Before the
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W., Washington, D.C. 20554

In the Matter of	)	
	)	
Wireline Competition Bureau Seeks Comment On Applying The Qwest Phoenix Forbearance Order Analytic Framework In Similar Proceedings	)	WC Docket No. 06-172 WC Docket No. 07-97

COMMENTS OF AT&T INC.

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TABLE OF CONTENTS

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	)	
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Pursuant to the Public Notice ("*Notice*"),[1] AT&T Inc. ("AT&T") submits the following Comments.

INTRODUCTION AND SUMMARY

The recent *Qwest Forbearance Order*[2] reflects a substantial change in the standard the Commission applies to petitions seeking forbearance from network element unbundling and certain other types of local exchange service regulatory obligations. The Commission declared a "return" to a "traditional market power framework" derived from antitrust regulation and its own non-dominance proceedings, and stated that it would grant forbearance from such obligations only if the applicant could "demonstrat[e] that it does not have market power" in various narrowly defined product and geographic markets. *Qwest Forbearance Order* ¶¶ 42-43. Applying this new framework, the Commission denied Qwest's petition seeking relief from

[1] Public Notice, *Wireline Competition Bureau Seeks Comment On Applying The Qwest Phoenix Forbearance Order Analytic Framework In Similar Proceedings*, WT Docket Nos. 06-172, DA-10-1115 (rel. June 22, 2010) ("*Notice*").

[2] Memorandum Opinion and Order, *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, FCC 10-113 ("*Qwest Forbearance Order*").

unbundling and other regulation in Phoenix. Although Qwest undeniably faces significant intramodal and intermodal competition in the Phoenix Market Statistical Area ("MSA") – as evidenced by annual line losses in the neighborhood of 10 percent and the cumulative loss of nearly *half* of its once-monopoly position, – the Commission faults Qwest throughout the Order for failing to meet its new evidentiary burden of proving that it lacks any market power. The Commission now asks whether and how it should apply this framework in other pending and future forbearance proceedings.

As explained below, the new framework, as articulated and applied in the *Qwest Forbearance Order*, has a number of serious legal and conceptual deficiencies when applied to forbearance proceedings such as these and should not be continued. Nonetheless, if the Commission intends to apply this framework in future forbearance proceedings, it must modify its approach. In the *Qwest Forbearance Order* the Commission's application of its new framework rested on numerous incorrect assumptions and unreasonable evidentiary hurdles that would be completely unwarranted in a properly constructed market power inquiry. In this regard, although it is difficult for AT&T to comment on the sufficiency of Qwest's evidentiary showings, given that much of the important evidence is under seal, any market power approach that, as here, *disregards altogether* entire categories of obviously relevant competitive constraints plainly requires re-examination.

To begin with, however, it is important to reiterate that insisting on a full, Merger Guidelines-style market power showing in order to obtain forbearance from individual local exchange obligations is neither lawful nor conceptually correct. Under Section 10, the applicant need only show that the *specific regulation* at issue is no longer necessary to ensure just and reasonable rates, to protect consumers, or to advance the public interest and in many contexts –

including, especially, network element unbundling requirements – requiring a forbearance applicant to demonstrate a lack of market power is to insist on a showing that goes far beyond what Section 10 actually requires. Qwest's Phoenix application appears to be a good example of this disconnect: Qwest faces competition from numerous facilities-based competitors in Phoenix, which have won substantial market share. At the same time, competitors in Phoenix do not rely to any substantial degree on Unbundled Network Elements ("UNEs"). Thus, regardless of whether Qwest has or does not have market power in Phoenix, UNEs have little, if anything, to do with ensuring just and reasonable rates in the Phoenix MSA. Hinging forbearance on a showing of no market power thus deviates from the statutory standard.

Indeed, there is a distinct air of unreality about the entire *Qwest Forbearance Order* – and that unreality stems from a fundamental error of logic that infects the whole order. Although Qwest faces competition in Phoenix from scores of competitors, the Commission's mode of analysis in the *Qwest Forbearance Order* was to isolate each type of competitor and, one by one, come up with a reason why each standing alone does not act as a sufficient constraint on Qwest's pricing and can be ignored. Thus, the Commission concludes, seriatim, that the ubiquitous facilities-based cable provider does not "count," that the multiple facilities-based wireless competitors do not "count," that the numerous over-the-top VoIP providers do not "count," that the 25 competitors with facilities-based transport networks do not "count," and so on. The resulting conclusion, however, is absurd on its face: the Commission continues to treat Qwest as a monopolist – even though it faces stiff competition on multiple fronts from quite successful competitors that have collectively won as much as half of the business. And there is a further defect: a DOJ-style merger analysis was never intended to be used to assess the existence or non-existence of "market power" in contexts like this, and in the Commission's new approach its actual function is to create a near-insuperable burden of proof on the applicant by requiring evidence that no applicant could ever possess. To be sure, Qwest's showing here may have been deficient under any standard – it is impossible to tell from the public record – but there is no question that Qwest suddenly found itself in a maze of evidentiary hoops and hurdles that would be so difficult for any carrier to navigate that they essentially work a repeal of the forbearance statute.

If despite its unsuitability to forbearance inquiries of this type, the Commission is going to apply this framework in future proceedings, it should modify its approach. With respect to mass market services, the Commission's treatment of both cable and wireless competitors was particularly indefensible. The Commission held that Qwest's cable competitor, Cox, did not act as a constraint on Qwest's pricing because Qwest and Cox constituted a facilities-based duopoly. Even putting aside that there are numerous facilities-based competitors in Phoenix (not two), the Commission dodged what it acknowledged is the crucial question in any market power analysis of duopoly – *i.e.*, whether the purported duopoly is the type that would facilitate collusion or the type that would promote fierce rivalry. The Commission cannot ignore that issue in any future application of this framework, and any serious consideration of the industry structure (*e.g.*, high fixed, sunk costs and bundled service offerings) and actual market performance (*e.g.*, intense competition to attract and retain customers by offering them more for less) would compel the conclusion that network unbundling and other regulation of the types at issue is not necessary to protect consumers even if the duopoly premise was correct.

Moreover, the ILEC-cable "duopoly" premise is itself untenable. The Commission summarily dismissed competition from the multiple facilities-based wireless carriers in Phoenix that have already grabbed more than a quarter of the market, because Qwest did not submit an econometric study on the cross-elasticity of demand between wireline and wireless customers. This was wholly arbitrary; such a study would be very difficult, if not impossible, for Qwest to construct, and in future proceedings the Commission should not erect unreasonable evidentiary barriers to avoid dealing with the substantive issues. The sheer level of wireless substitution is so large that the Commission cannot simply ignore it – not only is it a disruptive force that further undermines any ability of the ILEC and cable company to collude, but wireless competition is clearly a major factor impacting ILEC pricing even if the Commission were to conclude that it would not be a sufficient constraint standing alone.

The Commission's treatment of enterprise competition was also indefensible, in that the Commission's assessment of both retail and wholesale competition deviated in important ways from a standard market power analysis. With respect to retail competition, the Commission gave far too much weight to static market share data. Economists, the Commission, and other regulators have repeatedly recognized that static market shares alone are not dispositive and, in fact, the Commission should have placed more weight on evidence such as Qwest's line losses and declining shares, which are more directly probative. Similarly, although the Commission paid lip service to the importance of including potential competition in its analysis, it appears to have ignored such competition altogether. Indeed, in assessing whether the elimination of UNEs would have any impact on the marketplace, the Commission discounted completely the ability of competitors to extend their facilities to new routes or buildings, and it also gave insufficient weight to the well-established ability of competitors to compete successfully by using wholesale services other than UNEs (including special access purchased from the incumbent). By ignoring these important sources of competition, the Commission's analysis concerning the necessity of § 251(c)(3) unbundling requirements is incomplete and arbitrary.

With respect to the wholesale marketplace, the Commission began by properly recognizing that the existence of multiple wholesale suppliers of transport and loop facilities translates into increased competition for retail enterprise services, but it simply dismissed the *twenty-five* competitive providers that had deployed extensive local fiber networks along the routes serving most enterprise customers on the grounds that Qwest had not shown that those competitors had deployed facilities along *each and every* route. It similarly dismissed loop competition, again on the ground that competitors had not already deployed competing loop facilities on a large scale basis. As the Justice Department has recognized in prior merger proceedings, however, once competitors have deployed substantial transport facilities and have collocated in most central offices – as appears to be the case in Phoenix – they can and do compete for nearby customers, regardless of whether they already have facilities there, and the Commission cannot ignore circumstances in which firms can compete successfully without the regulations at issue.

I. THE COMMISSION'S MARKET POWER FRAMEWORK, WHEN APPLIED TO THE FORBEARANCE PROCEEDINGS AT ISSUE HERE, IS BOTH LEGALLY AND CONCEPTUALLY FLAWED.

The Commission should not use its new market power framework in other similar forbearance proceedings because it is both legally and conceptually flawed. As explained below, this framework is unlawful in three major ways: (1) it requires an applicant to "demonstrat[e] that it does not have market power" to obtain forbearance, a standard that requires an applicant to show far more than what Section 10 actually requires to obtain forbearance from regulatory obligations such as these; (2) it relies on the logical fallacy that the Commission can isolate each type of competitor and find reasons to dismiss each one as a constraint on the ILEC's pricing, thus leading to the facially absurd result that an applicant is treated as having market power even though it is suffering rapid line losses and has lost half of the market; and (3) it insists on the sort of onerous and extensive showings that the Justice Department might undertake in a merger proceeding (in which the burden is on the government to show that an entity has market power, and the government has the authority to compel third parties to submit the data necessary to make such a showing), even though such showings are not conceptually related to these requirements and would establish a nearly insuperable burden of proof that would effectively make forbearance unattainable.

