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

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

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2010 **Released: June 22, 2010**

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

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I. INTRODUCTION

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

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

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

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

[2] *See, e.g.*, *id*. at 1–6.

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

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

II. BACKGROUND

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

A. Dominant Carrier Regulation

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

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[4] *See infra* paras. 19–20, 45.

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

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

[7] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *Competitive Carrier First Report and Order*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (*AT&T v. FCC*), *cert. denied*, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Competitive Carrier Sixth Report and Order*), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceeding); *see* 47 C.F.R. § 61.3(q), (y).

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

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

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

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

[9] *Id.* at 14, para. 57.

[10] *Id.* at 14, para. 58.

[11] *Id.* at 13, para. 54.

[12] *Id.* at 7, para. 27.

[13] *See id.* at 20–26, paras. 85–111.

[14] *See id.* at 20, para. 84.

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

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

[17] *Id.* at 3307, para. 67.

[18] *Id.* at 3308, para. 70.

[19] *Id.* at 3303–04, para. 59.

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

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

B. The Telecommunications Act of 1996

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

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[20] *Id.* at 3308, para. 71

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

[22] *Id.* at 3308, para. 70.

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

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

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

[26] *See supra* note 23.

[27] *See infra* notes 82 & 85.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[36] *Id.* at 2547–48, paras. 24, 26.

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

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

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

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

to seek forbearance from unbundling obligations in specific areas where the "requirements for forbearance have been met."[41]

2. Section 10—Forbearance

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

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

[41] *Id.* at 2556–57, paras. 38–39.

[42] 47 U.S.C. § 160(a).

[43] 47 U.S.C. § 160(b).

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

[45] *Id*. at para. 21.

[46] *Id*.

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

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

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

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

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

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

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

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

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

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

[54] *Id*. at 19452, para. 71.

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

[56] *See, e.g.*, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959–60, paras. 1–2 (2007) (granting certain conditional forbearance from unbundling obligations in wire centers in the Anchorage study area) (*ACS UNE Forbearance Order*), *appeals dismissed*, *Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, (continued….)

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

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

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

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

withdrew both its petitions.[58]

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

20. Following those remands, the Wireline Competition Bureau sought "comment on how the Commission should reconsider its analysis" in the remanded decisions,[62] and simultaneously extended the comment cycle for the related Qwest Phoenix petition.[63] Subsequently, at Qwest's request, the Bureau further extended the date for reply comments on both sets of proceedings to October 21, 2009.[64] Qwest sought this extension "to allow parties sufficient time to address the complex set of legal and economic issues likely to be raised in the initial comments."[65] Most recently, on April 15, 2010, the Bureau issued a public notice observing that "certain commenters have urged the Commission to adopt a different standard for analyzing" these forbearance petitions than had been used in the past—namely, a market-power-based approach—and seeking comment on the potential application of that approach in the context of the Qwest Phoenix forbearance petition.[66]

III. DISCUSSION

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

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

[59] *Verizon v. FCC*, 570 F.3d at 296.

[60] *Id*. at 304.

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

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

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

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

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

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

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

A. Scope of Qwest's Petition

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

B. The Need for a More Comprehensive Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[78] *Id*. at 19448, para. 67.

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

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

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

[79] *Id*. at 19448–49, paras. 66–68.

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

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

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

its own facilities. This focus inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers. The potential for supracompetitive prices may be a concern where there is a duopoly or a market dominated by a few firms and there are high barriers to entry into the market. Economists,[83] courts,[84] and the Commission[85] have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[86]

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

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

[85] *See, e.g.*, *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket Nos. 02-34, 02-54, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10789, para. 64 (2003) (finding that "the factors that have led courts to disfavor mergers to duopoly also support establishing a procedure that will maintain at least three competitors in a frequency band, unless an interested party can rebut our presumption that three is necessary to a competitive market"); *Application of EchoStar Commc'ns Corp. (a Nevada Corporation), General Motors Corp, and Hughes Electronics Corp. (Delaware Corporations) (Transferors) and EchoStar Commc'ns Corp. (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20624–26, paras. 170–74 (2002) (*EchoStar/DirecTV Order*); *see also id* at 20624, para. 170 ("Both economic theory and empirical economic research have shown that firms in concentrated, oligopoly markets take their rivals' actions into account in deciding the actions they will take."); *Application of Air Virginia, Inc. (Assignor) and Clear Channel Radio Licenses, Inc. (Assignee), for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, MM Docket No. 02-38, Hearing Designation Order, 17 FCC Rcd 5423, 5432, para. 27 (2002) ("In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination."). *See also SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18325–34, paras. 65-78 (2005) (*SBC/AT&T Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, WC Docket No. 05-65, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008–09, para. 37 (1997); *see also, e.g.*, *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7872–73, para. 100 (1996).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[99] *Id.* at 19452, para. 71.

[100] *Id.* at 19451, para. 69.

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

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

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

(Continued from previous page)

carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input").

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

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

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

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

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

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

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

[110] In the *Verizon/MCI Order*, the Commission observed that MCI was no longer a significant competitor for small business and mass market customers "given the significant reduction in its marketing and consumer operations." *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18475, 18489–90, paras. 77, 104 (2005) (*Verizon/MCI Order*).

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

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

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

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[111] COMPTEL Opposition, Attach. at 6.

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

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

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

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

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

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

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

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

[118] *See, e.g.*, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5675–76, paras. 23–26 (2007) (*AT&T/BellSouth Order*); *SBC/AT&T Order*, 20 FCC Rcd at 18303-04, paras. 20-23; *Verizon/MCI Order*, 20 FCC Rcd at 18446–47, paras. 20–23; *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293-309, paras. 38–73.

[119] *See* Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OFFICIAL J. EURO. UNION, Mar. 7, 2002, at Annex 1, *available at* http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00330050.pdf (Framework Directive) (setting forth procedures for market definition and analysis to be used by national regulatory authorities to justify the imposition of regulatory obligations); *Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Counsel on a Common Regulatory Framework for Electronic Communication Networks and Services*. OFFICIAL J. EURO. UNION (February 11, 2003), *available at* http://ec.europa.eu/information_society/topics/telecoms/regulatory/publiconsult/documents/relevant_markets/l_11420030508en00450049.pdf (Framework Recommendation) (interpreting the Framework Directive with respect to the identification and evaluation of relevant markets); *see also Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*, Dec. 18, 2009, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:337:SOM:EN:HTML.

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

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

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

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

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

[123] 47 U.S.C. §§ 160(a)(3), (b).

[124] *See infra* Part III.D.4.

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

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

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

39. As some commenters note, in *EarthLink v. FCC*, the D.C. Circuit observed that section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,'" and provides the Commission flexibility to "balance the future benefits against short term impact."[131] Indeed, a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest's petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.[132] In this petition for forbearance from currently applicable regulations, by contrast, we do not find any persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.[133] To the contrary, maintaining unbundling of legacy facilities,

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

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

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

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

[131] *EarthLink v. FCC*, 462 F.3d at 8–9.

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

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

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

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

C. Overview of Our Approach to Forbearance Analysis

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

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

[134] *See infra* Part III.E.1.c.

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

[136] *Id.* at 37.

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

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

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

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

42. The traditional market power framework enables us to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted. Specifically, our market power analysis begins by defining the relevant product[141] and geographic markets[142] and by identifying the market participants. Next, we perform an analysis, in which we examine available evidence regarding market shares[143] and evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by Qwest or by Qwest in concert with a few competitors.[144] Based on this finding, we determine whether the regulations

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

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

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

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

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

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

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

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

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

D. Threshold Market Analysis

1. Product Markets

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

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

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

time, as technology, prices, product characteristics, and consumer preferences evolve.[146]

a. Wholesale Product Markets

47. The relevant distinct wholesale product markets we consider below are informed by prior Commission precedent,[147] the evidence in the record, and the regulations at issue.

(i) Wholesale Loops and Dedicated Local Transport

48. In determining which network elements it would require to be unbundled pursuant to section 251(c)(3), the Commission found impairment with respect to certain loops and dedicated interoffice transport, and it accordingly imposed unbundling obligations in certain situations.[148] In prior analyses, the Commission likewise has identified separate product markets for wholesale loops and local transport.[149] Consistent with our traditional approach to market definition, we find that, in the face of a "small but significant and nontransitory" increase in the price of wholesale loops, wholesale customers would be unlikely to switch to wholesale dedicated transport, since dedicated transport will not permit the wholesale customer to reach its customers. Likewise, we find that, in the face of a "small but significant and nontransitory" increase in the price of wholesale dedicated transport, a wholesale customer would be unlikely to switch to wholesale loops, since wholesale loops will not permit the wholesale customer to carry its traffic back to its switch. Thus, we find it appropriate here to define loops and dedicated local transport as distinct wholesale product markets.[150]

49. The Commission also has found that, in general, circuits of differing capacities, such as DS0, DS1, and higher-capacity circuits are likely to constitute separate relevant product markets.[151]

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[146] Because the record does not contain data necessary to perform the hypothetical monopolist test quantitatively, we use the conceptual framework of the traditional approach as "a methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition" as a way to measure competition. *Draft Revised Horizontal Guidelines*, § 4.1.3. We reject as unfounded concerns that the use of formal market definition, "if carried to its logical extreme, [could] eliminate the Commission's ability to bracket uncertainty about complex market interactions even when clearing up that uncertainty would not affect the result," and "would threaten to render section 10 a dead letter by imposing a requirement that . . . would be practically impossible to meet." AT&T Market Power PN Comments at 10–11.

[147] *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18305–06, 18352-53, paras. 25–27, paras. 112–13; *Verizon/MCI Order*, 20 FCC Rcd at 18447–49, 18494–95, paras. 25–27, 113–14; *AT&T/BellSouth Order*, 22 FCC Rcd at 5677–78, 5729, paras. 28–30, 125.

[148] *See generally Triennial Review Order*, 18 FCC Rcd at 17035–49, paras. 84–104; *Triennial Review Remand Order*, 20 FCC Rcd at 2536–37, para. 5. In addition, the Commission required unbundling of certain subloops—particularly inside wire subloops. *Triennial Review Order*, 18 FCC Rcd at 17184–95, paras. 343–54 (discussing subloop unbundling obligations).

[149] *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18305, para. 25; *Verizon/MCI Order*, 20 FCC Rcd at 18447–48, para. 25; *AT&T/BellSouth Order*, 22 FCC Rcd at 5677, para. 28.

[150] *Cf.* Framework Recommendation at para. 8 (identifying wholesale unbundled access to metallic loops and subloops and wholesale trunk segments of leased lines as separate relevant product markets, which Member State regulators must examine under the Framework Directive).

[151] *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448–49, para. 27 n.89; *AT&T/BellSouth Order*, 22 FCC Rcd at 5678, para. 30 n.94. The Commission has also distinguished, for example, between "'Type I' special access services, which are offered wholly over a carrier's own facilities, and 'Type II' special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment." *AT&T/BellSouth Order*, 22 FCC Rcd at 5677–78, para. 29. Given the record evidence here, we need not address this distinction.

Consequently, we find it appropriate to distinguish product markets further based on capacity. Although Qwest maintains that "there are "numerous options for carriers to purchase 'last mile' wholesale services that allow them to bypass Qwest's network entirely,"[152] we disagree and find instead that, however evaluated, the record in this proceeding reveals a lack of significant wholesale competitors to Qwest in the Phoenix MSA. We therefore need not define the wholesale loop and transport product markets more precisely here.[153]

(ii) Originating and Terminating Switched Access

50. Qwest seeks forbearance from dominant carrier regulation of carrier's carrier switched access charges. These are charges that LECs impose on interexchange carriers for originating and terminating interexchange calls. We define originating and terminating switched access as separate relevant product markets.

b. Retail Product Markets

(i) Retail Residential/Mass Market Services

51. Retail mass market services generally are purchased by residential customers and some very small business customers.[154] Sometimes, however, the differences between residential customers and very small business customers make it more appropriate to treat products sold to very small business customers as part of a distinct product market.[155] In some situations, very small business customers demand different services or face different prices than residential customers.[156]

52. We begin our analysis by recognizing that, even though telecommunications offerings typically include multiple features that may be relevant when defining product markets, at the most basic level, a consumer demands "access" from a provider to connect to a communications network.[157] Depending upon the type of access, the consumer will be able to connect to a wireline telephone network, a mobile wireless network, a data network, or another communications network. Our determination of the

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[152] Qwest Petition at 39.

[153] *See infra* Part III.D.4.a.

[154] *See Triennial Review Order*, 18 FCC Rcd at 17063, para. 127 (stating that "[m]ass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features").

[155] As in our recent merger orders, we recognize that some small businesses are more appropriately considered with residential customers, while others are more appropriately considered separately as part of the enterprise customer segment. *See SBC/AT&T Order*, 20 FCC Rcd at 18335, para. 82 n.243 (defining mass market to include both residential and small business customers); *Verizon/MCI Order*, 20 FCC Rcd at 18477, para. 83 n.245; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, CC Docket No. 00-175, WC Docket Nos. 02-112, 06-120, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16452, para. 22 (2007) (*Section 272 Sunset Forbearance Order*); *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5222, para. 24 (2007) (*Qwest Section 272 Sunset Forbearance Order*).

[156] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17063, para. 127 n.432; Arizona Corporation Commission Comments at 10–11 (arguing that small business market is distinct from the residential market).

[157] The access provider usually charges a recurring monthly fee, and it frequently offers various communications services in combination with this access service.

relevant product market considers the demand for access. For example, we consider the extent to which Qwest's residential voice customers would switch from Qwest's service to Cox's residential voice services or to mobile wireless voice service in response to an increase in Qwest's monthly price for voice service.[158]

53. *Wireline Services*. In prior proceedings, the Commission has determined that services offered to mass market customers fall into several separate product markets, including local voice service, bundled local and long distance voice service, broadband Internet access service, and bundled voice and broadband Internet access service.[159] We find no reason to reach a different conclusion in this proceeding.[160]

54. *VoIP*. We find that the degree to which particular VoIP services are viewed as close substitutes for other local services varies depending upon the characteristics of the particular VoIP offering. In accord with Commission precedent, we divide VoIP providers into two general types: (1) facilities-based VoIP providers; and (2) "over-the-top" VoIP providers.[161] As in the past, we find that mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market.[162] Also as in prior proceedings, we agree with commenters that the record here is insufficient to determine which over-the-top VoIP services should be included in the relevant product market.[163]

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[158] As used in the present context, "usage substitution" occurs when a customer who subscribes to wireline telephone service and to mobile wireless service begins using the mobile wireless service more and the wireline telephone service less, or vice versa. "Access substitution," in contrast, occurs when the customer stops subscribing to wireline telephone service altogether in favor of mobile wireless service, or vice versa. *See infra* at para. 55.

[159] *SBC/AT&T Order*, 20 FCC Rcd at 18336, para. 82; *Verizon/MCI Order*, 20 FCC Rcd at 18477, para. 83; *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16452, para. 22; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5217, para. 15; *AT&T/BellSouth Order*, 22 FCC Rcd at 5723, para. 114. Stand-alone long distance service is not implicated by the regulations at issue here, and thus we do not consider that product market in our analysis. Although there is insufficient evidence in this record to define a separate relevant market for voice and broadband Internet service bundles, or other bundles such as those including video, there is some evidence that bundling may have competitive significance. *See, e.g.*, Qwest Petition at 14 (discussing bundling by cable operators); Qwest Brigham Decl., Exh. 4 at 8 (discussing evidence of the role of bundles in the decision whether to rely solely on wireless service). We note in addition that Staff analysis of the December 2008 data collected on Form 477 indicates that, nationwide, 91% of fixed interconnected VoIP customers purchase bundled voice and broadband service. Given the specific record here, we did not conduct a detailed analysis of broadband Internet services and bundled services. In future proceedings, such analysis may prove necessary.

[160] Incumbent LECs' mass market subscribers pay both intrastate rates for local telephone service and a "subscriber line charge," or "SLC," which is the end-user charge regulated by this Commission, for interstate access. As discussed below, the SLC and the carriers' carrier charge components collectively make up the regulation of rates for the switched services from which Qwest seeks dominant carrier relief.

[161] *SBC/AT&T Order*, 20 FCC Rcd at 18337, para. 86; *Verizon/MCI Order*, 20 FCC Rcd at 18479, para. 87.

[162] *SBC/AT&T Order*, 20 FCC Rcd at 18338, para. 87; *Verizon/MCI Order*, 20 FCC Rcd at 18479–80, para. 88. Arizona Corporation Commission Reply at 14.

[163] *See*, *e.g.*, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11740, para. 16 ("We do not include providers of 'over-the-top' or nomadic [VoIP] services in our competitive analysis because there are no data in the record that justify finding that these providers offer close substitute services."); Broadview Comments at 41 (Qwest provides no Phoenix-specific data regarding VoIP usage); Covad Opposition at 11–12 (VoIP over-the-top services are not equivalent substitutes for an incumbent LEC's wireline services); PAETEC Opposition at 11–12 (same); Arizona Corporation Commission Reply at 14 (same). Over-the-top VoIP providers do not operate their own loop and transport networks and instead require customers to obtain access facilities from Qwest or its competitors.

