

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

MAILED
JUN 28 2010
FCC Mail room

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

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2010

Released: June 22, 2010

By the Commission: Chairman Genachowski and Commissioner Copps issuing separate statements;
Commissioners McDowell and Baker concurring and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION..... 1
II. BACKGROUND..... 4
A. DOMINANT CARRIER REGULATION..... 5
B. THE TELECOMMUNICATIONS ACT OF 1996..... 9
1. Section 251(c)(3)—Unbundled Access to Network Elements..... 10
2. Section 10—Forbearance..... 14
III. DISCUSSION..... 21
A. SCOPE OF QWEST’S PETITION..... 22
B. THE NEED FOR A MORE COMPREHENSIVE APPROACH..... 23
C. OVERVIEW OF OUR APPROACH TO FORBEARANCE ANALYSIS..... 41
D. THRESHOLD MARKET ANALYSIS..... 46
1. Product Markets..... 46
a. Wholesale Product Markets..... 47
(i) Wholesale Loops and Dedicated Local Transport..... 48
(ii) Originating and Terminating Switched Access..... 50
b. Retail Product Markets..... 51
(i) Retail Residential/Mass Market Services..... 51
(ii) Retail Enterprise Services..... 62
2. Geographic Markets..... 64
3. Marketplace Competitors..... 66
4. Competitive Analysis..... 70
a. Wholesale Competition..... 70
(i) Wholesale Loops..... 70
(ii) Dedicated Local Transport..... 76
(iii) Originating and Terminating Switched Access..... 79
b. Retail Competition..... 80
(i) Mass Market..... 80
(ii) Enterprise Market..... 87
E. FORBEARANCE ANALYSIS..... 92
1. Forbearance from Section 251(c) UNE obligations..... 93
a. Section 10(a)(1)—Charges, Practices, Classifications, and Regulations..... 95

| | |
|--|-----|
| (i) Wholesale Markets | 96 |
| (ii) Retail Markets..... | 97 |
| b. Section 10(a)(2)—Protection of Consumers | 101 |
| c. Section 10(a)(3)—Public Interest..... | 104 |
| 2. Forbearance from Dominant Carrier Regulation of Switched Access Services..... | 110 |
| a. Section 10(a)(1)—Charges, Practices, Classifications and Regulations | 111 |
| b. Section 10(a)(2)—Protection of Consumers | 114 |
| c. Section 10(a)(3)—Public Interest..... | 115 |
| 3. Forbearance from <i>Computer III</i> | 119 |
| IV. EFFECTIVE DATE | 121 |
| V. ORDERING CLAUSES | 122 |
| APPENDIX—Commenters | |

I. INTRODUCTION

1. This order addresses a petition by Qwest Corporation (Qwest) seeking relief from certain longstanding wholesale and retail regulations—including requirements to sell bottleneck network elements such as last-mile copper loops to other communications service providers—in Phoenix, Arizona.¹ Qwest argues that it faces sufficient competition in Phoenix to render these regulations unnecessary, based primarily on claimed competition for traditional voice telephone services.² We evaluate Qwest’s petition using a market power analysis, similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews. Under this approach, we separately evaluate competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers. We also consider how competition varies within localized areas in the Phoenix market.

2. Under this analysis and based on the data in the record, Qwest fails to demonstrate that there is sufficient competition to ensure that, if we provide the requested relief, Qwest will be unable to raise prices, discriminate unreasonably, or harm consumers. For example, the record reveals that no carrier besides Qwest provides meaningful wholesale services throughout the Phoenix marketplace, and that competitors offering business services largely must rely on inputs purchased from Qwest itself to provide service. Moreover, even if there were a stronger competitive showing for some services, there are unresolved policy and administrability questions about whether and how regulatory relief could be tailored to that competition when other services remain insufficiently competitive. We therefore conclude that, at this time, the regulations at issue remain necessary to protect against “unjust and reasonable” rate increases and are “necessary for the protection of consumers,” and that forbearance would not be “consistent with the public interest,” as required by section 10 of the Communications Act,³ and we deny Qwest’s petition.

3. We recognize that the communications marketplace is changing, as technology, prices, product characteristics, and consumer preferences evolve, and we believe that the analysis we use is well-

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket 09-135 (filed March 24, 2009) (Qwest Petition).

² See, e.g., *id.* at 1–6.

³ 47 U.S.C. § 160 (2010); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 et seq. In this order, we use “1996 Act” to refer exclusively to the Telecommunications Act of 1996, and use “the Act” to refer either to the 1996 Act or the Communications Act which the 1996 Act amended.

designed to protect consumers, promote competition, and stimulate innovation by thoroughly analyzing competitive developments in this market. While Qwest has not met its burden to justify forbearance based on the current record, following the release of this order the Wireline Competition Bureau will seek comment on the application of this same analytical approach to other, similar requests for regulatory relief, including two pending remand proceedings.⁴ This will help ensure that the Commission's approach in forbearance proceedings such as this one is not only data-driven, economically sound, and predictable, but also reflects a forward-looking approach to competition and the best understanding of ways to appropriately tailor regulatory relief when it is justified.

II. BACKGROUND

4. Since the Commission began implementing policies to foster competition in communications markets, it has recognized the need to adjust regulation to reflect competitive conditions. Thus, for example, in 1980 it distinguished between dominant carriers and nondominant carriers, and it streamlined the regulation of nondominant carriers.⁵ Moreover, it recognized that it might need to reclassify carriers as dominant or nondominant as competitive conditions evolved.⁶ Similarly, in passing the 1996 Act, Congress, *inter alia*, sought to introduce competition into local telecommunications markets and to facilitate increased competition in telecommunications markets already subject to competition, while at the same time directing the Commission to adjust or eliminate regulations as competition developed and market conditions evolved. In furtherance of these goals, the 1996 Act imposed different obligations on different types of carriers. Thus, it imposed certain minimal obligations on all telecommunications carriers, other obligations on all local exchange carriers (LECs), and certain additional obligations on incumbent LECs, including the obligation to give competitors access to their network elements on an unbundled basis at cost-based rates. The 1996 Act also included provisions to facilitate the adjustment of regulations to evolving market conditions. For example, section 10 of the Act requires the Commission to forbear from enforcing statutory or regulatory requirements if certain conditions are satisfied. These regulatory provisions and developments are summarized below.

A. Dominant Carrier Regulation

5. In a series of orders in the *Competitive Carrier* proceeding, the Commission distinguished between dominant carriers and nondominant carriers.⁷ The Commission defined “a

⁴ See *infra* paras. 19–20, 45.

⁵ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*) (subsequent history omitted).

⁶ *Id.* at 6, para. 26; see, e.g., *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Nondominance Order*).

⁷ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *Competitive Carrier First Report and Order*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 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) (*Competitive Carrier Fourth Report and Order*), vacated, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (*AT&T v. FCC*), cert. denied, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Competitive Carrier Sixth Report and Order*), vacated, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceeding); see 47 C.F.R. § 61.3(q), (y).

dominant carrier as a carrier that possess[es] market power” (*i.e.*, the power to control price),” and a nondominant carrier as one that does “not possess power over price.”⁸ In discussing the market characteristics that it considered in determining whether a carrier possesses market power,⁹ the Commission, *inter alia*, emphasized that, “[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities” because it provides the ability “to impede access of its competitors to those facilities,” and thus is treated “as prima facie evidence of market power requiring detailed regulatory scrutiny.”¹⁰

6. Because nondominant carriers lack market power, the Commission found that “application of our current regulatory procedures to nondominant carriers imposes unnecessary and counterproductive regulatory constraints upon a marketplace that can satisfy consumer demand efficiently without government intervention,”¹¹ and it therefore streamlined the regulation of such carriers.¹² Specifically, the Commission relieved nondominant carriers from *ex ante* rate regulation, reduced their tariff obligations, and accorded them presumptive streamlined treatment under section 214 of the Act.¹³ By contrast, the Commission determined that dominant carriers should remain subject to more extensive regulation under Title II of the Act.¹⁴ Of particular relevance here is the requirement that dominant LECs, including the Bell Operating Companies (BOCs), be subject to *ex ante* rate regulation for their switched access services,¹⁵ including both intercarrier charges and end user charges.

7. The Commission also recognized that developments in the marketplace could result in a previously dominant carrier becoming nondominant with respect to particular services. For example, in 1995 in the *AT&T Domestic Nondominance Order*, the Commission, after an in-depth market analysis, concluded that AT&T lacked individual market power in the interstate interexchange markets and accordingly reclassified AT&T as nondominant in the provision of domestic interstate, long-distance services.¹⁶ Among the factors the Commission cited in support of its finding were: (1) AT&T’s market share had been falling steadily for ten years, and had decreased to approximately “55.2 and 58.6 percent in terms of revenues and minutes respectively;”¹⁷ (2) AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors;¹⁸ (3) AT&T’s competitors possessed the ability to accommodate a substantial number of new customers on their networks with “little or no investment immediately, and relatively modest investment in the short term,” (*i.e.*, that they had sufficient excess capacity to constrain AT&T’s pricing behavior);¹⁹ (4) “virtually all customers . . . have numerous choices

⁸ *Competitive Carrier First Report and Order*, 85 FCC 2d at 13–14, paras. 54, 56.

⁹ *Id.* at 14, para. 57.

¹⁰ *Id.* at 14, para. 58.

¹¹ *Id.* at 13, para. 54.

¹² *Id.* at 7, para. 27.

¹³ *See id.* at 20–26, paras. 85–111.

¹⁴ *See id.* at 20, para. 84.

¹⁵ *See id.* at 1, 15, 20, paras. 2 & n.1, 62–64, 84; *see also* 47 C.F.R. pt. 61 (Subpt. E), pt. 69.

¹⁶ *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3273, para. 1.

¹⁷ *Id.* at 3307, para. 67.

¹⁸ *Id.* at 3308, para. 70.