The Statutory Standard. To begin with, the Commission's insistence on a market power showing in the *Qwest Forbearance Order* reflects a fundamental misapplication of the statute. The statute lays out a specific inquiry: it requires the Commission to forbear from enforcing any "statutory provision or regulation" if it determines that (1) enforcement "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory," 47 U.S.C. § 160(a)(1); (2) enforcement "is not necessary for the protection of consumers," *id*. § 160(a)(2); and (3) non-enforcement "is consistent with the public interest," *id*. § 160(a)(3).

The Commission's error is to read these provisions as *requiring* the petitioner to make one very specific (and very onerous) type of showing: the full-scale market power analysis that the Commission uses in its nondominance proceedings. The Commission purports to find these requirements in each of three showings required by Sections 10(a). In particular, the Commission concludes that "[t]his market power analysis is the *precise inquiry* specified in section 10(a)(1)," but the Commission also asserts that it "informs" the assessment of whether the carrier could "harm consumers by charging supracompetitive rates" and furthers the Commission's inquiry into whether forbearance would "promote competitive market conditions" under the public interest evaluation.[3] Accordingly, the Commission explains that, under the new standard it is now applying, "Qwest could satisfy the section 10 criteria for the regulations at issue [only] by demonstrating that it does not have market power" at either the wholesale or retail level. *Qwest Forbearance Order* ¶ 43.

Insisting on this type of market power showing goes far beyond what Section 10 requires. The question in forbearance proceedings like these is not whether the applicant is nondominant or has lost all market power. Rather, as the statute provides, the question is whether *the particular regulation at issue* remains necessary (if it ever was). The D.C. Circuit has held repeatedly that Section 10 does not require any particular type of showing, nor does it "impose[] any particular mode of market analysis or level of geographic rigor."[4] Many kinds of regulations can outlive their usefulness and indeed become affirmatively harmful even if the applicant still has market power. In many cases, it should be possible to show that the regulation at issue is no longer playing a meaningful role in maintaining just and reasonable rates without having to make the extensive and difficult type of showing that the Commission apparently contemplates in the *Qwest Forbearance Order*.

The Commission's new approach is particularly inapt in the context of unbundling regulations.[5] Unbundled network element obligations have never been based on a theory of

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[3] *Qwest Forbearance Order* ¶ 37 (emphasis added).

[4] *Earthlink, Inc.* v. *FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *Verizon Tel. Cos.* v. *FCC*, 570 F.3d 294, 300 (D.C. Cir. 2009) (same). *See also* Report and Order and Memorandum Order, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 22 FCC Rcd. 16440, ¶¶ 25-28 (2007) ("*Qwest Section 272 Sunset Forbearance Order*"); Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd. 19415, ¶ 18 (2005) ("*Qwest Omaha Forbearance Order*").

[5] *See Qwest Forbearance Order* ¶ 38 ("[f]orbearance from section 251(c)(3) . . . would be based on whether the provider no longer has market power").

preventing the incumbent local exchange carrier ("ILEC") from exercising market power.[6] Rather, unbundled elements were a mechanism to jump-start facilities-based competition in the early days of the Telecommunications Act of 1996 ("Act"); the statutory unbundling test focuses not on whether the incumbent has market power but whether the competitor would be "impaired" in its ability to offer a service without access to the specific facilities at issue.[7] When considering whether to forbear from such requirements, the Commission's analysis must be informed by the relatively limited purpose UNEs are meant to serve; the Commission cannot *assume* (as it does in the *Qwest Forbearance Order*) that unbundled elements continue to be necessary as long as the incumbent retains any market power.

In that regard, the Commission's replacement of the Section 10 inquiry with a "market power" approach can easily lead to absurd and indefensible results (and appears to have done so in the *Qwest Forbearance Order*). If only a small and dwindling number of CLECs are choosing to use unbundled network elements to compete, while other modes of entry (including "genuine, facilities-based" modes such as cable and wireless[8]) are on the rise, then regulated access to

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[6] *See, e.g.*, Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 109 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, USTA* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, 543 U.S. 925 (2004).

[7] The Commission claims that the market power test overlaps with the impairment test because both tests incorporate an inquiry into whether the requesting carrier is encountering "barriers to entry." *See Qwest Forbearance Order* ¶ 38 & n.126 (quoting *Triennial Review Remand Order*, 20 FCC Rcd. 2533, ¶ 10 (2005)). In fact, the impairment test, as articulated in the *Triennial Review Remand Order*, has little in common with the Commission's market power test. The Commission's impairment test takes into account a wide variety of factors relating to situations in which competition can be usefully encouraged without undermining either incentives for investment and innovation or other statutory objectives, and with a due regard for the availability of alternative avenues of entry (including other non-UNE wholesale services offered by the incumbent). Whether the incumbent has market power plays essentially no role in how the Commission weighs those competing factors. *See, e.g.*, *Triennial Review Remand Order* ¶¶ 20-28.

[8] *USTA II* at 576.

unbundled elements has little if any connection to the consumer protection parameters laid out in section 10. This appears to be the case in Phoenix: Qwest faces competition from an array of competitors that do not use UNEs, and regardless of whether Qwest has market power, the use of unbundled elements today is so negligible that it seems clear that the availability of those elements is playing no meaningful role in ensuring just and reasonable rates. Under those circumstances, denying forbearance violates the statute and elevates an unwarranted desire for the "widest possible unbundling" over the realities of the marketplace.[9]

Nor does the Commission's focus on "market power" give proper consideration to the substantial *costs* of unbundling, which include the "tangled management inherent in shared use of a common resource," substantial disincentives to investment and innovation "by both ILECs and CLECs," the anti-competitive regulatory imbalances of imposing unbundling on ILECs but not their facilities-based competitors, and the burdens of state implementation proceedings to establish rates and terms.[10] As the D.C. Circuit has explained, "nothing in the Act appears a license to the Commission to inflict the[se] sort[s] of costs . . . under conditions where it had no reason to think doing so would bring on a significant enhancement of competition," as appeared to be the case in Phoenix. Such an infliction of costs is no more permissible in a denial of forbearance than it would be in mandating unnecessary unbundling in the first place.[11]

The D.C. Circuit has repeatedly rejected claims that the statute requires a full market power showing as a pre-requisite to the relaxation of individual rules or applications of rules. For example, in *Earthlink*, the petitioner argued that "the statute permits the FCC to grant

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[9] *Id.*

[10] *U.S. Telecom Ass'n* v. *FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("*USTA I*").

[11] *Id.* at 429; *see also id.* (the Commission "'cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network,'" (quoting *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999))).

forbearance only after a 'painstaking analysis of market conditions' for 'particular geographic markets and for specific telecommunications services,'" but the D.C. Circuit specifically rejected the argument.[12] The Commission claims that it has discretion to change its interpretation of Section 10, and although the courts have made clear that the Commission is expected to take a practical and flexible approach to the evaluation of evidence in forbearance petitions,[13] its approach here goes too far. The Commission's new market power test comes dangerously close to conflating the forbearance standard with the non-dominance standard (even though non-dominance itself is not at issue in these petitions).

The Logical Fallacy of Discounting the Totality of the Competition. The FCC's market power approach – at least as applied in the *Qwest Forbearance Order* – also relies heavily on a fundamental logical fallacy that renders the entire approach there arbitrary. As the D.C. Circuit has explained in another context, "[t]hose who do not take into account conditional probability are prone to making mistakes in judging evidence."[14] Specifically, "[t]hey may think that if a particular fact does not itself prove the ultimate proposition . . ., the fact may be tossed aside and the next fact may be evaluated as if the first did not exist."[15] It is a "fundamental mistake,"

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[12] *Earthlink*, 462 F.3d at 8; *see also id*. at 9 (rejecting argument that forbearance can be justified only by "a traditional market analysis (including market share, demand and supply elasticity, and other factors)"); *see also WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (rejecting claim that the Section 201 requirement of "just and reasonable" rates required a "painstaking analysis of market conditions such as that which is required when a LEC seeks classification as a non-dominant carrier" before it relaxed or eliminated its price cap rules).

[13] *Earthlink*, 462 F.3d at 209 (the forbearance statute "is silent about how to determine when such [forbearance] is appropriate" and the Commission "reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances").

[14] *Al-Adahi* v. *Obama*, 2010 WL 2756551 (D.C. Cir. 2010).

[15] *Id.*

however, to "requir[e] each piece of the . . . evidence to bear weight without regard to all (or indeed any) other evidence in the case."[16]

The Commission makes precisely this error in the *Qwest Forbearance Order*. Even though Qwest faces competition in Phoenix from many robust local competitors, the Commission isolates each type of competitor and, one by one, finds some reason why it should not "count" as a source of constraint on Qwest's pricing. Thus, the facilities-based cable competitor does not count; the multiple facilities-based wireless competitors do not count; VoIP competitors do not count; the 25 competitors with extensive facilities-based transport networks in Phoenix do not count – "[a]nd so on."[17] For all of the purported "rigor" of these individual assessments, however, the result is a conclusion that is facially absurd: the Commission concludes that Qwest, a carrier that has already lost half of the market in Phoenix, remains a monopolist with market power because none of the scores of competitors in Phoenix "count."

