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the lines suggested in the FTC-DOJ Horizontal Merger Guidelines and certain Commission merger decisions.³ The Commenters also respond herein to the Commission's request for input on how a market power-oriented analysis should apply and whether the record evidence supports granting forbearance in this proceeding.⁴

As explained herein and in our initial comments, the Commenters urge the Commission to apply a market power-based approach to Qwest's request for forbearance from UNE unbundling obligations in the Phoenix MSA and to deny Qwest's petition in its entirety for failure to meet that standard.

I. INTRODUCTION AND SUMMARY

The market power-oriented forbearance framework endorsed by the Commenters herein would provide the Commission and industry participants with a comprehensive roadmap for the conduct of UNE forbearance proceedings. Importantly, this proposed framework, which has been applied successfully by the Commission on past occasions to judge non-UNE forbearance requests, should result in forbearance being granted only in situations where the consequences would not be a diminution in narrowband or broadband competition.

A market power-based analysis requires a robust assessment of the competitive environment in the product and geographic markets at issue and therefore should lead to forbearance awards only in situations where the elimination of UNE obligations would not

including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements; and from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules concerning the process for acquiring lines, discontinuing services, or making assignments or transfers of control. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 09-135 (filed Mar. 24, 2009) ("*Second Phoenix Petition*"), at 7-11.

³ *April 15th Public Notice*, at 1-2.

⁴ *Id.*, at 2.

negatively affect the nature and extent of competition or the availability or price of services offered to end user customers.

Under a market power-based standard, product and geographic markets must be specifically defined and a separate competitive analysis conducted for each. The Commenters and other interested parties repeatedly have warned the Commission of the shortcomings of the *Omaha/Anchorage* standard, which does not provide for the identification of individual product markets and does not require product market-specific competitive analyses of UNE forbearance requests.⁵

A market power-oriented inquiry would begin with an evaluation of actual competition in the particular product and geographic market at issue (as measured by the petitioning ILEC's market share) but it would not end there. The market share possessed by the petitioning ILEC is just one of the factors that would be considered. The scope of the Commission's review would include an evaluation of the level of actual and potential competition on both the retail and the wholesale level in the particular market under consideration. It also would include other important factors alien to the *Omaha/Anchorage* analysis such as whether competitive carriers can easily obtain the facilities and services purchased from the ILEC seeking UNE forbearance from alternative sources on reasonable rates and terms. The petitioning ILEC's size, resources, and technical capabilities also would be relevant to the Commission's analysis.

A market power-based analysis repeatedly has been blessed by the courts. Thus, its adoption here would lend some much-needed stability and predictability to the UNE

⁵ See, e.g., Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 3, 2009) ("*April 3rd Ex Parte Letter*"), at 4-5, 8-9.

forbearance process after long years of litigation and uncertainty. The Commenters urge the Commission to apply a market power standard to evaluate the Qwest Phoenix forbearance request and all other petitions for forbearance from Section 251(c)(3) unbundling obligations.

II. A MARKET POWER-ORIENTED ANALYSIS SHOULD PROVIDE THE BASIS OF THE COMMISSION'S REVIEW OF QWEST'S UNE FORBEARANCE REQUEST

The Commenters urge the Commission to apply a market power-based approach to the Qwest Phoenix MSA petition and to all future UNE forbearance requests. As noted in our initial comments, this approach incorporates appropriate elements from the standard developed in the *Omaha Forbearance Order* while avoiding several material shortcomings of that standard. A market power-based analysis has the additional benefit of having been refined by the Commission through development and application in a number of varied proceedings over the past twenty years, including both merger dockets and proceedings in which incumbent local exchange carriers ("ILECs") have sought forbearance from dominant carrier rules and regulations.⁶

The Commission's market power-oriented analysis properly incorporates elements of the traditional analysis of potential horizontal acquisitions and mergers conducted by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). The analytical framework and specific standards employed by DOJ in determining whether a merger is likely substantially to lessen competition are outlined in the well-established Horizontal Merger Guidelines.⁷ The standards governing the Commission's review of mergers and forbearance

⁶ See Initial Comments of Broadview Networks, Inc., NuVox, and XO Communications, LLC, WC Docket No. 09-135 (filed Sept. 21, 2009) ("*Broadview, et al. Initial Comments*"), at 12.