¹⁹ *Id.* at 3303–04, para. 59.

of equal access carriers;²⁰ (5) both business and residential customers were highly demand elastic and frequently switched carriers;²¹ and (6) AT&T had not controlled local bottleneck facilities for over ten years.²² Based on these and other related competitive considerations, the Commission reclassified AT&T as nondominant with respect to interstate, domestic, interexchange services.²³

8. In the *Competitive Carrier Proceeding* and in certain subsequent proceedings relating to dominance classification, the Commission was primarily concerned with whether the carrier possessed “individual” market power.²⁴ In the *AT&T Domestic Nondominance Order*, the Commission again primarily focused on individual or unilateral market power.²⁵ Importantly, however, the Commission in that order also recognized possible concerns that could arise from collusion.²⁶ In subsequent decisions applying its market power analysis, the Commission expressly recognized the potential for either individual or joint market power in particular circumstances.²⁷

B. The Telecommunications Act of 1996

9. The major purpose of the 1996 Act was to establish “a pro-competitive, deregulatory national policy framework.”²⁸ Among the primary goals of the 1996 Act were “opening the local exchange and exchange access markets to competitive entry” and “promoting increased competition in telecommunications markets that are already open to competition, including the long-distance services market.”²⁹ The 1996 Act introduced several key changes that are relevant here.

²⁰ *Id.* at 3308, para. 71

²¹ *Id.* at 3305–07, paras. 63–66. The Commission further noted that as many as 20% of AT&T’s residential customers changed carriers at least once a year. *Id.* at 3305, para. 63.

²² *Id.* at 3308, para. 70.

²³ Although the Commission found that AT&T lacked individual market power, it nevertheless remained concerned that AT&T, MCI, and Sprint might be colluding to raise the price of long-distance service for low-volume customers. *Id.* at 3313–15, paras. 81–83. In response, AT&T offered certain commitments to protect these low-volume, long-distance users, which the Commission adopted as a condition of the order. *Id.* at 3316–17, paras. 85–86. The Commission also adopted certain conditions related to service to Alaska and Hawaii. *See, e.g., id.* at 3333–35, paras. 114–15. The Commission subsequently reclassified AT&T as generally nondominant with respect to international message telephone service (IMTS) based on a consideration of a similar range of criteria. *See generally Motion of AT&T Corp. to Be Declared Non-Dominant for International Service*, CC Docket No. 79-252, Order, 11 FCC Rcd 17963 (1996).

²⁴ *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d at 10, para. 26; *see also Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 557–62, paras. 6–12 (discussing alternative definitions of market power).

²⁵ *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3292, para. 35 (AT&T neither possesses nor can unilaterally exercise market power within the interstate, domestic, interexchange market taken as a whole); *see also id.* at 3313, para. 80 (finding that “AT&T unilaterally cannot raise and sustain prices profitably above a competitive level for residential services”).

²⁶ *See supra* note 23.

²⁷ *See infra* notes 82 & 85.

²⁸ JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. Rep. No. 104-230, at 113 (1996) (Conf. Rep.) (JOINT EXPLANATORY STATEMENT).

²⁹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15505, para. 3 (1996) (*First Local Competition Order*) (subsequent history omitted).

1. Section 251(c)(3)—Unbundled Access to Network Elements

10. First, the 1996 Act imposes a number of duties on incumbent LECs designed to open local markets to competition. “Foremost among these duties is the LEC’s obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors.”³⁰ In particular, section 251(c)(3) requires “that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2).”³¹ In addition, section 251(d)(2) provides that “[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”³²

11. Following reversals by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) of its first two attempts to interpret section 251(d)(2)’s impairment standard,³³ the Commission ultimately adopted an interpretation of impairment that is tied to the concept of barriers to entry. Specifically, the Commission “held that a requesting carrier is impaired ‘when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.’”³⁴ Consistent

³⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T v. Iowa Utilities*).

³¹ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2534, para. 1 (2005) (*Triennial Review Remand Order*), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (*Covad v. FCC*). Qwest also seeks forbearance from section 271(c)(2)(B)(ii) of the Act (*i.e.*, checklist item 2), which incorporates and is coextensive with section 251(c)(3). Qwest Petition at 7. Under this provision, a BOC must provide “nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” 47 U.S.C. § 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth a 14-point “competitive checklist” of access, interconnection, and other threshold requirements that a BOC must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services. *See* 47 U.S.C. § 271(c)(2)(B). After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements. *See* 47 U.S.C. § 271(d)(6); *see also* *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19419, 19462–63, paras. 7, 94–96 (2005) (*Qwest Omaha Forbearance Order*), *aff’d*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (*Qwest v. FCC*).

³² 47 U.S.C. § 251(d)(2). There is a different standard for unbundling proprietary network elements but, as a practical matter, such issues rarely arise. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17086, para. 171 (2003) (*Triennial Review Order*), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, aff’d in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand, Triennial Review Remand Order, aff’d, Covad v. FCC*.

³³ *AT&T v. Iowa Utilities*, 525 U.S. 366; *United States Telecomm. Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

³⁴ *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (quoting *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84). As the Supreme Court observed in *Verizon Commc’ns v. FCC*, “[a] newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent’s entire existing network, the most costly and difficult of which would be laying down the ‘last mile’ of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.” *Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467, 490 (2002) (*Verizon Commc’ns v. FCC*); *see also* JOINT EXPLANATORY (continued....)

with the direction of the D.C. Circuit, the Commission focused on those operational and economic barriers to entry that are linked to natural monopoly characteristics, in particular: “(1) economies of scale; (2) sunk costs; (3) first-mover advantages; (4) absolute cost advantages; and (5) barriers within the control of the incumbent.”³⁵

12. The Commission further concluded that it should make its impairment determinations with regard to a “reasonably efficient competitor,” without attaching weight to the individualized circumstances of any actual requesting carrier.³⁶ Thus, the Commission presumes that a requesting carrier will use reasonably efficient technology, but does “not presume that a hypothetical entrant possesses any particular assets, legal entitlements or opportunities, even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances.”³⁷

13. The Commission’s unbundling rules are not based solely on impairment, however. Rather, section 251(d)(1) requires the Commission to consider “at a minimum” whether competitors would be impaired without access to specific network elements, which enables the Commission to consider other factors in tailoring its unbundling rules. Thus, consistent with direction from the D.C. Circuit,³⁸ the Commission has limited its unbundling rules notwithstanding possible impairment in particular circumstances in an effort to promote regulatory parity and network investment.³⁹ The Commission also relied upon this language to “decline to order unbundling of network elements to provide service in the mobile wireless services market and the long distance services market” where “competition has evolved without access to UNEs.”⁴⁰ The Commission did “not believe that it [was] appropriate at [that] time to render similar judgments regarding” services provided by LECs, but it noted that another provision added by the 1996 Act—section 10—provides an opportunity for incumbent LECs

(Continued from previous page)

STATEMENT at 148 (stating that “it is unlikely that competitors will have a fully redundant network in place when they initially offer local service because the investment necessary is so significant. Some facilities and capabilities . . . will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251.”).

³⁵ *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (citing *Triennial Review Order*, 18 FCC Rcd at 17037–41, paras. 87–91).

³⁶ *Id.* at 2547–48, paras. 24, 26.

³⁷ *Id.* at 2548, para. 26. Thus, the Commission “reject[ed] the arguments of some parties that just because one competitive LEC holds a particular set of assets, ‘by extension, any efficient [competitive LEC]’ must be deemed to hold those assets.” *Id.* at 2548, para. 26 n.77 (citation omitted).

³⁸ *See, e.g., USTA II*, 359 F.3d at 580 (“[T]he CLECs rightly point to *USTA I*’s observation that ‘impairment’ was the ‘touchstone,’ . . . but that opinion, far from barring consideration of factors such as an unbundling order’s impact on investment, clearly read the Act, as interpreted by the Supreme Court in *AT&T*, to mandate exactly such consideration.”).

³⁹ *See, e.g., Triennial Review Order*, 18 FCC Rcd at 17148–54, paras. 285–97 (With respect to hybrid loops, the Commission considered, “balanced against impairment,” possible investment disincentives that could arise from unbundling, the more extensive presence of cable modem service than wireline broadband Internet access service, and the possibility of using other unbundled network elements (UNEs) to offer similar services.); *Triennial Review Remand Order*, 20 FCC Rcd at 2656, para. 221 (“Considering the disincentives for competitive LECs to rely on competitive switches, we decline to unbundle switching on a nationwide basis pursuant to our ‘at a minimum’ authority, regardless of the assertions of some commenters that requesting carriers may face some limited impairment in particular subsets of the mass market without access to unbundled local circuit switching.”); *USTA II*, 359 F.3d at 580 (“We therefore hold that the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.”).

⁴⁰ *Triennial Review Remand Order*, 20 FCC Rcd at 2554–55, para. 36.

to seek forbearance from unbundling obligations in specific areas where the “requirements for forbearance have been met.”⁴¹

2. Section 10—Forbearance

14. Section 10 of the Act provides that the Commission shall forbear from applying any provision of the Act or any Commission regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁴² In making the “public interest” determination, the Commission must also consider pursuant to section 10(b) “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”⁴³ In proceedings initiated by a petition for forbearance under section 10(c), “the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance.”⁴⁴ This burden of proof “encompasses both the burden of production and the burden of persuasion.”⁴⁵ Thus, in addition to stating a *prima facie* case in support of forbearance, “the petitioner’s evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance.”⁴⁶

15. In its first major decision under section 10, which granted forbearance from tariffing requirements for interstate interexchange services, the Commission recognized that Congress adopted the forbearance statute against the backdrop of the Commission’s efforts to limit regulation of nondominant carriers in the *Competitive Carrier* proceeding.⁴⁷ In particular, the Commission found that section 10 “provides the Commission with the forbearance authority that the courts had previously concluded was lacking,” and that “[t]he Commission now has express authority to eliminate unnecessary regulation and to carry out the pro-competitive, deregulatory objectives that it pursued in the *Competitive Carrier* proceeding for more than a decade.”⁴⁸ Building upon the competitive analysis and findings in the *Competitive Carrier* proceeding and the *AT&T Domestic Nondominance Order*, the Commission

⁴¹ *Id.* at 2556–57, paras. 38–39.

⁴² 47 U.S.C. § 160(a).