55. *Mobile Wireless Services*. Whether mobile wireless services should be included in the same relevant product markets as fixed wireline service is a complicated issue, and one that is evolving over time. Although a growing number of mass market customers subscribe exclusively to mobile wireless service, the majority of households continue to subscribe to both a wireline and a mobile wireless telephone service, and the proportion of households subscribing to both services has not substantially changed since the first half of 2006.[164] With respect to such households, the Commission previously has found that most subscribers to both wireline and wireless engage in some *usage* substitution.[165] The more difficult question is how to measure the degree of *access* substitution between mobile wireless and wireline services.[166] The issue of *access* substitution is critical for purposes of market definition, since, given trend toward flat-rated prices for wireline services, it is the degree of access substitution that will affect most directly whether mobile wireless services constrain the price of wireline services. The increasing percentage of residential customers that rely solely on mobile wireless voice service suggests that an increasing percentage of voice customers view wireless and wireline services as close substitutes, increasing the likelihood that wireless service may materially constrain the price of residential wireline voice service. As discussed below, however, the record here does not enable us to make such a finding for purposes of Qwest's forbearance request.

56. The fundamental question in a traditional product market definition exercise is whether mobile wireless access service constrains the price of wireline access service.[167] These two services should be in the same relevant market only if the prospect of buyer substitution to mobile wireless access constrains the price of wireline access. The first question before us then is whether a hypothetical profit-maximizing firm that was the only present and future seller of wireline local access services could

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[164] The Centers for Disease Control and Prevention (CDC) estimates that 58.2% of households subscribe to both a mobile wireless and wireline service. For the last 3 years, the proportion of households subscribing to both landline and mobile wireless service has fluctuated around 59%, while the proportion of households that subscribe only to mobile wireless increased from 13.6% to 24.5%. CENTERS FOR DISEASE CONTROL AND PREVENTION, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY - DECEMBER 2009 tbl. 1 (2010) (2010 CDC Wireless Substitution Report), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.htm.

[165] In the *Section 272 Sunset Forbearance Order*, the Commission analyzed markets using different metrics to account for wireless usage substitution. *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16453, para. 24; *see also, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18342–44, paras. 92–94.

[166] *See, e.g.*, *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21612–13, para. 239 (finding it "premature to consider the existence of a separate relevant market in which wireline and wireless services compete for mass market consumers"); *Verizon/MCI Order*, 20 FCC Rcd at 18481–02, para. 90 (finding no evidence that mobile wireless service has a price constraining effect on residential wireline service, but including mobile wireless in the relevant market "when it is used as a complete substitute for all of a consumer's' voice communications needs"); *High Cost Universal Service Support*, Order, 23 FCC Rcd 8834, 8843–44 paras. 20–21 (2008) (concluding that "the majority of households do not view wireline and wireless services to be direct substitutes," and that "rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer's existing wireline service"); *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11742–43, paras. 19–20 (finding that "mobile wireless service should be included in the local services product market to the extent that it is used as a complete substitute for all of a consumer's voice communications needs").

[167] *Cf.* Cavalier Opposition, Declaration of Michael D. Pelcovits at 6–9 (Cavalier Pelcovits Decl.) (explaining that to properly define the relevant product market here, one would consider the demand for wireline service, estimate the cross elasticity of demand between wireline and wireless service, and analyze switching patterns between wireline and wireless in response to changes in the marketplace); *id*. at 10 ("[T]he key empirical test is *how much switching* between wireline and wireless access is due to changes in the relative prices (*i.e.*, the cross-elasticity of demand).").

profitably impose a small but significant and nontransitory increase in price (SSNIP).[168] In other words, we consider whether there are a sufficient number of wireline service customers who, in response to a price increase in wireline local access service, would stop subscribing to their wireline service and instead rely exclusively on mobile wireless service, so as to render the price increase unprofitable.

57. As an initial matter, we note that the Commission, the DOJ, and foreign regulators have previously found that mobile wireless service does not constrain the price of wireline service. For example, in 2005 and 2007 the Commission found that mobile wireless substitution does not appear to have a price-constraining effect on wireline service.[169] A recent report by the DOJ likewise found no evidence that mobile wireless access substitution constrains landline telephone service prices.[170] In addition, Ofcom (the telecom regulator for the United Kingdom), in evaluating the retail market for fixed (*i.e.*, wireline) access, found that, "while there is some substitutability between fixed and mobile access, consumers predominantly view the two types of access as meeting different needs and have a strong preference to purchase both fixed and mobile access."[171] It thus concluded that mobile wireless services should not be included in the same relevant product market as wireline access service.[172]

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[168] *See EchoStar/DirecTV Order*, 17 FCC Rcd at 20607, para. 109 n.330; *see also, e.g.*, *DOJ/FTC Guidelines*, § 1.11.

[169] *See Verizon/MCI Order*, 20 FCC Rcd at 18483, para. 91 n.276; *SBC/AT&T Order*, 20 FCC Rcd at 18340–42, paras. 89–90; *AT&T/BellSouth Order*, 22 FCC Rcd at 5711, 5714–15, paras. 90, 95–96. In those decisions, the Commission nevertheless counted "cut-the-cord" *wireless* customers in calculating market shares for *wireline* service. As discussed above, we find that that prior approach incorrectly deviated from economically sound standards for defining product markets.

[170] U.S. DEPARTMENT OF JUSTICE, VOICE, VIDEO, AND BROADBAND: THE CHANGING COMPETITIVE LANDSCAPE AND ITS IMPACT ON CONSUMERS 61 (2008) (DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM), *available at* http://www.justice.gov/atr/public/reports/239284.pdf (discussing the competitive importance of service bundles); *see also* Cavalier Pelcovits Decl. at 16 n.22. Contrary to Qwest's claims, the DOJ report does not merely provide a summary of industry positions. *See* Qwest Market Power PN Comments at 13–16. Qwest also argues that the report reached incorrect conclusions because it compared wireless prices to stand-alone landline access prices rather than to the price for a bundle of local and long distance services. *Id*. However, the DOJ report primarily focused on purchasing patterns and did not conduct a price analysis. We therefore find little merit to Qwest's argument. For the reasons, discussed here, we also reject Qwest's assertion that the Commission should include wireless similar to Canada and the California Commission. Qwest Market Power PN Comments at 7–8.

[171] Ofcom, *Fixed Narrowband Retail Services Markets: Consultation on the Identification of Markets and Determination of Market Power* at 21, paras. 4.33–4.34 (Mar. 19, 2009) (Ofcom Market Study), *available at* http://www.ofcom.org.uk/consult/condocs/retail_markets/fnrsm_condoc.pdf ("In a hypothetical scenario where BT's line rental price increased by 10% (and the price of other fixed and mobile access remained constant)[,] only 4% of respondents stated that they would cancel the fixed line with 22% responding they would switch to a different supplier. Of those who indicated that they would switch calls, only 5% (1% of total sample) would switch to a mobile phone supplier. While these hypothetical questions are more relevant for the assessment of BT's market power nonetheless they do provide some evidence that mobile access is not regarded by consumers as a particularly strong substitute for fixed line access."); *see also supra* note 164 (citing data showing that most U.S. households purchase both mobile wireless and landline services).

[172] *See generally* Ofcom Market Study at 19–21, paras. 4.26–4.34. We acknowledge that there is a split among the state regulators that have addressed this issue. *Compare* Qwest Comments at 7–8 (providing evidence that several state authorities have concluded that wireless service provides competitive discipline to wireline providers) *with* Letter from Samuel L. Feder, Counsel to Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135, at 1–3 (filed May 11, 2010) (Cavalier May 11, 2010 *Ex Parte* Letter) (providing evidence that several state authorities have reached the opposite conclusion and that none of the states cited by Qwest conducted or reviewed an econometric study).

58. No evidence in the record here causes us to reach a different conclusion. In particular, neither Qwest nor any other commenter has submitted evidence that would support a conclusion that mobile wireless service constrains the price of wireline service.[173] For example, Qwest has produced no econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services.[174] Nor has it produced any evidence that it has reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service.[175] Nor has it produced any marketing studies that show the extent to which consumers

[173] Although Qwest argues that wireless provides competitive discipline on wireline prices and that competition at the margin disciplines a firm's pricing behavior, it has provided no empirical or documentary evidence that its pricing has been constrained by wireless service offerings. *See* Qwest Reply at 29; Qwest Reply, Declaration of Timothy J. Tardiff and Dennis L. Wiesman, Exh. 1 at paras. 84–87 (Qwest Reply Tardiff/Weisman Decl.). Qwest's observation that the number of wireless access lines exceeds the number of wireline access lines is not probative of the issue of the substitutability between wireline and wireless services for residential households. *See* Qwest Reply Tardiff/Weisman Decl. at para. 87. We note there generally is a substantial price differential between mobile wireless service and fixed wireline service, although the record does not contain sufficiently geographically disaggregated pricing information for us to make findings with respect to the Phoenix MSA. Moreover, each individual in a multi-person household would need a mobile telephone to fully benefit from the mobility of such services, thereby somewhat increasing the equipment and service costs related to the service. In addition, although Qwest offers DSL service on a "stand-alone" basis, Qwest offers discounts for DSL service that is bundled with Qwest's local exchange service; thus, the effective price difference between Qwest's wireline telephone service and mobile wireless service is even larger for customers who wish to subscribe only to mobile wireless service and Qwest's DSL service. *See* Qwest Petition at 25; Compare Qwest High-Speed Internet Plans, *available at* http://www.qwest.com/residential/internet/broadbandlanding/compare_plans.html.

[174] *See, e.g.*, Cavalier May 11, 2010 *Ex Parte* Letter at 1–2 & Attach. at 1–3 (Cavalier Supp. Pelcovits Decl.) (attaching a copy of Supplemental Declaration of Michael D. Pelcovits filed in WC Docket Nos. 08-24 & 08-49) (discounting an econometric study by Ware and Taylor, which is cited by Qwest, because the study assumes the central question the analysis should be seeking to answer, contains no modeling, statistical analysis, or hypothesis testing, and, in any event, was not submitted in the record). Further, here, as well as in other proceedings, we find that the Mikkelsen Mobile Services White Paper is inadequate to estimate the cross-elastic effect from wireless price change on the decision to subscribe to any fixed line. *See* Kent W. Mikkelsen White Paper, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition* (Apr. 21, 2008) (Mikkelsen Mobile Services White Paper), *available at* http://www.comptel.org/files/free-to-compete/econ-inc_wireless-cut-cord_april21_2008.pdf; *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11743, para. 20 n.73; *see also SBC/AT&T Order*, 20 FCC Rcd at 18342, para. 90 n.277; Integra Opposition at 25–26, n.82. Cavalier's economic expert argues that the demand for wireline services may have become less elastic over time if the remaining wireline customers view the actual or perceived benefits of retaining the wireline service to have increased over time. Cavalier Pelcovits Decl. at 15. If the demand for wireline services has become less elastic, then the remaining customers could face a higher risk of a supra-competitive price increase, and this risk could increase with consumer preferences for voice services bundled with broadband and/video services.

[175] Indeed, the DOJ recently observed that "there is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices. In response to customers 'cutting the cord,' a telephone company can either lower its prices to all customers to keep subscribers from switching, or leave prices where they are. A company would choose the first option if the loss of revenue from cord-cutting is expected to be greater than the loss of revenue from reducing the fees paid by customers who would not switch. If, however, the extent of wireless substitution in response to price changes is small, the company would choose not to lower prices. In fact, stand-alone landline access prices have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation." DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 66.

view wireless and wireline access services as close substitutes.[176]

59. Instead, Qwest submitted studies that estimate the percentage of households that exclusively rely upon mobile wireless services in the Phoenix area,[177] which cannot alone establish whether mobile wireless services should be included in the same relevant product market as residential wireline voice service.[178] Knowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price-constraining effect on wireline access services.[179] Moreover, while we acknowledge that the number of customers that rely solely on mobile wireless service has been growing steadily, we find that other reasons may explain the growth in the number of wireless-only customers, besides an increasing cross-elasticity of demand between mobile wireless and wireline services. For example, nationwide statistics published by the CDC suggest that the choice to rely exclusively upon mobile wireless services could be driven more by differences in consumers' age, household structure, and underlying preferences than by relative price

[176] *See, e.g.*, *id*.; Cavalier Pelcovits Decl. at 16 (arguing that the extent to which customers would substitute wireless service in response to a price increase in wireline service "remains unknown and a large substitution effect cannot simply be assumed to exist").

[177] Qwest Petition, Exh. 4, Nielsen Study: Call My Cell—Wireless Substitution in the United States, September 2009 (Nielsen Study); Qwest Petition, Exh. 5, MarketStrategies: Understanding Wireless-Only Versus Wire-line Penetration in the Phoenix Metropolitan Area (MarketStrategies Study).

[178] We acknowledge that the Commission in the *Qwest 4 MSA Forbearance Order* suggested that geographically disaggregated evidence of the percentage of voice subscribers that rely on mobile wireless only might demonstrate that Qwest was entitled to forbearance in the Phoenix MSA. *See Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11745, para. 22. Since those statements were made, however, the D.C. Circuit remanded the *Verizon 6 MSA Forbearance Order* and instructed the Commission to provide a more complete economic analysis of its decision to deny forbearance. The D.C. Circuit, at the Commission's request, also remanded the *Qwest 4 MSA Forbearance Order*. After the remands, the Wireline Competition Bureau issued a Public Notice in the present proceeding seeking new record data that might show that, under a traditional market power analysis, mobile wireless service is in the same relevant product market as mass market wireline telephone service. *See supra* paras. 17–20.

[179] *See, e.g.*, DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 65–67; *see also id*. at 65 (stating that "[t]he existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on the prices for access to landline services" and that, while the evidence before it did not allow definitive conclusions, there are reasons "to think that wireless is not by itself an effective competitive constraint today"); Cavalier Pelcovits Decl. at 19 (explaining that a decline in demand should not be confused with an increase in demand elasticity). Even if we were to find the number of "cut-the-cord" customers to be relevant in our market definition analysis, however, we find that the Qwest studies provide insufficient detail about how the data was collected to assess the validity or confirm the results obtained. In the case of the MarketStrategies Study, we find that details on the data weighting are lacking as well as how this data is used to calculate the confidence intervals for the estimates. The report does not include the survey or describe the survey protocol in particular with respect to non-responses or follow-up contacts. *Cf.*, Arizona Corporation Commission Reply at 17-18 (asserting that the MarketStrategies Study is too small and the methodology of the Neilsen Study is not clear); COMPTEL Opposition at 32 (Nielsen Study has insufficient detail to evaluate and there are no details on the survey methodology), 33–35 (MarketStrategies Study appears to disproportionately survey mobile wireless households; unclear how households were selected). We reject Qwest's assertion that the studies' estimated proportion of wireless-only households are not statistically different from each other. *See* Qwest Reply, Exh. 3 at 1–2. This hypothesis cannot be accepted without conducting a statistical test of the difference between the two survey's estimated proportions. *See generally* ROBERT JOHNSON AND PATRICIA KUBY, JUST THE ESSENTIALS OF ELEMENTARY STATISTICS, ch. 10 (10th 2008). For these reasons above, we reject Qwest's assertion that the proportion of wireless-only households confirm "the validity of treating wireline and wireless as substitutes." Qwest Market Power PN Comments at 9.

differentials.[180] Furthermore, just as some customers may rely solely on mobile wireless service regardless of the price of wireline service, several classes of customers appear unlikely to drop wireline service in response to a significant price increase,[181] including those who: (a) value the reliability and safety of wireline service; (b) value a single point of contact for multiple household members; (c) live in a household with poor wireless coverage; (d) operate a business out of their home and believe that wireline service offers better reliability and sound quality; or (e) desire a service that is more economically purchased when bundled with a local service (*e.g.*, wireline broadband Internet service, or a video service).[182] Indeed, because the record reflects that the majority of residential customers continue to subscribe to both mobile wireless and wireline services, it appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.[183]

60. Accordingly, we find that Qwest has proffered insufficient evidence to justify including mobile wireless service in the same relevant product market as wireline service for purposes of evaluating the instant petition. We emphasize, however, that we make no affirmative finding that mobile wireless services do not currently, or may not soon, belong in the same product market as residential wireline voice services. Nor are we suggesting that mobile wireless services must be a perfect substitute for residential wireline services for it to constrain the price of wireline service.[184] In fact, we acknowledge that the increasing number of households that rely solely on mobile wireless services suggests that more consumers may view mobile wireless as a closer substitute for wireline voice service than in the past. We find only that there is insufficient data in the record to make such a determination here.[185]

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[180] Nationwide, the CDC finds that, of the adults living in wireless-only households, 48.6% are 25–29 years old and 37.8% are 18–24 years old, while only 14.9% are 45–64 years old and fewer than 5.3% are 65 years old or older. 2010 CDC Wireless Substitution Report, Tbl. 2. In addition, 62.9% of adults living in wireless-only households live with unrelated adult roommates and only 24.1% of wireless-only households contain children. *Id. Cf.*, Cavalier Pelcovits Decl. at 14 ("[T]he complexity of the data points to significant differentiation in consumer demand for wireline and wireless services based on many different factors. Price is only one of these factors, whose importance has not been measured properly.").

