 6-MSA Order* (“Finally, as I’ve stated before, I continue to believe that the Act contemplates a competitive environment based on more than a simple rivalry – or duopoly – of a wireline and cable provider.”).

¹³¹ *Omaha Forbearance Order*, at ¶ 71. The Commission explained its belief that “the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under Sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct.” *Id.*

¹³² *Id.*, at ¶ 67.

and conditions once released from the legal mandate of Section 251(c) has proven incorrect.”¹³³ McLeodUSA detailed it made repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and that “Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.”¹³⁴ Ultimately, McLeodUSA made the decision that, in the absence of unbundling and wholesale alternatives, it had to leave the Omaha market.

In short, if Qwest and a single competitor maintain the only last-mile facilities available to serve customers, there is no evidence to support the prediction that, if Section 251(c)(3) forbearance is granted, a sustainable wholesale market will develop or that the retail market behavior of the two carriers will deviate at all from the behavior of Qwest and Cox in Omaha. In that circumstance, without the clear presence of substantial competitive facilities-based wholesale alternatives from multiple competitors, Section 251(c)(3) forbearance certainly is not warranted.

To this end, Qwest relies on the wholesale offerings of several carriers in particular, including Cox, SRP telecom, AGL Networks, Integra, AT&T, XO, Level 3, tw telecom, AboveNet, and 360 Networks. Qwest claims that the overall fiber coverage of the Phoenix MSA by these wholesale providers is extensive.¹³⁵ Yet Qwest overlooks that fact that, today, these providers access with their own facilities substantially fewer than 1000 commercial buildings, without even accounting for double counting, as explained above. Moreover, when a

¹³³ See *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) (“*McLeodUSA Petition*”), at 1.

¹³⁴ *Id.*, at 4. At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.

¹³⁵ *Second Phoenix Petition*, at 38.

competitor lights a building, this does not mean that the property owner or manager has given the carrier access to serve the entire building. Rather, access may be limited to certain tenants or certain floors, whereas Qwest alone is much more likely to have access to the entire building.

Further, as explained in Section V.B above, adding buildings to a network is not as straightforward as Qwest maintains. There are considerable costs associated with adding “near net” buildings, and there must first be a business case for doing so. As detailed above, XO will consider adding a building only when customer demand equals or exceeds 3 DS-3s of capacity, due to the costs associated with construction, rights of way access, building access, and other matters.¹³⁶ While Qwest attempts to paint a rosy picture of the impact alternative facilities providers are having on enterprise competition within the Phoenix MSA, a closer look at these providers reveal their limited suitability as a source of leased facilities for competitive carriers.

The Commenters explained in Section V.A above, the limited impact Cox has had in the business market and the continued unsuitability of its network to support business services throughout much of the Phoenix MSA. These same shortcomings in its provision of retail services carry over to its role as a provider of wholesale services within the Phoenix MSA. In short, in addition to Cox’s limited geographic reach to commercial properties, Cox’s hybrid coaxial cable network where it is present in commercial buildings is still unsatisfactory for serving demanding business customers with high capacity needs, especially those with needs in excess of T-1 circuits.¹³⁷ Moreover, XO cannot use Cox’s Ethernet services to provide service to its own customers for a number of reasons. First, Cox’s Switched Ethernet Private Line and Ethernet Virtual Private Line circuits are not provided on a dedicated basis, which means that

¹³⁶ See *Govil Declaration, supra*, at ¶¶ 14-19.

¹³⁷ See Section V.A, *supra*.

they are susceptible to throughput degradation. XO’s business customers require dedicated, “always on” connectivity. Second, Cox does not currently offer 10MB services, which is XO’s most popular level of service to business customers. Third, Cox’s Maximum Transition Unit (MTU) size is 1522 bytes, which differs from the MTU industry standard of 1544 bytes to which XO adheres. Consequently, attempts to use Cox’s Ethernet service to support XO business customers would create interoperability issues and frustrate tracking, reporting, and efficient responses to trouble tickets. Finally, Cox’s offered service levels of 99.9% is considerably below XO’s standard for business customers, which is 99.999%.

Qwest claims that “SRP [Telecom] provides a viable option for carriers that seek an alternative access solution to the use of Qwest’s network in the Phoenix MSA.”¹³⁸ XO, the Commenter with a facilities-based presence in Phoenix, notes that it does not use SRP and does not consider SRP a viable option for wholesale transport and, especially, loops. The SRP network was built to provide communication between electrical transmission sub-stations, a fact which severely constrains SRP’s potential usefulness as a wholesale resource for competitive telecommunications providers serving business customers. As a consequence, SRP’s facilities are on electrical system transmission routes – not distribution routes – and are located above SRP’s high-voltage electrical facilities.

Because of the configuration of the SRP network on the electric utility transmission network, a carrier such as XO has very limited access to those facilities – typically only at power substations.¹³⁹ Only trained power technicians can add splices, maintain, and

¹³⁸ *Second Phoenix Petition*, at 34-35.

¹³⁹ While SRP offers access to approximately 35 buildings, based on the configuration of SRP’s network and its other shortcomings, as detailed herein, XO does not expect SRP to significantly expand its reach of last-mile facilities in the near term.