⁴³ 47 U.S.C. § 160(b).

⁴⁴ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, para. 20 (2009) (*Forbearance Procedures Order*).

⁴⁵ *Id.* at para. 21.

⁴⁶ *Id.*

⁴⁷ *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738, para. 13 (1996) (*Detariffing Order*), *reconsideration granted in part*, Order on Reconsideration, 12 FCC 15014 (1997), *further reconsideration granted*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *rev. denied sub nom.*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (*MCI WorldCom, Inc. v. FCC*). In the *Competitive Carrier* proceeding the Commission first permissively, and then mandatorily, detariffed nondominant carriers’ interexchange services. *See Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 582–83, para. 43; *Competitive Carrier Sixth Report and Order*, 99 FCC 2d at 1027–28, para. 11. In 1985, the D.C. Circuit vacated the mandatory detariffing decision. *AT&T v. FCC*, 978 F.2d at 729. In 1994, the Supreme Court determined that the permissive detariffing decision was inconsistent with the “rate-regulation, file-tariff system for common-carrier communications” established by Congress. *MCI v. AT&T*, 512 U.S. at 234.

⁴⁸ *Detariffing Order*, 11 FCC Rcd at 20738, para. 13.

concluded that the section 10 criteria were satisfied, and it mandatorily detariffed interstate, domestic, interexchange services provided by nondominant carriers.⁴⁹

16. Carriers subsequently have sought to satisfy the section 10 forbearance criteria by demonstrating the competitiveness of the local marketplace in particular geographic areas. The Commission addressed one such petition in the *Qwest Omaha Forbearance Order*.⁵⁰ As relevant here, Qwest sought forbearance from certain dominant carrier regulation of its access services, as well as forbearance from its section 251(c)(3) unbundling obligations.⁵¹ Record evidence indicated that Qwest faced competition in the Omaha Metropolitan Statistical Area (MSA) primarily from the incumbent cable operator, Cox, and primarily with respect to services provided to residential customers.⁵² Largely on that basis, the Commission granted Qwest forbearance from certain dominant carrier regulation on an MSA-wide basis, and from section 251(c)(3) unbundling obligations in wire centers where Cox's voice-enabled cable plant covered at least 75 percent of the end-user locations.⁵³ Rejecting commenters' concerns "that forbearing from application of unbundling obligations to Qwest will result in a duopoly,"⁵⁴ the Commission predicted that competition would continue to develop in Omaha after Qwest's unbundling obligations were eliminated in certain wire centers.⁵⁵

17. The Commission followed the same general approach when considering subsequent petitions for forbearance that sought similar relief in other markets. For the roughly thirteen geographic areas where it has applied this general framework, the Commission has granted some relief in three areas, and denied it in ten.⁵⁶ In the two most recent Commission orders addressing such petitions—the 2007

⁴⁹ See *id.* at 20732-33, para. 3; see also *supra* note 47.

⁵⁰ *Qwest Omaha Forbearance Order*, 20 FCC Rcd 19415.

⁵¹ *Id.* at 19417, 19422, paras. 3, 11.

⁵² Although the Commission did cite certain evidence regarding competition by Cox for enterprise customers, this evidence was insufficient to satisfy even the limited competitive analysis "informed by" the Commission's dominance precedent. Compare, e.g., *id.* at 19448, 19450–51 paras. 66, 69 (citing certain evidence of competition from Cox as part of the analysis granting UNE forbearance) with *id.* at 19438, para. 50 (holding that Qwest has not provided sufficient data regarding enterprise competition to justify forbearance from dominant carrier pricing regulations).

⁵³ *Id.* at 19446, para. 62; *Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 22 FCC Rcd 13561 (WCB 2007). As used in the *Qwest Omaha Forbearance Order*, "an intermodal competitor 'covers' a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19444, para. 60 n.156.

⁵⁴ *Id.* at 19452, para. 71.

⁵⁵ See *infra* paras. 33–36 for a more detailed discussion of those predictions.

⁵⁶ See, e.g., *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, 1959–60, paras. 1–2 (2007) (granting certain conditional forbearance from unbundling obligations in wire centers in the Anchorage study area) (*ACS UNE Forbearance Order*), appeals dismissed, *Covad Comm'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), 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*, WC Docket No. 06-109, (continued....)

Verizon 6 MSA Forbearance Order and 2008 *Qwest 4 MSA Forbearance Order*— the Commission denied the requested relief, including for Qwest’s service territory in the Phoenix MSA, and Verizon and Qwest appealed to the D.C. Circuit.⁵⁷

18. While those appeals were pending, both Verizon and Qwest filed additional forbearance petitions for portions of the geographic areas for which forbearance previously was denied. In particular, Verizon filed petitions seeking forbearance in Rhode Island and Cox’s service territory in the Virginia Beach MSA, and Qwest subsequently filed the instant petition seeking forbearance in the Phoenix MSA. On May 12, 2009—the statutory deadline for the first of Verizon’s two forbearance petitions—Verizon

(Continued from previous page)

Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (granting in part, subject to conditions, certain forbearance from dominant carrier regulation in Anchorage) (*ACS Dominance Forbearance Order*), petitions for recon. pending; *Petitions 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, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (*Verizon 6 MSA Forbearance Order*) (denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 6 MSAs), remanded, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) (*Verizon v. FCC*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257 (2008) (*Qwest Terry Forbearance Order*) (granting certain forbearance from dominant carrier and UNE obligations in the Terry, Montana exchange); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008) (*Qwest 4 MSA Forbearance Order*) (denying forbearance from dominant carrier, *Computer III*, and UNE regulations in 4 MSAs), motion for voluntary remand granted, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (*Qwest Corporation v. FCC*). For a more detailed summary of these decisions, see, for example, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11732–35, paras. 4–10. We note that two of the three proceedings granting forbearance implicated somewhat distinctive circumstances. In the *Qwest Terry Forbearance Order*, the Commission faced a situation where a new entrant, Mid-Rivers Telephone Cooperative Inc., had completely overbuilt the Terry, Montana exchange and had been formally designated as the “incumbent LEC,” and was itself subject to dominant carrier regulation as well as section 251 requirements (albeit limited initially by the rural exemption in section 251(f)). See generally *Qwest Terry Forbearance Order*, 23 FCC Rcd 7257. In granting certain conditional forbearance in the *ACS UNE Forbearance Order*, the Commission also pointed out the “unique circumstances in the Anchorage study area,” including factors not present in many of the other petitions such as the fact that “most businesses in the Anchorage study area purchase only low-capacity services,” and “due to the unique physical characteristics of the Anchorage study area, new entrants would face unique circumstances in terms of network deployment.” *ACS UNE Forbearance Order*, 22 FCC Rcd at 1986, para. 41. In addition, there was a voluntarily-negotiated interconnection agreement that formed the basis for the continued provision of wholesale services required as a condition of forbearance in Anchorage. *Id.* at 1983-85, para. 39.

⁵⁷ On January 14, 2008, Verizon filed an appeal of the Commission’s decision in the *Verizon 6 MSA Forbearance Order* to deny Verizon forbearance from section 251(c)(3) unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs (6 MSAs). On July 29, 2008, Qwest filed an appeal with the D.C. Circuit of the *Qwest 4 MSA Forbearance Order* denying forbearance relief in the Denver, Minneapolis-St. Paul, Phoenix and Seattle MSAs (4 MSAs). See *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, Public Notice, 24 FCC Rcd 10881 (WCB 2009) (*Remands Comment Cycle Public Notice*); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas; Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 06-172, WC Docket No. 07-97, Order, 24 FCC Rcd 11983 (WCB 2009) (extending comment period) (*Remands Extension Comment Cycle Public Notice*). Qwest filed its forbearance petition in this proceeding on March 24, 2009, while its appeal of the *Qwest 4 MSA Forbearance Order* was pending.

withdrew both its petitions.⁵⁸

19. On June 19, 2009, the D.C. Circuit issued an opinion and remanded the *Verizon 6 MSA Forbearance Order* to the Commission for further consideration of its decision to deny Verizon relief from section 251(c)(3) unbundling obligations.⁵⁹ The D.C. Circuit found that the Commission, without explanation, “changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace.”⁶⁰ On August 5, 2009, the D.C. Circuit, at the Commission’s request, remanded the *Qwest 4 MSA Forbearance Order*, which relied on a substantially similar analytical framework.⁶¹

20. Following those remands, the Wireline Competition Bureau sought “comment on how the Commission should reconsider its analysis” in the remanded decisions,⁶² and simultaneously extended the comment cycle for the related Qwest Phoenix petition.⁶³ Subsequently, at Qwest’s request, the Bureau further extended the date for reply comments on both sets of proceedings to October 21, 2009.⁶⁴ Qwest sought this extension “to allow parties sufficient time to address the complex set of legal and economic issues likely to be raised in the initial comments.”⁶⁵ Most recently, on April 15, 2010, the Bureau issued a public notice observing that “certain commenters have urged the Commission to adopt a different standard for analyzing” these forbearance petitions than had been used in the past—namely, a market-power-based approach—and seeking comment on the potential application of that approach in the context of the Qwest Phoenix forbearance petition.⁶⁶

III. DISCUSSION

21. For purposes of Qwest’s forbearance petition, we find it appropriate to return to a competitive analysis that more carefully defines the relevant product and geographic markets and examines whether there are any carriers in those markets that, individually or jointly, possess significant market power. As discussed below, a number of considerations persuade us that, in evaluating Qwest’s

⁵⁸ Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24, 08-49 (filed May 12, 2009).

⁵⁹ *Verizon v. FCC*, 570 F.3d at 296.

⁶⁰ *Id.* at 304.

⁶¹ *Qwest Corporation v. FCC* (remanding *Qwest 4 MSA Forbearance Order*). In these four MSAs, Qwest sought the same forbearance relief that it seeks in this proceeding. *See infra* para. 22 (describing the scope of Qwest’s instant forbearance request).

⁶² *Remands Comment Cycle Public Notice*, 24 FCC Rcd at 10881–82.

⁶³ *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation’s Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Public Notice, 24 FCC Rcd 10887 (WCB 2009).