[181] DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 63.

[182] *See, e.g.*, Cavalier Pelcovits Decl. at 17–19; *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615, 9619–21, 9624–26, paras. 8–14, 19–21 (2008) (describing the capabilities of various wireline and wireless technologies for providing broadband Internet access service); *see also* Qwest Brigham Decl., Exh. 4 at 8 (reporting the top reasons for returning to landline service); Integra Opposition at 5 (asserting that Qwest had not claimed that mobile wireless broadband belongs in the residential wireline broadband market nor do they belong in the same market).

[183] S*ee, e.g.*, *supra* note 164; DOJ VOICE, VIDEO AND BROADBAND SYMPOSIUM at 66 (more than 80% of consumers do not consider mobile wireless and wireline telephone services to be substitutes because they pay for both services).

[184] *See* Qwest Brigham Decl. at paras. 20–21.

[185] Even assuming arguendo that the Commission were to include mobile wireless service in the same product market as residential wireline voice service and concluded that Qwest lacked market power for this service, this would not change the outcome of our ultimate forbearance decision in this proceeding. The regulations at issue in Qwest's petition are not targeted to residential voice service, and the record does not reveal how any relief from such regulations could be tailored in a way that was limited in that manner. In our analysis below, we have sought to identify a number of the policy and administrability questions associated with tailoring such relief to inform the record in future proceedings seeking regulatory relief based on similar competitive claims.

61. We recognize that excluding mobile wireless service from the product market for residential wireline service may appear to represent a change in course from the statements in some prior forbearance orders. In the *Qwest 4 MSA Forbearance Order*, the Commission, in *dicta*, and without a thorough economic analysis, suggested that geographically-specific estimates of "mobile wireless service should be included in the local services product market,"[186] though it recognized that "mobile wireless service and wireline telephone services are not perfect substitutes."[187] Consistent with the more comprehensive analytic approach we use here, we conclude that mobile wireless-only customers should be included in calculating residential voice market shares only upon a showing that residential mobile wireless service constrains the price of residential wireline service.[188]

(ii) Retail Enterprise Services

62. Consistent with Commission precedent and with the record in this proceeding, we find that the communications services offered to enterprise customers fall into a number of separate relevant product markets.[189] We again find that local voice, long distance voice, and data services constitute distinct product markets.[190] In addition, enterprise customers frequently purchase high-capacity transmission services. We find again that different capacity services may constitute separate relevant product markets.[191] As in our prior merger orders, the evidence in the record is insufficient to define precisely the boundaries of various transmission service markets.

63. In previous orders, the Commission has found it appropriate to define separate relevant product markets based on the class of customer.[192] For example, the Commission previously found that small business customers fall into a separate relevant product market from mid-sized to large retail enterprise customers.[193] Moreover, carriers treat small enterprise customers differently from larger business customers, both in the way they market their products and in the prices they charge. As in our prior orders, we again find that there are separate product markets for the different enterprise customer groups. Although we also conclude that the record is insufficient to differentiate one class from another in a precise manner for most enterprise services, for purposes of this proceeding we accept the line-size classification used by the Arizona Corporation Commission to delineate small, medium, and large

[186] *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11742, para. 19; *id*. at para. 20 (recognizing "that mobile wireless service and wireline telephone services are not perfect substitutes"). The approach taken in the *Qwest 4 MSA Forbearance Order* relied on certain statements in the Commission's *BOC/IXC Merger Orders* but did not independently consider whether the facts in that record supported the inclusion of mobile wireless services in the relevant product markets in the particular 4 MSA areas. *See id*. at para. 20.

[187] *Id.*

[188] *See supra* para. 56.

[189] *SBC/AT&T Order*, 20 FCC Rcd at 18321–24, paras. 57–61; *Verizon/MCI Order*, 20 FCC Rcd at 18463–66, paras. 57–61.

[190] As with services provided to mass market customers, incumbent LECs' rates for local telephone service include both intrastate rates and interstate switched access charges, known as "subscriber line charges" (*i.e.*, SLCs).

[191] *SBC/AT&T Order*, 20 FCC Rcd at 18321–24, paras. 57–61; *Verizon/MCI Order*, 20 FCC Rcd at 18463–66, paras. 57–61.

[192] *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60.

[193] This distinction exists because, unlike small enterprise customers, larger businesses often contract for more complex services, including Frame Relay, virtual private networks, and enhanced 800 services. Larger businesses also tend to negotiate commercial contracts rather than taking services off of a tariff or general offering.

businesses.[194]

2. Geographic Markets

64. Consistent with Commission precedent, we reaffirm that each customer location constitutes a separate relevant geographic market, given that a customer is unlikely to move in response to a small, but significant and nontransitory increase in the price of the service.[195] For reasons of administrative convenience, the Commission traditionally has aggregated customers facing similar competitive choices.[196] We continue to follow this approach here.[197]

65. In addition to the effect on competition in the properly-defined relevant geographic market, however, forbearance could have effects in broader geographic areas, depending upon the particular facts and circumstances.[198] To the extent that we have evidence of effects in broader geographic areas, such as for wholesale loops and dedicated transport, we consider those broader areas as well in our competitive analysis below.

3. Marketplace Competitors

66. We find that Qwest faces competition in the Phoenix MSA from numerous competitors, though principally for retail services. Because the evidence indicates only minimal wholesale competition, we simply note below the extent to which any of these marketplace competitors might provide wholesale services.

67. *Residential Services*. The record indicates that, in addition to Cox, the incumbent cable operator in Phoenix, Qwest faces competition from a small number of competitive LECs in the Phoenix MSA. These competing providers of residential service, other than Cox, rely predominantly—if not exclusively upon Qwest facilities, including UNEs and other wholesale services, to provide their services.[199]

68. *Enterprise Services*. The record indicates that, in addition to Cox, Qwest faces

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[194] The Arizona Corporation Commission recommended and obtained access line counts from each carrier in the Phoenix MSA, disaggregated into three business customer classifications: small (less than 4 lines provided); medium (4 to 100 lines provided); and large (more than 100 lines provided). Arizona Corporation Commission Comments at 10; Arizona Corporation Commission Reply at Exhs. 1–13.

[195] A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *See supra* note 142. For multi-location enterprise customers that want a single provider, the issue is more complicated. To be administratively feasible, we have adopted different relevant geographic markets to capture different classes of business customers. Thus, in some cases, we have looked at broader geographic areas, sometimes even the entire United States, for example. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18325, para. 63; *Verizon/MCI Order*, 20 FCC Rcd at 18467, para. 63. For each of these geographic markets, we then focus on carriers that provide service throughout the areas as defined.

[196] *See, e.g.*, *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19426, para. 18; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5222–23, paras. 25–28; *AT&T/BellSouth Order*, 22 FCC Rcd at 5700–01, paras. 68–69 & 5718, paras. 103–04.

[197] Although Qwest seeks forbearance from the relevant regulations in the 64 wire centers comprising its service area footprint in the Phoenix MSA, the geographic scope of its requested relief is not dispositive of the definition of the "relevant geographic markets" under the traditional market power analysis.

[198] *SBC/AT&T Order*, 20 FCC Rcd at 18307, para. 29; *Verizon/MCI Order*, 20 FCC Rcd at 18450, para. 29.

[199] Qwest Petition at 13–16, 27–28; *see also supra* Part III.D.1.b(i).

competition from more than a dozen competitive LECs in the Phoenix MSA.[200] These competitors, other than Cox, rely predominantly upon Qwest facilities, including UNEs and other wholesale services, to provide their services.[201]

69. *Wholesale Services*. The record indicates that Cox offers some wholesale services in the Phoenix MSA. Cox's non-cable plant facilities are not widely deployed, however, and it apparently provides little, if any, wholesale service over its cable plant, which is deployed primarily in residential areas.[202] The other potential wholesale suppliers Qwest cites, including Integra (via its acquisition of Electric Lightwave), XO, Level 3, tw telecom, SRP Telecom, and AGL Networks,[203] likewise have comparatively few networks facilities in the Phoenix MSA and rely primarily upon Qwest's facilities to provide services.[204] In addition, the record does not reveal significant fixed wireless wholesale service offerings in the Phoenix MSA.[205]

4. Competitive Analysis

a. Wholesale Competition

(i) Wholesale Loops

70. Although there are no data in the record by which to calculate market shares for any relevant wholesale loop product market,[206] we note that, in the *Qwest 4 MSA Forbearance Order*, the

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[200] Qwest Petition at 25–32; *see also, e.g.*, Arizona Corporation Commission Reply, Exh. 7 (showing **[REDACTED]**); *infra* Part III.D.4.b(ii).

[201] Arizona Corporation Commission Reply, Exh. 7.

[202] *See infra* para. 71.

[203] Qwest Petition at 33–37; *id*. at 31 (reporting competitive fiber in the Phoenix MSA). *See* Integra Opposition, Declaration of Steve Fisher, Attach. D, at para. 7 (Integra Fisher Decl.).

[204] *See infra* para. 71.

[205] *See infra* notes 210, 212 (describing evidence of fixed wireless alternatives in the Phoenix MSA).

[206] Nor is there information in the record that would enable us to evaluate other factors, such as elasticity of demand, or whether any wholesale competitors have comparable size, resources, or cost structure to Qwest. Our analysis in this order relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in the Phoenix MSA. The data indicate that Qwest is the only significant provider of wholesale services. Arizona Corporation Commission Reply, Exh. 7. Qwest argues it is critical to include all competitors in our market share analysis. Qwest Market Power PN Comments at 5. The Arizona Corporation Commission included data from all competitors in the Phoenix market, including facilities-based and providers that rely upon wholesale inputs. Arizona Corporation Commission Reply, Exh. 7. Qwest expresses concern about Commission reliance on the Arizona Corporation Commission data because it was filed pursuant to the *Second Protective Order*. *See* Letter from Harisha J. Bastiampillai, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 3 & n.8 (filed May 26, 2010). Specifically, Qwest notes that under the terms of the *Second Protective Order* only outside counsel or third-party consultants are allowed to review the data, and claims that such individuals "are not familiar with the market data" and that the need to rely on such individuals would "significantly undermine Qwest's ability to address the validity of the data submitted by the ACC." *See id*. We find that the Arizona Corporation Commission data contains Highly Confidential Information, and is properly subject to the *Second Protective Order* adopted in this proceeding. In adopting the *Second Protective Order*, the Commission carefully balanced the Commission's desire to obtain the best available evidence against companies' legitimate interest in protecting highly confidential information. *See generally 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, Second Protective Order, 24 FCC Rcd 9509 (WCB rel. July 29, 2009) (*Second Protective Order*). The Commission routinely adopts protective orders like this in other proceedings that involve highly (continued….)

Commission found there were no "significant alternative sources of wholesale inputs" in the Phoenix MSA.[207] There is nothing in the record here to cause us to alter this conclusion.[208]

71. Specifically, the record indicates that, other than Qwest, there are no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA, either individually or in the aggregate. Further, the record reveals no wholesale suppliers of last-mile connections to *mass market* end users in the Phoenix MSA other than Qwest.[209] In limited situations, competitive carriers,[210] including Cox,[211] have constructed their own last-mile connections to enterprise customers, and in even more

(Continued from previous page)

confidential information. More importantly, Qwest did not object to adoption of the *Second Protective Order* and Qwest has submitted confidential data pursuant to the *Second Protective Order* in this proceeding—including in Qwest's petition itself. *See, e.g.*, Qwest Petition (seeking protective orders for the confidential and highly confidential information contained in Qwest's forbearance petition). The *Second Protective Order* applies to all participants in this proceeding, and commenters that want to review Qwest's highly confidential information must rely on outside counsel or consultants, just as Qwest must do to review other parties' highly confidential information. Thus, we find no procedural unfairness or merit to Qwest's claims in this regard.

[207] *See Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11756, para. 37.

[208] Much of the information Qwest submitted is insufficiently detailed to permit any specific inferences regarding the level of competition in the Phoenix MSA. *See, e.g.*, Qwest Petition at 12, 33–39; Qwest Brigham Decl. at para. 51 (providing information that Cox advertises certain wholesale offerings but not providing any evidence on the price of those services or Cox's success in marketing them); *id*. at paras. 57, 59–62 (primarily providing nationwide data regarding certain competitors taken from their marketing materials). For instance, Qwest relies on a competitor's marketing assertions as evidence that this competitor is a "very viable option for carriers that seek an alternative access solution to the use of Qwest's network in the Phoenix MSA." Qwest Brigham Decl. para. 53 (stating that this provider has "comprehensive 'last-mile' solutions to connect commercial buildings . . . throughout the Phoenix area—all without the use of Qwest facilities"). However, the same marketing materials explain that this competitor's fiber network reaches only 50 buildings and business campuses in the Phoenix MSA, which does not approach the coverage needed to provide effective competition to Qwest for retail or wholesale services throughout the Phoenix MSA. *Id.*

[209] Although Cox has an extensive last-mile network, it does not appear to supply wholesale loops connected to residential homes or very small businesses. *See* Arizona Corporation Commission Reply, Exh. 15 (showing that Cox provides **[REDACTED]** in the Phoenix MSA). The record does not indicate that any entity other than Qwest and Cox has extensive last-mile connections to residential customers or very small business customers that would enable it to provide wholesale services, nor are we aware of any entity other than Qwest actually providing a wholesale mass market wireline access service.

[210] *See, e.g.*, Arizona Corporation Commission Reply at 21 & Exh. 14 (showing that AGL Networks serves **[REDACTED]** and the Salt River Project serves **[REDACTED]** buildings over their own facilities in the Phoenix MSA); Broadview Comments at 48–49 (explaining that XO has its own facilities connected only to **[REDACTED]** buildings in the market and has added only **[REDACTED]** new commercial buildings in the last 16 months); Covad Opposition at 20–23; Integra Opposition at 18 (asserting there are no significant alternative sources of wholesale loops for carriers serving businesses in the Phoenix MSA); Integra Opposition, Declaration of Scott Liestman, Attach. C at para. 5 (Integra Liestman Decl.) (reporting that tw telecom has deployed its own loop facilities to only **[REDACTED]**% of its customer locations in Phoenix, and that it had constructed loops to only **[REDACTED]**% of the commercial buildings in Phoenix); PAETEC Opposition at 21, 25 (claiming a lack of wholesale competition and that competitive facilities deployment is limited); Broadview Comments at 50 (stating that Nextlink, a provider of fixed wireless services, has only **[REDACTED]** hubs in the Phoenix MSA, one of which is subject to **[REDACTED]** and currently serves business customers in only **[REDACTED]** buildings).

[211] Arizona Corporation Commission Reply, Exh. 6 (providing Cox's access line counts for its large business customers by ZIP Code area); Broadview Comments at 34 (Cox only provides services to **[REDACTED]** of 133,000 commercial buildings in Phoenix MSA); Integra Fisher Decl. at para. 7 (Cox only offers wholesale loops facilities to a limited number of buildings and **[REDACTED]**; *id*. at paras. 8–9 (discussing Cox's OSS limitations).

limited situations appear to offer these services to competitors as wholesale inputs.[212] We find that the record evidence does not provide support for Qwest's assertion that "wholesale customers have access to a wide range of competitive alternatives," or that the market for wholesale services is competitive.[213] In light of the limited state of competitive loop deployment and the even more limited availability of alternative wholesale loop facilities, we need not analyze in detail all the specific product and geographic markets defined above.[214]

72. Our analysis of whether Qwest possesses market power also considers potential entry.[215] We find, however, that the existence of significant barriers to entry, both in general[216] and specifically in

[212] *See, e.g.*, Arizona Corporation Commission Reply at 11, 22–23 (explaining that there are not many wholesale alternatives in the Phoenix MSA particularly for last-mile facilities); *id*. at 9, 21 & Exh. 7 (showing competitive carriers' extensive reliance on Qwest facilities, including UNEs); *id.* at Exh. 15 (showing the extent to which **[REDACTED]** rely on Cox's wholesale services); Integra Fisher Decl. at para. 10 ("Intregra has not found any fixed wireless providers that have the capabilities to serve as alternatives to Qwest for wholesale loops in the Phoenix MSA."). Even if we were to accept Qwest's claim that competitive fiber has been deployed to approximately **[REDACTED]** buildings in the Phoenix MSA and that the only end-users locations of relevance are the approximately **[REDACTED]** buildings Qwest asserts have more than $1,000 in monthly telecommunications demand, this would amount to competitive deployment to less than **[REDACTED]**% of end-user locations. Qwest Petition at 31 (reporting GeoTel data with additional Commission analysis); Letter from Thomas Jones et al., Counsel to Integra et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135, Attach. at 4 (filed Apr. 28, 2010) (Integra Apr. 28, 2010 *Ex Parte* Letter) (estimating there are approximately **[REDACTED]** buildings in the Phoenix MSA with **[REDACTED]** of demand). We note that various commenters contend that Qwest's estimate of the percentage of buildings with competitive fiber deployment is significantly overstated and that a much larger number of buildings should be considered relevant when estimating the size of the addressable market. *See, e.g.*, Broadview Comments at 38–39 (asserting that there is competitive LEC fiber to less than **[REDACTED]**% of 133,000 commercial buildings in Phoenix MSA and that aggregating the last-mile connections of the seven largest competitive networks in the Phoenix MSA plus XO yields only approximately **[REDACTED]** last-mile connections); Broadview Reply at 9 (citing a 2006 U.S. Government Accountability Office (GAO) Report showing that competitors with last-mile facilities reached only 3.7% of buildings in the Phoenix MSA with at least DS1 capacity). Whatever specific measure of competitive deployment is more accurate, we find insufficient competitive deployment of last-mile facilities to allow significant levels of competition in the relevant wholesale markets.