⁷ U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, available at http://www.justice.gov/atr/public/guidelines/horiz_book/toc.html ("*FTC-DOJ Horizontal Merger Guidelines*").

requests differ from those of DOJ however. Thus, the Commission's review of mergers and forbearance petitions, while *informed by* the Horizontal Merger Guidelines, is not *limited by* the analysis reflected therein.

The DOJ Antitrust Division's review "is limited solely to an examination of the potential competitive effects of the acquisition, without reference to national security, law enforcement, *or other public interest considerations.*"⁸ Conversely, in merger review proceedings and forbearance dockets alike, the Commission is tasked *inter alia* with determining whether the broad public interest would be served by granting the requested relief.⁹ As such, the scope of its analysis "is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players."¹⁰ Thus, the market power-oriented standard developed by the Commission appropriately takes into consideration not only whether the requested relief would reduce existing competition, but also whether the relief would "accelerate the decline of market power by dominant firms in the relevant communications markets" and "the effect [of the requested relief] on future competition."¹¹

A. The History of the Commission's Market Power-Based Analysis

⁸ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 15 (2005) ("*Verizon/MCI Order*") (emphasis supplied).

⁹ See, e.g., *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23255 (2002) ("*AT&T/Comcast Order*"); *Verizon/MCI Order*, ¶ 18; *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 21 (2007) ("*AT&T/BellSouth Order*"); *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 13 (2005) ("*Omaha Forbearance Order*") *aff'd* *Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶ 10 (2007) ("*Anchorage Forbearance Order*").

¹⁰ *AT&T/BellSouth Order*, at ¶ 21 (footnote omitted).

¹¹ *Id.*

The Commission first developed its market power-oriented regulatory approach in a series of orders between 1979 and 1985 in the *Competitive Carrier* proceeding.¹² The Commission identified two types of carriers in that docket – those with market power (dominant carriers) and those without market power (non-dominant carriers).¹³ The Commission relaxed its regulation of non-dominant carriers based on its conclusion that non-dominant carriers could not charge rates or engage in practices that violate the requirements of the Communications Act of 1934, as amended (“Act”) since customers always had the option of taking service from a dominant carrier whose rates and terms remained subject to regulation. In determining whether an entity possessed market power (and was therefore dominant), the Commission focused on certain identifiable market features, including “the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services,” and whether the firm controlled “bottleneck facilities.”¹⁴

In its *Fourth Report and Order* in the *Competitive Carrier* proceeding, the Commission, more specifically defined market power alternatively as “the ability to raise prices by restricting output” and as “the ability to raise and maintain price above the competitive level

¹² *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied MCI v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the “*Competitive Carrier*” proceeding).

¹³ *First Report and Order*, 85 FCC 2d at 20-21. The Commission’s current rules define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (*i.e.*, one that does not possess market power). 47 C.F.R. §§ 61.3(q), 61.3(y).

¹⁴ *Id.*

without driving away so many customers as to make the increase unprofitable.”¹⁵ In addition, the Commission recognized that, in order to assess whether a carrier possesses market power, the relevant product and geographic markets first must be defined.¹⁶ These definitions and considerations track the analysis specified in the Horizontal Merger Guidelines.

In 1995, the Commission applied these principles to reclassify AT&T as non-dominant in the interstate, domestic, interexchange market.¹⁷ In determining that AT&T no longer possessed market power (*i.e.*, was no longer dominant), the Commission focused on: (1) AT&T’s market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T’s customers; and (4) AT&T’s cost structure, size, and resources.¹⁸ The Commission concluded that AT&T no longer possessed market power notwithstanding numerous commenters’ argument that AT&T’s 60 percent market share in the long-distance market was *prima facie* evidence of AT&T’s dominant status. Commenters pointed out that a 60 percent market share alone generates a Herfindahl-Hirschman index (“HHI”) of 3600,¹⁹ twice as high as the level set by DOJ in the Horizontal Merger Guidelines as defining a “highly concentrated” market that is “likely to create or enhance market power or facilitate its exercise.”²⁰ The Commission applied its broader focus, however, and concluded that overall conditions in the domestic interexchange market supported a finding that AT&T lacked market power.²¹

¹⁵ *Id.*, at 558 (citing A. Areeda & D. Turner, *Antitrust Law* 322 (1978) and W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 937 (1981)).

¹⁶ *Id.*, at 562.

¹⁷ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 (1995) (“*AT&T Reclassification Order*”).

¹⁸ *Id.*

¹⁹ *Id.*, at 3294.