This mode of analysis is legally arbitrary, but it is all the more unlawful because the reasons the Commission gave for dismissing one after another of these competitors are, as explained in more detail in the next section, equally unfounded:

For example, the record in the Qwest case showed that some twenty percent of the Phoenix market had "cut the cord" and were relying entirely on facilities-based wireless competitors for local service. The Commission refused to consider the clear implications of such widespread substitution and, instead, declared that it would not "count" the wireless firms as a constraint on Qwest's prices unless the petitioner could show, with an econometric study, that an increase in the price of Qwest's wireline service would induce customers to switch to a wireless competitor. It was unreasonable to completely dismiss substitution of that magnitude.

[16] *Id.*

[17] *Id*.

Moreover, as explained in the next section, there are numerous reasons why constructing such a study would be very difficult, and insisting on such a study was simply another instance of the Commission denying forbearance based on an unreasonably high burden of proof rather than on reasoned analysis.

Having irrationally dismissed wireless (and all other local sources of competition), the Commission concludes that the Phoenix market is a facilities-based duopoly (Qwest and the cable provider, Cox). The Commission then dismisses competition from Cox as a constraint on Qwest's pricing, on the ground that it cannot be assumed that a "duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices."[18] As the Commission concedes, however, not all duopolies are created equal: some types of duopoly facilitate collusion, whereas other types result in robust price competition.[19] In the *Qwest Forbearance Order*, the Commission never analyzes whether the Qwest-Cox "duopoly" is the type that would actually encourage collusion – again relying on Qwest's failure to meet its "burden of proof" (and, in effect, faulting Qwest for not anticipating the absurd conclusion that Phoenix is a duopoly). Even if an ILEC-cable duopoly could reasonably be assumed, as explained in the next section the local telephone business has the classic characteristics of in which two "duopoly" firms are forced to compete.

The Commission also irrationally discounted the many competitors exercising price constraints for enterprise customers. Although the Commission pays lip service to the notion that a "market power framework" would consider both actual and potential competition, the Commission consistently concludes that potential competition from existing facilities-based CLECs and intermodal providers that can extend and expand their networks does not constrain

[18] *Qwest Forbearance Order* ¶ 29.

[19] *Id*. ¶ 32.

ILEC pricing and that a showing that a small share of buildings are currently served by alternative networks establishes market power.[20] Incredibly, the Commission rejected a claim of effective competition even with respect to unbundled transport, notwithstanding the fact that there were *twenty-five* competitors with substantial fiber deployment throughout the relevant commercial areas.[21] Such an approach – in which the Commission apparently insists that a firm have a completely ubiquitous network before it will "count" as a price-constraining competitor – unreasonably ignores potential competition and these firms' demonstrated ability to build new extensions along new routes (as well as their demonstrated ability to compete successfully using special access).

The Unlawful and Inapt Burden of Proof. The market power analysis that the Commission used in the *Qwest Forbearance Order* was developed in a completely different context for completely different purposes, and is ill-adapted for use in these types of forbearance proceedings for several reasons. First, by the Commission's own description, it is using a framework that was "established in the *Competitive Carrier* proceedings and developed further in subsequent decisions," and it cites various non-dominance and merger orders.[22] The types of forbearance proceedings at issue, however, do not lend themselves to the sort of market power analysis used in those contexts. Whether a carrier has become non-dominant is not at issue in

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[20] *See, e.g.*, ¶¶ 72-74.

[21] *Id.* ¶ 77.

[22] *Id.* ¶ 37 & n.118 (citing Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271 (1995) ("*AT&T Non-Dominance Order*"); Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18290 (2005) ("*SBC-AT&T Merger Order*"); Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Applications for Transfer of Control*, 22 FCC Rcd. 5662 (2007) ("*AT&T-BellSouth Merger Order*"); Memorandum Opinion and Order, *Verizon Communications and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18433 (2005) ("*Verizon-MCI Merger Order*")).

these proceedings, and the merger analysis "comparable to the analysis used by the DOJ [and] FTC" were never designed and cannot be used to determine whether specific regulatory measures like unbundled network elements are necessary or useful in meeting the pre-requisites of Section 10.

In particular, the Justice Department's Merger Guidelines and associated analytical methods may be useful for predicting whether a merger will result in a price *increase* measured against current price levels, but those methods cannot be used to determine whether those current price levels are "just and reasonable," or whether forbearance from a particular Commission regulation will have a positive or negative impact on those rates.[23] As one former DOJ Chief Economist has explained, the "Merger Guidelines' approach . . . was not designed to measure the *existence* of market power."[24] The Guidelines ask whether a merger is likely to result in a price increase measured against "current [price] levels."[25] They do not provide a means for determining what the *competitive* price level is or whether prices in a regulated marketplace are in fact competitive. Without knowing the competitive price, "there is no way to implement [the Guidelines'] market definition test" outside the merger context.[26] And if one *does* know the competitive price, "the market definition exercise is useless," because one could simply compare

[23] In the *Qwest Forbearance Order*, the Commission in a footnote "disagree[s]" with AT&T that the merger guidelines are not useful in determining whether forbearance is warranted, but that is based on its erroneous argument (refuted above) that it can treat the forbearance inquiry as whether the petitioner has lost all market power (*i.e.*, whether it has become non-dominant). *See Qwest Forbearance Order* ¶ 37 & n.122 (arguing that the non-dominance inquiry is the "precise inquiry specified in section 10(a)(1)").

[24] Reply Declaration of Dennis W. Carlton, Allan L. Shampine, and Hal S. Sider, ¶ 53 (Exhibit A to Reply Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC filed Feb. 24, 2010) ("Carlton-Shampine-Sider Decl.").

[25] *Id.* ¶ 54.

[26] Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 Competition Policy, Competition Int'l, 19-20 (Spring 2007).

the current price to the competitive price without needing the merger-related analysis at all.[27] Indeed, the Justice Department itself has acknowledged that there are "circumstances where the hypothetical-monopolist paradigm for defining markets is difficult to apply or where a mechanical application of the paradigm may be unhelpful or misleading," including situations involving "dynamic, high-tech markets where competitive interactions may be particularly difficult to assess."[28]

Equally important, although the Commission claims the "market power framework" provides a more "rigorous" and "data-driven" method of assessing forbearance petitions, in this context it provides nothing but a faux rigor that obscures more than it illuminates. In the context of mergers, the Justice Department can actually perform the type of market power analysis envisioned in the *Qwest Forbearance Order*, because it can use its subpoena power to obtain detailed and granular data from all competitors in the marketplace, it can measure the number of actual and potential competitors for individual routes and assess the possible impact of the merger on those routes, and it can use competitive screens to limit its inquiry to the relatively small number of routes where the merger could have a material impact on market concentration. Moreover, in the merger context, the government bears the burden of proving that the proposed merger would have a negative impact on competition. By contrast, a carrier seeking forbearance has only a small fraction of this information in its possession, and therefore it could not even begin to make the same sort of "market power" showing in a "complete when filed" forbearance

[27] *Id.* Moreover, unlike the merger context, elimination of unbundled network elements would not ordinarily mean the elimination of the competitors that use UNEs, because those competitors could obtain wholesale inputs from other sources (ILEC or otherwise). And even if some of those competitors did exit the market, it is by no means a given that the competitors' customers would switch to the ILEC rather than one of the many other competitors in the market.

[28] Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's First Workshop 3 (Dec. 3. 2009) *available at* http://www.justice.gov/atr/public/speeches/252614.pdf.

petition – much less *throughout* an MSA for all of the various "product" and route-by-route "geographic" markets the Commission identifies in the *Qwest Forbearance Order*, and particularly where (as the Commission proposes) the carrier would bear the burden of disproving any negative impact.

The Commission's market power framework thus imposes a near-insuperable burden of production and proof on the applicant that would lead to the denial of many meritorious forbearance petitions.[29] It would thereby frustrate Congress' intent and effectively repeal the policies embodied in section 10. Over the years, the Commission has repeatedly recognized that, in the context of local exchange markets, insistence on this type of market power framework is completely impractical for many regulatory purposes, and therefore it has consistently sought to *balance* the need to relax or eliminate outdated regulations with an administratively workable approach to the evidence relating to competitive conditions. In the *Qwest Forbearance Order*, by contrast, the Commission abandoned that balance altogether, and established a standard that makes forbearance dependent on evidence that is not within the possession of petitioners and which would be extremely burdensome to produce and evaluate in this context.

A better approach – one the Commission used in prior forbearance proceedings of this nature – is to focus on the intensity of *retail* facilities-based competition. Where consumers already enjoy the benefits of intense retail competition between strong facilities-based competitors, the justification for wholesale access regulation is largely eliminated. The prospect of losing business to a facilities-based competitor provides powerful incentives to offer

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[29] *Whitman* v. *Am. Trucking Assn's*, 531 U.S. 457, 485 (2001) ("[t]he EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion"); *Cities of Statesville, et al.* v. *Atomic Energy Comm'n*, 441 F.2d 962, 994 (D.C. Cir. 1969) ("[w]hen an agency's reading of a term of its governing statute virtually nullifies one of its substantive provisions, the interpretation is not entitled to the usual deference").

reasonable terms for wholesale access to keep traffic "on-net" and to minimize "stranded plant." The incentives to attract and retain wholesale customers are particularly strong in network industries characterized by high fixed and low marginal costs, where losing traffic to a facilities-based competitor has particularly large negative impacts on firm profits and where, as the Commission previously recognized, incumbent providers face highly demand-elastic customers and highly supply-elastic competitors. Accordingly, the Commission has not convincingly refuted the essential elements of the approach adopted in the *Qwest Omaha Forbearance Order* and upheld by the D.C. Circuit in *Qwest Corp.* v. *FCC*, 482 F.3d 471, 479-81 (D.C. Cir. 2007). Forbearance would be entirely appropriate upon a showing that the applicant faced strong facilities-based competition, whether the competition comes from a single facilities-based competitor such as a cable VoIP provider or from a mix of individually small, but collectively potent, wireline and wireless competitive constraints.[30] Such an approach would properly recognize that the public interest is concerned with *consumer* welfare, not maintaining a specific (and relatively unimportant) type of wholesale competition for its own sake.

