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

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to 47 U.S.C. §	)	WC Docket No. 09-135
160(c) in the Phoenix, Arizona	)	
Metropolitan Statistical Area	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

The National Association of State Utility Consumer Advocates ("NASUCA") and the New Jersey Division of Rate Counsel ("Rate Counsel") recommend that the Federal Communications Commission ("FCC" or "Commission") adopt with some modifications the recommendations of Integra, PAETEC and Broadview, and the Arizona Corporation Commission that the FCC use a traditional market power approach in its forbearance analysis, specifically as such analysis relates to Qwest's petition for forbearance in the Phoenix Metropolitan Statistical Area ("MSA") and more generally as such analysis applies to incumbent local exchange carriers' ("ILECs'") petitions for forbearance.

NASUCA and Rate Counsel support an analytic standard that "hews closely to basic principles of competition policy and the FTC-DOJ Horizontal Merger Guidelines."[1] Indeed in numerous filings submitted previously by NASUCA and by Rate Counsel (for example, regarding proposed mergers, regarding petitions for forbearance, and regarding special access services), NASUCA and Rate Counsel have supported and relied upon traditional market power analysis, and have faulted ILECs for their excessive reliance on speculation about future market conditions.

Among the elements of a sound analytic framework are the definitions of relevant markets, including separate product markets for residence and business consumers; separate product markets for retail and wholesale services; the use of the wire center as the relevant geographic market for mass market services. Wireless service should not be

considered to be an economic substitute for wireline service in either the residence or business market nor should bundled offerings be considered to be within the same product market as is stand-alone basic local exchange service. The FCC should seek and require empirical evidence of actual competition and should afford far less weight to ILECs' speculations about potential entry.

The FCC should adopt the CLECs' proposed facilities-based test as a first-step "bright-line" screen of forbearance petitions. Specifically, ILECs would be required to demonstrate in all relevant geographic and product markets that two or more facilities-based competitors **in addition to** the incumbent carrier each serve at least 15% of the retail market. Such a demonstration would be necessary to merit more detailed review by the FCC but would not in isolation provide sufficient grounds for approving forbearance petitions. As the second step, ILECs, based on the principles set forth in the FTC-DOJ merger guidelines, would need to demonstrate that they lack market power in each market for which they seek forbearance. The second step of FCC review is essential because, even with the presence of two facilities-based competitors, each with 15% market share, an ILEC, based on a comprehensive economic analysis, could still be found to possess market power. Furthermore, ILECs should bear the burden of demonstrating that they satisfy both steps of the FCC's analytic framework.

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[1] Public Notice, at 1.

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I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks comment on the analytic framework that the FCC should apply in its examination of the request for forbearance sought by Qwest Corporation ("Qwest") from certain regulatory obligations within the Phoenix, Arizona Metropolitan Statistical Area ("MSA") pursuant to 47 U.S.C. § 160[2] and more generally in its examination of requests for forbearance submitted by incumbent local exchange carriers ("ILECs"). As described in the Public Notice, Qwest seeks forbearance from "(1) loop and transport unbundling obligations; (2) dominant carrier tariffing and price cap regulations for its mass market and enterprise switched access services; (3) requirements applicable to dominant carriers under section

[2] FCC Public Notice DA 10-647, "Request for Additional Comment and Data Related to Qwest Corporation's Petition for Forbearance from Certain Network Element and Other Obligations in the

214 of the Communications Act concerning processes for acquiring lines, discontinuing service, and assignments or transfers of control; and (4) certain Computer III requirements, including comparably efficient interconnection and open network architecture."[3] The FCC's Public Notice specifically refers to filings submitted by certain competitive local exchange carriers ("CLECs") and by the Arizona Corporation Commission ("ACC") that recommend specific analytical approaches to evaluating forbearance petitions submitted by ILECs. The Public Notice states:

> In filings in this proceeding, certain commenters have urged the Commission to adopt a different standard for analyzing incumbent local exchange carrier (LEC) forbearance petitions than has been applied in prior forbearance proceedings involving similar requests for relief. A group of competitive LECs urge the Commission to adopt a standard "that hews closely to basic principles of competition policy and the FTC-DOJ Horizontal Merger Guidelines." Similarly, another filer urges the Commission, in assessing Qwest's forbearance request, to examine Qwest's market power in discrete product and geographic markets under the standards of the FTC-DOJ Horizontal Merger Guidelines and the similar market power analysis that the Commission has conducted in recent merger decisions.[4]

The FCC specifically seeks comment "by Qwest and other interested persons on

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Phoenix, Arizona MSA," April 15, 2010.