⁶⁴ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Order, 24 FCC Rcd 11980 (2009); *Remands Extension Comment Cycle Public Notice*.

⁶⁵ Qwest Corporation, Request for Extension of Time to File Reply Comments on Qwest Corporation’s Petition for Forbearance, WC Docket No. 09-135 at 1 (filed Sept. 3, 2009).

⁶⁶ *Request for Additional Comment and Data Related to Qwest Corporation’s Petition for Forbearance from Certain Network Element and Other Obligations in the Phoenix, Arizona MSA*, WC Docket No. 09-135, Public Notice, DA 10-647 at 1 (rel. Apr. 15, 2010). Comments received in response to this Public Notice are referred to as “Market Power PN Comments.”

current petition for forbearance in the Phoenix MSA, this analysis is preferable to the analysis the Commission applied to this type of petition in the *Qwest Omaha Forbearance Order* and its progeny.

A. Scope of Qwest's Petition

22. In its petition, Qwest seeks forbearance from a variety of regulations based on the level of competition in its service territory within the Phoenix-Mesa-Scottsdale, Arizona MSA (Phoenix MSA).⁶⁷ Specifically, Qwest seeks forbearance from loop and transport unbundling obligations of section 251(c)(3) and 271(c)(2)(B)(ii) of the Act,⁶⁸ as implemented in related provisions of the Commission's rules.⁶⁹ For mass market and enterprise switched access services, Qwest also seeks forbearance from Part 61 dominant carrier tariffing requirements;⁷⁰ Part 61 price cap regulations;⁷¹ requirements applicable to dominant carriers arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control;⁷² and certain *Computer III* requirements including comparably efficient interconnection (CEI) and open network architecture (ONA) requirements.⁷³

B. The Need for a More Comprehensive Approach

23. Qwest bases its request for forbearance primarily on claims it is subject to effective competition in the Phoenix MSA. It is clear that competition, properly demonstrated, can form the basis for forbearance under section 10.

24. The Commission has discretion in determining the analytical approach it will use in evaluating forbearance petitions.⁷⁴ With the benefit of hindsight and upon further consideration, we conclude that there is a better analytical framework than the one the Commission employed in the *Qwest Omaha Forbearance Order*, which led the Commission to find adequate competition to justify

⁶⁷ Qwest Petition at 1 & Declaration of Robert H. Brigham, Attach. (Qwest Brigham Decl.). Qwest's service area footprint in the Phoenix MSA consists of 64 wire centers. Qwest Petition at 1. Throughout this order, we refer to "Qwest's service area footprint within the Phoenix MSA," which is the area within which Qwest has sought relief, simply as "the Phoenix MSA."

⁶⁸ Qwest Petition at 7 (citing 47 U.S.C. § 251(c)). Qwest seeks this relief for its wholesale provision of voice-grade, DS1, and DS3 unbundled loop and transport facilities. *Id.* Qwest also seeks forbearance from the congruent loop and transport unbundling obligations of 47 U.S.C. § 271(c)(2)(B)(ii). *Id.*

⁶⁹ *Id.* (citing 47 C.F.R. §§ 51.319(a), 51.319(b), and 51.319(e)).

⁷⁰ *Id.* (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, and 61.59). Qwest asserts that if it is granted forbearance relief from these dominant carrier tariffing requirements, it would willingly accept, as a condition of such relief, being subject to the permissive tariffing rules that apply to competitive LECs. *Id.* at 7-8 (citing 47 C.F.R. §§ 61.18-61.26).

⁷¹ *Id.* at 8 (citing 47 C.F.R. §§ 61.41-49). Qwest asserts that it would willingly accept the conditioning of this relief on the application to Qwest of the pricing benchmark that applies to competitive LEC. *Id.*

⁷² *Id.* at 10 (citing 47 C.F.R. §§ 63.03-.04).

⁷³ *Id.* at 11 (citing *Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007)).

⁷⁴ *EarthLink Inc. v. FCC*, 462 F.3d 1, 7 (D.C. Cir. 2006) (*EarthLink v. FCC*) (using the *Chevron* framework to review the Commission's forbearance analysis, under which the court "will uphold the FCC's interpretation as long as it is reasonable, even if "there may be other reasonable, or even more reasonable views" (internal citation omitted)).

forbearance. Moreover, particularly in light of subsequent developments, there does not appear to be a basis for relying on the predictive judgments the Commission made there. Below, we identify some of the problematic elements of the framework used in the *Qwest Omaha Forbearance Order*, particularly with respect to its analysis of whether unbundling relief should be granted based upon the claimed competitiveness of the marketplace. As a result of those elements, application of that approach in other similar situations may result in granting relief from existing obligations before competition has developed sufficiently to protect against the exercise of market power by incumbent LECs. In the next section, we propose a more comprehensive analytical framework, based on traditional market power analysis, for evaluating forbearance petitions such as Qwest's.

25. The first relevant element of the *Qwest Omaha Forbearance Order* framework is its use of different analytical frameworks for evaluating the marketplace competitiveness underlying requests for relief from different obligations—e.g., unbundling obligations, certain dominant carrier regulations, and certain other section 251(c) and section 271 obligations, respectively.⁷⁵ Although requests for forbearance from different statutory requirements or rules might correctly focus on competition for different products and services, the order does not adequately explain why it is appropriate to use fundamentally different analytical methodologies to evaluate competition for purposes of unbundling relief versus relief from dominant carrier regulation.

26. Second, while the *Qwest Omaha Forbearance Order* referenced certain wholesale or retail services in a general manner, the Commission has acknowledged that it did so as part of “a broader evaluation of competition and as a reflection of how parties submitted data in that proceeding,”⁷⁶ and not “to formally define product markets pursuant to a market power analysis.”⁷⁷ This higher-level analysis led to certain conclusions that were not adequately justified as a matter of economics. For example, while acknowledging that there were no other providers of wholesale facilities or services besides Qwest,⁷⁸ the Commission eliminated all unbundled loop and transport obligations based largely on predictive judgments. As discussed below, we do not believe that the marketplace has borne out those predictions, and we do not rely on those predictions here.

27. As interpreted by subsequent Commission orders, the Commission in the *Qwest Omaha Forbearance Order* adopted what, as a practical matter, largely amounted to a two-part test to determine

⁷⁵ Compare *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19425, para. 17 (dominant carrier forbearance “inquiry is informed by the Commission’s traditional market power analysis”), with *id.* at 19447–52, paras. 65–72 (finding competition sufficient to forbear from section 251(c)(3) in certain wire centers without engaging in a market power analysis), and *id.* at 19456–71, paras. 84–111 (finding competition insufficient to forbear from remaining section 251(c) and 271 regulations without engaging in a market power analysis).

⁷⁶ *ACS UNE Forbearance Order*, 22 FCC Rcd at 1966, para. 12 n.41 (discussing the approach in the *Qwest Omaha Forbearance Order*).

⁷⁷ *Id.* at 1966, para. 12 (declining to define product markets for the purpose of its competitive analysis because it was following the approach to evaluating UNE forbearance from the *Qwest Omaha Forbearance Order*). In considering whether to forbear from dominant carrier regulation, the Commission identified various markets and assessed whether Qwest possessed market power, but it did not do so with the rigor we return to here. See, e.g., *Integra Opposition* at 2–3 (noting that the *Qwest Omaha* line of forbearance precedent “suffers from several basic deficiencies, such as the practice of relying, at least to some extent, on a market share test in the residential telephone market as a basis for determining whether to grant forbearance in the business market”). Indeed, the Commission acknowledged that, even with respect to its analysis of whether to forbear from certain dominant carrier regulations, it was not undertaking a “stand-alone market power inquiry.” *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19425, para. 17 n.52.

⁷⁸ *Id.* at 19448, para. 67.

whether to forbear from statutory unbundling obligations with respect to UNE loop and transport elements used to provide service to mass market and enterprise market customers. In the first part of the test, the Commission considered primarily whether the petitioner's *retail* market share for *mass market telephone* subscribers had dropped below a particular level. Although the Commission also included a high-level discussion of enterprise services, it reached conclusions without relying on a consistent analytical framework.⁷⁹ In the second part of the test, it considered the geographic reach of the incumbent cable company's network, and it granted unbundling relief in a wire center if the incumbent cable company's network reached more than a specified percentage of end-user locations served by that wire center.

28. Neither portion of this test adequately assesses the presence or absence of market power. The focus in the first part of the test on Qwest's market share for retail mass market telephone service was not, by itself, sufficient to determine whether Qwest possessed the power to control price (in other words, individual market power)⁸⁰ in the markets for retail mass market services or retail enterprise services, or in any wholesale market.⁸¹ Nor did the generalized claims about competition for enterprise customers allow for such an evaluation. It is well established that the assessment of a carrier's individual market power requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.⁸² Accordingly, the Commission's nearly exclusive emphasis on Qwest's share of the mass market retail voice marketplace—without meaningful consideration of Qwest's market shares in other relevant retail and wholesale markets, as well as other factors pertinent to whether Qwest, individually or jointly, possessed market power in those markets—is not supported by current economic theory.

29. The second, and arguably more important, part of the test focused on the extent to which a single provider (the incumbent cable company) could provide services in each Qwest wire center over

⁷⁹ *Id.* at 19448–49, paras. 66–68.

⁸⁰ See *Competitive Carrier First Report and Order*, 85 FCC 2d at 13, para. 54 (defining “market power” as “the power to control price”).

⁸¹ See, e.g., EarthLink Market Power PN Comments at 2 (stating that, “in its forbearance decisions, the FCC’s failure to apply a market-power analysis, including specifically refusing to define relevant product markets, has led to undisciplined decision making, particularly with respect to enterprise markets”).