II. IF THE COMMISSION NONETHELESS RETAINS THE "MARKET POWER FRAMEWORK" IN FORBEARANCE PROCEEDINGS, IT SHOULD MODIFY THE WAYS IN WHICH IT ASSESSES COMPETITION.

As explained above, the so-called "market power framework" employed in the *Qwest Forbearance Order* is fundamentally flawed and inapposite in forbearance proceedings. But the *Order* also *applied* the Commission's market power framework in a way that both ignored relevant evidence of competitive constraints that ILECs face in providing mass market and enterprise services and faulted Qwest for failing to proffer evidence that Qwest could not

[30] *See, e.g., Qwest Omaha Forbearance Order* ¶ 59 ("we find that the substantial intermodal competition for telecommunications services provided over Cox's own extensive facilities is sufficient to grant Qwest forbearance from the application of its section 251(c)(3) obligations with respect to loops and transport").

reasonably obtain. Assuming that the Commission intends to apply this framework to future forbearance petitions, the Commission, at a minimum, should do so in a manner that gives appropriate weight to the full range of competitive pressures that incumbent LECs face—including both actual and potential competition—and that recognizes the limited competitive information available to forbearance applicants.

A. A More Defensible Application of the Market Power Framework Would Give Greater Weight to the Constraints on Pricing Provided By Cable, Wireless, and VoIP Competitors.

If the Commission retains a market power test for obligations relating to mass market services, the Commission must account for *all* of the potential sources of constraint on the ILEC's pricing – whether or not that particular source is independently a sufficient constraint, whether or not the incumbent has access to all sources of evidence that might enable the Commission to make such an assessment, and whether or not a particular source of competitive constraint can be established with mathematical precision. The Commission should recognize that competition assessments in forbearance proceedings are inherently holistic, inherently involve an element of prediction, and inherently resist precise quantification. The appropriate treatment of mass market retail competition – and particularly assessments of the role of facilities-based competition, wireless services, and VoIP services – all illustrate the need for this appropriate degree of judgment, flexibly exercised in the context of all relevant competitive forces.

1. The ILEC-Cable "Duopoly" and Facilities-Based Competition.

Although the Commission acknowledges that "facilities-based coverage should be a leading factor in the Commission's analysis of whether, not just where, forbearance is warranted,"[31] the Commission must modify its treatment of this crucial factor in subsequent proceedings to provide a more defensible assessment of competition. In most MSAs, there are *multiple* facilities-based competitors: not just a cable system operator that (as in Phoenix) provides nearly complete facilities-based coverage for the provision of mass market telephony services, but also multiple, facilities-based providers of mobile wireless service. Thus, contrary to the Commission's conclusion in the *Qwest Forbearance Order* (and as discussed in greater detail below), the typical MSA is *not* a facilities-based duopoly, and there is no basis to disregard wireless carriers as a source of competition entirely. Equally important and in all events, the Commission acknowledges that duopolies often generate significant pricing constraints, but it does not even attempt to determine whether that is the case with the purported duopoly in Phoenix. And, in fact, if the Commission did undertake that analysis, it would almost certainly be forced to conclude that cable system offerings provide significant pricing constraints on the ILEC.

A proper application of the market power approach would examine several factors that make any purported ILEC/cable "duopoly" dramatically inconsistent with conditions conducive to tacit or direct collusion. First, as even the Commission recognizes, the existence of "facilities with sufficient spare capacity that . . . could be[] used to compete in a particular product market" is especially important for any assessment of competitive dynamics.[32] Cable providers have ubiquitous networks, and therefore they represent a competitive threat for almost every ILEC customer and have the supply capacity that could accommodate nearly 100 percent of the mass market demand in any given MSA. In contrast, "tacit collusion" is most likely when two producers effectively direct their productive capacity to a stable, relatively fixed portion of the

[31] *Id.* ¶ 82.

[32] *See id.* ¶ 45 n.248.

market – which would permit supracompetitive returns in certain cases because the two firms can achieve an equilibrium that allows each to utilize almost its full capacity. For telephone and cable companies, however, any "tacit collusion" would require that each producer forgo exploiting a very significant portion of its plant and capacity. Where the two firms' facilities completely overlap, as they do in most MSAs, the foregone production is equal to the competitor's market share. These conditions of "sufficient spare capacity" create tremendous competitive pressure to compete for customers in order to make use of the firm's sunk investment; those conditions are inimical to price and share stability.

In addition, the Commission should recognize that tacit collusion is particularly unprofitable and unlikely where facilities-based providers have high sunk costs, economies of scale and scope, and significant profit margins for incremental market share gains. These are classic conditions where tacit collusion is least likely, yet the Commission's *Qwest Forbearance Order* dismissed this central economic argument and competitive dynamic with a single sentence asserting that no evidence supports a finding of high elasticity of demand.[33] Not only is this conclusion incorrect with respect to cable and LEC mass market telephony offerings, but at a minimum the issue deserves far more careful consideration than was offered in the *Qwest Forbearance Order*. More importantly, the Commission improperly ignored the incentives that a provider of services over high-sunk cost networks with economies of scale and scope has: as long as there is any material substitution between products of the "duopoly" – and the history of cable providers' market share gains show that there clearly is – then each provider has a strong incentive to compete to try to preserve and increase the return on its enormous capital base.

[33] *See id.* ¶ 86 n.258.

Indeed, these factors suggest that overlapping cable and LEC facilities create precisely the competitive circumstances that the Commission itself acknowledges leads to price competition rather than collusion between "duopoly" providers. The Commission notes that "under the Bertrand model, duopoly can result in a competitive equilibrium under the assumption of perfectly homogenous products and no capacity constraints . . . in the short run," and that pricing competition can arise under the Bertrand model where "each firm maximizes its profits by choosing the price at which it will sell its output."[34] Although the Commission claims that there is no "direct evidence" of mass market service provision reflecting these characteristics,[35] it conducted no analysis that would permit it to characterize the market one way or another. In fact, those three characteristics – similar products, no relevant capacity constraints, and price-point marketing – appear to be unusually apt descriptions of the conditions under which LECs and cable telephone providers offer mass market telephony services.

Tacit collusion to maintain prices above competitive levels also requires that parties to any such agreement have the ability to monitor the prices being charged by the other parties to the agreement and to punish cheaters.[36] These critical components do not exist here. Cable providers do not tariff their retail offerings,[37] and there is a tremendous variety in the types of

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[34] *Id.* ¶¶ 30 n.88 & 86.

[35] *Id.* ¶ 86.

[36] *SBC-AT&T Merger Order* ¶ 78 ("We find that the merger will not increase the likelihood of tacit collusion or other coordinated behavior in relevant markets. On the contrary, we find that, even if competitors reached tacit agreements in the enterprise market, there are strong incentives to cheat and scant ability to detect and punish such cheating.").

[37] Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd. 20730, ¶ 53 (1996) ("we believe that tacit coordination of prices for interstate, domestic, interexchange services, to the extent it exists, will be more difficult if we eliminate tariffs, because price and service information about such services provided by nondominant interexchange carriers would no longer be collected and available in one central location").

services and discounts in their marketplace offerings. Today, customers rarely purchase stand-alone wireline local exchange service from either cable companies or LECs. Instead, customers typically purchase bundled packages that also include other services, such as broadband Internet and video. There is great diversity in the types of bundles offered by LECs and cable companies, as well as in the features of the various components of the bundles. For example, these bundles have varying broadband Internet access speeds and features, and they have different video services (*e.g.*, different channels, different numbers of HD channels) and different levels of integration of video, Internet and telephone services. The proliferation of bundles and the great variety of offerings makes it virtually impossible for LECs and cable companies to monitor or enforce any tacit collusion agreement, which renders attempts at tacit collusion highly unlikely in the first place.

Finally, a careful and detailed analysis of competition would assess the impact of wireless services (and VoIP services) on the ability of cable companies and LECs to collude in the provision of mass market telephony services. Even if the Commission concludes that wireless mobile services do not independently impose a sufficient pricing constraint on LEC provision of mass market telephony services, it does not follow that those service offerings are irrelevant to the potential for tacit collusion between the ILEC/cable "duopoly." Indeed, the continuing market share gains by mobile service providers (at the expense of both LECs and cable system operators) strongly appears to be precisely the kind of disruptive competitive force that impedes collusion and the development of a profitable, stable equilibrium.

2. Mobile Wireless Services.

The Commission's treatment of mobile wireless services in the *Qwest Forbearance Order* also improperly disregards the very real competitive and pricing constraints that such services impose on providers of landline mass market retail services. The Commission should modify its approach in two respects: it should not apply the "product market" concept too rigidly to avoid incorrectly concluding that wireless services impose no important pricing or competitive constraints, and it should not apply its framework in a way that insists on unreasonable evidentiary showings.