[213] Qwest Petition at 33; *see supra* note 206.

[214] As noted above, the Commission also required unbundling of subloops used for access to multiunit premises. 47 C.F.R. § 51.319(b); *see generally Triennial Review Order*, 18 FCC Rcd at 17184–95, paras. 343–54 (discussing subloop unbundling obligations). As the Commission found in the *Triennial Review Order*, generally there are no alternatives to the incumbent for these facilities, and future facilities-based entry is unlikely. *Triennial Review Order*, 18 FCC Rcd at 17193, para. 351 (stating that often there is no alternative inside wiring other than the incumbent LEC's).

[215] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC 12348, 12373 para. 50 (2008).

[216] The Commission previously has recognized that there are significant barriers to the deployment of last-mile network facilities. *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2579–81, 2616–19, paras. 72–77, 150–54; *Triennial Review Order*, 18 FCC Rcd at 17107–09, 17122–25, 17160–62, 17207–09, paras. 205–07, 237–40, 303–06, 371–73. We note that, in evaluating the competitive effects of certain BOC/IXC mergers on wholesale special access, both the DOJ and the Commission used a "screen" designed to predict the potential for additional competitive entry into particular buildings with certain minimum levels of enterprise demand. *AT&T/BellSouth Order*, 22 FCC Rcd at 5682–83, para. 42 n.114 (discussing the screens, which applied to buildings with demand of two DS3s or greater). Qwest failed to provide the data necessary to apply such a screen in the Phoenix MSA.

the Phoenix MSA,[217] indicates that potential competition poses no significant competitive constraint in this MSA. Our evaluation of the likelihood of potential competition for wholesale loops considers entry via supply-side substitution (*i.e.*, whether an existing provider of services is likely to construct new loop facilities to expand its service offerings) and *de novo* entry (*i.e*., whether an entrant is likely to construct its own last-mile network).[218]

73. We find potential competition from either supply-side substitution or from *de novo* entry to be unlikely in the Phoenix MSA. That a few competitors have constructed some competitive loop facilities in the Phoenix MSA does not support a conclusion that competitors would find it potentially profitable to build duplicative loop facilities throughout the market. Thus, potential entry cannot be relied upon to constrain market prices.[219] Further, there is no record evidence suggesting that Cox is likely to begin providing wholesale connections to mass market customers, and, as described above, the evidence indicates that Cox's network is connected to relatively few enterprise customers.[220] The record further indicates that Qwest's other competitors likewise have few lit buildings, and that these competitors are not viewed as offering significant alternatives to Qwest's wholesale service offerings.[221] Although there is some evidence of limited wholesale activity with respect to particular buildings, we find no basis to conclude that potential entry would be sufficient to ensure a competitive market in the overall Phoenix MSA. Rather, the fact that facilities-based competitors have so few last-mile connections suggests that entry is costly and difficult. Consequently, we conclude that new wholesale entry in the Phoenix market is not likely to be reasonably timely and that Qwest is therefore likely to remain the only major wholesale provider of relevant services in the Phoenix MSA.

74. The record indicates that competitors generally make entry and exit decisions based on an evaluation of broader geographic areas than individual buildings.[222] Moreover, if a competitor seeks to serve a multi-location business customer, it must have access to facilities that reach all of the customer's

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[217] *See, e.g.*, Broadview Comments at 49 (explaining that adding buildings is costly and XO will only undertake such investment if there is a strong business case and demonstrated capacity need for at least 3 DS-3s); Integra Opposition, Declaration of Byron S. Cantrall, Attach. A at paras. 3–6 (Integra Cantrall Decl.) (discussing barriers to building a profitable competitive network in Phoenix); *see also* Integra Opposition, Declaration of Dave Bennett, Attach. B at para. 4–5 (Integra Bennett Decl.); Integra Liestman Decl. at paras. 5–11.

[218] We note that the Commission often has framed its consideration of potential competition as part of its discussion of supply elasticity. Considerations of potential competition also relate to the issue of barriers to entry, however, and we consider it in that context here.

[219] *See supra* paras. 70–71.

[220] Arizona Corporation Commission Reply at 8 & Exhs. 7–10; Broadview Comments at 35, 45–46 (noting that Cox's switched Ethernet private line and virtual private line circuits are not provided on a dedicated basis and are susceptible to throughput degration; Cox does not offer 10MB services; and Cox's maximum Transition Unit size differs from the industry standard).

[221] *See supra* para. 71 and accompanying notes; *see also* Qwest Petition at 34–35. We reject Qwest's assertion that the competitive LEC lit building data is understated. As discussed below, data supplied by the Arizona Commission indicates that of the **[REDACTED]** business access lines served by competitive LECs (excluding Cox), only **[REDACTED]** of these lines, or **[REDACTED]**% are served without relying on Qwest's facilities. Arizona Corporation Commission Reply at 13 & Exh. 7.

[222] *See, e.g.*, Integra Liestman Decl. para. 6 (explaining that tw telecom will build its own facilities only if: (1) the customer will commit to a pay a monthly recurring charge above a certain amount for a lengthy time period; (2) the customer will have at least two locations; and (3) tw telecom can obtain similar commitments from additional customers for at least one of these locations).

locations.[223] Thus, in addition to evaluating the extent of competitive facilities deployment to particular buildings, we must also evaluate appropriate broader geographic areas. Of particular importance, we find credible assertions that Cox's last-mile network, although extensive in residential areas, could not readily serve most of the enterprise businesses in these markets at this time.[224] The record evidence here further indicates that the networks of competitive LECs other than Cox reach relatively few buildings.[225] We thus find that there is inadequate facilities-based wholesale competition in broader geographic areas to support a finding that Qwest lacks market power with respect to wholesale loops.

75. Based on the record, we also find that Qwest's special access services, section 271 access arrangements, Qwest's Local Services Platform (QLSP) wholesale service,[226] and section 251(c)(4) resale are not adequate alternatives to section 251(c)(3) unbundled loops for competitive LECs. As an initial matter, as discussed above, the proposition that competitors could rely on special access or wholesale access rights under section 271 is inconsistent with prior Commission decisions, which among other things have noted that these alternative wholesale offerings are not priced at cost-based rates.[227] There are technical distinctions between unbundled loops and these wholesale offerings, as well.[228] Finally, we do not find that section 251(c)(4) resale presents an adequate alternative. A carrier that resells Qwest's service is unable to compete on service quality or service features other than those offered by Qwest. Moreover, because it is unable to use its own network facilities to provision the service, a carrier using section 251(c)(4) resale has little incentive to invest in its own network facilities. As the Commission has recognized, competition over service quality and features is one of the key advantages of UNE-based competition over resale competition.[229]

(ii) Dedicated Local Transport

76. As with wholesale loops, there is insufficient data in the record to identify the location of competitive local transport facilities or to calculate market shares for dedicated local transport.[230] Although there appears to be a limited amount of competitive deployment of transport facilities in Phoenix, based on the present record, we cannot find that Qwest is subject to effective competition for its transport services in this market.

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[223] *See* Integra Cantrall Decl. at para. 4 (explaining that "[m]ulti-location customers generally demand that their service provider serve all of their locations within the urban area").

[224] *See supra* note 211.

[225] *See supra* para. 71.

[226] QLSP is Qwest's commercially negotiated wholesale service that replaced its UNE-P service (UNE loop and switching).

[227] *See supra* Part III.B (discussing certain factors considered in the *Triennial Review Remand Order*, such as risk of abuse, and finding them persuasive in this instance as well).

[228] *See, e.g.*, Letter from Samuel L. Feder, Counsel to Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-135 at 3 (filed May 7, 2010) (Cavalier May 7, 2010 *Ex Parte* Letter) (stating that, unlike UNEs, the voice-grade loop special access service that is offered by certain incumbent LECs is a voice-grade service only, meaning that Cavalier would not be able to provide DSL, VoIP, or IPTV services over that special access offering).

[229] *See First Local Competition Order*, 11 FCC Rcd at 15667–69, paras. 332–34. Moreover, we note that other provisions of the Act suggest that resale cannot effectively discipline the behavior of facilities-based providers. *See, e.g.*, 47 U.S.C. § 271 (requiring the presence of a facilities-based competitor, not just a reseller, as a precondition of Bell Company entry into the long distance market).

[230] Likewise, we do not have data or information that would enable us to evaluate other factors, such as elasticity of demand, or whether any wholesale competitors have comparable size, resources, or cost structure to Qwest.

77. As an initial matter, competitive carriers allege they have only limited alternatives to Qwest for transport services.[231] To support its claims of adequate transport alternatives, Qwest submitted evidence from GeoTel that approximately 25 unaffiliated providers have approximately **[REDACTED]** fiber route miles in the Phoenix MSA.[232] However, these data do not demonstrate the presence of facilities-based competitive alternatives for any relevant product market—*i.e.*, routes between any two Qwest wire centers,[233] particularly given that "there are many routes between Qwest wire centers in which Qwest is the only provider of wholesale transport facilities."[234] In fact, the record indicates that the only competitive transport facilities deployed in the Phoenix MSA are on routes where Qwest already has obtained relief from UNE transport obligations by virtue of the Commission's unbundling rules (and for which further unbundling relief thus is unnecessary).[235] We therefore are not persuaded that Qwest is subject to effective competition for dedicated local transport services in relevant geographic markets in the Phoenix MSA, and we find no other record evidence demonstrating competitive alternatives for dedicated local transport services in the relevant geographic markets.

78. The Commission has recognized that barriers to entry in the provision of dedicated interoffice transport, while possibly somewhat easier to overcome than for loops, nevertheless may be significant.[236] The present record does not reveal likely widespread potential competition for wholesale

[231] *See, e.g.*, Broadview Comments at 47–48 & Declaration of Bryan Burns, App. A at para. 7 (explaining AGL Network's capabilities as a provider of transport in the Phoenix MSA).

[232] Qwest Petition at 30.

[233] As the Commission has repeatedly found, general evidence that a competitor has constructed fiber in a particular region, such as evidenced through fiber maps or the total number or route miles of fiber in a geographic region, is not alone sufficiently indicative of competition on particular transport routes to justify granting forbearance. *See, e.g.*, *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11757–58, para. 39; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd 21316–17, para. 40; *Triennial Review Remand Order*, 20 FCC Rcd at 2583, 2597, paras. 82, 110 (cautioning that evidence of competitive transport based on maps and numbers of route miles of fiber is limited); *Verizon/MCI Order*, 20 FCC Rcd at 18455–56, para. 45 n.123. *See Triennial Review Remand Order*, 20 FCC Rcd at 2589–94, paras. 96–102; *see also id*. at 2589, para. 96 (establishing "fiber-based collocation as a key factor . . . because a sufficient degree of such collocation indicates the duplicability of these network elements and, thus, a lack of impairment").

[234] *See* Integra Fisher Decl. at para. 11; *see also id*. at Exh. 1 (listing **[REDACTED]** of a total of 64 wire centers in the Phoenix MSA in which Qwest is the only wholesale transport provider).

[235] *See* Integra Fisher Decl. at para. 11 & Exh. 2 (listing wire centers in the Phoenix MSA in which Qwest is not the only wholesale transport provider); *see also* Qwest Non-Impaired Wire Center Lists for Loops and Dedicated Transport, *available at* http://www.qwest.com/wholesale/clecs/nta.html (Non_Impaired_Wire_Center_12_23_09.xls) (last visited May 12, 2010) (listing wire centers in which Qwest has obtained unbundling relief under the Commission's unbundling rules); 47 C.F.R. § 51.319(e) (setting forth dedicated transport unbundling obligations); *Triennial Review Remand Order*, 20 FCC Rcd at 2575, para. 66 (establishing that for DS1 transport, competing carriers are impaired on routes for which at least one end-point is a wire center with fewer than 38,000 business lines and fewer than four fiber-based collocators; for DS3 transport, competing carriers are impaired on routes for which at least one end-point is a wire center with fewer than 24,000 business lines and fewer than three fiber-based collocators).

[236] *Triennial Review Remand Order*, 20 FCC Rcd at 2578–79, para. 71 ("Compared to loops, which serve individual customers, dedicated transport carries much more traffic and has much greater potential for added future traffic, as competitive LECs continue to aggregate traffic on a route. For these reasons, 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."). We also note that carriers may not find it economic to purchase competitive transport in limited quantities. *See* Integra Fisher Decl. at para. 5 (describing the fixed and recurring costs associated with establishing and managing multiple wholesale relationships, and noting that establishing these (continued….)

dedicated local transport between Qwest's central offices in these areas. In particular, there is no evidence that competition via capacity expansion by existing facilities-based providers or *de novo* entry is likely. Evidence that present competitors have deployed limited amounts of fiber in a larger geographic area does not support a conclusion that those providers readily could offer wholesale services on a particular route, or that a potential entrant economically could deploy its own fiber on a particular route in a timely manner in response to a small but significant and nontransitory increase in the price of wholesale transport services.

(iii) Originating and Terminating Switched Access

79. In the *CLEC Access Charge Reform Order*, the Commission explained that, for switched access services, only end-user customers have the possibility of competitive alternatives in the market in which they purchase access service.[237] IXCs, which also must pay switched access charges, face a bottleneck monopoly from the LECs—whether incumbent LEC or competitive LEC—that provide access to their end users.[238] The Commission also recognized that, as long as switched access charges may be imposed by tariff, the market for these services is not structured in a way to allow competition to discipline rates for carriers' carrier charges, and the Commission thus determined that these charges may not be fully deregulated.[239] Nothing in the record here contradicts those conclusions. Thus, we conclude that Qwest, like other LECs, possesses market power over originating and terminating switched access.

b. Retail Competition

(i) Mass Market

80. For the reasons described below, we find the retail mass market for wireline services in Phoenix remains highly concentrated with two dominant providers, Qwest and Cox. Of particular importance to our analysis, Cox is Qwest's only competitor that now provides or is soon likely to provide[240] retail service to mass market customers over its own last-mile network to any significant extent in the Phoenix MSA. Although there are several other providers that serve some mass market customers in the Phoenix MSA, they are "fringe"[241] competitors that are able to compete only by relying extensively on UNEs and other Qwest wholesale services.

81. We begin by considering evidence regarding current retail market shares in the relevant geographic markets. Our analysis of mass market services relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in

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duplicate capabilities and incurring duplicate costs make it difficult and in many instances impossible to offer and sustain a profitable service offering).

[237] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001) (*CLEC Access Charge Reform Order*).

[238] *Id*. The Commission explained that end-user customers have no incentive to choose a LEC that charges low switched access charges, since he or she does not pay the charges directly, and the customer's IXC is prevented by geographic rate averaging requirements from passing those charges on to the customer. *Id*. at 9935–36, para. 31.

[239] *Id*. at 9938, paras. 39–40.

[240] *See supra* note 209.

[241] A fringe competitor is a small firm operating in a market that is dominated by a single firm or a few firms. The fringe competitors take the price set by the dominant firm(s) as given and maximize their profits given this price. *See, e.g.*, NOEL D. URI, THE ECONOMICS OF TELECOMMUNICATIONS SYSTEMS at 148–49 (Nova Science Publishers, Inc. 2004).

the Phoenix MSA.[242] Based on these data, we find that Qwest and Cox **[REDACTED]** percent in Phoenix MSA,[243] and that mass market consumers effectively face a duopoly for these services in the Phoenix MSA. The remaining **[REDACTED]** percent share of the relevant market are served by various fringe providers[244] that rely upon Qwest's resale or wholesale offerings.[245]

82. In conducting its traditional market power analysis, the Commission, among other things, generally has considered whether there are competitors in the market with spare capacity that readily could serve Qwest's customers if Qwest, or Qwest in conjunction with Cox, sought to raise prices above competitive levels.[246] We continue to believe that such evidence of facilities-based competition is highly

[242] We base our market share calculations on residential data because we cannot extract the data for very small business customers from the Arizona Commission's data. We believe these residential market shares are likely to approximate sufficiently closely the market shares for the mass market residential and very small business customers because they have similar demand patterns, are served primarily through mass marketing techniques, purchase similar volumes and types of communications services, and would likely face the same competitive alternatives within a geographic market. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18347, para. 102 n.307; *Verizon/MCI Order*, 20 FCC Rcd at 18488, para. 103 n.306.

