- Verizon cites the *Verizon-MCI Merger Order* for the proposition that a market share analysis "may misstate the competitive significance of existing firms and new entrants."[55] But the FCC made this statement in the context of competition for retail enterprise service, including from "systems integrators" and "value added resellers" that rely on the incumbent's own wholesale facilities to provide service.[56] Such non-facilities-based entry is relatively easy and can occur without expenditure of sunk costs. However, as the FCC has held in the unbundling context and as the Joint Commenters reiterate below, entry via resale of ILECs' facilities is irrelevant to whether facilities based competition can constrain incumbents prices in local telecommunications markets.[57]

- AT&T notes that the DOJ closed an investigation of the merger of Whirlpool and Maytag despite their high shares because "Samsung and other foreign manufacturers could increase their imports into the U.S." and "*[e]xisting U.S. manufacturers* have access capacity and could increase their production."[58]

Collectively, these cases stand for the proposition that, in those instances where multiple actual entrants have already gained a significant foothold in the market and possess substantial excess capacity, they can expand output and restrain the anti-competitive practices of other firms in the market. Under this analysis, it would be reasonable for the FCC to take into account the supply response of firms *currently* in a market, but which possess a smaller market share than the incumbent, in determining whether forbearance is appropriate. This is because such existing competitors *have already incurred the sunk costs of entry*.

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[55] *See* Verizon Comments at 20 (citing *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 74 (2005) ("*Verizon-MCI Merger Order*")).

[56] *See Verizon-MCI Merger Order* ¶ 74.

[57] *See Infra* discussion at 16-18.

[58] AT&T Comments at 6 (emphasis added) (*citing* Dept. of Justice, Press Release, *Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag* (Mar. 29, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm)).

The Joint Commenters agree that the FCC should consider the constraining effect of such existing competitors on the incumbent's post-forbearance conduct. In fact, the Joint Commenters' Proposed Test would grant forbearance based, in part, on the presence of two facilities-based wireline providers that cover 75 percent of the customer locations serving a particular market, even if those competitors has each garnered only a 15 percent market share. If a competitor has already incurred the substantial sunk costs in constructing last-mile facilities and gained sufficient market share to demonstrate that it is a viable competitor, it may be able to increase supply in a particular market to check the incumbent's ability to raise rates.

B. All Of The Available Evidence Indicates That Committed Potential Entry Is Unlikely To Occur In The Local Markets At Issue

While a supply response from an actual competitor may serve to discipline an incumbent LECs' prices, there is no reason to believe that committed potential entry is likely to occur in the local markets at issue. With the exception of cable company entry into the mass market voice and broadband markets (made possible by their ability to leverage their legacy video investment in HFC facilities),[59] entry on a sufficient scale to check incumbent behavior post-forbearance has simply not occurred, making future entry unlikely. For this reason, the FCC should presume that only actual competition, not potential competition, is relevant to the forbearance analysis.

This is particularly true in the business market where customers demand services that can only be provided via intramodal fiber or copper facilities. All of the available evidence indicates that, due to the high sunk costs of fiber deployment, further entry (i.e., additional last-mile fiber construction) by CLECs and cable companies would never be

[59] *See* Paetec Comments at 30.

"timely, likely and sufficient" in scale to restrain incumbents' prices post forbearance. As the FCC has repeatedly held, carriers must still be able to economically justify the substantial sunk costs involved last mile facilities construction, even to locations near their fiber networks.[60] The Joint Commenters and others have repeatedly demonstrated that, while fiber deployment is feasible at those few locations where the revenue is sufficient to justify construction, the available revenues are insufficient to justify loop deployment to the overwhelming majority of commercial customer locations.[61] Accordingly, there is no reason to believe that fiber deployment will ever occur in enough locations to constrain the ability of the incumbent to raise price post forbearance to business retail and wholesale customers.

Notwithstanding the proven difficulties in deploying last-mile fiber facilities, Verizon asserts that widespread fiber-based deployment is just around the corner. Verizon cites to anecdotal evidence from competitors' press statements that cable companies and CLECs have expanded their fiber transport networks and serve many end-user locations now. Because their networks pass "near" tens of thousands of additional buildings, Verizon argues that competitors can easily expand their networks to reach

[60] *See TRRO* ¶ 150 ("The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location. Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.").