Product Market Definition. At the most basic level, an overly rigid approach to product market definition would arbitrarily exclude acknowledged and important sources of price constraint and substitution. For example, the Commission acknowledges that "most subscribers to both wireline and wireless engage in some *usage* substitution,"[38] but it nonetheless excludes mobile wireless services completely from its competitive assessment under the theory that the only type of substitution that matters is "access substitution" (*i.e.*, cutting the cord). That distinction is not defensible. Even under the Commission's reasoning, usage substitution imposes an important constraint on the wireline providers' pricing. Foremost, the Commission's analysis ignores that many LEC customers continue to purchase plans that include per minute (*i.e.*, usage) charges for intra-LATA toll and long distance services. And, per minute charges are common for wireless service offerings, including the increasingly popular pre-paid wireless service offerings. It is thus no answer at all to dismiss usage substitution based solely on the grounds that many consumers purchase flat-rate plans. Even if wireline and wireless providers offered only flat rate plans, the Commission's reasoning is still fatally flawed. To the extent that customers substitute usage away from wireline services to wireless services, the wireline service becomes increasingly less valuable to the consumer. Consequently, usage substitution places a significant constraint on the price that can be charged for flat rate wireline offerings without resulting in customers cutting the cord. The Commission's heavy emphasis on the distinction

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[38] *Qwest Forbearance Order* ¶ 55.

between access substitution and usage substitution thus prevents its analysis from addressing a crucial competitive dynamic.

Treatment of Evidence of Competition. The Commission's treatment of the evidence as to whether wireless services generate pricing constraints in the *Qwest Forbearance Order* was also arbitrary, and in future forbearance proceedings a more sensible "market power" approach would require more careful implementation. In three respects, the approach adopted in the *Qwest Forbearance Order*, if carried over into other proceedings, would likely cause the Commission to disregard competitive constraints imposed by mobile wireless services and disregard important competitive dynamics that should inform the forbearance analysis.

First, the Commission's approach cannot require a nearly impossible evidentiary showing while simultaneously disregarding extensive competitive analysis submitted by an applicant. In the *Qwest Forbearance Order*, the Commission did both. The Commission required Qwest to meet a practically impossible standard that is more appropriate for a theoretical exercise than any real-world assessment of actual competition. The Commission faulted Qwest for failing to produce "econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services" or "marketing studies that show the extent to which consumers view wireless and wireline access services as close substitutes."[39] It would be exceedingly difficult to construct such a study.

An econometric study of cross-elasticities of demand would require a carrier to obtain data sufficient to isolate percent changes in demand for mobile services caused by percent changes in the price of wireline services in the specific area being studied. But any attempt to gather such data would be inherently arbitrary, and often impossible. For example, customers

[39] *Id.* ¶ 58.

typically purchase wireline and mobile voice services as part of bundled packages that include other services (*e.g.*, video, Internet, and messaging) and multiple geographic areas (*e.g.*, national mobile voice plans), making any attempt to isolate changes in the price of voice services for any particular area an inherently arbitrary exercise. Moreover, LEC wireline prices are often regulated and such price changes therefore tend to be rare, creating additional challenges to finding the data needed to conduct elasticity studies. In addition, mobile voice services are typically offered by several different national and regional wireless providers in any particular area, which means that applicants will lack the information necessary to determine how overall demand for mobile voice services changed in response to a change in price for wireline voice services. And even if mobile wireless demand for a particular area could be identified, there is no effective way to obtain the massive amount of data needed to control for the extent to which increases or declines are attributable to wireline prices or one of the other myriad variables that affects demand for mobile voice services, such as prices changes for text messaging, email, and VoIP services.

The Commission also systematically discounted the extensive evidence submitted by Qwest while adopting nearly any and every criticism of that evidence offered by forbearance opponents. Qwest submitted an economic study that was far more sophisticated than any of the regulatory reports on which the Commission relied, and the Commission accepted extremely speculative arguments for not at least partially crediting and factoring the Qwest evidence into its analysis.[40] For example, the Commission relied on observations that a significant price difference existed between mobile wireless and fixed mobile service, and credited the Cavalier expert's suggestion that "the demand for wireline services may have become less elastic over

[40] *See, e.g., id.* ¶ 32 & nn.173 & 174.

time."[41] The first observation has no bearing on substitution in light of the additional functionalities provided by mobile wireless service (*i.e.*, mobility), and the second is simply speculation that fails to account for the growing ranks of mobile-only customers. If applied 100 years ago to the horse-pulled carriage and the motorcar, this analysis would provide ample basis for concluding that carriage pricing would continue unconstrained.

In all events, there was no reason for the Commission to completely disregard the evidence that Qwest did present merely because it failed to meet some arbitrarily high standard set by the Commission. The Commission's analysis suggests that if the evidence fails to meet its arbitrary, theoretical standard, it is of no probative value at all, and provides no basis for concluding that mobile wireless service has *any* constraining effect on wireline pricing.[42] But this conclusion does not follow at all. Even if the Commission finds that certain evidence is "insufficient[] … to justify including mobile wireless service in the same relevant product market as wireline service," the evidence may – indeed, must – nonetheless inform any sophisticated assessment of the actual competitive relation between wireline and wireless service provision. It does not support the conclusion, as the Commission would have it, that the competitive relation is non-existent.

Second, while it was insisting on econometric studies that would be extremely difficult to construct, the Commission ignored the most telling evidence of all: the dramatic shifting over time of customers from wireline to wireless services, including even "access substitution." The Commission acknowledges that "the increasing number of households that rely solely on mobile wireless service suggests that more consumers may view mobile wireless as a closer substitute for wireline service than in the past" (as the declining price and increased sophistication of stand-

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[41] *Id.*

[42] *See id.* ¶¶ 58-60.

alone and bundled offers would also confirm), that the Commission has given weight in prior decisionmaking to that basic and obvious fact, and that this "cutting the cord" phenomenon justifies further inquiry.[43] The fact that the Commission's analytical framework and decisionmaking process completely fails to account for this crucial market factor confirms that the Commission's framework is too rigid and its assessment of evidence too skewed against any showing that wireline pricing might be constrained.

Third, the Commission should not create a presumption against a finding of pricing constraints based on conclusions formed in prior regulatory proceedings. In the *Qwest Forbearance Order*, the Commission appeared to do just that in accepting prior analyses by the Department of Justice and Ofcom and simply stating that the record evidence does not suffice to "cause[] us to reach a different conclusion."[44] The Justice Department's conclusions in fact were quite limited and even ambiguous. It was analyzing issues relating to mergers (which present considerably different issues than forbearance), and even within that context (as the Commission itself notes, *see Qwest Forbearance Order* ¶ 57 n.169), the Department did treat mobile wireless services as relevant to its assessment of market share (and thus market power) even if it did not find that mobile wireless services provided an independent constraint on wireline pricing for purposes of merger analysis.[45] In any event, the Department report did not purport to be conclusive, but rather emphasized that it only "analyze[d] and synthesize[d] the . . . statements and submissions" presented at a particular symposium, and did not to engage in a far-reaching

[43] *See id.* ¶¶ 60-61; *Notice*, at 2.

[44] *See Qwest Forbearance Order* ¶¶ 57-58.

[45] *See* U.S. Dept. of Justice, *Voice, Video, and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*, at 3 (2008) ("2008 DOJ Report").

assessment of competitive conditions in particular contexts.[46] The Ofcom report is even less useful – that document sought responses as part of the initiation of a competition review, and the treatment of wireless mobile services reflected only a limited household survey of likely responses to a hypothetical wireline pricing increase by British Telecom.[47] A survey of British customers' potential behavior is, to put it mildly, not very probative in making competition assessments in U.S. markets.

Indeed, the Commission elsewhere alludes to the real lesson of the various prior regulatory assessments: not only are the Justice Department's conclusions at best ambiguous, "there is a split among the state regulators that have addressed this issue" and "several state authorities have concluded that wireless service provides competitive discipline to wireline providers."[48] In contrast to "synthesizing" symposia presentations or reporting on household surveys, these conclusions often reflect expert local regulators developing a record and applying their experience in actual market behavior to undertake analysis akin to that required by the statutory forbearance test. Far from a presumption against a finding that mobile wireless services constrain wireline pricing, prior regulatory assessments in fact support such a finding.

3. VoIP Services.

The Commission's treatment of "over-the-top" VoIP services was also inconsistent with a sound approach to a market power analysis. In the *Qwest Forbearance Order,* the Commission concluded that "the record here is insufficient to determine which over-the-top VoIP services should be included in the relevant product market,"[49] and thus completely disregarded such VoIP

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[46] *Id*.

[47] See Ofcom Report, *Fixed Narrowband Retail Services Markets,* ¶¶ 4.33-4.34 (Mar. 19, 2009).

[48] *Qwest Forbearance Order* ¶ 57 n.172.

[49] *Id.* ¶ 54.

services for purposes of its competitive analysis. This is a *non sequitur*. Even if the record did not permit a conclusion about which particular services should be applied in a formal market share calculation, the record – and indeed the Commission's independent understanding of the industry – certainly permits and in fact requires the conclusion that such VoIP services are an important qualitative factor in any assessment of competition. Not only do even over-the-top VoIP services inherently displace demand for components of the incumbent LEC's offering (*e.g.*, long distance or international service), but such services also lead customers away from LEC local exchange services because such customers can use broadband connections from competitors (including wireless and cable).