²⁰ *FTC-DOJ Horizontal Merger Guidelines*, at § 1.51.

²¹ *AT&T Reclassification Order*, at 3307-3309.

The market power-based analytical approach developed and refined in the dominant/non-dominant context has already been applied by the Commission in assessing petitions seeking forbearance from certain rules and regulations under Section 10 of the Act.²² In 1998, US West Communications, Inc. (“US West”) petitioned the Commission for forbearance from dominant carrier rules governing its provision of certain special access and high capacity dedicated transport services in the Phoenix, Arizona MSA.²³ After US West filed its petition, US West, the SBC Companies (“SBC”), the Bell Atlantic Telephone Companies (“Bell Atlantic”) and the Ameritech Operating Companies (“Ameritech”) filed several additional forbearance petitions seeking pricing flexibility in the provision of certain special access and high capacity dedicated transport services in many markets throughout the United States for substantially the same reasons proffered by US West in its Phoenix petition.²⁴ The Commission addressed the petitions on a consolidated basis. In doing so, it considered the petitioning Bell Operating Companies’ (“BOCs”) assertions and evidence “that they no longer possess market power in the provision of special access and high capacity dedicated transport services in the specified

²² As the Commission has noted, a request for forbearance from specific dominant carrier rules is substantively different from a request for reclassification as a non-dominant carrier. See, e.g., *Omaha Forbearance Order*, at ¶ 17.

²³ *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 (filed Aug. 24, 1998).

²⁴ *Petition of the SBC Companies for Forbearance from Regulation as a Dominant Carrier for High Speed Dedicated Transport Services in Specified MSAs*, CC Docket No. 98-227 (filed Dec. 7, 1998); *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington MSA*, CC Docket No. 99-1 (filed Dec. 30, 1999); *Petition of the Bell Atlantic Companies for Forbearance from Regulation as Dominant Carrier, in Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Washington, D.C., Vermont and Virginia*, CC Docket No. 99-24 (filed Jan. 20, 1999); *Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA*, CC Docket No. 99-65 (filed Feb. 5, 1999).

market(s) because there is sufficient competition to prevent them from raising prices above competitive levels.”²⁵

The Commission denied each of the requests for forbearance, concluding that the record in the proceedings concerning the state of competition in the market for special access and high capacity dedicated transport services was not sufficiently developed to support a conclusion that the BOC petitioners lack market power, and thus qualify for forbearance.²⁶ US West appealed the Commission’s decision to the D.C. Circuit, charging that the Commission erred in focusing exclusively on market share and in not considering evidence of supply and demand elasticity in its forbearance analysis.²⁷ In response, the Commission argued that market share data is critical to a *prima facie* showing of competition.²⁸ The D.C. Circuit remanded the case to the Commission, holding that the Commission’s conclusion that market share data is essential for a *prima facie* showing of competition “simply is not consistent with the agency’s earlier decisions” which also considered “supply substitutability, elasticity of demand, and the cost structure, size and resources of the carrier” in assessing market power.²⁹ Importantly, the Court did not suggest that it would be unlawful for the Commission to apply a forbearance standard that focused initially (or principally) on market share. Should the Commission decide to do so, however, it must explain its decision. The Court held:

The FCC’s new policy that market share data is essential to evaluate a carrier’s market power may well be reasonable, but until the Commission has

²⁵ *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Red 19947, 19959 (1999) (“*US West Forbearance Order*”).

²⁶ *US West Forbearance Order*, at 19953.

²⁷ *AT&T Corp. v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001).

²⁸ *Id.*

²⁹ *Id.*, at 736.

adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act.³⁰

More recently, the Commission has applied market power principles to assess whether separate petitions by Qwest, ACS of Anchorage, Inc., and Verizon for forbearance from various dominant carrier tariffing requirements, price cap regulations, and Section 214 rules for acquiring and discontinuing lines and for assignment or transfers of control should be granted in certain geographic markets.³¹ The Commission has carefully noted that “the four-factor [market power test] does not bind” its determinations.³² At the same time, in each case it has applied established market power criteria to assess whether forbearance should be granted.

As noted in the *April 15th Public Notice*, the Commission also routinely assesses market power in its analysis of potential mergers.³³ As explained by the Commission in the 1997 *NYNEX/Bell Atlantic Order*, the scope of its inquiry in merger dockets is quite broad.