[61] *See, e.g., TWTC Special Access Letter* at 15-17. *See generally* Opposition of Time Warner Telecom Inc., Cbeyond, Inc., and Eschelon Telecom, Inc. (Erratum), Attach. A - Declaration of Stephanie Pendolino on Behalf of TWTC, WC Dkt. No. 07-97 (filed Sept. 13, 2007) (discussing TWTC deployment costs and limited number of TWTC "target" buildings).

these buildings.[62] For these reasons, Verizon implies that the FCC should grant forbearance in those geographic markets where competitors own fiber transport networks and have begun serving some end-user locations over their own fiber facilities because market-wide fiber deployment will arrive soon thereafter.[63] In other words, Verizon argues that evidence of limited fiber deployment meets the FTC/DOJ committed potential entry standard. But there is no basis for this conclusion. In fact, detailed evidence filed recently in the Phoenix Forbearance Proceeding demonstrates that fiber-based deployment is limited and is likely to stay that way for the foreseeable future.

1. CLEC Fiber Deployment

As Integra and TWTC reiterated less than a month ago, they must rely on the incumbent for last-mile connections unless a particular customer location generates the many thousands of dollars of monthly revenue necessary to justify construction. Because such revenue is rarely available, competitors serve few customer locations using their own loop facilities.

[62] *See* Verizon Comments at 10-11 ("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. 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. 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 network.'").

[63] *See id.* at 11 ("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.").

Integra stated that it must earn approximately **[highly confidential begin] [highly confidential end]** in monthly recurring revenue to justify fiber loop construction.[64] Because most of Integra's businesses demand no more than single or multiple DS1s of service, each customer generates on average **[highly confidential begin] [highly confidential end]** in revenue per month, making loop deployment infeasible in the vast majority of circumstances.[65] As a result, Integra has only built end-user connections to **[highly confidential begin] [highly confidential end]** customer locations in the Phoenix MSA as of August 21, 2009.[66]

TWTC faces similar obstacles in deploying facilities to its customer locations.[67] Given the **[highly confidential begin] [highly confidential end]** average loop deployment cost in Phoenix (assuming a loop length of a mile or less), TWTC must earn **[highly confidential begin] [highly confidential end]** per month for **[highly confidential begin] [highly confidential end]** months to reach the **[highly confidential begin] [highly confidential end]** percent internal rate of return necessary to justify construction.[68] TWTC targets particular buildings with the assumption that it can win

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[64] *See Joint Opposition*, Attach. B - Declaration of Dave Bennett ¶ 4.

[65] *See id.*

[66] *See id.* ¶ 5.

[67] TWTC's target customer is a medium to large sized business, while Integra targets mostly smaller sized businesses. Therefore, on average, TWTC's customers generate more monthly revenue than the average Integra customer does. For that reason, TWTC has been able to deploy facilities to more locations than Integra. However, as explained, the **[highly confidential begin] [highly confidential end]** of TWTC's customers in Phoenix are served with off-net facilities, because most customer locations do not generate sufficient revenue to justify construction.

[68] *See Joint Opposition,* Attach. C - Declaration of Scott Liestman ¶ 6 ("We rarely construct these facilities beyond a mile, as it is generally cost prohibitive, except where there are extraordinary revenue opportunities.").

[highly confidential begin] [highly confidential end] percent of the telecommunications spending in that building.[69] Therefore, in order to earn **[highly confidential begin] [highly confidential end]** per month, TWTC targets buildings with approximately **[highly confidential begin] [highly confidential end]** in monthly telecommunications spending.[70]

Given these constraints, TWTC used GeoResults building telecom spend data to determine the percentage of commercial buildings in Phoenix (those with two or more DS1s of demand) to which it has not yet constructed loops but to which it might be able to in the future. Based on that analysis, TWTC concluded that it can realistically serve an additional **[highly confidential begin] [highly confidential end]** percent of the market[71] in Phoenix. Given that it has currently constructed loops to **[highly confidential begin] [highly confidential end]** of commercial buildings in Phoenix, TWTC will not be able to construct loops in the future to more than **[highly confidential begin] [highly confidential end]** percent of the commercial buildings in Phoenix.[72]

Even these numbers overstate the number of buildings where deployment is possible. Problems obtaining rights of way, building access and other issues unrelated to the price of deployment ensure that TWTC and Integra will be unable to deploy facilities to a portion of those locations where deployment otherwise meets the companies' theoretical cost models.

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[69] *See id.* ¶ 7.

[70] *See id.* ¶ 8.