⁸² See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15775–82, paras. 28–41 (1997) (*LEC Classification Order*) (explaining that the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999); *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293–3309, paras. 38–73; see also, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); William M. Landes and Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (Landes and Posner Market Power Law Review); Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Guidelines*). The FTC recently released for public comment a proposed revision of the *DOJ/FTC Guidelines*. See *Horizontal Merger Guidelines for Public Comment*, Public Notice (*Draft Revised Horizontal Guidelines*) (Apr. 20, 2010), available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>. The approach adopted in this order is consistent with the *DOJ/FTC Guidelines* and the proposed revisions in the *Draft Revised Horizontal Guidelines*.

its own facilities. This focus inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers. The potential for supracompetitive prices may be a concern where there is a duopoly or a market dominated by a few firms and there are high barriers to entry into the market. Economists,⁸³ courts,⁸⁴ and the Commission⁸⁵ have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare. As the D.C. Circuit has stated, “[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination.”⁸⁶

⁸³ See, e.g., 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 359–60, para. 840a (1978) (“Under some conditions, a few relatively large firms in a market may simply individually recognize the mutual interdependence of their price and output decisions and refrain from competing in price. Diversity of circumstances and interests typically prevents such non-competitive pricing from precisely matching the price a monopolist would charge, but does not preclude results that more nearly resemble monopoly than competition.”); MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS, ch. 15 (1998) (KATZ & ROSEN); JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION, ch. 5 (1992) (TIROLE); ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY, ch. 12 (1995) (MAS-COLELL, WHINSTON & GREEN); Steffen Huck, et. al., *Two Are Few and Four Are Many: Number Effects in Experimental Oligopoly*, 53 JOURNAL OF ECONOMIC BEHAVIOR AND ORGANIZATION 435–46 (2004); see also Letter from Thomas Jones, et al., Counsel to Integra Telecom Inc., et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, Declaration of Stanley M. Besen, Attach. at 3–15 (filed Apr. 29, 2010) (Integra Besen Decl.) (discussing the theory and empirical evidence regarding pricing in concentrated markets).

⁸⁴ See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (*FTC v. H.J. Heinz Co.*) (“In a duopoly, a market with only two competitors, supra-competitive pricing at monopolistic levels is a danger.”); *id.* at 715 (“[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”).

⁸⁵ See, e.g., *Amendment of the Commission’s Space Station Licensing Rules and Policies*, IB Docket Nos. 02-34, 02-54, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10789, para. 64 (2003) (finding that “the factors that have led courts to disfavor mergers to duopoly also support establishing a procedure that will maintain at least three competitors in a frequency band, unless an interested party can rebut our presumption that three is necessary to a competitive market”); *Application of EchoStar Commc’ns Corp. (a Nevada Corporation), General Motors Corp. and Hughes Electronics Corp. (Delaware Corporations) (Transferors) and EchoStar Commc’ns Corp. (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20624–26, paras. 170–74 (2002) (*EchoStar/DirecTV Order*); see also *id.* at 20624, para. 170 (“Both economic theory and empirical economic research have shown that firms in concentrated, oligopoly markets take their rivals’ actions into account in deciding the actions they will take.”); *Application of Air Virginia, Inc. (Assignor) and Clear Channel Radio Licenses, Inc. (Assignee), for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, MM Docket No. 02-38, Hearing Designation Order, 17 FCC Rcd 5423, 5432, para. 27 (2002) (“In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination.”). See also *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, 18325–34, paras. 65-78 (2005) (*SBC/AT&T Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, WC Docket No. 05-65, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008–09, para. 37 (1997); see also, e.g., *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7872–73, para. 100 (1996).

⁸⁶ *FTC v. H.J. Heinz Co.*, 246 F.3d at 724 (citing precedent). In referring to the risk of collusion or coordination in this order, we are referring to the risk of tacit collusion. Tacit collusion occurs when firms coordinate their behavior by observing and anticipating their rivals’ behavior. It does not require explicit agreement and need not constitute illegal conduct. Although not illegal, tacit coordination is discouraged by antitrust policy “even more than express (continued....)

30. We thus find that the move from monopoly to duopoly is not alone necessarily sufficient to justify forbearance in proceedings such as this one. While duopolies may yield competitive results in certain circumstances, both theoretical and empirical studies suggest that duopolies may pose competitive concerns in other circumstances. For example, economic theory holds that firms operating in a market with two or a few firms (*i.e.*, an oligopoly) are likely to recognize their mutual interdependence and, unless certain conditions are met, in many cases may engage in strategic behavior, resulting in prices above competitive levels.⁸⁷ Under a variety of theoretical models, based on realistic assumptions, prices in markets with few dominant firms are likely to be higher than prices in competitive markets for two reasons.⁸⁸ First, because each firm's actions directly affect the profit of the other firms, under some reasonable assumptions,⁸⁹ theory predicts that firms will unilaterally decide not to lower prices (or increase quantities) to competitive levels. Even when firms behave non-cooperatively and consider only unilateral actions, they recognize that lowering prices may trigger responses from rivals that render vigorous competition for customers unprofitable. Second, when there are only a few firms in a market, they are more likely to engage in coordinated interaction that harms consumers than when there are a greater number of firms. Such coordination includes tacit as well as explicit collusion, and can result in supracompetitive pricing.⁹⁰ We acknowledge, however, that under certain conditions duopoly will yield a competitive outcome.⁹¹

31. Empirical evidence of duopolistic competition in some telecommunications markets supports these theoretic conclusions. Specifically, two empirical studies found supracompetitive prices in

(Continued from previous page) _____

collusion, for tacit coordination, even when observed, cannot easily be controlled" by antitrust authorities. *Id.* at 725 (quoting 4 PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, *ANTITRUST LAW* 9, para. 901b2 (rev. ed.1998)).

⁸⁷ See generally *supra* note 83 (KATZ & ROSEN at ch. 15; JEAN TIROLE at ch. 5; MAS-COLELL, WHINSTON & GREEN at ch. 12). See also Integra Besen Decl. at 3-5; Integra Opposition at 29 & n.95.

⁸⁸ Two basic models of duopoly (or oligopoly behavior) are the Cournot Model, in which each firm maximizes its profits by choosing its output level, and the Bertrand Model, in which each firm maximizes its profits by choosing the price at which it will sell its output. In general, the Cournot Model will result in non-competitive market outcomes. It can be shown that for a firm operating in a market with homogenous products, the price-cost margin will be higher the higher the firm's market share, and smaller the higher the elasticity of demand for the product. See *supra* note 83 (KATZ & ROSEN at 491-504; TIROLE at 218-221). Under the Bertrand Model, duopoly can yield a competitive outcome assuming homogeneous products and no capacity constraints. Under other assumptions, duopoly may yield a non-competitive outcome even under Bertrand competition. See *supra* note 83 (TIROLE at 211-223, 245-247; MAS-COLELL, WHINSTON & GREEN at 400-405).

⁸⁹ As long as the firms have some degree of product differentiation or have capacity constraints, or compete in quantities as in the Cournot Model under any assumptions, then theories of oligopoly behavior predict that equilibrium prices will exceed competitive levels. See CARL SHAPIRO, *Theories of Oligopoly Behavior*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION ch. 6 (R. Schmalensee and R.D. Willig eds., North Holland Publishing 1989); JEFFREY CHURCH AND ROGER WARE, *INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH* ch. 10 (Irwin/McGraw-Hill 2000) (CHURCH & WARE).

⁹⁰ See *DOJ/FTC Guidelines*; see also *supra* note 86. A significant body of literature has developed on the factors that can facilitate or discourage oligopolistic collusion. See generally George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44-61 (1964); Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 415-73 (Richard Schmalensee & Robert D. Willig, eds., 1989); DREW FUDENBERG AND JEAN TIROLE, *DYNAMIC MODELS OF OLIGOPOLY* (1986).

⁹¹ For example, under Bertrand competition, in which each firm maximizes its profits by choosing the price at which it will sell its output, duopoly will yield a competitive result under certain assumptions. MAS-COLELL, WHINSTON & GREEN 387-400 *supra* note 83.

the mobile wireless industry during its duopoly period.⁹² The Commission also has noted that high and stable prices for wireless service existed during the period of duopoly, but that such prices dropped dramatically as new PCS competitors began to launch service.⁹³ Empirical studies of other industries similarly have found that prices are likely to be higher in markets with greater concentration.⁹⁴

32. Furthermore, forbearing from unbundling obligations on the basis of duopoly, without additional evidence of robust competition, appears inconsistent with Congress' imposition of unbundling obligations as a tool to open local telephone markets to competition in the 1996 Act. As discussed above, the major purpose of the 1996 Act was to establish "a pro-competitive, deregulatory national policy framework," and one of its key goals was to open "the local exchange and exchange access markets to competitive entry."⁹⁵ Indeed, in considering the 1996 Act, Congress recognized that cable operators were

⁹² Parker and Röller found that prices for mobile wireless services during the duopoly period were significantly above competitive levels and that the industry participants' actions suggested tacit collusion. Philip M. Parker & Lars-Hendrik Röller, *Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephone Industry*, 28 RAND JOURNAL OF ECONOMICS 304, 304-322, (1997) (PARKER AND RÖLLER). Similarly, Busse concluded that firms engaged in collusive pricing in the U.S. mobile wireless industry during this time period. Maghan R. Busse, *Multimarket Contact and Price Coordination in the U.S. Cellular Telephone Industry*, 9 J. OF ECON. AND MANAGEMENT STRATEGY 287-320 (2000) (BUSSE). See also Integra Besen Decl. at 9-10 (discussing empirical studies of pricing for mobile wireless services); COMPTTEL Opposition, Attach. at 22-26 (attaching a copy of comments filed in WC Docket Nos. 06-172 & 07-97) (discussing empirical studies of pricing for mobile wireless service in the United States and other countries, and describing price increases for other communications services in various states); Covad Opposition, Attach. 1 at 17-18 (attaching a copy of COMPTTEL's comments filed in WC Docket Nos. 06-172 & 07-97) (discussing studies of rates increases in duopoly cable markets and of the failure of wireless mobile services to constrain pricing by cable/telco duopolies).

⁹³ In the *Cingular/AT&T Wireless Order*, the Commission stated that "[t]he Commission's first broadband PCS auction in 1995 marked the beginning of the transition from a cellular duopoly to a far more competitive market in mobile telephony services," and that "[a]fter stabilizing at a plateau in the final years of the cellular duopoly, the price per minute of mobile telephony service started to decline shortly before the first commercial launches of PCS service and subsequently dropped sharply and steadily." *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21553, 21555, paras. 61, 67 (2004) (*Cingular/AT&T Wireless Order*).