[3] Id.

[4]Public Notice, citing Opposition of Integra Telecom, Inc., *et al*., WC Docket No. 09-135, at 2 (filed Sept. 21, 2009), and Comments of PAETEC Holding Corp., WC Docket Nos. 06-172 and 07-97, at 40-47 (filed Sept. 21, 2009), appended as Attachment 1 to Opposition of PAETEC Holding Corp., WC Docket 09-135 (filed Sept. 21, 2009) (citing, *e.g.*, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); and *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005)); and also citing Comments of Broadview Networks, Inc. *et al.*, WC Docket No. 09-135, at 12-22 (filed Sept. 21, 2009) (advocating use of a market power approach and citing, *inter alia*, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995)); Comments of Arizona Corporation Commission, WC Docket No. 09-135, at 8 (filed Sept. 21, 2009) (urging the Commission to use a traditional market power approach in its forbearance analysis).

whether, in considering Qwest's Phoenix MSA Petition, [the FCC] should apply a market power-oriented approach along the lines suggested in the FTC-DOJ Horizontal Merger Guidelines" and also as applied by the Commission in certain decisions that it rendered regarding mergers. The FCC seeks comment on how such an analytical approach would apply, the appropriate definition of the relevant product and geographic markets, and if such an approach were adopted, whether the record evidence supports granting Qwest's request for forbearance. Furthermore, the FCC seeks comment on how it should determine whether, for mass market consumers, mobile wireless service is in the same relevant product market as wireline telephone service.[5]

NASUCA as an organization[6] and Rate Counsel as an agency representing New Jersey consumers and as a member of NASUCA,[7] present these comments to support the use of a market power-oriented approach by the FCC in its analysis of the merits of ILECs' forbearance petitions. Section II of these comments provides a short overview of the Commission's recent forbearance decisions, as discussed in the comments filed by the CLECs and referenced in the FCC's Public Notice. Sections III and IV provide a brief

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[5] Public Notice at 2.

[6] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[7] Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. N.J.S.A. §§ 52:27EE-1 *et seq*.

discussion of the CLECs' and the ACC's recommendations. In Section V, NASUCA and Rate Counsel provide their recommendations regarding the appropriate analytic framework for assessing the merits of ILECs' forbearance petitions.

II. THE COMMISSION'S RECENT FORBEARANCE DECISIONS UNDERSCORE THE NEED FOR A COMPREHENSIVE ANALYTIC FRAMEWORK FOR EXAMINING PETITIONS.

The CLECs and the ACC refer to previous Commission orders relating to three recent forbearance proceedings – the ACS Anchorage Petition, the Omaha Petition, and the Verizon 6 MSA Petition.[8] For example, PAETEC discusses the flawed Omaha Order as follows:

> The Commission's "predictive judgment" in the Omaha Forbearance Order that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. In reality, the Omaha forbearance decision directly caused PAETEC's exit from that market, and deterred other carriers from entering. Indeed, if anything, the lesson learned from the Omaha experiment is to not make the same mistake again.[9]

Integra observes the following:

> As the Joint Commenters have explained, the standards that the Commission has applied in past UNE forbearance orders have suffered from numerous fundamental flaws, including the failure to properly define product markets, the failure to properly assess the likelihood of potential

[8] See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area,* WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1977 (2007)("*ACS Anchorage Order*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Order*"); *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas,* Memorandum Opinion and Order, 22 FCC Rcd 21293, 21313 (2007) ("*Verizon 6 MSA Order*").

[9] Comments of PAETEC Holding Corp. filed in WC Docket Nos. 06-172 and 07-97 (September 21, 2009) (PAETEC Attachment 1), at 4.

> future competitive entry and the failure to account for the consequences of a duopoly market structure.[10]

In its *Verizon 6 MSA Forbearance Order*, the FCC denied Verizon's forbearance request, and this order was later remanded by the D.C. Circuit in *Verizon v. FCC*, which faulted the Commission for failing to explain why it had purportedly departed from its previous practice of considering potential competition in its analysis.[11] Specifically the *Verizon v. FCC* Court stated that the FCC

> changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace. **The flaw is not in this change, but rather in the FCC's failure to explain it**. In the *Order*, the FCC without explanation applied these newly dispositive factors as if that had always been its method of competitiveness analysis.[12]

The *Omaha Forbearance Order* underscores the importance of lessening the weight that the FCC affords potential competition in its examination of forbearance petitions, and the *Verizon 6 MSA Forbearance Order* underscores the importance of the FCC delineating well-articulated economic criteria that ILECs must satisfy to demonstrate the merits of any particular petition for forbearance.

