

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

In the Matter of)
)
Wireline Competition Bureau Seeks)
Comment on Applying the *Qwest Phoenix*) WC Docket Nos. 06-172, 07-97
Forbearance Order Analytic Framework)
in Similar Proceedings)

COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation (“Sprint”) respectfully submits its Comments in the above-captioned proceeding pursuant to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice¹ seeking comment on whether to extend the market power analytical framework used in the *Qwest Phoenix Forbearance Order*² to other requests for relief.³ Sprint fully supports the application of the market power analytical framework used in the *Qwest Phoenix Forbearance Order* to the *Verizon 6 MSA Forbearance Order* remand proceeding and future similar proceedings.

While the *Public Notice* only seeks comment on the use of the *Qwest Phoenix Forbearance Order* market power analytical framework in “the remand proceedings and similar future forbearance proceedings,”⁴ Sprint believes this market power analysis

¹ Public Notice, Wireline Competition Bureau Seeks Comment on Applying the *Qwest Phoenix Forbearance Order* Analytic Framework in Similar Proceedings, (“*Public Notice*”) DA 10-1115 (rel. June 22, 2010).

² *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, Memorandum Opinion and Order, FCC 10-113, 2010 FCC LEXIS 3841 (rel. June 22, 2010) (“*Qwest Phoenix Forbearance Order*”).

³ Current similar proceedings include *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*”), remanded, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).

⁴ *Public Notice* at 3.

should also be applied whenever the Commission deliberates on ILEC dominant carrier issues that affect the competitive marketplace, including: (1) special access rate regulation and pricing flexibility reform;⁵ (2) review and reversal of previous forbearance grants, in particular forbearance from regulation of Ethernet services;⁶ and (3) reexamination of wireless roaming regulations.⁷

The *Qwest Phoenix Forbearance Order* correctly applied a market power analysis, similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission and the Department of Justice in anti-trust reviews. Before adopting this approach, the Commission examined earlier decisions that addressed flawed predictions of potential competition and justified the use of a rigorous market power analytical framework. The Commission examined multiple product and geographic markets, the lack of competition in a duopoly market, and the lack of competitive alternatives, in particular with respect to ILEC domination of the special access wholesale product market. The Commission's approach was correct in this case and should be consistently applied to other forbearance requests and to other proceedings

⁵ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*).

⁶ See, *In the Matters of 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 Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, 22 FCC Rcd 18705 (Oct. 12, 2007), and *In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, 22 FCC Rcd 19478 (Oct. 24, 2007).

⁷ See, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers; Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 05-265; WT Docket No. 00-193, 20 FCC Rcd 15047; 2005 (Aug. 31, 2005); *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, 22 FCC Rcd 15817, (Aug. 16, 2007); and *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 25 FCC Rcd 4181, (Apr. 21, 2010).

where ILEC dominance under current regulations appears to undermine the development of a competitive marketplace.

I. A PROPER ANALYTIC FRAMEWORK EXAMINES MULTIPLE PRODUCT AND GEOGRAPHIC MARKETS

An ILEC⁸ participates in several telecommunications product markets in its territory. In the *Qwest Phoenix Forbearance Order* the Commission considered the following product markets:

- Wholesale Loops and Dedicated Local Transport⁹
- Differing Speeds of High Capacity Circuits¹⁰
- Retail Residential/Mass Market Services¹¹
- Retail Enterprise Services¹²

A proper review of competition must take into account each of these product markets because the level of competition within each market is different, and as a result, the harm that can be caused differs markedly. When a market power analysis is conducted in multiple product markets, specific data must be considered for each market -- an analysis

⁸ A holding company owning an ILEC also often participates in many other telecommunications markets including long distance, VoIP service, Internet access, wireless services, wholesale services, information services, and enhanced services. This is often done through an affiliate of the ILEC. Any competitive analysis needs to consider all ILEC affiliates.

⁹ *Qwest Phoenix Forbearance Order* at ¶ 48. (The Commission previously identified “separate product markets for wholesale loops and local transport” and again concluded that wholesale customers, facing a price increase in wholesale loops would not switch to dedicated transport because dedicated transport does not reach the end user customer. Further, wholesale customers facing a price increase in dedicated local transport would not switch from dedicated local transport to loops because loops do not allow the wholesale customer to carry its traffic back to its switch.)

¹⁰ *Id.* at ¶ 49. (The Commission found “it appropriate to distinguish product markets further based on capacity.”)

¹¹ *Id.* at ¶ 51. (The Commission examined “the extent to which Qwest’s residential voice customers would switch from Qwest’s services to Cox’s residential voice services or to mobile wireless voice service” in response to a Qwest price hike. The Commission also examined managed VoIP services and “over-the-top VoIP services” as well as small business services.)