Before we can approve the transfers of licenses and other authorizations underlying the merger, we must be persuaded that the transaction is in the public interest, convenience and necessity ... The public interest standard is a broad, flexible standard, encompassing the “broad aims of the Communications Act.” These “broad aims”

³⁰ *Id.*, at 737.

³¹ See *Omaha Forbearance Order*, at ¶ 17; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, ¶ 26 (2007) (“*ACS Dominance Order*”); *Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (“*Verizon 6-MSA Order*”), at ¶¶ 20, 27; *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 (2008) (“*Qwest 4-MSA Order*”), at ¶ 13.

³² *Omaha Forbearance Order*, at n.52.

³³ *April 15th Public Notice*, at 1.

include, among other things, the implementation of Congress' "pro-competitive, de-regulatory national policy framework" for telecommunications, "preserving and advancing" universal service, and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services."³⁴

"[T]he public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws."³⁵ However, consideration of the competition policies underlying the Sherman and Clayton Acts is an important component of the Commission's wide-ranging merger inquiry and the assessment of those competition policies necessarily includes full and careful consideration of market power principles.³⁶

B. The Components of a Market Power Standard

The elements of a market power approach are well-established and straightforward. Under this framework, the Commission: (1) delineates the relevant product and geographic market(s) for examination; (2) identifies the firms that are current or potential suppliers in that market; and (3) determines whether the carrier under evaluation possesses individual market power in that market.³⁷

³⁴ *In the Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987 (1997) ("NYNEX/Bell Atlantic Order") (footnotes omitted). See also *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 50 (1999) ("Ameritech/SBC Order"); *AT&T/Comcast Order*, at ¶¶ 26-27.

³⁵ *NYNEX/Bell Atlantic Order*, at 19987.

³⁶ See, e.g., *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd 15236, ¶ 12 (1998) ("AT&T/Teleport Order"); *Ameritech/SBC Order*, at ¶¶ 49-50; *AT&T/Comcast Order*, at ¶ 28.

³⁷ *Omaha Forbearance Order*, at ¶18 (citing *LEC Classification Order*, at 15776, 15782).

The first tasks in the Commission's market power analysis are to establish the relevant product and geographic markets and to identify all relevant suppliers in each market. Once these tasks are completed, the Commission's attention must turn to whether a petitioning party possesses market power. This determination is made based on a comprehensive assessment of the state of competition in the individual product and geographic markets at issue.³⁸ Under well-established principles of antitrust analysis, the Commission reviews: (1) the petitioner's market share; (2) the demand elasticity of the petitioner's customers; (3) the supply elasticity of the market; and (4) the petitioner's cost structure, size, and resources.³⁹

1. The Commission Must Identify Individual Product Markets

In defining product markets for purposes of a market power-based review, the Commission is properly guided by the methodology set forth in the FTC-DOJ Horizontal Merger Guidelines.⁴⁰ Under that methodology, consumers with similar demand patterns are identified and aggregated.⁴¹ More specifically, a product market is a product or group of products "such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other products remained constant."⁴² Thus, the parameters of a product market are defined by the group of products that would enable a hypothetical monopolist to profit from a significant and nontransitory price increase.

³⁸ See, e.g., *Omaha Forbearance Order*, at ¶ 25.

³⁹ See, e.g., *AT&T Reclassification Order*, at ¶ 38; *Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, 11 FCC Rcd 17997, ¶¶ 39-41 (1996) ("*AT&T International Non-Dominance Order*").

⁴⁰ *FTC-DOJ Horizontal Merger Guidelines*, § 1.1.

⁴¹ *Omaha Forbearance Order*, at ¶ 18.

⁴² *FTC-DOJ Horizontal Merger Guidelines*, § 1.1.

Importantly, substitutions of Product B for Product A by some customers in response to a price increase in Product A does not lead to the conclusion that both products are in the same product market unless the substitution of Product B for Product A is sufficient to prevent the price increase in Product A from yielding a profit. As Dr. Kent Mikkelsen has explained, the relevant inquiry for product market definition purposes is whether a hypothetical monopolist could profitably increase the price paid by *existing* purchasers of Product A. Customers who no longer purchase Product A are not relevant to the inquiry.⁴³

Moreover, as customers shift from Product A to Product B, it might be easier for the producer of Product A to increase its price because customers who view Product B as a substitute for Product A would already have switched to Product B. The remaining consumers of Product A are likely to have less elastic demand and therefore be less likely to switch because of an increase in the price of Product A. Therefore, the producer of Product A would be able to set a higher, profit-maximizing price for remaining Product A customers.⁴⁴

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.⁴⁵ 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

⁴³ White Paper of Kent W. Mikkelsen, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition*, attached to Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008) ("*Mikkelsen White Paper*"), at 8-9.