[243] *Compare* Arizona Corporation Commission Reply, Exh. 7 (showing that competitive LECs provide **[REDACTED]** residential access lines using Qwest facilities); Arizona Corporation Commission Reply at 12 & Exh. 11 (showing that Cox provides **[REDACTED]** residential access lines in the Phoenix MSA] *with* Arizona Corporation Commission Reply at 15–16 & Exh. 13 (showing that Qwest provides **[REDACTED]** residential access lines in the Phoenix MSA, including reported VoIP "lines"). The Arizona Commission supplied estimates of Cox's access line totals by ZIP Code and by wire center; we rely on the wire center totals because they represent the area for which Qwest has requested forbearance. We are not persuaded by Qwest's attempt to demonstrate the level of competition in Phoenix by citing to reductions in Qwest's retail access lines in service. *See* Qwest Petition at 6. We find market share data based on actual line counts to be a more reliable indicator of the extent of competition in the market than Qwest's line loss data. In addition, there are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. *See, e.g.*, *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32; *see also* Broadview Comments at 52.

[244] *See* Integra Besen Decl. at 8 & n.17 (citing a study that "estimate[s] that the presence of a third competitor affects prices once its share is greater than or equal to 16 percent"); Covad Opposition, Attach. 1 at 15 (discussing the DOJ's allegations that the merger of WorldCom and Sprint would leave only two major competitors for particular services, along with a competitive fringe that was "insufficient to prevent coordinated pricing or other anticompetitive behavior" (citing *United States v. Worldcom, Inc., & Sprint Corp.*, Complaint, paras. 69–71, 94–95, 112, 134)); *U.S. v. Rockford Mem. Corp*., 898 F.2d 1278, 1283–84 (7th Cir. 1990) (noting that for a competitive fringe with 10% of the market to take an additional 10% share from the leading firms would only reduce the leading firms' shares to 81 percent but would require the fringe firms to increase their own output by 90% (*i.e.*, from 10 to 19% of the market), which would take time and would "force up their costs, perhaps steeply"); Landes and Posner Market Power Law Review, *supra* note 82, at 947 ("Intuitively, it is cheaper to raise price by curtailing output if fringe sellers have a lower market share since the same percentage increase by the fringe will yield a smaller absolute increase in their output.").

[245] Arizona Corporation Commission Reply, Exh. 7 (showing that **[REDACTED]** competitive LECs in the Phoenix MSA provide an aggregate of **[REDACTED]** residential access lines using Qwest facilities); Qwest Brigham Decl., Exh. 7 (showing that Qwest provides a total of **[REDACTED]** QLSP, UNE-P, and resale lines).

[246] *See, e.g.*, *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3303–04, 3308, paras. 59, 70 (finding that AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors, which possessed the ability to accommodate a substantial number of new customers on their networks with little or no investment immediately, and relatively modest investment in the short term).

relevant to determining whether competition is sufficient to satisfy the section 10 criteria.[247] Indeed, we believe that facilities-based coverage should be a leading factor in the Commission's analysis of whether, not just where, forbearance is warranted.[248] The record does not reveal any wireline providers other than Cox that have last-mile network facilities coverage to any significant degree, however.[249] To the contrary, as discussed above, the record indicates that other competitors are dependent on Qwest's last-mile facilities, including UNE loops, to serve mass market customers.[250]

83. We next evaluate the potential for competition to amelioriate the possibility of unilateral or joint exercise of market power by the entry of new facilities-based competitors by supply-side substitution and *de novo* entry. We find the potential for entry via supply-side substitution to be unlikely in the Phoenix MSA. Prior to Cox's offering of local services, it was a potential entrant via supply-side substitution in locations where its cable system was deployed and upgradeable (at relatively low incremental cost). It is now an actual competitor in the mass market where it has appropriate network facilities. Based on the current record, however, we are unable to identify any other potential facilities-based competitors for mass market services in Phoenix. Although the leading mobile wireless providers have ubiquitous networks, as described above, we cannot conclude on the basis of this record that residential mobile voice services fall within the same relevant product markets as wireline services.[251] Nor is there any evidence that mobile wireless carriers are likely to alter their pricing strategies dramatically to offer a closer substitute to Qwest's local service offerings in response to a small but significant and nontransitory increase in the price of fixed mass market services, particularly given that the majority of consumers already purchase mobile wireless services at current price levels.

84. With respect to the possibility of *de novo* entry, the Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile

[247] In the *Qwest Omaha Forbearance Order* and subsequent decisions, the Commission evaluated this to some extent with respect to the cable operator, by considering data regarding cable "coverage." *See supra* note 53 (citing the *Qwest Omaha Forbearance Order* and explaining that an intermodal competitor "covers" a location where it uses its own network, including its own last-mile facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings); *see also ACS UNE Forbearance Order*, 22 FCC Rcd at 1977, para. 32. We clarify that, for purposes of the analysis we now undertake, we do not require that a competitor offer "the full range of services that are substitutes for the incumbent LEC's local service offerings" for its facilities to be considered at all. Instead, we consider competitive facilities deployment if those facilities are, or readily could be, used to compete in particular product markets, but only to that extent.

[248] Thus, under the Commission's approach as articulated above, the presence of multiple competitors possessing facilities with sufficient spare capacity that are, or readily could be, used to compete in a particular product market potentially could be sufficient for forbearance in that product market, even if the incumbent carrier retained a majority share of the market. *See supra* Part III.B. As noted above, however, in light of our concerns about the sufficiency of a duopoly given the record evidence here, the presence of a single facilities-based competitor in a market for particular services is not a sufficient basis for us to conclude that Qwest is subject to effective competition. *Id*.

[249] *See* Arizona Corporation Commission Reply at 13 (stating that Cox is Qwest's only meaningful wireline facilities-based competitor for residential customers in the Phoenix MSA and that the only other carrier with significant market share relies on Qwest's facilities to provide service, and that AT&T and MCI, "to the best of the ACC's knowledge, have not been actively marketing any residential services to customers in the Phoenix MSA for some time"); *see also id.*, Exh. 7 (providing access line count data).

[250] Arizona Corporation Commission Reply at 9 & Exh. 7.

[251] *See supra* paras. 55–61.

facilities.[252] Congress enacted and the Commission implemented the UNE framework in an attempt to lower barriers to entry and to create a viable platform for entry into the local market. We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.[253] In short, cable operators may have faced comparatively lower barriers to entering telecommunications services markets because they owned existing cable networks that could be upgraded at a feasible incremental cost, but this does not imply that entry barriers for other competitive LECs have eased.

85. We recognize that, in a small number of geographic markets, cable over-builders such as RCN have entered the market. The extent of this entry has been limited, however, and the marketplace has become more difficult for these providers with the expansion of LECs into video services.[254] There is no record evidence that any cable over-builder is considering expanding its network into Phoenix. Nor is there any evidence that any new entry would be timely; likely; or sufficient in its magnitude, character, and scope to operate as a competitive counterbalance to any attempted price increase by a hypothetical monopolist.[255] In the absence of any record evidence that a *de novo* entrant is likely to construct a network in this market in the near future, we do not find the theoretical possibility of such occurrence sufficient to support a finding that Qwest, or Qwest in conjunction with Cox, would not have the ability to exercise significant market power with respect to retail mass market services.

86. Consequently, we are unable to find that Qwest is subject to effective competition in the Phoenix MSA. The theoretical and empirical concerns above prevent us from simply assuming that a duopoly in this context is sufficient to ensure effective competition for the legacy services at issue in Qwest's petition.[256] We recognize that, under some models and in some situations, duopoly can provide

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[252] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd 17035–41, paras. 85–91; *see also Triennial Review Remand Order*, 20 FCC Rcd at 2615–19, paras. 149–54 (discussing barriers to entry for high-capacity loops).

[253] *Id.*; *see, e.g.*, *supra* paras. 71–73.

[254] Gary Kim, *Overbuilds, Municipal or Otherwise, a Tough Sell*, SATELLITE TECHNOLOGY, March 15, 2010 http://satellite.tmcnet.com/topics/satellite/articles/78538-overbuilds-municipal-otherwise-tough-sell.htm.

[255] *See DOJ/FTC Guidelines*, § 3.0.

[256] *See supra* paras. 30–31. We note that the Commission has, in some instances, granted regulatory relief in certain markets where there were only two competitors at the time, based on findings of potential competition, among other considerations. *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review--Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, 01-337, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880–81, 14894–98, paras. 50, 77–85 (2005) (*Wireline Broadband Internet Access Order*) (finding that the marketplace for broadband Internet service was "an emerging market," and that while "[c]able modem and DSL providers are currently the market leaders," there was evidence of "other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations," and noting that, consistent with the mandate of section 706, it was appropriate to limit certain regulatory requirements); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1467–68, 1470, paras. 138, 148 (1994) (noting that "the Commission has previously acknowledged that, while competition in the provision of cellular services exists, the record does not support a conclusion that (continued….)

sufficient competition. In particular, under the Bertrand model, duopoly can result in a competitive equilibrium under the assumption of perfectly homogeneous products and no capacity constraints even in the short run.[257] We have no evidence in the record here, however, suggesting that these conditions are present in the markets at issue. Nor do we find direct evidence that the markets at issue are behaving in a competitive manner, or other record evidence that duopoly has resulted in effective competition for the relevant products.[258]

(ii) Enterprise Market

87. Based on the record evidence, we find competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest's wholesale services,[259] and that Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services by competitors that rely on their own last-mile connections to serve customers.

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cellular services are fully competitive," but finding that "[i]n addition to actual competition today, the threat of potential competition in the future may also affect current cellular pricing and investment"). As discussed above, we likewise consider any evidence of potential competition as part of our traditional market power analysis. *See supra* paras. 84–85.

[257] As noted above, however, the Bertrand model can also result in noncompetitive equilibrium under different assumptions (*e.g.*, product differentiation). *See supra* notes 88 & 89.

[258] *See generally* Covad Opposition, Attach. 1 at 10 (noting that, as the D.C. Circuit has explained, in a market "characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions"); COMPTEL Opposition, Attach. at 23–26; Integra Apr. 28, 2010 *Ex Parte* Letter, Attach. at 6 (Cox's prices for wholesale loops are high in the limited number of locations it offers such facilities). We reject Qwest's argument that modest levels of competition may be sufficient to impose pricing discipline in a market where the providers have pronounced scale and scope economies and high price-cost margins, because Qwest's explanation implicitly assumes a relatively high elasticity of demand, and there is no evidence in this record that the demand for the relevant product is particularly elastic in Phoenix or any other geographic market. We also reject Qwest's hypothetical argument about the incentives of an incumbent LEC offering a bundled service offering of local, long-distance, vertical features, and broadband service. First, this bundled service offering is not within the relevant product market for the Petition under consideration. Second, even if this bundled service offering were being considered in this proceeding, we would reject this argument because there is no evidence in this record of an estimate of the elasticity of demand for this service offering and Qwest's analysis does not consider the impact of any switching costs that the consumer would incur with the substitution of one firm's bundled service offering for a competitor's bundled service offering. *See* Qwest Reply Tardiff/Wiseman Decl. at paras. 61–65.

[259] In prior proceedings, we have not had sufficiently detailed data to define localized relevant geographic markets in which all enterprise customers face the same competitive choices, and instead used the most disaggregated data possible in performing the structural analysis for different types of business services and for certain broad classes of business customers, where such data is available. *See, e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18328–31, paras. 69–72; *Verizon/MCI Order*, 20 FCC Rcd at 18470–73, paras. 69–72; *Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16459–60, paras. 34, 35. In this proceeding, most competitive deployment of facilities is reported as a Phoenix MSA total rather than being provided in a more disaggregated geographic area. *See, e.g.*, Arizona Corporation Commission Reply, Exh. 7 (showing competitive LEC lines served with non-Qwest facilities in the Phoenix MSA). Thus, even though some of the data in the record is provided on a more disaggregated basis, we would be ignoring facilities-based competition of which we are aware to conduct our analysis on that more disaggregated basis. *See, e.g.*, Qwest Brigham Decl., Exh. 2 (providing Qwest's retail switched access line totals by wire center); Arizona Corporation Commission Reply, Exhs. 8–10 (providing Cox's business retail switched access line total estimates by wire center); *id*. at 22 & Exh. 14 (providing lit building totals by ZIP Code for AGL Networks and Salt River Project). Nevertheless, having examined the ZIP Code and wire center data that has been filed in the record, we find nothing in that data that causes us to alter our conclusions above.

88. We begin by considering evidence regarding current retail market shares in the Phoenix MSA where Qwest provides services.[260] Our analysis of retail enterprise services, like our analysis of mass market services, relies upon line count data submitted by the Arizona Commission because it is the most recent and most complete data available for all competitors in the Phoenix MSA. Although we find that we cannot precisely define separate relevant product markets for all enterprise services, we rely upon the Arizona Commission data to inform our analysis of the enterprise market.[261] These data indicate that Qwest has a market share of **[REDACTED]** percent across all business customer classes, a market share of **[REDACTED]** percent for small business, a market share of **[REDACTED]** percent for medium businesses; and a market share of **[REDACTED]** percent for large businesses.[262] In addition, competitors other than Cox rely heavily on Qwest's wholesale offerings to provide enterprise services.[263] The Arizona Commission data suggest that Qwest's facilities are used to provide the following percentages of competitors' lines: **[REDACTED]** percent for all business lines, **[REDACTED]** percent for small businesses, **[REDACTED]** percent for medium businesses, and **[REDACTED]** percent for large businesses.[264] These data further show that Cox has a market share of **[REDACTED]** percent for all businesses, a market share of **[REDACTED]** percent for small businesses, a market share of **[REDACTED]** percent for medium businesses, and a market share of **[REDACTED]** percent for large businesses.[265] Along with the other data in the record, these market share data suggest that none of Qwest's competitors, either individually or in the aggregate, have deployed facilities that enable effective

[260] We do not have data or information that would enable us to evaluate other factors, such as elasticity of demand, or whether any retail enterprise competitors have comparable size, resources, or cost structure to Qwest. We do not find Qwest's evidence of decreases in its switched business access lines persuasive. *See* Qwest Reply at 12. We find market share data based on actual line counts to be a more reliable indicator of the extent of competition in the market than Qwest's line loss data. In addition, Qwest does not provide any evidence of the overall size of the market during the relevant time period, or the extent to which decreases in Qwest's retail switched access sales could be offset by increases in its retail special access sales or its wholesale switched and special access sales, or the extent to which Qwest's retail switched access customers are migrating to managed services or IP-based technologies that can reduce the number of voice-grade-equivalent access lines required to serve the same level of demand, or other relevant possibilities.

[261] Our analysis of particular enterprise customer classes is determined by the availability of data in this record. The analysis may overstate or understate Qwest's competitive significance because the number of lines used by an enterprise customer may be an imperfect means of delineating customer classes.

[262] The Arizona Corporation Commission obtained access line counts from each carrier in the Phoenix MSA disaggregated into three business customer classifications: small (less than 4 lines provided); medium (4 to 100 lines provided); and large (more than 100 lines provided). Arizona Corporation Commission Comments at 10; Arizona Corporation Commission Reply, Exhs. 1, 3, 5 (Cox Business lines), Exh. 7 (non-Cox competitive LEC lines), Exhs. 8-10 (Qwest lines, including VoIP "lines").

[263] *See supra* note 221 (stating that of the **[REDACTED]** business lines that are served by competitive LECs in the Phoenix MSA, only **[REDACTED]**, or **[REDACTED]**% of those lines are served without Qwest facilities). For instance, the data submitted by the Arizona Commission indicates that **[REDACTED]** business lines, **[REDACTED]** business lines, **[REDACTED]** business lines and **[REDACTED]** business lines are served using Qwest's facilities. *See* Arizona Corporation Commission Reply, Exh. 7.

[264] Arizona Corporation Commission Reply Exh. 7 (non-Cox competitive LEC lines), Exhs. 1, 3, 5 (Cox lines). Consistent with our findings above, these data are evidence that Qwest's network is practically ubiquitous while the aggregate network capacity of Qwest's competitors is comparably limited. *See supra* at Part III.D.4.a.i.

[265] Arizona Corporation Commission Reply Exh. 7 (non-Cox competitive LEC lines), Exhs. 1, 3, 5 (Cox lines), Exhs. 8, 9, 10 (Qwest lines).

competition to Qwest in the absence of the regulated wholesale offerings at issue.[266] Qwest has provided no evidence sufficient to rebut this conclusion.[267]

89. The same barriers to entry noted above in the context of wholesale loop and transport services apply equally to the facilities-based provision of retail enterprise services.[268] In this regard, we find no record basis for concluding that Qwest is subject to effective potential competition through either supply-side substitution or *de novo* entry. Although there are other facilities-based communications networks operating in these geographic markets, including mobile wireless providers and satellite providers, there is no persuasive record evidence that the services offered via such networks are in the same relevant product markets as those at issue here. Finally, although Qwest asserts that *fixed* wireless providers are capable of providing enterprise services,[269] there is no evidence in this record that one or more of these providers is likely to enter and offer enterprise services to any significant portion of enterprise businesses anytime in the future.[270]

90. We find that *de novo* entry is equally unlikely. As discussed above, in the *Triennial Review Order*, the Commission found that competitive carriers face extensive economic barriers to the construction of last-mile facilities.[271] Congress enacted and the Commission implemented the UNE framework in an attempt to lower barriers to entry and to create a viable platform for entry into the local market. We see nothing in the record to indicate that the passage of time has lowered these barriers for competitive LECs that do not already have an extensive local network used to provide other services to enterprise locations today.[272] Qwest suggests that fixed wireless is a possible means of *de novo* entry, but the record contains no evidence that such entry is likely in these areas any reasonable timeframe.