III. CLEC RECOMMENDATIONS

Integra, PAETEC, and Broadview recommend that the Commission, in reviewing forbearance petitions, conduct a thorough market power analysis,[13] and that this market

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[10] Integra, at 6-7.

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

[12] *Verizon v. FCC* at 18 (citations omitted, emphasis added).

[13] Opposition of Integra Telecom, Inc., tw Telecom Inc., Cbeyond, Inc., and One Communications Corp. ("Integra"), Opposition of PAETEC Holding Corp. ("PAETEC"), and Initial Comments of Broadview Networks, Inc., Nuvox, and XO Communications LLC ("Broadview").

power analysis consider market share, supply elasticity, demand elasticity, barriers to entry, and characteristics of the incumbent, such as its size, cost structure, and resources.[14] In order to analyze market share, the CLECs recommend that the Commission:

1) define the relevant product and geographic markets,
2) separate the residential market from the business market, and the retail market from the wholesale market, and
3) use the MSA as the geographic area of analysis for forbearance proceedings.[15]

These three commenters recommend that the Commission require at least two **actual** facilities-based competitors **in addition to** the incumbent carrier before granting forbearance.[16]

According to Integra, "In assessing the level competition [sic] within the relevant market, the FCC should presume that potential competitive entry is irrelevant to the competition analysis because such entry is not likely to be timely or sufficient to constrain the incumbent's exercise of market power in local wireline telecommunications markets. The FCC should focus instead on whether the level of actual competition is

[14] *See* PAETEC Attachment 1, at 5-6 and 37-40; Broadview, at 10-11 and 19-22.

[15] *See* Integra, at 3, 7-9; PAETEC Attachment 1, at 6; Broadview, at 17.

[16] The CLEC commenters assert that forbearance should be granted only when there are at least two facilities-based competitors in the relevant market *in addition to* the incumbent carrier. Integra recommends that these two competitors should have a substantial share of the market (e.g., 15% each). Integra, at 11 and 27. PAETEC Attachment 1, at 29 (stating, "[a]s a result of the premature action in Omaha, the presence of a single competitor operating only in the retail market left the incumbent Qwest free to raise its rivals' costs and impede entry, eventually driving out competition to the detriment of consumers) and 33. See also discussion of wholesale test. Integra, at 9.

sufficient to prevent Qwest from charging prices above cost." [17] PAETEC recommends that Qwest "must be required to show more than that the conditions for potential competition exist in a particular market segment. Qwest must demonstrate with specificity the existence of actual competition - that is, multiple competitors winning market share and providing services over their own networks."[18]

With regard to examining the residential market separately from the business market, PAETEC notes:

> The Commission's competition analysis in the Omaha Forbearance Order failed to take separate residential and business markets into account — both in analyzing deployment of competitive loop facilities and in evaluating competitors' market share. In considering whether facilities based competitors had deployed their own loop facilities to 75% of all end user locations in the geographic market, the Commission did not differentiate between residential locations and business locations. Thus it could have granted forbearance for UNEs used in business markets even if no business locations were actually served by the facilities based cable provider. The Commission simply failed to examine whether and to what extent competitors had actually deployed loop facilities in the business market. The Commission was instead apparently content to assume that cable competitors would extend their networks serving residential customers to business markets in a reasonable period of time, without any data to support its assumption.[19]

The CLEC commenters also assert that wireless-only consumers should not be included in market share analysis of wireline telephone service.[20] Integra notes that "In the Competitive ETC Order, the Commission explicitly found that 'the majority of

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[17] Integra, at 3.

[18] PAETEC, at 4. See also PAETEC Attachment 1, at 33.

[19] PAETEC Attachment 1, at 19-20. See also, footnote 59: "The Commission further compounded its error in its coverage test by only considering whether Cox facilities 'passed by' a certain percentage of end user premises. As discussed infra, there are significant physical and economic barriers that make this coverage test an unreasonable measure of deployed 'loop facilities.'"