⁴⁴ See Declaration of Stanley M. Besen, attached to Letter from Thomas Jones, Counsel to tw telecom, inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Jul. 9, 2009) ("*Besen Declaration*"), at ¶ 9.

⁴⁵ *Omaha Forbearance Order*, at ¶ 21.

may not be adequate or feasible substitutes for services offered to business customers.”⁴⁶ The Commission instead delineated two product markets: the mass market and the enterprise market.⁴⁷

The Commenters recommend that the Commission adopt two product markets for purposes of conducting its UNE forbearance analysis in the instant docket: the residential market and the business market.⁴⁸ As a general matter, residential customers have different service needs and engage in a different decision-making process than do business customers.⁴⁹ Residential customers typically require basic voice capability and have lesser data demands, whereas business customers normally 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 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.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*, at ¶ 22.

⁴⁸ 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.

⁴⁹ *SBC/Ameritech Order*, at n.146.

⁵⁰ 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. 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).

The product market criteria suggested by the FTC-DOJ Merger Guidelines direct the Commission to take into account all relevant evidence, including:

- (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
- (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- (3) the influence of downstream competition faced by buyers in their output markets; and
- (4) the timing and costs of switching products.⁵¹

While the Commission may not have all necessary pricing and other information required to formally apply the criteria described above to the instant petition, there is no anecdotal evidence to suggest that significant numbers of residential service customers have shifted or have considered shifting to the purchase of business products in response to changes in the price of residential services, or visa versa. Likewise, there is no evidence to suggest that suppliers of residential services base business decisions on the prospect of residential customer substitution of business services in response to relative changes in the price of residential services. In fact, the evidence regarding residential and business customer characteristics and the marketing and advertising strategies employed by the providers of the residential and business services described herein point to the conclusion that the services purchased by residential and business customers are not substitutable. Thus, residential and business customers belong in different product markets for purposes of the Commission's Section 10 analysis.⁵²

⁵¹ *FTC-DOJ Horizontal Merger Guidelines*, § 1.1.

⁵² 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.

Moreover, application of the principles described in the *Mikkelsen White Paper* and the *Besen Declaration* lead to the finding that wireline and mobile wireless residential telephone services constitute different product markets since, notwithstanding the increasing substitution of wireless for wireline services by residential customers who have “cut-the-cord” over the past several years, there is no record evidence that wireless services exercise a price constraint on wireline residential services for the remaining wireline residential consumers.⁵³

2. The Commission Must Establish The Geographic Market For Review

The Commission consistently has recognized that technically the relevant geographic market for wholesale telecommunications services such as loops is a point-to-point connection.⁵⁴ The Commission also consistently has recognized that it is not administratively feasible to conduct a competition analysis of each separate point-to-point connection.⁵⁵ Consequently, the Commission routinely aggregates or groups circuits into larger geographic areas for competitive analysis purposes.⁵⁶ Here, MSAs represent the most appropriate means of aggregating geographic markets.

It is appropriate for the Commission to use the MSA as the geographic market in which to analyze competition for forbearance purposes because the competitive effects of granting forbearance from loop and transport unbundling obligations generally would be felt throughout a broad geographic area encompassed by an MSA. As noted by commenters in the pending *Verizon 6-MSA* and *Qwest 4-MSA* remand dockets:

⁵³ See *Mikkelsen White Paper*, at 8-9; *Besen Declaration*, at ¶ 9.

⁵⁴ See, e.g., *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order in CC Docket No. 06-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Red 15756, ¶ 5 (1997).

⁵⁵ *Id.*, at ¶ 66.

⁵⁶ See, e.g., *Verizon/MCI Order*, at ¶ 28 (“In order to simplify its analysis ... the Commission has traditionally aggregated or grouped customers facing similar competitive choices ...”).