91. As discussed above,[273] upon further consideration, we are unwilling to predict that Cox's

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[266] *See, e.g.*, *supra* note 210 (describing the extent of competitive last-mile facilities deployment in the Phoenix MSA).

[267] We reject the Harte-Hanks business share estimate submitted by Qwest. That share estimate is based upon a single question in which some group of 1,500 business customers in the Phoenix MSA were asked to identify their "primary telecommunications provider." Qwest Petition at 27. We do not find this to be a reliable predictor of Qwest's market share of the enterprise market in total or for any customer class for enterprise services because: (1) there is no indication of how respondents were chosen; (2) the response to a single question seeking the name of the customer's "primary provider for telecommunications services" is not dispositive of a firm's market share in the relevant product market at issue here (switched access services) whether for the enterprise market as a whole or for any specific customer class of this market; (3) the survey response is not indicative of the market participants' current output for any service market; and (4) the survey response is not indicative of any competitor's reliance upon Qwest for key product inputs, including the inputs for which Qwest seeks forbearance from unbundling obligations. *See, e.g.*, Ad Hoc Comments at 4–5; Broadview Comments at 26–27; COMPTEL Opposition at 38–39; Broadview Reply at 5 n.14.

[268] To reach potential customers with its own facilities, Cox, like any other competitive LEC, would need to overcome the relevant entry barriers. *See* Integra Opposition at 14–17; Integra Bennett Decl. at para. 4; Integra Liestman Decl. at paras. 5–9; *see also supra* para. 73 (discussing the hurdles Cox and other competitive LECs face for supply side substitution); *supra* note 217 (describing difficulties competitive LECs other than Cox face in extending their last-mile networks).

[269] Qwest Petition at 36; Qwest Brigham Decl. at paras. 45, 58.

[270] *See supra* notes 210, 212 (describing evidence of fixed wireless alternatives in the Phoenix MSA).

[271] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17035–41, paras. 85–91.

[272] *See supra* para. 84.

[273] *See supra* para. 36.

competitive success in the retail mass market currently subjects, or will in the future subject, Qwest to effective competition in the enterprise market. As a result, we conclude that there is insufficient actual and potential competition to constrain effectively the price of Qwest's enterprise services.

E. Forbearance Analysis

92. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[274] In determining whether forbearance is consistent with the public interest, the Commission also must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[275] Forbearance is warranted under section 10(a) only if all three elements of the forbearance criteria are satisfied.[276] Moreover, as the Commission has recognized, when seeking forbearance, "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance."[277] We evaluate the petition for forbearance based on the record as a whole and conclude that Qwest has not satisfied its burden of demonstrating that the section 10(a) standards have been met with respect to its request.[278]

1. Forbearance from Section 251(c) UNE obligations

93. As discussed above,[279] Congress enacted section 251(c)(3) with the goal of opening local markets to competition. With respect to the UNEs at issue here, the Commission has concluded that reasonably efficient competitors face barriers to entry that are likely to make entry into these markets uneconomic without access to those UNEs.[280]

94. Qwest contends that competition for telecommunications services in the Phoenix MSA is sufficiently developed that the regulations adopted pursuant to section 251(c)(3) from which it seeks forbearance are no longer necessary under the criteria of section 10, and that forbearance is in the public interest. Under the framework described above, competitive conditions might justify forbearance from UNE obligations if the petitioner could demonstrate that it lacks market power in the relevant wholesale markets.[281] Even in the absence of robust wholesale competition, forbearance relief might be warranted

[274] 47 U.S.C. § 160(a).

[275] 47 U.S.C. § 160(b) (providing that, in making the determination under section 10(a)(3), the Commission shall consider whether forbearance will promote competitive market conditions).

[276] *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

[277] *Forbearance Procedures Order*, 24 FCC Rcd at 9544, para. 20.

[278] Because we deny Qwest's request for forbearance on the merits, we decline to reach the substance of Broadview Networks Motion for Summary Denial. *See* Motion for Summary Denial of Broadview Networks, WC Docket No. 09-135 (filed Aug. 25, 2009) (arguing that the Commission should summarily deny the present petition and consider the merits of Qwest's request for forbearance in the Phoenix MSA only in the pending *Qwest 4 MSA* remand proceeding to avoid the unnecessary expenditure of resources).

[279] *See supra* Part II.B.1.

[280] *See supra* paras. 11–12.

[281] *See supra* Part III.C.

if, for example, there is sufficient full, facilities-based competition for the relevant retail services.[282] Based on the competitive analysis above, however, we do not find sufficient evidence to conclude that either circumstance is present here.[283]

a. Section 10(a)(1)—Charges, Practices, Classifications, and Regulations

95. Based on the record evidence and our analysis above, we conclude that section 251(c)(3) UNE regulations remain necessary to ensure that Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in Phoenix.[284]

[282] *See id*. As we observe above, the mere fact that a relevant retail market was effectively competitive would not, by itself, be sufficient to justify relief, particularly if that retail competition may depend on the rules or regulations from which forbearance relief is being sought. *Id*.

[283] COMPTEL and Covad (among others) argue, as a threshold matter, that the Commission may not forbear from enforcing the pertinent section 251(c)(3) unbundling requirements because it has not validly determined, pursuant to section 10(d), that those requirements have been "fully implemented." *See, e.g.*, COMPTEL Opposition at 14–20; Covad Opposition at 43–45. These commenters acknowledge that the Commission previously ruled, in the *Qwest Omaha Forbearance Order* that the section 251(c) obligations had been fully implemented "because the Commission has issued rules implementing section 251(c) and those rules have gone into effect" and further conceding that the D.C. Circuit affirmed the Commission's statutory interpretation as reasonable. COMPTEL Opposition at 14–15; Covad Opposition at 43–44. Nevertheless, COMPTEL and Covad assert that, because it had not first been presented to the Commission as required by 47 U.S.C. § 405(a), the court expressly declined to address the "distinct" claim that the Commission's interpretation of section 10(d) with respect to section 251(c) obligations was inconsistent with language in the earlier *First Local Competition Order* that allegedly had acknowledged "a role for States and service providers in implementing § 251(c)." *See* COMPTEL Opposition at 16; Covad Opposition at 43–44; *Qwest Corporation v. FCC*, 482 F.3d at 478. The commenters contend that the Commission must address and reconcile that alleged inconsistency now. *See* COMPTEL Opposition at 15–20; Covad Opposition at 43–44. Doing so here, we find that there is no inconsistency. COMPTEL and Covad quote general statements from the *First Local Competition Order* and other related rulemaking orders about the roles assigned to state commissions and incumbent carriers under sections 251 and 252. *See, e.g.*, COMPTEL Opposition at 16–18 (relying on paras. 6, 41, 54, 67, 85, 111, 116, 307 of the *First Local Competition Order*). Those statements do not purport to interpret the "fully implemented" language of section 10(d) that is at issue here. Moreover, the Commission's *Qwest Omaha Forbearance Order* interpretation of sections 10(d)'s "fully implemented" language as it relates to section 251(c) obligations has the practical virtue of establishing a bright line threshold standard for determining whether a forbearance inquiry may proceed, while still preserving more nuanced analysis, under the standards of sections 10(a) and (b), for determining whether forbearance ultimately should be granted. *Cf. Qwest v. FCC*, 482 F.3d at 478 (rejecting claim that the FCC's "fully implemented" interpretation would permit forbearance "before the benefits from unbundling were 'significantly realized,'" in light of the "independent requirements of § 10, such as § 10(b)'s mandate to consider whether forbearance would 'promote competitive market conditions'"). Such analysis is fully capable of taking into consideration the performance of service providers and the actions of state commissions under section 251(c) and section 252. Thus, even if there were tension between the Commission's interpretation of section 10(d)'s "fully implemented" language in the *Qwest Omaha Forbearance Order* and its earlier statements about section 251(c) in the *First Local Competition Order* such tension would provide no basis upon which to set aside our section 10(d) interpretation. *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) ("[T]he existence of contrary agency precedent gives [the court] no more power than usual to question the Commission's substantive determinations. We still ask only whether the Commission has adequately explained the reasons for its current action and whether those reasons themselves reflect a 'clear error of judgment.'" (internal citations omitted)).

[284] 47 U.S.C. § 160(a)(1). As noted above, Qwest also seeks forbearance from section 271(c)(2)(B)(ii) of the Act or checklist item 2, which incorporates and is coextensive with section 251(c)(3). *See supra* para. 22. For the same reasons discussed here, we also reject Qwest's forbearance request with respect to section 271(c)(2)(B)(ii) of the Act.

In particular, we find both the wholesale and the retail markets insufficiently competitive to satisfy section 10(a)(1).

(i) Wholesale Markets

96. The present record regarding wholesale competition does not enable us to find that the unbundling requirements no longer are necessary to ensure that Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in the absence of section 251(c)(3) regulations. As explained in our competitive analysis, *supra*, there is no record evidence of significant competition for the wholesale products used to serve either mass market or enterprise customers.[285] Further, as described above, we have reconsidered several predictions we made in the *Qwest Omaha Forbearance Order* regarding wholesale services and decline to make similar predictions in the context of Qwest's request for forbearance in this proceeding.[286]

(ii) Retail Markets

97. As noted above, notwithstanding a lack of competition in wholesale markets, forbearance nevertheless might be warranted if there were evidence of sufficient retail competition among facilities-based competitors that have deployed last-mile networks to serve end users.[287] As the Commission previously has found, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[288] The competitive evidence here, however, falls far short of such a showing.

98. *Retail Mass Market Services*. For the reasons explained in our competitive analysis, we cannot conclude that there is sufficient facilities-based competition for retail mass market services in the Phoenix MSA to meet the section 10(a)(1) criteria for UNE forbearance. As explained above, Qwest and Cox dominate the relevant mass market services. Together, they have a combined market share of **[REDACTED]** percent in Qwest's service territory in the Phoenix MSA.[289] With the exception of Cox, all other providers of the relevant mass market services remain dependent on Qwest's facilities.[290] Nothing in the record indicates that the recognized barriers to entry, which UNEs are designed to help competitors overcome, have been lowered to enable similar competitive facilities deployment by any provider other than Cox. Thus, there is no evidence that, absent section 251(c)(3) regulation, Qwest would be subject to effective retail competition for mass market customers. For the reasons discussed above, that is inadequate competition to ensure that the rates and practices for retail mass market services would be just, reasonable, and non-discriminatory.

99. *Retail Enterprise Market Services*. As discussed in our competitive analysis, *supra*, we also conclude there is insufficient evidence of competition in the retail enterprise markets to forbear from UNE obligations under section 10(a)(1). In the retail enterprise markets, Qwest appears to be the sole provider with facilities serving the vast majority of commercial buildings.[291] Given the need to consider

[285] *See supra* Part III.D.1.a.

[286] *See supra* Part III.B.

[287] *See supra* Part III.C.

[288] *US West Forbearance Order*, 14 FCC Rcd at 16270, para. 31.

[289] *See supra* para. 81.

[290] *See supra* para. 80.

[291] *See, e.g.*, *supra* para. 88 (showing Qwest has a market share of **[REDACTED]**% of all business lines and that its facilities are used to provide **[REDACTED]**% of competitive LEC business lines).

competitive effects on a broader geographic basis as well, it is important to observe that for the vast majority of enterprise customers in these markets, no competitor or aggregate of competitors to Qwest has deployed last-mile facilities that could be used to provide competitive enterprise services. Moreover, if competitive entry to core parts of a region is limited by the premature elimination of UNEs, competitive LECs may not be able to justify entry into the surrounding wire centers, even where UNEs loops remain available.[292]

100. Therefore, given the absence of evidence of a competitive wholesale market or sufficient competition among integrated firms competing for downstream retail services over their own facilities, we cannot justify forbearance from UNE obligations under section 10(a)(1) due to facilities-based competition. Specifically, we conclude that section 251(c)(3) UNEs continue to be necessary to ensure just and reasonable and not unjustly and unreasonably discriminatory rates, terms, and conditions for retail services in Phoenix at this time.

b. Section 10(a)(2)—Protection of Consumers

101. The analysis above underlying our conclusion that section 251(c)(3) UNEs remain necessary to ensure just and reasonable and not unjustly and unreasonably discriminatory rates, terms, and conditions, likewise leads to the conclusion that these requirements remain necessary for the protection of consumers.[293] We find that our unbundling rules remain necessary to protect consumers for additional reasons, as well.

102. First, there is evidence that consumers can benefit from innovative offerings provided by competitors relying on UNEs.[294] Several providers have explained that by attaching their own equipment to legacy copper loops leased as UNEs, they have been able to differentiate their service offerings and provide additional choices to residential or business customers in markets entered by relying on UNEs.[295] In this manner, for example, Cavalier is able to offer telephone, television, and broadband Internet services, thus promoting competition for voice, video, and broadband services.[296] Although Cavalier to

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[292] *See, e.g.*, Covad Opposition at 21–22; Integra Opposition at 18–20 & Attach. 1 at paras. 2, 6; PAETEC Opposition, Attach. 1 at 22. In Omaha, for example, McLeod and others contend that the Commission's decision to eliminate UNE regulations in 9 of 24 Omaha wire centers has deterred additional competitive entry in the entire Omaha market. *See*, *e.g.*, McLeodUSA Petition at 14.

[293] 47 U.S.C. § 160(a)(2).

[294] *See, e.g.*, *Noramco of Delaware, Inc. v. DEA*, 375 F.3d 1148, 1158 (D.C. Cir. 2004) (affirming agency finding of inadequate competition from duopoly and that a greater number of entrants may yield benefits such as improved product quality, reliability of supply, financial terms and conditions, and order lead times).

[295] Cavalier May 7, 2010 *Ex Parte* Letter at 2 (stating that Cavalier offers basic dial tone, long distance, dial-up Internet access, DSL, and IPTV); *id.*, Declaration of Sean Wainwright, Attach. at para. 5 (Cavalier Wainwright Decl.) (stating that "Cavalier's price for local phone service with unlimited long distance and 12 calling features, including voicemail, is on average about $15–20 a month cheaper than either the applicable cable company or incumbent LEC in the markets Cavalier serves."); *id*. at para. 5 (stating that Cavalier provides a prepaid landline phone service priced at less than one dollar per day that can be purchased in blocks of 90-day intervals in markets where it provides service); Letter from Philip J. Macres, Counsel to Covad et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, 06-172, 07-97, 04-223 at 2 (filed Apr. 21, 2010) (Covad Apr. 21, 2010 *Ex Parte* Letter) (stating that high-capacity broadband services, including high-speed DSL and Ethernet services, can be provided over conditioned copper UNE DS0 loops by attaching certain electronics to these lines).

[296] Cavalier May 7, 2010 *Ex Parte* Letter at 2–3; Cavalier Wainwright Decl. at para. 8 (explaining that Cavalier is the only triple-play telecommunications alternative to the incumbent LEC for residential customers in certain markets it has entered); *see also* Letter from Genevieve Morelli, Counsel to Broadview et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 09-135, Attach. A at ii (filed May 20, 2010) (CLEC May 20, 2010 *Ex Parte*
(continued….)

date has not entered the Phoenix market, it contends that the only realistic potential for Cavalier and other similarly situated entities to enter the Phoenix MSA is through the continued availability of UNEs.[297]

103. Second, evidence in the record also suggests that competitors rely on UNEs to target particular niche markets or customer segments. For example, multiple carriers provide advanced services over copper loops to enterprise customers, including hospitals, fire departments, and schools, as well as government clients.[298] Competitive LECs already rely heavily on UNE loops to provide services to businesses in Phoenix.[299] Similarly, Cavalier reports that in other markets, it has been able to deploy advanced services to mass market consumers in inner-city neighborhoods where fiber technologies have not been deployed.[300] Cavalier asserts that, although it owns many of its own facilities, its "only realistic access to the vast majority of customers" over the last-mile is over unbundled DS0 UNE loops, and that it "likely will have to cease operations" if access to UNEs is foreclosed.[301] Therefore, forbearing from DS0 UNEs in particular could foreclose important choices for certain groups of customers.

c. Section 10(a)(3)—Public Interest

104. Pursuant to section 10(a)(3), we evaluate whether forbearance from UNE obligations in Phoenix is in the public interest.[302] In making that determination, we must consider whether forbearance from UNE obligations "will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services."[303]

105. We find that forbearance from section 251(c)(3) UNE obligations in Phoenix is not in the public interest. We found above that Qwest has failed to demonstrate that these regulations are no longer needed to protect consumers or to ensure just, reasonable, and not unreasonably discriminatory prices.