¹² *Id.* at ¶ 62. (Enterprise services include “a number of separate relevant product markets” including local voice, long distance voice, and data services with different high-capacity transmission speeds defining “separate relevant product markets.”)

of one product market does not fit all. The market power analytical framework appropriately considered the effects of ILEC dominance over competition within each of these product markets and this market power analysis should be continued in similar proceedings.

The Commission also reaffirmed “that each customer location constitutes a separate relevant geographic market, given that a customer is unlikely to move” in response to a price increase by the incumbent ILEC.¹³ This is not only true for retail customers of the ILEC, it is also true for wireless carriers. Each cell site is a customer location and a wireless carrier is unlikely to move its cell site in response to a price increase by the ILEC. It is also true that each customer location served by the ILEC remains a monopoly for origination and termination of voice calls to that location. Thus, the geographic location of each ILEC voice customer is a separate market controlled by the ILEC and this fact should be considered in any analytical framework used in the future.

It is important that a comprehensive analysis of each market be applied in forbearance and other proceedings where the Commission deliberates on the effects of ILEC dominance over competition in the marketplace. Forbearance from regulatory oversight would undermine the development of competition without an appropriate review of ILEC market power on a market by market basis. ILEC traffic termination, which includes switched access, reciprocal compensation, and mobile-to-land¹⁴ traffic, is a primary example of a specific geographic market in which ILEC market dominance can be used to suppress competition.

¹³ *Id.* at ¶ 64.

¹⁴ *See* 47 C.F.R. § 20.11.

II. AN ILEC/CABLE DUOPOLY IS NOT SUFFICIENT TO ENSURE THAT PRICES ARE CONSTRAINED TO COMPETITIVE LEVELS

The Commission correctly considered whether there are alternative wholesale providers of loops in the Phoenix MSA. It concluded that the record did not show any such wholesale alternative with coverage throughout the MSA. As a result, the record cannot support a claim “that the market for wholesale services is competitive.”¹⁵ The Commission further rejected potential entry as a competitive check on wholesale market power because of “the existence of significant barriers to entry”¹⁶ and because “competition from either supply-side substitution or from *de novo* entry” is unlikely.¹⁷ The Commission came to the same conclusion in the enterprise market.¹⁸ As a result, it found that potential competition could not be relied upon to be a competitive check on market power in the wholesale markets under review.

The Commission also found that the mass market was highly concentrated with the ILEC and the cable company holding dominant positions. Other providers were simply fringe providers able to compete only by relying extensively on UNEs and other Qwest wholesale services.¹⁹ The Commission found no evidence that this duopoly could “ensure effective competition for the legacy” mass market services under consideration in the Qwest petition or that “the markets at issue are behaving in a competitive manner.”²⁰ The Commission was correct when it concluded that a cable/telco duopoly is not sufficient to ensure that prices are constrained to a competitive level.

¹⁵ *Id.* at ¶ 71

¹⁶ *Id.* at ¶ 72.

¹⁷ *Id.* at ¶ 73.

¹⁸ *Id.* at ¶ 89.

¹⁹ *Id.* at ¶ 80.

²⁰ *Id.* at ¶ 86.

As the Commission moves forward in its deliberations of pending forbearance proceedings and other competition related proceedings, it is important that it take into account the limitations of relying on potential competition and the limitations of relying on duopoly markets to ensure effective competition when conducting a market power analysis of both retail and wholesale product and geographic markets dominated by the ILECs.

III. WIRELESS SERVICE IS NOT A COMPETITIVE RESTRAINT ON ILEC RETAIL PRICING

The Commission considered whether wireless service constrains the price of ILEC local service and noted that it had previously answered this question in the negative. Further, the Department of Justice and foreign regulators have come to the same conclusion.²¹ Indeed, the record indicates that “the majority of residential customers continue to subscribe to both mobile wireless and wireline services” so “mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.”²² The Commission correctly found that the record did not support a finding that wireless service constrained ILEC prices for local wireline service.

Furthermore, the ability of wireless carriers to be a competitive constraint on ILEC retail local service prices is limited by the wireless carriers’ dependence on wholesale special access inputs purchased primarily from the ILEC. Until special access is available at competitive level, cost-based prices, either via the availability of competitive facilities throughout a broad geographic area covered by a wireless carrier,

²¹ *Id.* at ¶ 57.

²² *Id.* at ¶ 59.

through strengthened regulation of special access, or through rescinding the wireless UNE-exemption,²³ wireless carriers cannot effectively constrain ILEC prices.

Accordingly, wireless should continue to be appropriately discounted as a competitive force in future forbearance and other ILEC dominant carrier related proceedings.²⁴ When the Commission considers the substitution of wireless services for wireline services under its market power analytical framework, it cannot ignore the fact that the near total dependence of wireless services on ILEC special access facilities undermines the ability of wireless carriers to provide price constraints on the ILEC. The existence of wireless carriers certainly does not support a decision that ILECs face competition or that ILEC wireline service prices are reasonable.