[20] Integra, at 23.

households do not view wireline and wireless services to be direct substitutes.'"[21] PAETEC asserts that "Qwest continues to point to mobile wireless service as a 'competitor,' although the Commission has established this is not a substitute for the package of services demanded by consumers in the residential market and falls well short of the robust services business customers demand from wireline providers."[22] PAETEC also cites Department of Justice ("DOJ") and UK Ofcom research showing that "based on the widely accepted methodology for defining relevant product markets, that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services."[23]

PAETEC asserts that the MSA is the unit considered by potential competitors when deciding whether or not to enter a market.[24] PAETEC also contends that, when conducting a market share analysis, the Commission should count retail customers only, and not wholesale customers.[25]

IV. ARIZONA CORPORATION COMMISSION COMMENTS

The ACC's comments agree in spirit with those of the CLECs, although some of its specific recommendations differ. In particular, the ACC agrees with the CLECs that analysis of the market should be based on **actual** competition, and not **potential**

[21]Id., at 24-25.

[22] PAETEC, at 3.

[23] Id., Attachment 1, at 19.

[24] Id., Attachment 1, at 22 and 45-46.

competition.[26] ACC also agrees that the residential market must be examined separately from the business market.[27] However, rather than using the MSA as the relevant geographic market, ACC recommends that the Commission conduct its analysis at the ZIP code or wire center level.[28] ACC further recommends that the Commission place more weight on the availability of wholesale alternatives than on retail alternatives.[29]

The ACC recommends also that "[b]ecause of the drastic impact that forbearance can have upon a carrier's operations and in the end its retail customers, the FCC should consider using traditional indicators of 'market power' in addition to a per se market share test."[30] Specifically, the ACC recommends that the FCC consider the petitioner's market share; the demand elasticity of the petitioner's customers; the supply elasticity of the market; and the petitioner's cost structure, size and resources.[31]

V. ANALYSIS OF RECOMMENDATIONS

A. Analytic Framework

NASUCA and Rate Counsel support the use of traditional market-power oriented economic analysis of relevant markets. The determination of relevant geographic and product markets is an essential first step. The Commission should use those criteria that

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[25] Id., Attachment 1, at 34.

[26] ACC, at 1.

[27] Id., at 2.

[28] Id.

[29] Id.

[30] Id., at 8.

[31] Id.

it has historically applied in order to assess market power: share of relevant market; elasticity of supply; elasticity of demand; and other factors, such as barriers to entry. Consumers' actual purchasing decisions and the prices that carriers can sustain in a declining cost industry provide the most reliable information about ILECs' market power. The Commission should reject proposals that would afford undue weight to speculative technologies, future plans, and potential entry. Also, in today's economy, costly access to capital presents a significant barrier to entry.

NASUCA and Rate Counsel concur with the CLECs and ACC that residential markets are distinct from business markets: The supply of and demand for residence services differ from that for business services. Similarly, NASUCA and Rate Counsel concur with the CLECs that that the retail and wholesale markets are distinct product markets.

NASUCA and Rate Counsel disagree, however, with the CLECs' proposed use of the MSA as relevant geographic market because it is overly broad, and because it includes areas with widely disparate levels of competition.[32] Consistent with the ACC's proposal, NASUCA and Rate Counsel recommend the use of the wire center as the geographic unit of analysis, particularly for assessing mass market competition. For special access and enterprise markets, the Commission should conduct a building-by-building analysis of the market.

Consistent with the CLECs' and ACC's comments, NASUCA and Rate Counsel urge the Commission to adopt an analytic framework that affords significantly more

[32] Alternatively, if the FCC were to adopt the MSA as the appropriate geographic market, it should ensure

weight to actual rather than to potential competition.

The FCC should use the following "bright line" test that Integra describes for assessing forbearance petitions as the first of a two-step analytic framework:

> (1) at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ("Wholesale Test");
> or
> (2) at least 75 percent of end-user locations are served by two or more facilities based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market ("Retail Test").[33]

The CLECs' recommendation that forbearance should be granted to Qwest only when there are at least two facilities-based competitors **in addition to** the incumbent carrier in the relevant market is a reasonable analytic approach for screening out those forbearance petitions that lack merit, as is the recommendation that these two competitors have a substantial share of the retail market (e.g., 15% each).[34] However, such a test should be only the first step of the FCC's analysis that is used to filter out petitions that clearly would not be in the public interest. ILECs should then also be required to satisfy a second step, specifically to demonstrate, with empirical evidence, that they lack market power in each geographic and product market for which they seek forbearance.