(Continued from previous page)
Letter) (explaining that "existing copper infrastructure represents a ready-made solution for expanding broadband access" in both the residential and business markets," including for competitors using UNEs).

[297] Cavalier May 7, 2010 *Ex Parte* Letter at 3; Cavalier Wainwright Decl. at para. 12 (stating that Cavalier has concluded that unbundled local loops are a necessary condition of it entering and remaining in a market).

[298] CLEC May 20, 2010 *Ex Parte* Letter, Attach. A at 10 (stating that Ethernet over UNE copper loops "is widely used today to meet the telecommunications needs of businesses, governmental agencies, and other community 'anchor tenants,' such as hospitals, schools, and libraries"); *cf. also* Cavalier May 7, 2010 *Ex Parte* Letter at 2; Cavalier Wainwright Decl. at para. 4 (stating that Cavalier provides a comprehensive suite of voice and data products to hospitals, fire departments, and schools, although the majority of Cavalier's business customers are small and medium-sized companies). Specifically, Cavalier provides businesses high speed Internet service using ADSL 2+ technology, 10mb Ethernet pipes, site-to-site private lines and full Internet T1s. Cavalier May 7, 2010 *Ex Parte* Letter at 2; Cavalier Wainwright Decl. at para. 4.

[299] *See* Arizona Corporation Commission Reply, Exh.7.

[300] Cavalier Wainwright Decl. at para. 8 ("Unlike Verizon's FiOS, Cavalier's service reaches older neighborhoods with copper facilities, in the inner city, not just the suburban fringe."). It is not always cost-effective to deploy fiber to enterprise locations either. *See* CLEC May 20, 2010 *Ex Parte* Letter, Attach. A at 10 ("Fiber optic cables currently reach less than 20% of buildings in the United States, and fiber deployment is expanding very slowly, by only one percent per year on average for the past five years."). Consequently, by using legacy copper facilities and UNEs, incumbents and competitive carriers can "greatly expand their broadband capacity and deliver business-grade Ethernet solutions while avoiding the millions of dollars in up-front capital costs that new fiber deployments may require." *Id.*

[301] Cavalier Wainwright Decl. at paras. 10, 12; Cavalier May 7, 2010 *Ex Parte* Letter at 1; *supra* note 297.

[302] *See* 47 U.S.C. § 160(a)(3).

[303] 47 U.S.C. § 160(b).

The findings discussed above likewise contribute to our conclusion that forbearance is not in the public interest. Indeed, our competitive analysis above is crucial in light of the statutory directive to examine whether forbearance will "promote competitive market conditions" and "promote competition among providers of telecommunications services."[304]

106. In addition, we find other potential competitive concerns here. For example, the Commission's rules allow a carrier that obtains access to a UNE for the provision of a telecommunications service also to use that UNE to provide other services.[305] Thus, a carrier could combine Qwest's UNE loops with its own electronics to provide bundled broadband, voice, and video services to mass market customers or a suite of voice and data products to enterprise customers in Phoenix.[306] The loss of UNEs thus could have competitive implications not only for traditional voice and data services, but for broadband Internet and video services as well. In addition, there is empirical econometric evidence from other contexts that wireline UNEs encourage the provision of broadband service.[307]

107. We are not persuaded that Congress intended us to forbear for the sole purpose of achieving regulatory parity between Qwest and the local cable operator, as Qwest suggests. First, "although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers."[308] Second, Qwest remains the dominant provider of both wholesale services and most enterprise services. Finally, given the lack of evidence of sufficient actual or potential competition here, we find the potential competitive harms associated with forbearance outweigh any theoretical benefits arising from regulatory parity.[309]

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[304] 47 U.S.C. § 160(b).

[305] *See* 47 C.F.R. §§ 51.100(b), 51.309(b); *see also Triennial Review Remand Order*, 20 FCC Rcd 2533, 2550, para. 29 n.83 ("Although we discard our qualifying services approach, this does not call into question our existing rule that a carrier obtaining access to a UNE for the provision of a telecommunications service for which UNEs are available may use that UNE to provide other services as well.").

[306] *See supra* paras. 102–03.

[307] For example, García-Murillo, Gabel, Ford, and Spiwak argue that UNEs encourage entry by voice competitors that spills over to the broadband market as well. *See* Martha García-Murillo & David Gabel, D., *International Broadband Deployment: The Impact of Unbundling* (presented at the 31st Telecommunications Policy Research Conference, Washington, D.C. (2003)); George Ford & Lawrence Spiwak, *The Positive Effects of Unbundling on Broadband Deployment* (Phoenix Center for Advanced Legal & Economic Public Policy Studies, Policy Paper No. 19) (2004), *available at* http://www.phoeni[X]-center.org/pcpp/PCPP19Final.pdf (retrieved Mar. 30, 2008). Prieger and Lee, using U.S. data, identify a statistically significant correlation between lower UNE rates and greater broadband availability, although the magnitude of the effects is small. James Prieger & Sunhwa Lee, *Regulation and the Deployment of Broadband*, HANDBOOK OF RESEARCH ON GLOBAL DIFFUSION OF BROADBAND DATA TRANSMISSION 241–259 (Y.K. Dwivedi, et al., eds., 2007). Distaso, Lupi, and Manenti obtain similar results using data from Europe. Walter Distaso, Paolo Lupi, & Fabio Manenti, *Platform Competition and Broadband Uptake: Theory and Empirical Evidence from the European Union*, 18 INFORMATION ECONOMICS AND POLICY 87–106 (2006). *But see* Jerry Hausman, *Internet-Related Services: The Results of Asymmetric Regulation*, BROADBAND: SHOULD WE REGULATE HIGH-SPEED INTERNET ACCESS? 129–156 (R. W. Crandall & J. H. Alleman, eds., 2002) (arguing that allowing competitors to rent facilities after they are deployed by the incumbents causes the incumbents to invest less in infrastructure).

[308] *UNE Remand Order*, 15 FCC Rcd at 3727, para. 55.

[309] In the *Qwest Omaha Forbearance Order*, we found that forbearance would further the public interest by increasing regulatory parity "[o]nce the benefits of competition have been sufficiently realized and competitive (continued….)

108. Nor are we persuaded that forbearance will enhance investment incentives in this context.[310] For the most part, the loop and transport UNEs at issue in this proceeding are legacy facilities that already have been constructed. Any investment disincentives therefore would seem to have little likely impact on Qwest's investment behavior in Phoenix, and Qwest would continue to have incentives to invest in fiber. The Commission already has taken significant steps to address possible investment disincentives through the unbundling rules in place today. In particular, the Commission has "substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market," has eliminated unbundling of OCN-capacity loops and transport and dark fiber loops, and placed caps on the ability to obtain other high-capacity loops and transport.[311] Indeed, the unbundling obligations associated with legacy DS0 loop facilities, for example, might give Qwest incentives to deploy fiber-to-the-home, which is subject to more limited unbundling obligations.[312] Furthermore, the record here reflects that the availability of price-regulated UNEs has provided an incentive for competitive carriers to invest in facilities and operational support services to bring innovative new services to customers.[313] Moreover, as mentioned above, UNE obligations have led some competitive carriers to invest in equipment and technologies to provide innovative broadband and video services over legacy copper loops.[314] Thus, public interest considerations in encouraging investment might well cut against Qwest's requested relief based on the record here.

109. In the *Qwest Omaha Forbearance Order*, the Commission found that the costs of regulatory intervention, including investment disincentives, are unwarranted and do not serve the public interest "once local exchange and exchange access markets are sufficiently competitive."[315] Here, we conclude that the relevant markets in Phoenix are not sufficiently competitive. In sum, we find on balance that forbearance would not promote competition and that, at this time, the public interest benefits associated with UNE obligations outweigh any possible public interest benefits arising from forbearance.

2. Forbearance from Dominant Carrier Regulation of Switched Access Services

110. Qwest asks the Commission to forbear from applying certain dominant carrier rate and

(Continued from previous page)
carriers have constructed their own last-mile facilities and their own transport facilities." *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19454–55, para. 78. For the reasons discussed above, we conclude that the *Qwest Omaha Forbearance Order* reached such competitive conclusions based on an unsound approach and unrealistic predictions. Thus, while we recognize the potential public interest benefits of regulatory parity in appropriate circumstances, we do not find such circumstances present here.

[310] Qwest Petition at 44.

[311] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2536-37, 2561–62, paras. 5, 49.

[312] *See* 47 C.F.R. § 51.319(a)(3) (describing limited unbundling obligations following deployment of fiber loops).

[313] *See, e.g.*, Susan M. Gately, et al., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs* (Feb. 2010) (submitted as an attachment to Letter from Harold J. Feld, Legal Director, Public Knowledge, et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 05-25, 06-172, 07-97, 09-135, 09-222, 09-223 (Feb. 12, 2010) (providing evidence that unbundling requirements and other wholesale access obligations foster investment by competitive LECs and incumbent LECs); PAETEC Opposition at 38 (stating that the Qwest Omaha forbearance decision "severely devalued" the investment PAETEC had made in its own network facilities prior to the forbearance the Commission granted in certain wire centers in Omaha).

[314] *See supra* paras. 102–03, 106. *But see* Qwest Market Power PN Comments at 6 (arguing "mandatory unbundling and/or wholesale pricing of network elements can discourage facilities-based investment.").

[315] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19454, para. 77.

tariffing regulations to its provision of mass market and enterprise switched access services in the Phoenix MSA.[316] For the reasons described below, we find that the section 10 criteria are not met, and we deny the requested forbearance.[317]

a. Section 10(a)(1)—Charges, Practices, Classifications and Regulations

111. The record does not support Qwest's contention that competition is sufficient to ensure that its interstate switched access charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory absent dominant carrier regulation.[318] The Commission has recognized that providers of switched access services serve two distinct customer groups: (1) interexchange carriers (IXCs), which purchase originating and terminating switched access services as an input for the long distance service that they provide to their end-user customers; and (2) end users who benefit from the ability, provided by access service, to place and receive long distance calls.[319] Accordingly, Qwest's switched access charges have two essential rate components: (1) carriers' carrier charges, imposed on interexchange carriers; and (2) the Subscriber Line Charge, or SLC, which is a flat-rated charge imposed on end users.[320] Qwest seeks forbearance from dominant carrier regulation for both rate components.

112. *Carrier's Carrier Switched Access Charges.* In the *CLEC Access Charge Reform Order*, the Commission explained that, for switched access services, only end-user customers potentially have competitive alternatives.[321] IXCs—the other class of switched access customers—are subject to the monopoly power that all LECs—incumbent and competitor alike—wield over access to their end users.[322] Consequently, competition for carriers' carrier switched access service is insufficient to constrain Qwest's rates, terms, and conditions, and thus cannot satisfy the criteria of section 10(a)(1). Nevertheless, in the

[316] Qwest Petition at 7–10 (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41–.49, 61.58, 61,59) ; *see also id.* at 45–46.

[317] Qwest also asks that we forbear from certain dominant carrier requirements governing the section 214 processes for acquiring lines, discontinuing service and transfers of control. *See* Qwest Petition at 10 (citing 47 U.S.C. § 214, 47 C.F.R. §§ 63.03–.04). Given our findings that there is insufficient evidence of competition in the markets at issue, we conclude Qwest has not satisfied the section 10 criteria and also deny its request for forbearance from these dominant carrier rules.

[318] *See, e.g.*, Qwest Petition at 45–46.

[319] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432, para. 33; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323, para. 40; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21306, para. 25; *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11747–48, para. 25; *see also CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38. Access services are not provisioned exclusively to IXCs; under Qwest's applicable tariff, any entity can purchase switched access services. *See* Qwest Corporation Tariff FCC No. 1, § 6.2.1A.1; *see also Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082, 1187, App. D, §§ 1.1, 2.6 (1984) (defining "customer(s)" to denote "any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or any other entity" that subscribes to tariffed services "including both Interexchange Carriers (ICs) and End Users").

[320] *See* 47 C.F.R. §§ 69.4(b); 69.152. Carrier's carrier charges include local switching, tandem switched transport, direct-trunked transport, and entrance facilities. 47 C.F.R. § 69.4(b).

[321] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38.

[322] *Id.* Although, the *CLEC Access Charge Reform Order* concerned rates for access charged by competitive LECs rather than incumbents, the distinction made there between end-user customers, that may choose among competitive alternatives, and interexchange carrier customers, that cannot, pertains with equal force to the provision of access by incumbent LECs such as Qwest.

Qwest Omaha Forbearance Order, the Commission granted conditional forbearance from dominant carrier regulation of these charges with respect to the mass market. In at least partial recognition of the end-user monopoly problem, the Commission imposed a condition designed to approximate the regulatory regime applicable to competitive LEC carriers' carrier switched access charges. In particular, access charges imposed by competitive LECs on their carrier customers by tariff are presumed to be just and reasonable if the rates are at or below a benchmark that is the rate of the competing incumbent LEC.[323] In an effort to approximate this regime for Qwest, the Commission conditioned forbearance on Qwest benchmarking to Qwest's own then-existing carriers' carrier switched access charges.[324] We decline to perpetuate this approach here. The *Qwest Omaha Forbearance Order* granted relief based on competitive findings regarding retail end-user services[325]—which do not pose a competitive constraint on a LEC's carrier's carrier switched access charges. Thus, the approach of the *Qwest Omaha Forbearance Order* is divorced from the competitive claims that were the foundation of the relief requested there, and in similar petitions. In addition, the relief granted in the *Qwest Omaha Forbearance Order*, which was specific to the mass market, is at odds with the manner in which carrier's carrier switched access charges are imposed. All incumbent LECs, including Qwest, have uniform carriers' carrier charges. These charges do not differentiate between retail customer classes, *i.e.*, whether the traffic is generated by mass market or enterprise end users.[326] Further, incumbent LECs do not maintain accounts that track residential and business switched access traffic separately. To date, no price cap carrier—including Qwest—has explained how it has or can implement switched access service forbearance relief specific to a single retail customer class (such as mass market customers).

113. *End-user Switched Access Charges.* Although it is at least theoretically plausible that sufficient retail competition could render dominant carrier regulation of SLCs unnecessary to ensure just, reasonable, and not unjustly and unreasonably discriminatory rates and practices, the record here does not demonstrate effective retail competition with respect to switched access services.[327] Moreover, as addressed further below, there are public interest concerns associated with decoupling the carriers' carrier charge and the SLC.[328]

b. Section 10(a)(2)—Protection of Consumers

114. Given our findings above that, contrary to Qwest's claims, there is insufficient evidence of competition to ensure that Qwest's switched access charges are just, reasonable, and not unjustly or unreasonably discriminatory, we likewise conclude that the dominant carrier pricing and tariffing regulations remain necessary to protect consumers under section 10(a)(2).[329] In addition, the record does

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[323] *See id.* at 9938, para. 40; 47 C.F.R. § 61.26(b). Further, competitive LECs may file tariffs on one-day's notice without cost support but are subject to mandatory detariffing of any rates that exceed the benchmark. 47 C.F.R. §§ 61.23(c), 61.26(b); *see also CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40. The Commission does not regulate the rates that competitive LECs charge their interexchange carrier customers pursuant to nontariffed arrangements.

[324] *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435, para. 41.

[325] *See id*. at 19429, para. 25.

[326] *See* Qwest Corporation Tariff FCC No. 1, § 6.8.

[327] *See supra* Part III.D.4.b.

[328] *See infra* Part III.E.2.c.

[329] 47 U.S.C. § 160(a)(2); *see also MCI v. AT&T*, 512 U.S. at 231 (tariff filings are the essential characteristic of a rate-regulated industry). We also note that Qwest's requested forbearance could have impacts beyond the MSA level. As we noted in the *Qwest 4 MSA* and *Verizon 6 MSA Forbearance Orders*, our rules require incumbent LECs to geographically average their access rates. *See Qwest 4 MSA Forbearance* Order, 23 FCC Rcd at 11751, para. 30 (continued….)

not fully address the impact a grant of forbearance relief would have on the affordability of telephone service. As detailed below,[330] the Commission historically has capped the SLC and provided for revenue recovery through other charges, such as carrier's carrier switched access charges.[331] This was done to help ensure affordability of service regardless of the actual cost of providing service to a particular customer.[332] In this regard, we note that price cap carriers already have the authority to lower their SLCs under dominant carrier price cap regulation today. Accordingly, the main effect of a grant of the requested forbearance would be to allow these carriers the flexibility to *raise* their SLCs without any associated obligation to lower any other charges (such as carrier's carrier charges). Future petitioners seeking similar forbearance should address these policy concerns, were the requested relief to be granted.[333]

(Continued from previous page)
n.112; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995)); 47 C.F.R. § 69.3(e)(7). This regulatory requirement causes price cap incumbents with state-wide operations, like Qwest, to effectively use their low-cost, urban and suburban operations to subsidize their higher cost rural operations. The likely effect of removing from price cap regulation lower cost operations in large urban metropolitan areas (like the one at issue in this matter) would be to increase the cost to Qwest's rural operations. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21311, para. 32 n.102 (stating that, "[i]n the future, applicants for forbearance relief from dominant carrier rate regulation should address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area."). We direct future applicants for forbearance relief to address: (1) the impact of a grant of relief on other rates in the applicable study area; (2) the policy implications of a potential rise in rates; and (3) how to ameliorate any negative impacts. Because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

[330] *See infra* Part III.E.2.c.