²³ See, *In the Matter of 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 20 FCC Rcd 2552, (Feb. 4, 2005). Similarly, the UNE use exemption for long distance services should also be rescinded.

²⁴ The Federal Trade Commission's ("FTC") Decision and Order *In the Matter of Intel Corporation*, Docket No. 9341, <http://www.ftc.gov/os/adjpro/d9341/100804inteldo.pdf> (last viewed August 12, 2010), considered whether contracts providing a discount on Intel products conditioned upon "Market segment share ... that a customer awards to [Intel]" or purchases of products "reaching a specified threshold (in units, revenues, or any other measure) or otherwise reducing the price of one unit ... because of the purchase or sale of an additional unit" are anticompetitive. (See page 10, ¶¶ 5 and 7). Further, the FTC considered whether multi-year contracts providing discounts were anticompetitive. (See page 11 ¶ 3c). The FTC prohibited these practices because of their anticompetitive results in tying the chip market to Intel for long periods of time. The same types of volume and term contracts are common in the volume and terms plans offered by large ILECs to wholesale customers. (See Comments of Sprint Nextel, *In the Matter of Qwest Communications International, Inc., Transferor, and CenturyTel, Inc. d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended*, WC Docket No. 10-110, July 12, 2010, pages 8-11 and Attachment III detailing ILEC term and volume contracts requiring commitments of 3-5 years and 90-95% of current business.) The ILEC term and volume plans are in the same class of terms prohibited by the FTC in the Intel case and have the same anticompetitive impact on the special access market as they have on the computer processor market. The FCC cannot find the special access market competitive as long as the ILEC exerts its market power through anticompetitive term and volume agreements.

IV. THE COMMISSION IS CORRECT IN ABANDONING EARLIER PREDICTIVE JUDGMENTS THAT COMPETITION WOULD DEVELOP UNDER FORBEARANCE REGULATION

Predictive outcomes, when viewed in retrospect, sometimes prove to be incorrect. In its *Qwest Omaha Forbearance Order*²⁵ the Commission made three predictions. First, that Qwest would make wholesale facilities available to competitors at “just and reasonable rates and terms.”²⁶ Second, that competitors could rely upon the rights they have “under sections 251(c) and 271” to minimize the risk of duopoly and other anticompetitive conduct in the Omaha market.²⁷ Third, that Qwest’s competitors would continue to invest in facilities even without access to unbundled loops or transport.²⁸ The Commission, found these predictions to be wrong, stating “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.”²⁹ These findings compel expedited reevaluation of prior forbearance decisions and the special access pricing flexibility rules which were all based on predictive judgments that appear to be as flawed as the *Qwest Omaha Forbearance Order* predictions.

The Commission noted that there are a number of reasons to be skeptical that an ILEC will ever have an incentive to make attractive wholesale offerings. It has long recognized that a dominant vertically integrated firm with market power in an upstream wholesale market “may have the incentive and ability to discriminate against rivals in downstream markets or raise rivals’ costs.” When the ILEC is the dominant or “sole

²⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (“Qwest Omaha Forbearance Order”),* 20 FCC Rcd 19415.

²⁶ *Id.* at 19455, ¶ 80.

²⁷ *Id.* at 19452, ¶ 71.

²⁸ *Id.* at 19451, ¶ 69.

²⁹ *Qwest Phoenix Forbearance Order* at ¶ 34.

provider of wholesale facilities and services, there is no reason to expect it to offer such services at ‘competitive’ rates,” rather, it should be expected that such a firm would “exploit its monopoly position as a wholesaler and charge supracompetitive rates, especially” absent regulation. Further, there is a lack of evidence that “the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated.”³⁰

Sprint’s experience with ILEC behavior in the wholesale market confirms that when an ILEC has the power to discriminate against rivals and to raise its rivals’ costs, it will do so. The supracompetitive prices of ILECs in the special access market and their unreasonable term and volume plans confirm this anti-competitive behavior. The actual behavior of the ILECs justifies abandonment of the Commission’s predictive outcomes, which proved to be incorrect, as stated in the *Qwest Omaha Forbearance Order*. The more rigorous market power analytical framework used by the Commission in the *Qwest Phoenix Forbearance Order* correctly relies upon fact and sound economics and should be used in the future.

V. CONCLUSION

The Commission should apply the market based analytical framework from the *Qwest Phoenix Forbearance Order* to future Section 10 forbearance proceedings. A robust market analysis and a showing of competitive outcomes, especially in the wholesale market, should be required before any forbearance from wholesale obligations is granted.

³⁰ *Id.*

Respectfully Submitted,

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