[71] The market is defined as those buildings with two DS1s of demand or more. *See id.*

[72] *See id.*

While these analyses were performed for Phoenix, there is no reason to believe that either Integra or TWTC would be able to deploy fiber to a materially greater percentage of buildings in any other market. Nationwide, TWTC relies on its own loop facilities to serve only **[highly confidential begin]** **[highly confidential end]** of its customer locations.[73]

Integra's and TWTC's limited loop deployment in Phoenix comports with the available data regarding the extent to which competitors have deployed fiber loops in the aggregate. When the GAO studied some of the 10-MSAs at issue in this proceeding, it concluded that competitors had deployed loops to fewer than 10 percent of buildings demanding DSx service in nearly all of those markets.[74] Given the sunk costs of construction, the GAO believed that many business locations with lower levels of customer demand would likely never see competitive alternatives.[75]

2. Cable Company Fiber Deployment

While cable companies were able to leverage their legacy video businesses to overcome the sunk costs necessary to deploy their HFC networks to mass market customers,[76] cable companies do not appear to enjoy similar advantages in funding the construction of last-mile fiber necessary to provide services demanded by business customers. In order to justify fiber construction, cable companies conduct build/buy

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[73] *See id.* ¶ 5.

[74] *GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 20 (Nov. 2006) ("*GAO Report*").

[75] *See id.* at 13.

[76] As discussed in more detail below, the available evidence indicates that cable companies' HFC networks cannot provide services that act as a viable substitute for DS0, DS1 or DS3 services demanded by businesses.

analyses just like CLECs. Given the high sunk costs of fiber construction, cable companies, like CLECs, serve relatively few customer locations with their own fiber.[77] As Covad *et al.*, argue, these costs have precluded more than an incremental expansion of Cox's limited last-mile fiber footprint in Omaha in the over four years since the FCC granted forbearance.[78]

IV. QWEST PROVIDES NO BASIS FOR ITS ARGUMENT THAT COMPETITOR MARKET SHARE IS LOW BECAUSE INCUMBENT LEC PRICES ARE SET BELOW COMPETITIVE LEVELS DUE TO REGULATION

Qwest argues that the FCC should not even consider market share estimates in determining whether forbearance is appropriate because incumbent LECs' high market shares are artificially inflated. This is so, asserts Qwest, because rate regulation (it is unclear if Qwest is referring to state or Federal) has reduced incumbent LEC prices below competitive levels. As a result, competitive entry is purportedly suppressed because CLECs cannot profitably compete with the incumbent.[79] Furthermore, because incumbent LEC prices are below competitive levels, Qwest asserts that it is unsurprising

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[77] *See* Sprint Nextel Comments at 3 ("Supply elasticity is low in the MSAs in question because significant barriers to entry remain high....Cable companies have not offered a broad alternative for last mile facilities that carriers need in order to compete in a self-sustaining manner.").

[78] *See* Covad *et al.*, Comments at 22.

[79] *See* Qwest Comments at 11-12 ("[I]f a regulatory body maintains a rate at an artificially low level, for universal service or other public interest reasons, this may discourage competitive entry. In such a case, a high market share may not be a reflection of market power, but may simply indicate that regulators have set the rates below the appropriate market level.").

that incumbent LECs would increase prices in the absence of rate regulation (it is unclear, but Qwest may be referring here to its price increase post-forbearance in Omaha).[80]

Qwest does not provide a single cite in its comments to support its assertion that rate regulation has pushed either its interstate or intrastate rates below competitive levels.[81] In fact, all of the available evidence shows that, in the absence of regulation, Qwest will raise rates well above competitive levels. According to evidence filed in the special access docket, in those locations where CLECs, including TWTC, have deployed their own last-mile facilities, their prices are much lower than Qwest's.[82] As explained above, TWTC only constructs fiber to those locations where it can achieve a positive rate of return over a relatively short period of time. If it can achieve a profit at rates much lower than Qwest, then surely Qwest's rates are well above both competitive levels and its own costs. This is particularly the case for Qwest's DS1 and DS3 services, which are often provided via copper. For those facilities, Qwest's sunk costs of construction have been recovered long ago.

Moreover, rates for interstate and intrastate services have been deregulated in many areas, permitting Qwest to raise its rates in those areas to what it alleges is the competitive level. For example, Qwest has taken advantage of pricing flexibility to raise

[80] *See id.* at 16 ("For an ILEC to be deemed to have market power, it is not enough that it is able to raise prices, but it must be able to sustain a price increase above competitive levels. Even if an ILEC has been granted the ability to raise its local prices by a state commission, it is highly likely that the prices are still below competitive levels.").

