Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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	)	WC Docket No. 06-172
	)	
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
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

COMMENTS OF FREE PRESS

S. Derek Turner
Free Press
501 Third Street, NW
Suite 875
Washington, DC 20001
202-265-1490

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The Commission requests public comment on "a market power analysis…well-designed to protect consumers, promote competition, and stimulate innovation."[1] The Commission relied on just such an analysis in denying a forbearance petition from Qwest.[2] At the outset, we applaud the Commission for moving away from the previous analytical framework that failed to adequately capture the true competitive state of the market. Forbearance decisions should rely on a data-driven, reality-based approach to understanding market competition. The use of the market power analytical framework relied in the *Qwest Phoenix Forbearance Order* (*Phoenix Order*) meets this standard. After all, when a company has market power, the Commission should be focused on promoting competition, not reducing it.

The Commission's previous approach to granting forbearance relied on a general look at whether markets had the *potential* for competition. In the *Qwest Omaha Forbearance Order* (*Omaha Order*), the Commission determined that Qwest faced (or could face) competition from the local cable company.[3] However, they also noted that this competition was largely limited to residential customers, not enterprise customers.[4] The Commission nonetheless found that a potential duopoly offers adequate competition.[5] Beyond this finding, they simply determined that CLECs would continue to provide competition following the removal of rules ensuring them

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

[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, 25 FCC Rcd 8622 (rel. June 22, 2010) (*Qwest Phoenix Forbearance Order*).

[3] *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, 19449 (rel. Dec. 2, 2005) (*Qwest Omaha Forbearance Order*).

[4] *Ibid.*

[5] *Ibid.* at para. 69.

access to ILEC facilities.[6] The result of these assumptions was reduced choice for enterprise customers.[7]

Thankfully, in the more recent *Phoenix Order*, the Commission determined that there "does not appear to be a basis for relying on the [*Omaha Order*'s] predictive judgments" and that "these predictions have not been borne out by subsequent developments."[8] Instead, the Commission found "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."[9] This approach allowed the Commission to more accurately determine a market's actual competitive environment, which is a requirement if the Commission wishes to abide by Section 10's requirements. This granular competitive analysis of the proper geographic area used in the *Phoenix Order* allows the Commission to view the market as customers would – namely which companies offer the specific services for the relevant economic market. When reviewed in this way, the Commission determined that the choices are scant and forbearance was not warranted.

The Commission's tentative decision to apply this framework to "similar requests for regulatory relief" is the correct one.[10] Through this framework, the Commission can analyze the market in question to determine whether consumers and/or businesses presently have an adequate amount of choice to justify forbearance. If the Commission rejects a position based on a finding of limited competition, a company is welcome to re-petition for forbearance, if and when additional competition develops. This process will ensure the Commission remains true to its

[6] *Ibid.* at para. 79.
[7] *Qwest Phoenix Forbearance Order* at para. 34-36.
[8] *Ibid.* at paras. 24, 34.
[9] *Ibid.* at 21.
[10] *Public Notice* at 2.

stated commitment to rely on a "rigorous and data-driven" framework and ultimately "protect consumers, promote competition and stimulate innovation."[11]

The Commission should also consider applying this shift away from presumptive predictions about future competition in other areas. There is nothing special about the enterprise market in terms of the Communications Act, and certainly no reason that it should receive the appropriate level of analytical rigor, while other segments of the telecommunications market remain under the analytically indefensible standard previously used.

The predictions that highlight the problems of the Commission's previous analytical framework in the *Omaha Order* were also present in the Commission's decisions to grant overarching deregulation of the residential market for broadband. Rather than perform a rigorous data analysis, the Commission simply relied on the parties seeking deregulation to assert, "the record…demonstrates that the broadband Internet access market today is characterized by several emerging platforms and providers."[12] Of course, five years later, the National Broadband Plan found that *96 percent* of the country still has two or fewer providers for wired broadband, and that mobile wireless services are not today, and may not in the future become viable

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[11] *Ibid.* at 3; *Qwest Phoenix Forbearance Order* at para. 3.