⁹⁴ See generally R. Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION ch. 16 987-88 (R. Schmalensee and R.D. Willig eds., North Holland Publishing 1989) (SCHMALENSSEE) (noting that, "[i]n cross-section comparisons involving markets in the same industry, seller concentration is positively related to the level of price"); see also, e.g., Integra Besen Decl. at 2-3, 5-14 (discussing empirical studies and evidence from mergers). According to Integra, one inter-industry comparison of price-cost margins for industries with different levels of concentration "generally shows that higher margins are associated with higher levels of concentration." *Id.* at 5 (citing SCHMALENSSEE). Other empirical studies, evaluating variations in prices in a given industry in different geographic areas with different levels of concentration, "suggest that, at least in some industries, the presence of a third substantial competitor results in a significant reduction in prices." *Id.* at 8; see also 8-10 (summarizing studies by J.E. Kwoka, *The Effect of Market Share Distribution on Industry Performance*, THE REVIEW OF ECONOMICS AND STATISTICS 108 (1979); T.F. Bresnahan and P.C. Reiss, *Entry and Competition in Concentrated Markets*, JOURNAL OF POLITICAL ECONOMY 1006 (1991); J. Hausman, *Mobile Telephone*, HANDBOOK OF TELECOMMUNICATIONS ECONOMICS, eds. M.E. Cave, S.K. Majumdar, and I. Vogelsang, n.1, Elsevier, 579 (2002). Finally, Integra suggests that price comparisons from studies of mergers have revealed evidence of higher prices in duopoly markets than in less concentrated markets. *Id.* at 13-15.

⁹⁵ *First Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

likely to emerge as facilities-based competitors for local telephone services.⁹⁶ Were that level of competition sufficient to fulfill Congress' goals for telephone services, the 1996 Act only would have needed to require interconnection. Instead, Congress established means for additional competitors to enter without fully duplicating the incumbent's local network.⁹⁷ It is clear Congress wanted to enable entry by multiple competitors through use of the incumbent LEC's network.

33. Recognizing the theoretical and empirical concerns associated with duopoly, the Commission, in the *Qwest Omaha Forbearance Order*, offered three predictive judgments, which it concluded would mitigate those concerns. It first predicted that Qwest would continue to make wholesale facilities, such as DS0, DS1, and DS3 facilities, available to competitors at "competitive rates and terms."⁹⁸ Second, and relatedly, it predicted that non-cable competitors could "rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 . . . [to] minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market."⁹⁹ Third, it predicted that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport.¹⁰⁰

34. Upon further consideration, we find that these predictions have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory.¹⁰¹ There are a number of reasons to be skeptical of the first prediction—that incumbent LECs, even if not required to offer UNEs, would have an incentive "to make attractive wholesale offerings." First, the Commission has long recognized that a vertically integrated firm with market power in one market—here upstream wholesale markets where, as discussed below, Qwest remains dominant—may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs.¹⁰² Second, because Qwest was the sole provider of wholesale facilities and

⁹⁶ See, e.g., JOINT EXPLANATORY STATEMENT at 148 (recognizing potential of cable companies to become facilities-based competitors within the meaning of section 271(c)(1)(A)).

⁹⁷ See, e.g., *id.* at 148 (concluding that competitors will still need access to the incumbent LEC's network, notwithstanding the potential emergence of cable companies as facilities-based competitors); see also *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, para. 55 (1999) (*UNE Remand Order*) ("We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be 'impaired' within the meaning of section 251(d)(2). . . . A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are 'impaired' under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.").

⁹⁸ *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19455, paras. 79–83.

⁹⁹ *Id.* at 19452, para. 71.

¹⁰⁰ *Id.* at 19451, para. 69.

¹⁰¹ The D.C. Circuit has recognized that the Commission "is fully capable of reassessing the situation if its predictions are not borne out." *EarthLink v. FCC*, 462 F.3d at 12.

¹⁰² See *General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 508, 510–11, paras. 71, 78 (2004); see also *LEC Classification Order*, 12 FCC Rcd at 15803, para. 83 (noting that "a (continued....)

services,¹⁰³ there is no reason to expect it to offer such services at “competitive” rates. Rather, assuming that Qwest is profit-maximizing, we would expect it to exploit its monopoly position as a wholesaler and charge supracompetitive rates, especially given that (absent regulation) Qwest may have the incentive to foreclose competitors from the market altogether.¹⁰⁴ Moreover, there is little evidence, either in the record or of which we otherwise are aware, that the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated.¹⁰⁵ For example, other than Cox, McLeodUSA was the only other competitor of significant size cited by the Commission in the *Qwest Omaha Forbearance Order*.¹⁰⁶ The record indicates that subsequent to the *Qwest Omaha Forbearance Order*, Qwest, with one exception,¹⁰⁷ was not spurred to offer McLeodUSA any wholesale alternatives to UNEs that were not already offered prior to the grant of forbearance.¹⁰⁸ Moreover, the record indicates that McLeodUSA has removed most of its employees from the Omaha marketplace, has limited its operations primarily to serving its existing customer base, and has ceased sales of residential and nearly all business services in Omaha.¹⁰⁹ This suggests that McLeodUSA likewise no longer should be considered a significant competitor in the Omaha marketplace.¹¹⁰ We also note record evidence that Integra, which had been contemplating entry into the (Continued from previous page) _____ carrier may be able to raise prices by increasing its rivals’ costs or by restricting its rivals’ output through the carrier’s control of an essential input”).

¹⁰³ *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19448, para. 67 (“The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.”).

¹⁰⁴ Janusz A. Ordover, et. al., *Equilibrium Vertical Foreclosure*, 82 AM. ECON. REV. 698 (1990); Oliver Hart & Jean Tirole, *Vertical Mergers and Market Foreclosure* in BROOKINGS PAPERS ON ECONOMIC ACTIVITY - MICROECONOMICS 205 (1990).

¹⁰⁵ For example, just prior to the *Triennial Review Remand Order*, when UNE-P was eliminated, Qwest provided 194,778 UNE-P arrangements in Phoenix. See Selected Form 477 Data as of December 31, 2004, available at <http://www.fcc.gov/wcb/iatd/comp.html>. By comparison, now that such arrangements are provided via commercial agreements, the latest available data indicate that Qwest provides only 82,278 such arrangements in Arizona. See Selected Form 477 Data as of June 30, 2008, available at <http://www.fcc.gov/wcb/iatd/comp.html>. We acknowledge that multiple factors potentially contributed to this decline of approximately 58%, but also note that this experience does not give reason for particular confidence in the Commission’s prediction that carriers’ incentives in offering commercial arrangements once UNEs are eliminated will maintain or increase competition.

¹⁰⁶ *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19433–34, para. 38 n.102.

¹⁰⁷ McLeodUSA states that Qwest has proposed a new “‘commercial’ DS0 loop offering,” but claims that the rates, terms, and conditions are not reasonable. See Letter from Andrew D. Lipman, Counsel to PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Dockets 04-223 & 09-135, Exh. A at 4-5 (attaching a copy of the Petition for Modification of McLeodUSA Telecommunications Services, Inc. in WC Docket No. 04-223 (McLeodUSA Petition) (filed Dec. 11, 2009) (PAETEC Dec. 11, 2009 *Ex Parte* Letter). Accord PAETEC Opposition at 40–41. Subsequent to the *Qwest Omaha* decision, McLeodUSA was acquired by PAETEC. See, e.g., Qwest Petition at 39 n.135.

¹⁰⁸ See, e.g., PAETEC Dec. 11, 2009 *Ex Parte* Letter at 5; PAETEC Opposition at 39–40; Covad Opposition at 28–40; see also COMPTTEL Opposition, Attach. at 6–11.

¹⁰⁹ McLeodUSA Petition at 14; PAETEC Dec. 11, 2009 *Ex Parte* Letter at 2–3; Arizona Corporation Commission Comments at 7; COMPTTEL Opposition, Attach. at 6.

¹¹⁰ In the *Verizon/MCI Order*, the Commission observed that MCI was no longer a significant competitor for small business and mass market customers “given the significant reduction in its marketing and consumer operations.” *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, 18475, 18489–90, paras. 77, 104 (2005) (*Verizon/MCI Order*).

Omaha market, abandoned its plans to do so after the Commission issued the *Qwest Omaha Forbearance Order*.¹¹¹ Although it is beyond the scope of this proceeding to estimate the extent of competition in Omaha today,¹¹² these subsequent developments have cast doubt on the accuracy of the Commission's first prediction made in the *Qwest Omaha Forbearance Order*.

35. There are similar concerns with the Commission's second prediction. This prediction—that competitors could rely on wholesale access rights and other rights they have under sections 251(c) and 271—is inconsistent with conclusions reached in the Commission's previous unbundling analysis.¹¹³ Specifically, in the *Triennial Review Remand Order*, the Commission, in response to *USTA II*, considered whether the availability of tariffed service offerings, such as special access services, meant that competitors were not impaired by lack of access to UNEs. Although the Commission found that the availability of special access services justified, in part, restricting the availability of UNEs to interexchange carriers and wireless carriers, it rejected this argument as a general reason for finding no impairment. Among the reasons the Commission gave in support of this conclusion was that these tariffed services might not be priced at cost-based rates.¹¹⁴ We find the reasoning of the Commission in the *Triennial Review Remand Order* persuasive in this context.¹¹⁵

36. Finally, the Commission's third prediction—that the areas where Cox currently had facilities would see further investment by Cox and by other competitors even without access to unbundled loops or transport—appears unwarranted. As an initial matter, there is no record evidence, nor are we aware of any evidence elsewhere, of significant new deployment of competitive facilities by non-incumbent providers in any of the Omaha wire centers where unbundling forbearance was granted. We see no persuasive economic reason to predict that, just because a cable company might find it profitable to make incremental investments in a preexisting network, subsequent entrants also would find it profitable to incur the costs of building an entire new network from scratch. Indeed, given that an incumbent, such as a cable company, may have an additional incentive to invest in facilities to deter additional entry from

¹¹¹ COMPTTEL Opposition, Attach. at 6.