[81] For example, there is no indication that Qwest ever asked or sought permission from the FCC to make an above-the-cap filing or that it has argued at state commissions that rate regulation does not permit Qwest to obtain a reasonable rate of return or meet competitive prices.

[82] *See Supra* n.40.

the rates in every MSA where it has received Phase II pricing flexibility (including Omaha) above the rates in price cap areas.[83] This is true for both one year, no volume terms as well as for volume/term agreements.[84] Similarly, as discussed above with respect to California and Illinois, many states have already eliminated intrastate rate regulation.

Furthermore, even in MSAs in which Qwest has increased prices after receiving Phase II pricing flexibility, competitive entry has not accelerated. The evidence of price increases by incumbent LECs in Phase II MSAs is widespread enough to support the inference that incumbent LECs are able to increase special access prices in those areas without experiencing substantial market share loss to any competitors, including new entrants.[85]

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[83] The FCC has granted Qwest Phase I and Phase II pricing flexibility for channel terminations in the following 20 MSAs: Albuquerque, NM; Bellingham, WA; Boise City, ID; Colorado Springs, CO; Davenport-Rock Island-Moline, IA-IL; Des Moines, IA; Dubuque, IA; Eugene-Springfield, OR; Fargo-Moorehead, ND-MN; Iowa City, IA; Medford, OR; Olympia, WA; Omaha, NE; Phoenix, AZ; Portland, OR-WA; Rochester, MN; Salt Lake City-Ogden, UT; Spokane, WA; St. Cloud, MN; and Yakima, WA. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 7363, ¶ 8 n.25 (2002).

[84] *See TWTC Special Access Letter*, Attach. A (showing that all of Qwest's price flex rates on one year, no volume terms are universally higher than Qwest's price cap rates on one year, no volume terms). Qwest's "RCP" plan provides the same percent discount off of price flex and price cap rates, so that price flex rates will remain above price cap rates after the RCP discount is applied. *See* Qwest FCC Tariff No. 1, Access Service, § 7.1.3 (B)(1) ("A RCP is an optional pricing plan that allows DS1 and/or DS3 customers to receive 22% price reductions for committing to a minimum quantity of DS1 and/or DS3 circuits provided to customer under Sections 7 and 17 of this Tariff for a 48-month term. The price reductions are taken from the month-to-month rates provided under Sections 7 [price cap] and 17 [price flex] of this Tariff for the DS1 and DS3 circuits.").

[85] *See TWTC Special Access Letter*, Attach A (showing that incumbents' special access rates are almost uniformly higher in Phase II areas than in areas which remain under price caps).

V. THE FORBEARANCE PROCESS REMAINS THE APPROPRIATE FORUM FOR DETERMINING WHETHER UNBUNDLING OBLIGATIONS SHOULD BE ELIMINATED

Verizon argues at length that the FCC must specify the process it intends to use to eliminate unbundling requirements.[86] It argues that any process must remedy the alleged failure of the impairment rules to keep up with new and emerging technologies and entrants.[87] Verizon asserts, "[t]hat process can be forbearance proceedings or it can be some other process."[88]

The FCC need not concern itself with this argument. The incumbents have a statutory right to file forbearance petitions. As the FCC recognized in the *TRRO*, ILECs are free to seek forbearance from unbundling obligations where they deem appropriate.[89] Moreover, the forbearance process is capable of keeping up with technological changes and new market entry that might have occurred since the *TRRO* triggers were designed. The FCC need only analyze these changes by using the appropriate analytical tools as discussed throughout this pleading.

Additionally, the FCC has shown its preference for the forbearance process by defining forbearance procedural rules to make that process work more smoothly. Qwest recently filed a petition for forbearance from unbundling obligations in Phoenix that will be subject to at least some of those rules.[90] There is no basis for changing the process by

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[86] *See* Verizon Comments at 4, 12-17.

[87] *See id.* at 12.

[88] *See id.* at 4.

[89] *See TRRO* ¶ 39.

[90] *See generally Forbearance Rules Order*; *see also Pleading Cycle Established for Comments on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, 24 FCC Rcd 9470 (2009).

which the FCC determines that unbundling rules are appropriate. Instead, the FCC should focus its resources on establishing a sound analytical framework for considering such petitions.

VI. CONCLUSION

The Commission should assess the merits of the 10 MSAs at issue in this remand in according with the discussion herein.

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