[12] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14857 (Rel. Sept. 23, 2005).

economic substitutes for wired services.[13] This finding confirms the obvious: the residential broadband market has been, is, and will continue to be *at best* a duopoly market. With that in mind it is worth noting that the Commission's recent *Phoenix Order* determined that it would be inconsistent with Congressional intent to "forbear[sic] from unbundling obligations on the basis of a duopoly."[14]

A lack of faith in a marketplace characterized by a duopoly lies at the heart of the reason the Commission denied Qwest's petition. The Commission found that the previous decision "inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient…to protect consumers."[15] The *Phoenix Order* also noted that a duopoly "may present significant risks of collusion and supracompetitive pricing."[16] These same dangers exist in the residential broadband market. For instance, despite incredible margins[17] and declining costs on high speed Internet,[18] cable operators recently increased monthly fees for high-speed Internet service.[19] Phone companies were quick to follow.[20]

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[13] *See* Reply Comments of Free Press, In the Matter of *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, pp. 48-50 ("*Net Neutrality Reply Comments*").

[14] *Qwest Phoenix Forbearance Order* at para. 32.

[15] *Ibid.* at para. 29.

[16] *Ibid.*

[17] *See e.g.* Michelle Ow, "Time Warner Cable Q1 margins led by broadband," *SNL Kagan*, May 6, 2010.

[18] *See e.g.* Nate Anderson, "Should broadband data hogs pay more? ISP economics say 'no'," *Ars Technica*, July 19, 2010.

[19] *See e.g.* Ed Gubbins, "Broadband price hikes to overshadow video, analyst says," *Connected Planet*, Jan. 4, 2010; Todd Spangler, "Comcast Hiking Cable-Modem Fee to $5 From $3 Monthly Nationwide," Sept. 15, 2009; Karl Bode, "New Comcast TV, Broadband, Phone Price Hikes April First," *DSL Reports*, March 9, 2010; Phillip Dampier, "Time Warner Cable Announces Another Road Runner Increase for Some - $4 More an Month for "Standalone" Service," *Stop the Cap!*, March 17, 2010. *See also* Comments of Free Press, In the Matter of *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All*

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These concerns should only grow with cable operators' clear advantage in higher broadband speed tiers in more than half the country. The National Broadband Plan determined that "in areas that include 75 percent of the population, consumers will likely have only one service provider (cable companies DOCSIS 3.0-enabled infrastructure) that can offer very high peak download speeds."[21] Considerable evidence already exists illustrating this development is well underway with consumers increasingly migrating towards higher speed connections that traditional ADSL networks simply cannot offer.[22] As such, cable operators routinely tout this dominance to investors.[23] The emerging monopoly environment for a majority of the population should only serve to exacerbate the Commission's concerns about consumer harms in a duopoly marketplace.

The insight gained from the *Phoenix Order's* new analytical framework, along with the current and future state of competition in the residential broadband market, highlights the paramount need for the Commission to transition broadband Internet access services back under a Title II framework.[24] Such a move will ensure that the Commission, at the very least, retains the *ability* to act to protect consumers were it to identify harms occurring in the marketplace. In

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(footnote continued)
Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future, GN Docket Nos. 09-137, 09-51, pp. 48-52.

[20] *See e.g.* Todd Spangler, "AT&T Hiking U-Verse TV, Internet, Voice Rates," *Multichannel News*, Dec. 21, 2009; Karl Bode, "AT&T Increasing DSL Prices," *DSL Reports*, March 4, 2010.

[21] Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, March 16, 2010, p. 42.

[22] *See e.g.* Reply Comments of Free Press, In the Matter of *Framework for Broadband Internet Service*, GN Docket No. 10-127, pp. 31-34.

[23] *See e.g. Net Neutrality Reply Comments* at 48-50.

[24] *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (Rel. June 17, 2010).

it's recent *Phoenix Order*, the Commission acted to promote competition and limit market power for enterprise broadband services in a duopoly market. But residential broadband consumers in an arguably less competitive duopoly market currently do not receive such protections; and unless the Commission reverses its past classification mistakes, it will lack the ability to introduce any such protections even in the face of gross marketplace harms. Such a situation should underscore the critical nature of the classification proceeding. Thus, we encourage the Commission to recognize the larger significance of its recent actions and apply this rigorous analytical framework consistently for both consumers and businesses.

Respectfully Submitted,

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Adam Lynn
Free Press
501 Third Street, NW
Suite 875
Washington, DC 20001
202-265-1490

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