¹¹² We therefore do not prejudice the outcome of McLeod's pending petition for reconsideration of the *Qwest Omaha Forbearance Order*, nor have we attempted to enumerate all of the issues that are relevant to that proceeding. See generally McLeodUSA Petition; see also, e.g., Qwest Reply at 51–52 (citing a report issued by the Nebraska Public Service Commission which indicates that, as of December 31, 2008, AT&T, including TCG Omaha, provided 48,144 facilities-based switched access lines to business customers in Nebraska, although neither the Nebraska report nor Qwest provide data demonstrating that these lines are located in Qwest's service territory in Omaha); 2009 NEB. PSC ANN. REP. ON TELECOMM., available at <http://www.psc.state.ne.us/home/NPSC/communication/AnnualReport2009.pdf>.

¹¹³ As discussed more fully below, we are in no way implying that an impairment analysis is dispositive of the Commission's forbearance analysis pursuant to section 10. See *infra* note 127.

¹¹⁴ *Triennial Review Remand Order*, 20 FCC Rcd at 2560–61, paras. 46–48 (also citing administrability, risk of abuse, and other factors for not concluding that the mere availability of tariffed services should be sufficient to demonstrate a lack of impairment). Indeed, even in subsequent orders following the *Qwest Omaha Forbearance Order* approach, the Commission has recognized that “[f]or the reasons set forth in the *Triennial Review Remand Order*, the Commission already has rejected the argument that use of special access, in itself, is a reason to forbear from UNE obligations, based on a number of different factors.” *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21315, para. 38.

¹¹⁵ We find this analysis persuasive with respect to both special access services and other services or facilities a BOC might offer under section 271. While the Commission has required that the prices of section 271 elements must be “just, reasonable, and not unreasonably discriminatory” as required under sections 201 and 202, it has not required that such prices be cost-based. See *Triennial Review Order*, 18 FCC Rcd at 17389, paras. 662–64.

potential rivals,¹¹⁶ even less can be inferred about subsequent entrants from the fact that most cable companies have found it profitable to upgrade their cable television networks to provide telephone and data services. Supporting this view, we have seen few new entrants in any domestic telecommunications markets that have been willing to invest in a totally new wireline network, at least to serve residential customers.

37. Given the theoretical and empirical concerns with duopoly in some markets, and the experience in Omaha following the Commission's grant of forbearance, we find it appropriate to adopt a more comprehensive analytical framework for considering forbearance requests like Qwest's.¹¹⁷ We thus return to a traditional market power framework, which the Commission established in the *Competitive Carrier* proceedings and developed further in subsequent decisions, to evaluate competition in telecommunications markets in forbearance proceedings such as this one.¹¹⁸ This approach also is comparable to the analysis used by the DOJ, FTC, and telecom regulators in other countries, including those in the European Community,¹¹⁹ to determine the extent of competition in a market. As discussed below, we find that this framework is better suited to analyzing claims that competition in the legacy services market is sufficient to satisfy the three-part section 10 forbearance criteria, not only with respect to dominant carrier regulation, but also with respect to the other regulatory obligations at issue here, such

¹¹⁶ CHURCH & WARE, *supra* note 89 at ch. 14; A. Michael Spence, *Entry, Capacity, Investment and Oligopolistic Pricing*, 8 BELL J. ECON. 534-544 (1997); Avinash K. Dixit, *The Role of Investment in Entry Deterrence*, 90 ECON. J. 95-106 (1980).

¹¹⁷ See Arizona Corporation Commission Comments at 1-2 (recommending that the Commission should put more weight on the availability of meaningful wholesale alternatives and incorporate more of a "market power" analysis, which it has used in many contexts in the past); Broadview Comments at 10-11 (requesting that the Commission stop using the section 251(c)(3) forbearance standard used in previous proceedings and replace it with a market power-based analysis); Cavalier Market Power PN Comments at 1 (similar); EarthLink Market Power PN Comments at 15 (similar). See also Qwest Market Power PN Comments at 2 (stating that "Qwest supports a market power approach that accords with Commission precedent, competition policy, and the goals of the Telecommunication Act of 1996").

¹¹⁸ See, 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, 5675-76, paras. 23-26 (2007) (*AT&T/BellSouth Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18303-04, paras. 20-23; *Verizon/MCI Order*, 20 FCC Rcd at 18446-47, paras. 20-23; *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293-309, paras. 38-73.

¹¹⁹ See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OFFICIAL J. EURO. UNION, Mar. 7, 2002, at Annex 1, available at http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/1_10820020424en00330050.pdf (Framework Directive) (setting forth procedures for market definition and analysis to be used by national regulatory authorities to justify the imposition of regulatory obligations); *Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services*. OFFICIAL J. EURO. UNION (February 11, 2003), available at http://ec.europa.eu/information_society/topics/telecoms/regulatory/publicconsult/documents/relevant_markets/1_11420030508en00450049.pdf (Framework Recommendation) (interpreting the Framework Directive with respect to the identification and evaluation of relevant markets); see also *Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*, Dec. 18, 2009, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:337:SOM:EN:HTML>.

as section 251(c)(3) unbundling.¹²⁰ In particular, the Commission's market power analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.¹²¹ This market power analysis is the precise inquiry specified in section 10(a)(1),¹²² and informs our assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates. Finally, in making its public interest evaluations pursuant to section 10(a)(3) and section 10(b), the Commission is required to consider whether forbearance "will promote competitive market conditions."¹²³

38. The Commission's traditional market power framework also is consistent with the policies underlying section 251(c)(3), as the Commission has implemented that provision. As discussed below, closer adherence to the Commission's traditional competitive analysis likely would prevent inappropriate grants of forbearance predicated on competition for a subset of services and customers between only two facilities-based providers, when it is unlikely that additional facilities-based entry would occur.¹²⁴ Forbearance from section 251(c)(3) unbundling instead would be based on whether the provider no longer has market power, which is consistent with Congress's goals of fostering local competition through multiple modes of entry.¹²⁵ Similarly, the Commission's "impairment" standard focuses heavily on barriers to entry,¹²⁶ which also are key components of a traditional market power

¹²⁰ Carriers are, of course, free to seek forbearance based on factors other than, or in addition to, claimed competition, so long as the section 10 criteria are satisfied. *See, e.g., Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements; Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c); Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of ARMIS Reporting Requirements; Petition of Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements; Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 08-190, 07-139, 07-204, 07-273, 07-21, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, 13654, para. 11 (2008) (granting conditional forbearance from "the current partial and uneven" collection of certain service quality and infrastructure data).

¹²¹ In the *Competitive Carrier First Report and Order*, the Commission found that "firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." *Competitive Carrier First Report and Order*, 85 FCC 2d at 20, para. 88.

¹²² 47 U.S.C. § 160(a)(1). We therefore disagree with AT&T and Verizon that a market power approach such as that outlined in the *DOJ/FTC Guidelines* applies only to mergers and is irrelevant to the question whether the Commission should grant forbearance in this situation. *See* AT&T Market Power PN Comments at 5, 7; Verizon Market Power PN Comments at 5.

¹²³ 47 U.S.C. §§ 160(a)(3), (b).

¹²⁴ *See infra* Part III.D.4.

¹²⁵ *See* JOINT EXPLANATORY STATEMENT at 148; *supra* para. 32; *UNE Remand Order*, 15 FCC Rcd at 3727, para. 55; *First Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

¹²⁶ Specifically, the Commission "held that a requesting carrier is impaired 'when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.'" *Triennial Review Remand Order*, 20 FCC Rcd at 2540, para. 10 (quoting *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84).

analysis.¹²⁷ Finally, as directed by the D.C. Circuit,¹²⁸ the Commission's unbundling analysis,¹²⁹ as well as a traditional market power analysis, considers evidence of both actual and potential competition.¹³⁰

39. As some commenters note, in *EarthLink v. FCC*, the D.C. Circuit observed that section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,'" and provides the Commission flexibility to "balance the future benefits against short term impact."¹³¹ Indeed, a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest's petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.¹³² In this petition for forbearance from currently applicable regulations, by contrast, we do not find any persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.¹³³ To the contrary, maintaining unbundling of legacy facilities,

¹²⁷ Similar to the barriers to entry considered under the Commission's impairment analysis, the Commission, in assessing whether a firm possesses market power, considers the existence and nature of barriers to entry. *See supra* para. 11; *Competitive Carrier First Report and Order*, 85 FCC 2d at 14, para. 57; *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3297-98, para. 47. We decline to adopt Verizon's suggestion that the Commission make impairment determinations to determine whether to grant forbearance from unbundling obligations. *See Verizon Market Power PN Comments* at 2-3; Letter from Thomas Jones et al., Counsel to Integra Telecom, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 1-2 (filed May 11, 2010). The Commission steadfastly has declined to use the section 251 impairment standard to interpret or apply the statutory criteria of section 10. *See, e.g., Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11753, para. 34, n.124; *see also Verizon v. FCC*, 570 F.3d at 300-02 (holding that the Commission's decision in the *Verizon 6 MSA Forbearance Order* to refuse to interpret and apply its section 251 impairment standard under section 10 was reasonable, and explaining that Verizon's argument to the contrary "fails because it unnecessarily conflates the FCC's impairment standard with the forbearance standard under § 10").

¹²⁸ *See, e.g., USTA II*, 359 F.3d at 574-75.

¹²⁹ *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2586-87, para. 87-88.

¹³⁰ *See, e.g., LEC Classification Order*, 12 FCC Rcd at 15775, para. 28 (determining market power by assessing both "firms that are current suppliers and those firms that are potential suppliers in [a] particular market"); *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3303-05, paras. 57-62 (discussing supply elasticity, including the ability of existing competitors ability to expand capacity to serve future customers and the possibility of *de novo* entry).

¹³¹ *EarthLink v. FCC*, 462 F.3d at 8-9.