CLECs that purchase wholesale inputs to provide downstream retail services can generally achieve minimum viable scale only if they serve geographic areas that are roughly the size of an MSA or at least the size of an MSA ... It is also important that each of Cbeyond's serving areas are large and contiguous so that Cbeyond can, among other things, serve customers with multiple locations and implement its sales model, which is based on face-to-face consultations and field visits with existing and potential business customers."⁵⁷

In the *Omaha Forbearance Order*, the Commission concluded that the appropriate geographic market for its forbearance analysis was the Qwest service territory within the Omaha MSA.⁵⁸ 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."⁵⁹ The Commenters agree that the Commission's forbearance review should be conducted on an MSA-wide basis.

3. Market Share

Once the product and geographic markets have been established, an assessment of the petitioner's market share is the next step in the Commission's analysis under a market power-oriented approach. Whether sufficient competition has been found to exist – as measured by the petitioner's market share – has been an important factor in various Commission decisions where market power was at issue.⁶⁰ For example, in determining that forbearance from certain dominant carrier rules and Section 251(c)(3) unbundling obligations was not warranted the

⁵⁷ Letter from Thomas Jones, Counsel to One Communications Corp., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 14, 2009), at 10-11.

⁵⁸ *Omaha Forbearance Order*, at ¶¶ 23-24.

⁵⁹ *Verizon 6-MSA Order*, at ¶ 22. *See also Qwest 4-MSA Order*, at ¶ 15.

⁶⁰ *See, e.g., AT&T Reclassification Order*, at 3307.

Verizon 6-MSA Order and the *Qwest 4-MSA Order*, the Commission found in both cases that the petitioning ILEC's market shares in the MSAs at issue were "sufficiently high to suggest that competition in [those] MSAs is not adequate to ensure that the 'charges, practices, classifications, or regulations ... for [] or in connection with that ... telecommunications service are just and reasonable and are not unreasonably discriminatory' absent the regulations at issue."⁶¹

At the same time, the Commission has made clear on several occasions – including in the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order* – that market share is an important, but not sufficient, element of its market power-based review.⁶² As noted in the *Verizon 6-MSA Order*, when conducting a market power analysis, "the Commission does not limit itself to market share alone, but also looks to other factors including supply substitutability, elasticity of demand, and firm, cost, size, and resources."⁶³ One or more of those factors may result in a particular market share resulting in a finding of market power in one proceeding and a finding of no market power in a second proceeding.⁶⁴

4. Market Elasticities and Structure

As noted above, market share cannot be evaluated in a vacuum. While not controlling, factors such as demand and supply elasticities, and the cost, structure, size and resources of the carrier under review are of relevance to the Commission's market power analysis. Demand elasticity refers to the willingness and ability of a carrier's customers to switch to another provider or otherwise change the amount of services they purchase in response

⁶¹ *Verizon 6-MSA Order*, at ¶ 27 (citation omitted). See also *Qwest 4-MSA Order*, at ¶ 27.

⁶² *Verizon 6-MSA Order*, at ¶ 28 (citation omitted). See also *Qwest 4-MSA Order*, at ¶¶ 13, 28.

⁶³ *Verizon 6-MSA Order*, at ¶ 28 (citation omitted).

⁶⁴ *Id.*, at ¶¶ 30-31.

to a change in price or quality of the service at issue.⁶⁵ High firm demand elasticity indicates customer willingness and ability to switch to another provider in order to obtain price reductions or desired features. Supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price.⁶⁶ As noted by the Commission in the *Omaha Forbearance Order*:

[T]wo factors determine supply elasticity: (1) whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.*, government imposed restrictions), economic (*e.g.*, capital costs, economies of scale), technological (*e.g.*, a new innovation protected by a patent), or operational (*e.g.*, lack of skilled workers).⁶⁷

Whether the carrier under review has sufficiently lower costs, size, superior resources, financial strength or technological capabilities as to “preclude the effective functioning of a competitive market”⁶⁸ may also bear on the Commission’s market power determination.

The Commission routinely has recognized that market share alone does not determine whether a carrier possesses market power. As seen in various Commission orders, other factors, such as the number of facilities-based competitors present in a market and the extent to which the carrier under review controls bottleneck facilities, may have a profound influence on whether a carrier with a particular market share possesses market power. For example, in the *AT&T Reclassification Order*, the Commission found that AT&T lacked overall market power in the long-distance services market notwithstanding AT&T’s market share of 60

⁶⁵ *COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14118, 14120 (1998) (“*COMSAT Reclassification Order*”).

⁶⁶ *Id.*, at 14123.

⁶⁷ *Omaha Forbearance Order*, at ¶ 35 (citation omitted).