Nor is it appropriate to completely disregard an actual and potential source of competition based on the lack of evidence of direct equivalence between the two services at issue. In the *Qwest Forbearance Order*, the Commission based its VoIP conclusion principally on several commenters' assertion that "VoIP over-the-top services are not equivalent substitutes for an incumbent LEC's wireline services."[50] Even if two services are not "equivalent," customers may still substitute between them when one service provider increases prices. That is the inquiry that the Commission must undertake if it is to pursue its "market power" framework, and neither the record nor the Commission's own understanding of VoIP service permit a rational conclusion that *no* substitution, and thus *no* constraining effect on price, exists in those circumstances.

B. Enterprise Competition.

The *Qwest Forbearance Order* also determined that Qwest failed to satisfy the requirement for forbearance from unbundling regulations governing dedicated DSn loop and

[50] *Id.* ¶ 54 n.163.

transport facilities used to provide services to enterprise customers. The *Qwest Forbearance Order* concluded that such unbundling obligations were necessary to protect both retail-level and wholesale-level competition for enterprise services. As noted above, much of the evidence that Qwest submitted is under seal and thus it is possible that Qwest simply did not put in enough evidence to justify forbearance under any reasonable standard. Nonetheless, there are numerous instances in the *Qwest Forbearance Order* in which the Commission appears to be adopting a standard and evidentiary burdens that would be indefensible under any rational market power approach, and the Commission should take care in future proceedings to apply the framework in ways that comport with established economics and regulatory policy. Indeed, the end result of the Commission's analysis was to deny forbearance to Qwest notwithstanding the fact that Qwest faces robust competition for retail enterprise customers—and wholesale access services—from numerous facilities-based competitors that appear to have deployed multiple fiber networks throughout the portions of the Phoenix MSA where enterprise customers are concentrated.

1. Retail Competition.

The *Qwest Forbearance Order* correctly recognized that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[51] This is true, as the *Qwest Forbearance Order* properly observed, even where there is not a robust market for "wholesale" access to the inputs used to provide finished services to retail customers.[52] Section 10 appropriately focuses on the public interest and consumer welfare, not on creating a "wholesale" market for its own sake. When alternative providers are capable of effectively serving retail enterprise customers without access to loop and transport facilities under section 251(c)(3), such

[51] *Id.* ¶ 97 (citing *US WEST Forbearance Order*, 14 FCC Rcd. 16270, ¶ 31 (1999)).
[52] *Id.*

unbundling, by definition, is not necessary to prevent an incumbent LEC from charging its retail customers excessive rates or insisting on unreasonable terms or conditions.

Despite correctly recognizing this principle, the *Qwest Forbearance Order* effectively undermined it by appearing to give dispositive weight to static market share data and by disregarding entirely numerous firms that compete vigorously with Qwest to serve enterprise customers.

1. The *Qwest Forbearance Order* gave significant, if not conclusive, weight to static market share data in concluding that Qwest could exercise market power in the market for retail telecommunications services provided to enterprise business customers if forbearance from loop and transport unbundling obligations were granted.[53] As AT&T previously explained in detail in this proceeding,[54] static market share data should be accorded little, if any weight in determining whether incumbent LECs can exercise market power over retail customers. It has been "many years since anyone knowledgeable about" competitive analysis "thought that concentration by itself imported a diminution in competition."[55] Instead, an economically appropriate analysis must consider the "*availability* of competition."[56]

In this regard, the Commission's conclusion that "market share data based on actual line counts" should be considered much more "persuasive" than evidence regarding "decreases in

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[53] *See, e.g.*, *id.* ¶¶ 88, 99.

[54] *See generally* Comments of AT&T, WC Docket Nos. 06-172, 07-97, 09-135 (filed Sept. 21, 2009).

[55] *Capital Cities/ABC, Inc.* v. *FCC*, 29 F.3d 309, 315 (7th Cir. 1994); *see also United States* v. *Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.") (emphasis in original).

[56] *Comcast Corp.* v. *FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (quoting *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 661 (1994)) (emphasis added).

Qwest's retail switched access" lines is particularly problematic.[57] The very opposite is true. Evidence regarding loss of business access lines is much more probative of whether an incumbent LEC has the ability to "maintain" its customer base than static market share data.[58] Even if some substitution may be more efficient to IP-based services,[59] that is not a basis for disregarding these data entirely or for concluding that static market share data are "more reliable" than line loss data.[60]

2. The *Qwest Forbearance Order*'s citation of static market share data would have been harmless had it then gone on to undertake an appropriate examination of the "availability" of alternative providers of telecommunications services to enterprise customers. Although far from clear, the *Qwest Forbearance Order*, however, appeared to conclude that only carriers that were capable of providing enterprise services *entirely over their own last-mile networks* were relevant to "supply-side substitution."[61] In other words, the Commission assumed that should Qwest attempt to impose unreasonable charges or terms on a retail customer, Qwest's retail customer would only be able to obtain comparable, alternative services from carriers that had deployed their own last-mile facilities to the retail customers' locations.

There is no justification for this restrictive assumption. As the Commission recognized, the issue in this proceeding is whether the Section 251(c)(3) unbundling obligations in Phoenix

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[57] *Qwest Forbearance Order* ¶ 88 n.260.

[58] *Syufy*, 903. F.2d at 665.

[59] *Qwest Forbearance Order* ¶ 88 n.260.

[60] *Id.* If the Commission had significant concerns about Qwest's line loss data, it could have requested that competitive carriers provide the Commission with their line-gain data. If Qwest had lost significant numbers of enterprise business lines while competitors had gained lines, the most reasonable inference is that competitors were gaining lines at Qwest's expense rather than "substitution" that would presumably impact competitors and Qwest alike.

[61] *Id.* ¶¶ 89, 99.

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.[62] The proper focus, therefore, is the extent to which the current *retail* enterprise marketplace is competitive, and whether forbearance from Section 251(c)(3) obligations would diminish that competition.

The *Qwest Forbearance Order* failed to come to grips with that question. If unbundling obligations were eliminated, Qwest would still face competition for enterprise customers not only from the numerous carriers in the Phoenix MSA that had deployed their own last-mile network facilities, but also from carriers that lease such access from wholesale suppliers (including special access services from Qwest). Retail providers, including AT&T, often obtain access to customer locations by leasing access from other providers, including purchasing special access services from the incumbent carriers. And the retail services provided to enterprise services over these leased access facilities are meaningful alternatives to those offered by carriers that offer retail services over their own last-mile networks.

Indeed, the *Qwest Forbearance Order* 's approach is flatly inconsistent with the *AT&T-BellSouth Merger Order*. There, the Commission found that although the market for enterprise services was highly concentrated and the merger would increase that concentration, the merger would not have any anticompetitive effects. The Commission reasoned that:

> available market share data does not reflect the rise in data services, cable and VoIP competition, and the dramatic increase in wireless usage. Foreign-based companies, competitive LECs, cable companies, systems integrators, and equipment vendors and value-added resellers are also providing service in th[e] market. Similarly, we find that market shares may misstate the competitive significance of existing firms and new entrants. . . . We find that a large number of carriers compete in this market (even though the market shares of some may be

[62] *Id.* ¶ 92.

small), and that these multiple competitors ensure that there is sufficient competition.[63]

Similarly, in the *AT&T-SBC Merger Order*, the Commission found competition for business customers was "robust"[64] and likely to remain so.[65] Notably, in many markets, retail competitors make relatively little use of UNEs. Moreover, the Commission in these orders did not distinguish between those carriers that provide service entirely over their own facilities and those that lease (in whole or in part) last-mile access facilities to serve their business customers. Nor did the Commission find that competition was enabled only by access to UNEs. To the contrary, the Commission observed that "there are numerous types of business models supporting competition for enterprise customers" and that many carriers offer service by leasing dedicated access facilities as "UNEs or special access and then using the loops to provide a bundled offering including voice, data and Internet access."[66]

The *Qwest Forbearance Order* appears to have rested its decision to ignore dozens of firms currently and vigorously competing with Qwest for enterprise customers by using a mix of their own facilities and special access services on the ground that Qwest special access services,

[63] *AT&T-BellSouth Merger Order* ¶ 80.

[64] *Id.* ¶ 73 n.223.

[65] This conclusion was supported not only by the record evidence, but by fifteen years of precedent in which the Commission has consistently recognized that competition in the enterprise market was particularly intense. *Id.* ¶ 75.

[66] *AT&T-BellSouth Merger Order* ¶ 80 n.239; *see also id.* ¶ 70 n.199 (rejecting arguments that competitive LECs are not meaningful competitors for enterprise customers); *AT&T-SBC Merger Order* ¶ 33 ("[W]e conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities and incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of AT&T [as an independent competitor].").

unlike UNEs, "*might* not be . . . cost-based."[67] But the *Order*'s implicit premise that competition from carriers using UNEs (but not other wholesale inputs obtained from other providers – including special access services) "counts" because only UNEs are "cost-based" is fundamentally mistaken. TELRIC-based UNE prices are not "cost-based" in any real-world sense of the term. Rather, they are based on "purely hypothetical" models of networks constructed using patently "unrealistic" and internally inconsistent assumptions about the market.[68] The Commission recognized as much in 2003 when it opened its still pending rulemaking proceeding to revisit virtually every aspect of TELRIC.[69] The Commission stated that TELRIC rules are "extremely complicated," "excessively hypothetical," and "very general," leading to highly "variable results" in UNE prices that do not in fact "reflect genuine cost differences."[70]

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[67] *Qwest Forbearance Order* ¶ 35 (emphasis added); *see also id.* ¶¶ 35 n.115, 75. The Commission further suggests that considering special access services would be inconsistent with its rulings in the *Triennial Review Remand Order*. See *id.* ¶ 35. This is doubly flawed. First, the Commission in the *Triennial Review Remand Order* declined to order unbundling used to serve wireless and long distance markets because of the demonstrated levels of competition in those markets. *See, e.g.*, *Triennial Review Remand Order* ¶¶ 3, 5, 34. But, as explained above, retail markets for enterprise customers are likewise robustly competitive notwithstanding the broad use of special access services by competitors in that market. Second, the Commission has effectively collapsed the "impairment" inquiry with the forbearance inquiry. Even if it can be said that carriers are "impaired" without access to certain loop and transport UNEs, the availability of special access services still remains highly relevant to the forbearance inquiry, which focuses on whether the particular regulation at issue (here, access to unbundled loop and transport facilities), remains necessary to protect customers. *See, e.g.*, *Verizon Tel. Cos.* v. *FCC*, 570 F.3d 294, 300-01 (D.C. Cir. 2009) (forbearance inquiry should not be "unnecessarily conflated with the impairment inquiry").