¹³² *See, e.g., DOJ/FTC Guidelines*, § 1.521 (discussing how factors such as changing technology could lead existing market shares to either overstate or understate a company's future competitive significance); Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 14-15 (2007) ("Indeed, innovation raises the fundamental question of whether current product-market shares are meaningful predictors of future competitive conditions in a dynamic industry and, thus, whether they are relevant to the prediction of the price and output effects of a merger.").

¹³³ *Cf., e.g., Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19469, para. 107 ("The reasoning that formed the basis of the Commission's decision to forbear from applying the section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements."); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15860, para. 8 (2004) (The Commission declined to "eliminate unbundling [of fiber to predominantly (continued...)]

such as copper loops, may increase the incentives of incumbent LECs to upgrade their facilities to fiber, as discussed below.¹³⁴

40. Finally, although Qwest's petition does not primarily involve advanced services, the data-driven evaluation of the state of competition in legacy services intrinsic to the Commission's traditional market power framework also may support broadband deployment and competition. As the National Broadband Plan explains, "the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers."¹³⁵ By using the more comprehensive antitrust-based analysis the Commission frequently has used in past proceedings, and that the nation's antitrust agencies regularly use to measure competition, we ensure that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.¹³⁶

C. Overview of Our Approach to Forbearance Analysis

41. Qwest bases its request for forbearance primarily on claims it is subject to effective competition in the Phoenix MSA. In assessing Qwest's petition for forbearance, we conduct a market power analysis. We recognize, as the D.C. Circuit has held, that "[o]n its face" section 10 "imposes no particular mode of market analysis or level of geographic rigor," but rather "allow[s] the forbearance analysis to vary depending on the circumstances."¹³⁷ It is clear that assessing competition through a market power analysis can form the basis for forbearance under section 10 in this context. Section 10 was adopted against the backdrop of the Commission's efforts to limit regulation of nondominant carriers through the *Competitive Carrier* proceeding,¹³⁸ and, as the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."¹³⁹ As explained above, in the *Qwest Omaha Forbearance Order* and subsequent decisions following *Qwest Omaha's* analytical approach, the Commission adopted an abbreviated analysis. While that approach may have been a permissible way to address forbearance petitions, in proceedings such as this one a traditional market power analysis is a more analytically precise method for evaluating predictive claims that competition in a market is sufficient to satisfy the section 10 criteria.¹⁴⁰

(Continued from previous page) _____

commercial multiunit buildings] for enterprise customers where the record shows additional investment incentives are not needed," and thus the goals of section 706 were not implicated.).

¹³⁴ See *infra* Part III.E.1.c.

¹³⁵ See FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, 47 (2010) (NATIONAL BROADBAND PLAN) (stating that "end-user loops and other point-to-point data circuits often serve as critical inputs to retail broadband services for business, mobile and residential customers").

¹³⁶ *Id.* at 37.

¹³⁷ *EarthLink v. FCC*, 462 F.3d at 8.

¹³⁸ *Detariffing Order*, 11 FCC Rcd at 20738, para. 13.

¹³⁹ *Petition of US WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Petition of US WEST Communications, Inc., for Forbearance, The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999) (*US West Forbearance Order*).

¹⁴⁰ See, e.g., *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (*AT&T Corp. v. FCC*) (reversing Commission's denial of forbearance based on its failure to explain why it was deviating from its traditional market (continued....))

42. The traditional market power framework enables us to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted. Specifically, our market power analysis begins by defining the relevant product¹⁴¹ and geographic markets¹⁴² and by identifying the market participants. Next, we perform an analysis, in which we examine available evidence regarding market shares¹⁴³ and evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by Qwest or by Qwest in concert with a few competitors.¹⁴⁴ Based on this finding, we determine whether the regulations

(Continued from previous page)

power analysis in evaluating competition); *EarthLink v. FCC*, 462 F.3d at 9 (noting EarthLink’s claim that “‘competition’ can only rationally be assessed by focusing on more specific product and geographic markets and by conducting a ‘traditional market analysis (including market share, demand and supply elasticity, and other factors)’” and concluding that “[w]hile such an analysis is no doubt appropriate in some circumstances, we cannot say the FCC was unreasonable in taking another tack here, tailoring the forbearance inquiry to the situation at hand”).

¹⁴¹ A relevant product market has been defined as a group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a “‘small but significant and nontransitory’ increase in price.” *DOJ/FTC Guidelines*, §§ 1.11, 1.12; see also *EchoStar/DirecTV Order*, 17 FCC Rcd at 20605–06, para. 106.

¹⁴² A relevant geographic market has been defined “as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a ‘small but significant and nontransitory’ increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.” *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines*, § 1.21).

¹⁴³ Some commenters argue against consideration of market shares, claiming they are “backwards looking.” See, e.g., Qwest Market Power PN Comments at 2, 4; Verizon Market Power PN Comments at 30. We disagree. Market shares provide a useful snapshot of current market conditions. Moreover, such data, when combined with data on trends in market shares and data on entry conditions, provides insight into how competition may evolve in the near future. As explained above, economic theory predicts that firms operating in a market dominated by a few firms are likely to recognize their mutual interdependence and engage in strategic behavior, which may lead to supracompetitive prices and other harms to consumers. See *supra* para. 30. Qwest also asserts that, in calculating market share, the proper analysis must include capacity as well as existing service. Qwest Market Power PN Comments at 4–5. Our calculation of market shares for each relevant product market in the Phoenix MSA is based upon the data and information in the record and a capacity-based market share calculation would not materially affect the result here. In the case of residential services, Qwest and Cox are essentially the only providers with capacity to serve end-users. See *infra* para. 81. The remaining providers of residential services rely exclusively upon Qwest wholesale last-mile facilities. Our analysis based upon service line counts indicates that Qwest and Cox [REDACTED]% of the market. See *id.* In the case of wholesale and retail enterprise services, only Qwest has ubiquitous coverage of the market and thus capacity to serve end-users. The record evidence indicates that Qwest’s competitors, absent leasing facilities from Qwest, would be unable to provide a timely supply response and that this response would likely require investment in significant sunk costs. See, e.g., *infra* paras. 72–73, 89–90. Thus, our calculation of market shares based upon current service levels is likely an accurate representation of the current market structure in the Phoenix MSA. Finally, Qwest argues that the *DOJ/FTC Guidelines* require the Commission to factor in entry alternatives that can be achieved within two years from initial planning to significant market impact. Qwest Market Power PN Comments at 6. Contrary to Qwest’s claims, the *DOJ/FTC Guidelines* state that in identifying market participants, entry must occur within one year and without the expenditure of significant sunk costs of entry and exit. *DOJ/FTC Guidelines*, § 1.32. The *DOJ/FTC Guidelines* recognize the need to consider potential entry, but state that entry must occur within two years. *DOJ/FTC Guidelines*, § 3.2. But see *Draft Revised Horizontal Guidelines*, § 9.1 (eliminating two-year time limitation on entry, but maintaining requirement that entry must “be rapid enough that customers are not significantly harmed”). Our analysis below considers potential entry.

¹⁴⁴ See, e.g., *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3346, para. 139; *AT&T Corp. v. FCC*, 236 F.3d at 736. In the *AT&T Domestic Nondominance Order*, the Commission explained that, after defining the relevant (continued....)

at issue remain necessary to protect against “unjust and reasonable” rate increases and are “necessary for the protection of consumers,” and whether forbearance would not be “consistent with the public interest,” as required by section 10 of the Act.

43. Under this approach, Qwest could satisfy the section 10 criteria for the regulations as issue by demonstrating that it does not have market power.¹⁴⁵ For example, Qwest could prove the relevant wholesale markets are effectively competitive. Alternatively, Qwest could demonstrate that there are a sufficient number of significant, full facilities-based competitors providing the relevant *retail* services so as to make those markets effectively competitive. The forbearance criteria could not be met, however, if Qwest, either individually or in conjunction with a small number of firms, could profitably sustain supracompetitive prices.

44. We also consider policy and administrability issues in our analysis. For example, the evidence in a future forbearance proceeding could indicate the existence of significant competition only for a subset of relevant products under consideration. This would raise questions regarding the extent to which the Commission could tailor regulatory relief to the particular services subject to sufficient competition. For example, if there were evidence of sufficient competition for residential voice service, the Commission would need to consider whether, or how, forbearance from unbundling obligations could be tailored given that unbundled DS0 loops are used to serve not only residential customers but also businesses, and to provide not only voice service but bundles of communications services. Throughout this order, we have attempted to provide greater clarity as to the policy and administrability issues that would arise in the context of requests for forbearance from the regulations at issue in this petition.

45. We also recognize that the factual, policy, and administrability questions raised here could arise in the Commission’s consideration of the remanded *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*, as well as future requests for regulatory relief based on intermodal competition to provide the services addressed in this order. To that end, following the release of this order the Wireline Competition Bureau will seek comment on the application of this same analytical approach to the remanded proceedings. By developing the factual record regarding the state of competition and possible ways to tailor any regulatory relief that might be warranted, the Commission will ensure that its approach is not only comprehensive and data-driven, but reflects a forward-looking approach to competition, including forbearance where warranted.

D. Threshold Market Analysis

1. Product Markets

46. The regulations from which Qwest seeks forbearance affect various types of wholesale and retail services. To evaluate Qwest’s claims that competition is sufficient to justify forbearance under section 10 with respect to those regulations, our analytical framework calls for us to define both wholesale and retail product markets. We define relevant product markets below, to the extent permitted by the available information in the record, though we recognize that market definitions can change over

(Continued from previous page) _____

markets and identifying participating firms, it would then evaluate available evidence regarding market shares, including trends in market share, and other factors, including supply substitutability, elasticity of demand, and the cost structure, size, and resources of the carrier. *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293, 3346, paras. 38, 139.

¹⁴⁵ We decline in this order to adopt any bright-line test or specific set of necessary conditions that must be satisfied before any future forbearance petitions would be granted. We therefore have no need to determine whether the hypothetical market share and facilities deployment thresholds set forth as a proposed UNE forbearance test is necessary or sufficient to warrant forbearance in particular markets. See, e.g., COMPTTEL Opposition, Attach. at 3; Integra Opposition at 9–10 (both proposing bright-line tests for unbundling forbearance).