NASUCA and Rate Counsel also concur with PAETEC that duopoly markets are

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that there is competition **throughout** the MSA and not simply in isolated pockets of the MSA.

[33] Integra, at 9-10.

[34] Id., at 11 and 27. PAETEC Attachment 1, at 29 and 33.

not competitive. PAETEC aptly explains:

> [I]n analyzing competition under its traditional market power framework the Commission should emphasize competition from wireline competitors that have deployed their own last mile loop facilities because competition from wireless (whether fixed or mobile), satellite, VoIP and broadband over powerline is neither currently significant nor capable of disciplining the incentive of the cable and RBOC incumbents to tend toward duopolistic behavior. The Commission should further recognize, as it has before in other contexts, that duopoly markets are unduly concentrated and therefore not competitive.[35]

Subsequent to the FCC's most recent Public Notice in this proceeding, on April 20, 2010, the Federal Trade Commission ("FTC") sought comment on a proposed update of the FTC and DOJ Horizontal Merger Guidelines.[36] The updates are intended to "more accurately reflect" the way in which the agencies are currently evaluating proposed mergers in practice and include details currently contained in the "Commentary on the Horizontal Merger Guidelines" that the agencies published in 2006.[37] One important proposed change is that market definition would no longer be considered an important first step for analytical purposes.[38] The proposed changes also include an increase in the post-transaction Herfindahl-Hirschman Index levels that would indicate a market would be concentrated or highly concentrated.[39] The proposed guidelines continue to "give substantial weight" to "the actual history of entry into the relevant market" and state: "Lack of successful and effective entry in the face of non-transitory increases in the

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[35] PAETEC Attachment, at 5-6.

[36] Federal Trade Commission Press Release, April 20, 2010, available at: http://www.ftc.gov/opa/2010/04/hmg.shtm.

[37] Id.

[38] Horizontal Merger Guidelines for Public Comment: Released on April 20, 2010, available at: http://www.ftc.gov/os/2010/04/100420hmg.pdf, at 7.

margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult."[40] In considering the role of potential entry, agencies would continue to be directed to consider the timeliness, likelihood, and sufficiency of entry to deter or counteract competitive concerns.[41]

NASUCA and Rate Counsel recommend that the FCC rely on the economic principles and criteria in the merger guidelines as they now exist. If the FTC and DOJ revise their guidelines, the FCC could seek comment on the implications of such revisions to the FCC's analysis of forbearance petitions. These proposed changes, however, should not become an excuse to delay the adoption of long overdue improvements to the FCC's analytic framework for evaluating ILECs' forbearance petitions.

B. Wireless Service Offered to Mass Market Consumers

The Commission seeks comment on "how the Commission should determine whether, for mass market consumers, mobile wireless service is in the same relevant product market as wireline telephone service."[42] The Commission further seeks comments on "whether the record evidence supports granting forbearance in this proceeding, if we were to adopt such an approach."[43]

NASUCA and Rate Counsel support the use of the current FTC-DOJ merger

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[39] Id., at 19.

[40] Id., at 27

[41] Id., at 27-29.

[42] Public Notice, at 2. See, also, footnote, stating: "A key element of the Guidelines, as they relate to product market definition, includes an inquiry into whether a hypothetical monopoly provider of a service profitably could impose a 'small but significant and nontransitory' increase in the price of such service."

[43] Id.

guidelines to analyze relevant product and geographic markets.[44] Using the FTC-DOJ merger guidelines as the proper analytic framework, based on the market conditions that prevail today, wireless service cannot yet be considered an economic substitute for wireline. The vast majority of mass market consumers continue to rely on wireline services for basic local exchange services. Prognostications regarding the future of wireless only households should not be relied upon to make decisions about the market as it exists today.

There is no evidence to suggest that wireless service can be considered to be in the same relevant product market for the purposes of the forbearance analysis at issue in this proceeding. Wireless service is simply not viewed as an economic substitute to wireline service for the majority of consumers, but rather is considered a supplement to wireline service. Also, as a threshold matter, NASUCA and Rate Counsel urge the FCC to distinguish between bundled offerings in the mass market and stand-alone basic local service. Packages do not constrain the prices for stand-alone local service.