[68] Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd. 20265, ¶¶ 4-5 (2003) ("*TELRIC NPRM*").

[69] *Id.* ¶ 6 (acknowledging that TELRIC has "been the subject of extensive criticism").

[70] *Id.* ¶¶ 6-7.

To be sure, carriers that are able to obtain access to below-cost UNEs may earn greater profits than carriers that either self-supply access or purchase special access. But preserving such artificially high profit margins is not a legitimate goal of the Commission's forbearance authority. Indeed, preserving entitlement to such excessively low prices when carriers could compete on the merits using special access will disserve consumers and the public interest. As AT&T has explained elsewhere,[71] below-cost UNEs dampen investment and facilities-based competition and thereby undercut a principal goal of the 1996 Act and this Commission. The Commission has already recognized as much, noting that TELRIC "distorts [the Commission's] intended pricing signals by understating forward-looking costs" and as a consequence, "thwart[s] one of the central purposes of the Act: the promotion of facilities-based competition."[72] Indeed, TELRIC reduces investment incentives for incumbents and competitors alike: the former will not deploy new facilities because they cannot make a reasonable return on their investments, and the latter have no need to invest in facilities because they can obtain the incumbents' facilities at below-cost rates.[73]

In all events, even if TELRIC were appropriately calculated, that would still not be a basis to disregard entirely the impact of competition from the numerous carriers using special

[71] *See, e.g.*, Supplemental Reply Comments of AT&T, WC Docket No. 05-25, RM-10593, at 29-32 (filed Aug. 15, 2007).

[72] *TELRIC NPRM* ¶ 3.

[73] *Id.* ¶ 51 & n.100 (citing economic literature and tentatively concluding that TELRIC "may undermine the incentive for either competitive LECs or incumbent LECs to build new facilities"). Relatedly, the Commission has justified forbearing from Section 271 unbundling requirements on the grounds that such mandated sharing undermines investment incentives and eliminating the obligation will ultimately result in more robust facilities-based competition. *See generally Earthlink*, 462 F.3d at 1. In finding that its ruling would have no negative impact on investment incentives, *see Qwest Forbearance Order* ¶ 108, the Commission did not consider its prior findings that TELRIC can undermine investment incentives. The Commission also seemed to believe that DS1 and DS3 loop and transport facilities are provided over copper facilities when, in fact, fiber facilities can be (and frequently are) used to provide such services.

access successfully to serve enterprise customers. Special access is just one of many inputs used to provide finished retail services to enterprise customers. Regardless of whether those services are or are not priced in excess of TELRIC, it is nonetheless indisputably the case that many carriers are, *in fact*, able to overcome any associated "cost" disadvantage and are able to offer alternatives to enterprise customers that, in the Commission's own words, provide "robust" competition to incumbent LECs. Thus, so long as special access service remains available at reasonable terms and conditions—as the Commission's current regulations require—then competing carriers can obtain the necessary last-mile customer access and combine that with their own extensive network facilities to offer effective alternatives to incumbent retail services and competition from these carriers must be considered in any economically appropriate forbearance analysis.

3. Finally, the *Qwest Forbearance Order* failed to undertake any "demand-side" analysis, asserting it lacked the "data or information" necessary to "evaluate" this factor.[74] But the Commission has had little trouble in conducting such analyses in prior competition proceedings. Specifically, in its merger orders, the Commission has repeatedly recognized that medium and large business customers tend to be highly sophisticated purchasers of communications services and, as such, are "likely to make informed choices based on expert advice about service offerings and prices."[75] Thus, at a minimum, should the Commission retain the *Order*'s "market power framework," it should consider the sophistication and bargaining power of enterprise customers in evaluating whether an incumbent LEC can exercise market power if forbearance from unbundling is granted.

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[74] *Qwest Forbearance Order* ¶ 88 n.260.

[75] *AT&T-SBC Merger Order* ¶ 75; *see also AT&T-BellSouth Merger Order* ¶ 81 n.243 ("[W]e find that mid-sized and large enterprise customers tend to be sophisticated purchasers and are able to negotiate for significant discounts."); *AT&T Reclassification Order* ¶ 65.

2. Wholesale Competition.

As explained above, an economically appropriate forbearance framework should focus on whether competitors in the marketplace today can offer alternative telecommunications services to enterprise customers without access to unbundled loops and transport. If competitors are able to offer viable alternatives using a mix of their own access facilities, access facilities leased from competitive carriers and/or through the purchase of special access from incumbent LECs, then forbearance from TELRIC-based unbundling should be granted without regard to the extent to which carriers can obtain last mile access services from multiple "wholesale" providers. The purpose of the Commission's forbearance authority is to protect consumers, not as a mechanism for ensuring that certain favored carriers are guaranteed a particular means of obtaining dedicated access facilities without regard to whether competition is feasible without such access.

In all events, the *Order*'s competitive analysis of the "market" for wholesale access to transport and loop access facilities was economically flawed and should not be used in future forbearance proceedings. The *Qwest Forbearance Order* also imposed an unrealistic and inappropriate burden of proof on Qwest, taking at face value mere assertions by forbearance opponents while faulting Qwest for failing to provide evidence and data that no applicant could reasonably obtain.

Transport Facilities. The *Qwest Forbearance Order* acknowledged that barriers to deploying local transport facilities can be significantly less than loop facilities because "dedicated transport carries much more traffic and has much greater potential for added future traffic" and "competitive LECs can take advantage of economies of scale, and can also make decisions about whether to self-deploy transport based not only on actual traffic, but on potential traffic as well."[76] No other finding appears possible on this record: although AT&T does not have access to the underlying record evidence, the public description in the *Qwest Forbearance Order* indicates that 25 different competitive carriers had deployed extensive local fiber networks in the Phoenix along the routes where most enterprise customers are located.[77]

These findings are more than sufficient to establish that Qwest faces extensive competition in the provision of wholesale transport service and that barriers to competitive expansion are modest. Nonetheless, the *Qwest Forbearance Order* concluded that it would not grant Qwest forbearance from Section 251(c)(3) unbundling obligations because Qwest purportedly failed to demonstrate that there were competitive alternatives for "any relevant product market—*i.e.*, routes between any two Qwest wire centers."[78] This assertion betrays a fundamental misunderstanding of the ways in which competitive carriers use competitive transport and the relevance of potential competition.

The extent of fiber transport between pairs of Qwest wire centers is irrelevant to the scope of competition an incumbent carrier faces. Carriers do not deploy local networks as a means to obtain connections between pairs of incumbent LEC central offices, but instead they deploy fiber rings to backhaul traffic from customer locations to their local and long distance networks (or to the networks of other carriers in order to sell wholesale access). Competitive carriers deploy fiber laterals from their main transport networks directly to customer locations when possible and, alternatively, collocate in select incumbent LEC central offices to access last-mile loop (or transport-loop) facilities to reach their customers. Similarly, a carrier seeking to obtain wholesale access from a competitive carrier does not care about obtaining transport

[76] *Qwest Forbearance Order* ¶ 78 n.236.

[77] *Id.* ¶ 77.

[78] *Id.*

between individual incumbent LEC central offices (or, for that matter, any particular central office), but needs access from the edge of its network to individual customer locations. Thus, the relevant issue is not whether competitive carriers have deployed fiber between every incumbent central office pair in a particular MSA, but whether competitive carriers have deployed fiber networks that are collocated in a sufficient number of incumbent end offices such that the competitive carriers can economically reach customer locations throughout the MSA. In this regard, a competitive carrier does not even need to be collocated at the wire center that directly serves the customer location; so long as it is located at another reasonably proximate wire center it can still access that location by purchasing special access transport and channel terminations from the incumbent.

The Commission's reasoning also fails to account for the ability of competitive carriers to connect to each other at wire centers (or carrier hotels) where they are both collocated. Even if only a single competitive carrier has deployed fiber to a particular central office, other carriers can still obtain access to that wire center (and customers subtended by the central office) by connecting to the carrier in wire centers where both are collocated. This is particularly true where multiple carriers have deployed their fiber to collocation hotels. In such instances, competitive carriers can obtain access to any route and customers served by another competitive carrier.