⁶⁸ *AT&T Reclassification Order*, at 3309, ¶ 73.

percent.⁶⁹ The Commission's conclusion was based on its assessment of several market characteristics including, importantly, extensive evidence of actual and potential facilities-based competition from three carriers with competing national networks as well as dozens of regional facilities-based carriers, all of which collectively possessed significant excess capacity, and several hundred smaller wholesale carrier customers that used that capacity to offer competing domestic long-distance services.⁷⁰

The Commission's determination fifteen years earlier that AT&T possessed market power rested, in part, on the fact that AT&T controlled local access facilities for over 80 percent of the nation's telephones.⁷¹ In reversing that determination in the *AT&T Reclassification Order*, the Commission found that "conditions in the market are far different ... AT&T has not controlled local bottleneck facilities for over ten years"⁷² and "virtually all customers today ... have numerous choices ..."⁷³

Conversely, in the *Verizon 6-MSA Order*, the Commission determined that Verizon possessed market power in the six MSAs for which it sought forbearance (and therefore should be denied forbearance) notwithstanding the fact that Verizon's overall market share in none of those markets reached the level enjoyed by AT&T at the time of the *AT&T Reclassification Order*. The Commission based its decision on the conclusion that the record in the Verizon proceeding did not show "comparable evidence of facilities-based competition."⁷⁴ The Commission determined that the market characteristics present in the AT&T proceeding

⁶⁹ *Id.*, at 3307.

⁷⁰ *Id.*, at 3308, ¶ 70.

⁷¹ *Id.*, at 3308, ¶ 69.

⁷² *Id.*

⁷³ *Id.*, at 3308, ¶ 71.

⁷⁴ *Verizon 6-MSA Order*, at ¶ 30.

“presented much more compelling evidence of the competitiveness of the marketplace ... than we find for the 6 MSAs based on the record here.”⁷⁵

The Commenters suggest that in evaluating Qwest’s request for forbearance from Section 251(c)(3) unbundling obligations in the Phoenix MSA, the Commission carefully consider Qwest’s market share and these additional factors, especially the extent to which supply elasticities may be low. Specifically, the Commission should evaluate the extent to which competitive service providers – including the Commenters and other wireline CLECs – can easily obtain wholesale facilities and services, including last-mile capabilities, from non-ILEC sources in the Phoenix MSA at reasonable rates and terms. To the extent that such facilities and services (including last-mile access) cannot easily be purchased elsewhere on reasonable rates and terms, the Commission should recognize that Qwest likely continues to possess market power. 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.

III. APPLICATION OF A MARKET POWER-BASED COMPETITIVE ANALYSIS COMPELS DENIAL OF QWEST’S PETITION

In initial and reply comments in the instant docket, the Commenters showed that the record evidence does not support granting Qwest forbearance from UNE unbundling obligations in the Phoenix MSA under a market power-based competitive approach. The Commenters will not repeat that showing here and instead direct the Commission to their

⁷⁵ *Id.*, at ¶ 28.

pleadings filed in September and October of last year.⁷⁶ The Commenters also direct the Commission's attention to the comments filed by other interested parties that raised similar concerns with Qwest's requested relief.⁷⁷ It is significant that Qwest has failed to respond substantively to the commenters' criticisms regarding the lack of factual support for forbearance. In the six months since reply comments were filed, Qwest has failed to produce any additional data nor has it presented any supplemental arguments to support its case. This thorough lack of attention by Qwest raises the question of how committed Qwest is to its petition and how serious it is about the case it has made for forbearance in the Phoenix MSA.

IV. CONCLUSION

For all of the foregoing reasons, Qwest's petition for forbearance from Section 251(c)(3) unbundling obligations in the Phoenix MSA should be denied.

Respectfully submitted,

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⁷⁶ See *Broadview, et al. Initial Comments*; Reply Comments of Broadview Networks, Inc., NuVox, and XO Communications, LLC, WC Docket No. 09-135 (filed Oct. 21, 2009) ("*Broadview, et al. Reply Comments*").

⁷⁷ See, e.g., Opposition of Integra Telecom, Inc., *et al.*, WC Docket No. 09-135 (filed Sept. 21, 2009); Opposition of Covad Communications Company, *et al.*, WC Docket No. 09-135 (filed Sept. 21, 2009); COMPTEL's Opposition to Qwest's Petition for Forbearance, WC Docket No. 09-135 (filed Sept. 21, 2009).