In a recent order, the FCC stated: "By the first half of 2009, the percentage of all households that had 'cut the cord,' and subscribe exclusively to wireless service, rose to an all-time high of more than 22.7 percent – i.e., more than one in five households."[45] However, even with this "all-time high," nearly four in five households continue to rely

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[44] See Public Notice, at 1.

[45] *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier*, WC Docket No. 05-337 and CC Docket No. 96-45, Order on Remand and Memorandum Opinion and Order, adopted: April 16, 2010, at para. 16 (citation omitted).

on a wireline connection to the public switched telephone network. The penetration level of wireless services has risen dramatically, yet only one-fifth of households actually have "cut the cord." One could reasonably conclude that few consumers, even among those already subscribing to wireless services, view the services as perfect substitutes for wireline services. Indeed, if the services were really viewed as substitutes, one would expect wireless-only rates to be much higher.

Integra states that:

> Although the FCC has in past orders included residential consumers who have "cut the cord" in its market share analysis for residential wireline telephone services, it has never provided any analytical support for this approach. In particular, the Commission has never undertaken an analysis of the extent to which the availability of wireless services constrains the price of wireline voice services. Nor is there any reason to believe that such an analysis would support the inclusion of mobile wireless telephone service in the wireline telephone service product market. This is because the relevant inquiry in a product market analysis would be whether a hypothetical monopolist could profitably increase prices for those customers who continue to purchase wireline service. Customers who have cut the cord are irrelevant to the analysis.[46]

NASUCA and Rate Counsel agree that for the portion of the market that has a cross elasticity of demand equal to or nearly zero, the availability of wireless service does not effectively discipline the pricing of a hypothetical monopolist. If a sufficient base of mass market consumers continues to reject wireless as a "good enough" substitute, the wireline provider can indeed raise prices profitably.

As stated above, in the first six months of 2009,[47] 22.7% of American homes only

[46] Integra, at 5.

[47] The Centers for Disease Control and Prevention's National Center for Health Statistics survey was undertaken between January and June 2009.

had wireless phones.[48] However, wireless-only households have certain distinct characteristics. For example, a report released by the Center for Disease Control and Prevention, based on the same National Health Interview Survey, states: "As age increased from 35 years, the percentage of adults living in households with only wireless telephone decreased: 21.5% for adults aged 35-44 years; 12.8% for adults aged 45-64 years; and 5.4% for adults aged 65 years and over."[49] These data show that elderly consumers rarely view wireless service as an economic substitute for wireline service (they may own wireless service, but they use wireless service **in addition to** rather than **instead of** wireline service). The fact remains that the overwhelming majority of households still rely on their basic wireline telephone for critical emergency services and to access other services in the community.

The Commission should use should apply a market power-oriented approach along the lines suggested in the FTC-DOJ Horizontal Merger Guidelines to determine whether, for mass market consumers, wireless is an economic substitute for wireline service, and, based on that analysis, should determine that the vast majority of consumers use wireless service to supplement but not to replace their wireline service.

VI. CONCLUSION

NASUCA and Rate Counsel support the CLECs' and ACC's recommendation

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[48] Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2009*, released December 16, 2009, available at: http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200912.pdf.

[49] Id., at 3.

that the Commission conduct market-power oriented analysis in its assessment of the merits of ILECs' petitions for forbearance. A critical element of such an analysis is the proper definition of relevant geographic and product markets. Consistent with NASUCA's and Rate Counsel's filings in other proceedings, the FCC should adopt the wire center as the proper geographic market for assessing mass market competition, and should conduct building-by-building analyses in special access and enterprise markets. As NASUCA and Rate Counsel demonstrated in filings regarding the Verizon 6 MSA Petition, the MSA is excessively broad for use as a geographic market for analyzing competition. Furthermore, for the reasons discussed earlier in these comments, the FCC should consider wireline and wireless service to be in distinct product markets. The increase in consumers' use of wireless service has not altered the fact that the vast majority of households continue to subscribe to wireline service service. The FCC should also differentiate between stand-alone basic local service and bundled telecommunications services. Finally, the FCC should afford substantially greater weight to actual rather than to potential competition.

NASUCA and Rate Counsel urge the Commission to reject Qwest's petition for forbearance and to require Qwest and other ILECs to submit any future forbearance petitions with supporting documentation that provides empirical evidence that would permit a comprehensive two-step market analysis as described in these comments.

Respectfully submitted,

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