The *Qwest Forbearance Order* then compounded this error by concluding that, notwithstanding the substantial deployment of fiber transport networks in Phoenix, "there is no evidence" that carriers would deploy alternative transport facilities to new routes in the event that Qwest attempted to raise transport rates on such routes.[79] Foremost, the Commission reached the

[79] *Id.* ¶ 78.

exact opposite conclusion in the *AT&T-BellSouth Merger Order*. There, the Commission observed "[t]he extensive local fiber networks already deployed by other competitors in BellSouth's territory indicate that these competitors are likely to find it feasible to construct additional collocations."[80]

In all events, the *Qwest Forbearance Order*'s premise that Qwest could raise prices for special access transport on the relative minority of central office-to-central office routes in the Phoenix MSA where there is no parallel competitive fiber is simply wrong. As AT&T has explained in the ongoing special access proceeding,[81] where an incumbent LEC has obtained Phase II pricing flexibility, it faces established and substantial competition *throughout* the MSA. And where an incumbent LEC has obtained only Phase I relief, its special access rates are price capped. Finally, even to the extent that an incumbent LEC can raise the prices for special access services, those services are tariffed on an MSA-wide basis and it is not feasible for an incumbent to raise transport prices for a select group of point-to-point routes within that MSA. Where competitive carriers have deployed transport networks throughout the portions of the MSA where enterprise customers are located (as appears to be the case in Phoenix), any attempt to raise special access transport prices on an MSA-wide basis would quickly and easily be defeated by existing competitors who would be more than happy to serve the incumbent's existing customer base.

Loop Facilities. The *Qwest Forbearance Order* also improperly determined whether market power exists with regard to "wholesale" supply of loop facilities. Specifically, the *Order* appeared to equate the existing level of deployment as conclusive as to whether market power

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[80] *AT&T-BellSouth Merger Order* ¶ 51; *see also id.* ¶ 54.

[81] Comments of AT&T, WC Docket No. 05-25, RM-10593, at 22 (filed Jan. 19, 2010); Reply Comments of AT&T, WC Docket No. 05-25, RM-10593, at 41 (filed Feb. 24, 2010).

exists. "[T]he fact that facilities-based competitors have so few last-mile connections suggests that entry is costly and difficult."[82] This is a logical fallacy that assumes its conclusion. The fact that "few" last-mile connections have been built is also consistent with the premise that Qwest's existing prices are constrained by the *threat* of potential entry should it try to raise prices.[83] As explained above, such potential competition can constrain prices just as much as existing, "actual" competition.

The Commission (and the Department of Justice ("DOJ")) recognized precisely this point in analyzing the AT&T-BellSouth and AT&T-SBC mergers.[84] In these proceedings, the Commission found that "loss" of AT&T's fiber connections to a building also served by BellSouth/SBC would *not* result in a diminution of competition to provide wholesale access to that building where another competitor could potentially extend its own fiber lateral to the building even if it did not currently serve the building.[85] Such potential competition is a particularly potent source of competition where, as here, a large number of competitors have deployed local fiber in close proximity to high-demand locations. Accordingly, it was improper for the *Qwest Forbearance Order* to infer from the mere fact that competitive carriers have not ubiquitously deployed fiber laterals to buildings that "potential entry cannot be relied upon to constrain prices."[86]

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[82] *Qwest Forbearance Order* ¶ 73.

[83] It is also quite likely that the availability of below-cost TELRIC UNE loops have diminished the incentive of competitive carriers to construct their own loop facilities.

[84] *AT&T-BellSouth Merger Order* ¶¶ 42-46 (describing and following analysis provided in *AT&T-SBC Merger Order*).

[85] *Id.*

[86] *Qwest Forbearance Order* ¶ 73.

The *Qwest Forbearance Order* multiplied this error in suggesting that a competitor must have deployed its own facilities to "all of the customer's locations" in order to "serve a multi-location business customer."[87] Although winning a contract to serve a multi-location customer typically requires a carrier to provide service to all of the customer's locations, a carrier does not ordinarily have to reach all of those locations exclusively over its own facilities. Instead, carriers frequently serve multi-location customers using a mix of their own local networks, dedicated access services from competitive suppliers, and special access services purchased from ILECs. AT&T, for example, relies on such third party access to reach a substantial number of its enterprise customer locations. And, if anything, competition is particularly intense for multi-location customers. Because in many cases no carrier will be able to serve such multi-location customers exclusively over its own facilities, that tends to diminish any advantage from having local facilities in a particular location. Conversely, serving multi-location customers can provide a competitive carrier with the revenue stream necessary to justify deployment of last mile facilities to relatively "low volume" locations that might not warrant such deployment on a stand-alone basis.

Inappropriate Burden Of Proof. Finally, if the Commission is going to apply in future proceedings the "market power framework" it adopted in the *Qwest Forbearance Order*, it must be sensitive to the limited evidence available to forbearance applicants. The *Qwest Forbearance Order*, however, provides a textbook illustration of the administrative burdens imposed by a rigid application of that framework, faulting Qwest for failing to adduce evidence that it could not reasonably be expected to produce while in many instances accepting uncritically the

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[87] *Id*. ¶ 74.

assertions of forbearance opponents that have every interest in understating the extent of competitive deployment and the ability to expand local networks.

For example, the *Qwest Forbearance Order* faulted Qwest for failing to provide the evidence used by the Justice Department and the Commission in its merger review to determine whether it is economic to extend local fiber to nearby buildings.[88] But in the merger proceedings, the DOJ—using its CID authority—itself gathered data from the merging parties and their competitors that the DOJ used to determine the extent to which competitive carriers served or could serve specific buildings. Further, the DOJ and the Commission focused on only the small subset of locations where the merging parties both had overlapping last-mile facilities. There is simply no way that a forbearance applicant could be expected to provide this information for *all* of the commercial buildings that exist in a MSA like Phoenix.[89]

Similarly, although acknowledging that fixed wireless can be used to provide last-mile access to buildings that might not otherwise be competitively served, the *Qwest Forbearance Order* faulted Qwest for not identifying the extent of fixed wireless services.[90] Although Qwest might reasonably be expected to identify whether it faces competition from fixed wireless providers in an MSA, data regarding the scope of such fixed wireless networks (including the ability to expand those networks) can only come from the fixed wireless providers.

At the same time, the Commission takes at face value mere assertions by competitive carriers regarding the scope of their network deployment. But in the prior merger proceedings, it

[88] *Id.* ¶ 72 n.216 ("Qwest failed to provide the data necessary to apply such a screen in the Phoenix MSA."). The data relied upon by DOJ included the location of competitive fiber networks, the distance from those networks to commercial buildings, and the demand at those buildings. *AT&T-BellSouth Merger Order* ¶¶ 42, 46 & nn.113-24.

[89] *See Qwest Forbearance Order* ¶ 71 n.212.

[90] *Id.* ¶ 90.

turned out that even after the DOJ gathered information directly from competitive suppliers about the scope of their local facilities, that information substantially *understated* the true extent of competitive supply.[91] Similarly, in at least one instance the *Qwest Forbearance Order* apparently credited patently contradictory assertions by competitive carriers.[92]

These points are merely symptomatic of a broader problem with the way in which the Commission attempted to determine market power in the *Qwest Forbearance Order*. The *Qwest Forbearance Order* effectively faulted Qwest for failing to prove that it faced effective competition for each transport route between its 64 wire centers and for each of the many thousands of buildings in the Phoenix MSA. Even if the Commission were to require competitive carriers to provide the relevant competitive data, it is simply not administratively feasible to make market power determinations on such a granular route-by-route, building-by-building basis for an entire MSA—including not just a determination of whether competition currently exists for each route or building, but also a determination of whether there can be potential competition for each route or building. The Commission has never required such a hyper-granular approach in its past forbearance orders and the courts have made clear it is not required by Section 10.[93] Further, in other competition proceedings, the Commission has

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[91] AT&T Reply, WC Docket No. 05-25, RM-10593, at 38 (filed Feb. 24, 2010) & Carlton-Sider-Shampine Reply Decl. ¶ 65. Further, verification and correction of the DOJ's competitive data required the burdensome and costly physical inspection of literally hundreds of buildings.

[92] *Compare Qwest Forbearance Order* ¶ n.212 (noting Integra's claims that no fixed wireless carrier offers wholesale loops in the Phoenix MSA) *with id.* n.210 (noting Broadview's assertion that Nextlink provides fixed wireless service to only a subset of commercial buildings in the Phoenix MSA).

[93] *EarthLink*, 462 F.3d at 8 (section 10 imposes "no particular mode of market analysis or level of geographic rigor"); *Verizon Tel. Cos.*, 570 F.3d at 300 (same). *See also Qwest Section 272 Sunset Forbearance Order* ¶¶ 25-28; *Qwest Omaha Forbearance Order* ¶ 18.

employed a broader geographic analysis where relevant competitive conditions are roughly equivalent.[94]

[94] *See, e.g.*, *AT&T-BellSouth Merger Order* ¶¶ 54, 68; *AT&T-SBC Merger Order* ¶ 63; *Verizon-MCI Merger Order* ¶ 63; In this regard, courts have insisted that the definition of a geographic market must be large enough to be meaningful and practicable *See, e.g.*, *Wampler* v. *Sw. Bell Tel. Cos.*, 2010 WL 597245 (5th Cir., Feb. 22, 2010) ("given the competition that exists between [building] owners [for tenants], the competition that exists between service providers, and given the highly mobile nature of today's society, we cannot hold that a single [MDU] [building] is so segregated as to be economically significant and thus represents a plausible geographic market"); *id.* ("Plaintiffs' alleged geographic market of MDUs essentially identifies specific venues (collections of apartment homes) that simply narrow the broader economic market in which these MDUs are located, which in this case is the City of San Antonio").

CONCLUSION

For the foregoing reasons, the Commission should not apply the analytical framework used in the *Qwest Forbearance Order*.

Respectfully Submitted,

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