[331] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 15992–93, para. 24 (1997) (*Access Charge Reform Order*), *aff'd*, *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *see also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low Volume Long-Distance Users; Federal State Joint Board on Universal Service*, CC Docket No. 96-262, et al., Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12974–77, paras. 29–35 (2000) (*CALLS Order*), *aff'd in part*, *rev'd in part*, *and remanded in part sub nom.*, *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002).

[332] *See Access Charge Reform Order*, 12 FCC Rcd at 15992–93, para. 24; *MTS & WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 280, para. 129 (1983) (*1983 Access Charge Order*), *modified*, 97 FCC 2d 682 (1983), *further modified*, 97 FCC 2d 834, *aff'd in principal part and remanded in part sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see generally MTS & WATS Market Structure*, CC Docket No. 78-72, Phase I, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135 (1982) (*Supplemental Notice*).

[333] We note that Qwest proposes to use the Subpart C rules in Part 69 and the associated rules in Part 61 to calculate maximum SLC rates "as if" the demand associated with the area subject to forbearance relief was still being treated as dominant and subject to the rules. *See* Qwest Petition at 9–10. Qwest reasons that this proposal would cause neither a change in average carriers' carrier rates nor a rise in end user rates outside the area granted relief. Further, Qwest agrees not to raise its SLC in the Phoenix MSA. *See id*. We question whether forbearance would be necessary under this approach, which appears to achieve the same result as price cap regulation.

c. Section 10(a)(3)—Public Interest

115. Finally, we are unpersuaded by Qwest's claims that forbearance from dominant carrier regulation of its switched access services is in the public interest. Qwest argues that dominant carrier regulation for switched access services dampens competition by limiting its ability to respond to competitive forces quickly to offer consumers new pricing plans or service packages; it further asserts that eliminating such regulation will promote the public interest by eliminating the unnecessary costs such regulations impose.[334] While dominant carrier regulation does impose some costs, as discussed above, we find based on this record that such regulation remains necessary to ensure just, reasonable, and not unjustly and unreasonably discriminatory rates and practices, and for the protection of consumers. Given those findings, we are not persuaded by Qwest's claims that the costs of such regulations outweigh their public interest benefits.

116. In addition, the Commission's current switched access charge rules reflect its public interest balancing of a number of competing concerns. In particular, the Commission created the end-user and carriers' carrier switched access charges to recover a group of related incumbent LEC costs. Due to affordability concerns, the Commission capped the amount to be recovered from end users.[335] The remaining costs were recovered through several other mechanisms, which included carriers' carrier charges.[336] The SLC was capped to ensure affordability regardless of the actual cost of providing service to particular customers. Over time, through access charge reform efforts, the cap on the SLC has been raised, while revenue recovery through other access charges has been reduced or eliminated, and replaced to a significant extent with explicit universal service support mechanisms.[337] Through these efforts, the Commission has been moving away from cost recovery through carriers' carrier charges, which, as explained above, never will be subject to competition. The requested forbearance proposes to deviate from the balances struck in this framework. For one, were we to grant the requested forbearance from dominant carrier regulation, that relief could allow a price cap carrier to raise its SLCs, while it continued to recover a tariffed carriers' carrier charge at existing levels (since its rates simply would be benchmarked to its existing rates). If the Commission granted a carrier the right to increase its SLC revenues, corresponding reductions in intercarrier revenues might be appropriate. Although Qwest proposes to cap its maximum SLC rates at existing levels,[338] neither it nor any carrier seeking dominant carrier relief has addressed the larger issue of how the public interest would be served by disconnecting the treatment of the SLC and the carriers' carrier charge, which historically have been two components of a delicate public interest balancing by the Commission.[339]

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[334] *See* Qwest Petition at 45–46.

[335] *See Access Charge Reform Order*, 12 FCC Rcd at 15992–93, para. 24; *1983 Access Charge Order*, 93 FCC 2d at 280, para. 129*; see generally Supplemental Notice*, 90 FCC 2d 135.

[336] *See generally CALLS Order*, 15 FCC Rcd at 12962.

[337] *See Access Charge Reform Order*, 12 FCC Rcd at 16142–50, paras. 367-87; *see also CALLS Order*, 15 FCC Rcd at 12974–77, paras. 29–35.

[338] *See* Qwest Petition at 9–10.

[339] We also note that Qwest's petition cites competition from mobile wireless service providers as a basis for granting forbearance from dominant carrier regulations. Qwest Petition at 45. Although we find insufficient evidence here to include mobile wireless services in the same product market as wireline services, were the Commission to reach a different conclusion based on the evidence in a future proceeding, the petitioner would need to address the competitive implications of the different opportunities for revenue recovery by LECs and mobile wireless providers under the Commission's rules. Specifically, the Commission's rules allow wireline carriers to recover some costs from other carriers, through carriers' carrier charges, while mobile wireless carriers generally (continued….)

117. Qwest also proposes that, as part of dominant carrier relief, its primary interexchange carrier charge (PICC) and carrier common line charge (CCLC) rate elements would "potentially" be placed in a nondominant carrier tariff.[340] As discussed above, in the *CLEC Access Charge Reform Order*, the Commission determined that nondominant carriers may not impose tariffed charges on their interexchange customers in excess of the benchmark rate.[341] Qwest does not currently charge a PICC or a CCLC in Arizona, and thus it cannot benchmark to existing rates. As long as Qwest does not tariff these charges as a dominant carrier, it may not do so as a nondominant carrier.[342] Even if a carrier was permitted to impose these charges as a dominant carrier, however, we question whether it would be in the public interest to allow a carrier that has been granted relief from dominant carrier regulation to continue to impose them. These charges were established to allow incumbent carriers to recover common line revenues they otherwise would have been unable to recover, due to the cap on the SLC.[343] As discussed above, a carrier receiving SLC forbearance relief no longer would be subject to the SLC cap. Accordingly, these charges, which are artifacts of dominant carrier rate regulation, might not be appropriate in a post-forbearance competitive market.

118. As a separate matter, Qwest's petition raises issues about universal service support that are not fully addressed in the record. If a carrier seeking forbearance receives universal service support such as interstate access support (IAS) in the areas for which relief is sought, as Qwest does here, its petition should address how forbearance relief would affect its receipt of support. IAS is meant to provide support to price cap carriers serving lines in areas where, due to the operation of the SLC cap, they are unable to recover their permitted CMT revenues.[344] Neither the SLC cap nor the CMT revenue requirement would necessarily apply in an area where forbearance relief is granted. As noted, because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

3. Forbearance from *Computer III*

119. We deny Qwest's request for forbearance from *Computer III* requirements.[345] We cannot find on the record before us that enforcement of the *Computer III* requirements is unnecessary within the meaning of section 10(a) of the Act.[346] Although Qwest requests forbearance from the *Computer III* requirements, there is no evidence in the record demonstrating why, on balance, the *Computer III* requirements are not necessary to ensure that the "charges, practices, classifications, or regulations . . .

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must recover all costs from their end users. *Compare* 47 C.F.R. § 69.4(b) *with* 47 C.F.R. § 20.15(c). As part of our public interest analysis under section 10(a)(3), we consider the effect of forbearance on competitive market conditions. *See* 47 U.S.C. § 160(a)(3), (b). Petitioners seeking forbearance from rate regulation, or other requirements, based on competition from mobile wireless providers thus need to address the competitive implications of the disparate ability of LECs and mobile wireless providers to impose carriers' carrier access charges.

[340] *See* Qwest Petition at 9.

[341] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

[342] *See id*. at 9945–46, para. 54.

[343] *See Access Charge Reform Order*, 12 FCC Rcd at 16005–06, 16009, paras. 58–60, 71.

[344] *See CALLS Order*, 15 FCC Rcd at 13043, para. 195; 47 C.F.R. § 69.152.

[345] We note that Qwest previously has obtained significant relief from *Computer III* requirements. *See, e.g.*, *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14875–76, para. 41. Our actions in this order do not disturb or implicate regulatory relief from *Computer III* requirements that Qwest already has obtained.

[346] 47 U.S.C. § 160(a).

for[] or in connection with [Qwest's local exchange and exchange access services] are just and reasonable and are not unjustly or unreasonably discriminatory" and necessary for the protection of consumers.[347] Indeed, there is scant evidence in the record regarding the requested relief from *Computer III* requirements at all.[348]

120. The Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards to prevent the BOCs from using "exclusionary market power" arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market.[349] The record here does not demonstrate that Qwest no longer possesses exclusionary market power, and thus, as in the *Section 272 Sunset Forbearance Order*, we must assume that Qwest still possesses such market power.[350] Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations . . . for[] or in connection with" enhanced services that are unjust, unreasonable, or unjustly or unreasonably discriminatory, and could otherwise harm consumers. Such results would be contrary to the public interest.[351] We thus are unable to find on this record that forbearance from the *Computer III* requirements satisfy any of the criteria of sections 10(a)(1), (a)(2), or (a)(3).

IV. EFFECTIVE DATE

121. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on June 15, 2010. The time for appeal shall run from the release date of this order.

V. ORDERING CLAUSES

122. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that Qwest Corporation's Petition for Forbearance in the Phoenix MSA filed March 24, 2009, IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[347] *Id.*

[348] The Qwest Petition devotes one paragraph, on page 11, to the *Computer III* forbearance issue and presents no explanation of why forbearance is warranted. Qwest Petition at 11.

[349] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384, 466–67, para. 216 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, 964, para. 4 (1986). "Exclusionary" (or "Bainian") market power, which is the "ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output." *See LEC Classification Order*, 12 FCC Rcd at 15802–03, para. 83 n.214 (citing Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L. J. 241, 249–53 (1987)).

[350] *See Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 16473, para. 64.

[351] *See* 47 U.S.C. § 160(a).

APPENDIX

Comments/Oppositions in WC Docket No. 09-135

Commenter/Opponent	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
Arizona Corporation Commission	Arizona Corporation Commission
AT&T Inc.	AT&T
Broadview Networks Inc., NuVox, and XO Communications, LLC	Broadview
Cavalier Telephone, LLC	Cavalier
COMPTEL	COMPTEL
Covad Communications Company, Alpheus Communications, L.P., U.S. TelePacific Corp., and Mpower Communications Corp., both d/b/a/ TelePacific Communications; First Communications, Inc., DeltaCom, Inc., Trucom LLC d/b/a CityNet – Arizona; and TDS Metrocom, LLC	Covad
Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp.	Integra
Paetec Holding Corp.	PAETEC

Replies in WC Docket No. 09-135

Replies	Abbreviation
Arizona Corporation Commission	Arizona Corporation Commission
Broadview Networks, Inc., NuVox, and XO Communications, LLC	Broadview
Qwest Corporation	Qwest

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Petition of Qwest Corporation for Forbearance Under 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order

Healthy, competitive markets are good for investment, good for jobs, and good for consumers. The Commission today unanimously agrees that Qwest has not demonstrated that the pro-competitive policy status quo should change for telecommunications markets in Phoenix, Arizona. This outcome is consistent with the agency's denial of similar petitions in 2007 and 2008. To increase predictability for the telecommunications industry, today's Order provides a clear, data-driven, and economically sound analytic framework for evaluating future petitions of this type.

Communications markets are dynamic, and cable companies, mobile phone providers, and others are increasingly serving consumers and businesses that previously had only one option for phone service. We must take account of these developments and use a forward-looking approach to evaluating competition in deciding whether incumbents have met the analytic test the Order spells out, in order to ensure that we grant relief where appropriate. Accordingly, today the Wireline Competition Bureau is releasing a Public Notice seeking comment on applying this test to similar petitions before the Commission, consistent with our efforts to facilitate openness and participation in Commission proceedings.

I thank the staff, particularly the staff of the Wireline Competition Bureau, for their hard work on this item.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Petition of Qwest Corporation for Forbearance Under 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order

Today the Commission returns to utilization of a comprehensive analytical framework, based on traditional market power analysis, when considering a request for forbearance from Title II and *Computer Inquiry* obligations. Over the past few years, the Commission had headed down an ill-considered road of granting far-reaching forbearance to petitioners who provided grossly insufficient evidence to support their cases. Starting in 2007, over my strong objection, the Commission abandoned well-established market power analysis—similar to that used by the Federal Trade Commission and the Department of Justice—and replaced it with approval-oriented decisions that relied more on the assertions of the petitioners than on a sound review entailing, *inter alia*, definition of specific product markets, establishment of clear geographic markets, and evaluation of the existence of true competition. In addition, these decisions included predictive judgments which relied on the workings of some invisible hand to find that competition would somehow grow through the elimination of pro-competitive obligations. As we see in the record developed for the instant proceeding, those rosy expectations of new competition just did not come to pass.

I commend Chairman Genachowski for demonstrating in this Order his commitment to conducting fact-based and data-driven proceedings. About one year ago, as Acting Chairman, I intended to apply just such an analysis to pending forbearance requests. However, those petitions were withdrawn at the eleventh hour, after a fully developed record had been collected and federal employees had dedicated extensive amounts of time to complete the proceeding. But we nevertheless proceeded to adopt new forbearance rules and the positive outcome of that action is today's vastly improved analysis and decision. So I am pleased to support this Order and commend Chairman Genachowski and my colleagues for giving forbearance petitions the attention and thorough analysis they deserve.

CONCURRING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Petition of Qwest Corporation for Forbearance Under 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order

I vote to concur because I agree with the outcome, but not the justification for, this decision. To be sure, in its remands of the Commission's prior forbearance decisions, the D.C. Circuit tasked the Commission with devising a new analytical framework. On the other hand, it appears that this analysis may set too high a bar – a test so stringent that *no* requesting carrier will ever satisfy it. I question whether, in reality, today's action eliminates the opportunity for achieving forbearance, which was expressly provided to carriers by Congress. As we move forward to consider the two pending cases, as well as any new petitions that may be filed, I hope that we will not find ourselves shackled by the stringent test established today.

I am hopeful that our fresh examination will lead to a stronger analysis of the effects of mobile wireless access penetration in the retail and wholesale markets in particular. Today's order states that this is a "complicated issue." This may be true. It is hard to believe, however, that a 25 percent rate of mobile wireless-only households does not have any effect on the market for access to telecommunications services. Indeed, in order to even try to keep up with the dynamism of the marketplace, the Commission must maintain the necessary flexibility to make adjustments when circumstances warrant. This is especially the case here as the analysis set forth in today's order is novel and untested.

I thank the staff of the Wireline Competition Bureau for their work on this matter. I am hopeful that my questions will be addressed in the record as we move forward.

CONCURRING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER

Re: *Petition of Qwest Corporation for Forbearance Under 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order

I applaud the Commission for its efforts in this Order to implement a more rigorous, predictable and consistent analysis of forbearance petitions such as this, and in particular for attempting to develop a data-driven approach that relies on hard evidence of competition in the market. Despite my support for developing a data-driven approach, I concur today because I have concerns about how this analytic framework might function in practice going forward.

As a general matter, I have continuing concerns that requiring too much infrastructure sharing among competitors at TELRIC rates skews incentives to invest for both incumbents and new entrants. I strongly believe that facilities-based competition best serves consumers under most market conditions and that we should intervene in the market only when there is persuasive evidence of market failure—and even then as narrowly as possible to address the failure without distorting market incentives. In the Telecommunications Act of 1996, Congress mandated that the Commission *shall* forbear when the three-prong test laid out in the statute is satisfied. Although I agree with the conclusions for the petition before us, I hope that the application of the statutory test using the analytic framework in this Order will not become an insurmountable hurdle for petitioners, which in turn would undermine the will of Congress to relieve regulatory burdens where competition can better regulate the market. I fear that if the bar is too high, findings of market failure will be overinclusive, the regulatory response will not be narrow enough, and infrastructure investment will suffer.

Moreover, although this Order finds that Qwest did not carry its burden of showing that mobile wireless constrains wireline prices, a recent study found that nearly one in four American homes have "cut the cord." In future forbearance proceedings, I hope the Commission will take the opportunity to consider in more depth the competitive effect of mobile wireless competition in the rapidly changing marketplace. Finally, my support for this analytic framework rests in part on our acknowledgment that other analyses may be appropriate under the statute in contexts other than forbearance from section 251 unbundling for legacy facilities—most notably in examining the market for broadband services.

For these reasons, I respectfully concur and as we gain experience with this new approach, I hope the Commission will be willing to modify it—with appropriate administrative procedure—if this test proves to be impossible to satisfy or conditions otherwise warrant. I thank the staff of the Wireline Competition Bureau for their thoughtful work on this item. I am also pleased that we are requesting additional comment on applying this analytic framework in similar forbearance proceedings. I hope that my concerns will be addressed in the record as we move forward.