

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

In the Matter of
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

Adopted: July 25, 2008

Released: July 25, 2008

By the Commission: Chairman Martin issuing a statement; Commissioner Copps concurring and issuing a statement; Commissioner Adelstein concurring and issuing a separate statement at a later date.

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**I. INTRODUCTION**

1. In this Order, we address four forbearance petitions<sup>1</sup> filed by Qwest Corporation (Qwest) pursuant to section 10 of the of the Communications Act of 1934, as amended (Act),<sup>2</sup> seeking certain forbearance relief in specific areas in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas (MSAs).<sup>3</sup> Specifically, Qwest seeks forbearance from loop and transport unbundling obligations pursuant to sections 251(c) and 271(c)(2)(B)(ii).<sup>4</sup> For mass market and enterprise services, Qwest also seeks forbearance from Part 61 dominant carrier tariffing requirements;<sup>5</sup> Part 61 price cap regulations;<sup>6</sup> dominant carrier requirements 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

<sup>1</sup> Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Denver Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Minneapolis-St. Paul Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Phoenix Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007) (Qwest Seattle Petition) (collectively, Qwest Petitions). On May 3, 2007, and August 3, 2007, Qwest filed errata to make certain corrections to its petitions. See Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed May 3, 2007) (correcting the Denver, Phoenix, and Seattle petitions); Letters from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed Aug. 3, 2007) (filing two separate letters correcting the Denver and Seattle petitions). See Appendix A for a list of commenters.

<sup>2</sup> 47 U.S.C. § 160.

<sup>3</sup> See Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed June 13, 2008) (Qwest June 13, 2008 *Ex Parte* Letter) (clarifying the geographic scope of Qwest’s petitions). For convenience, we refer to the 4 geographic markets for which Qwest seeks forbearance in this proceeding as “MSAs,” even though the areas Qwest identifies is in each case more limited than an MSA. See *infra* para. 15.

<sup>4</sup> 47 C.F.R. § 51.319(a), (b), (e).

<sup>5</sup> 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, 61.59.

<sup>6</sup> 47 C.F.R. §§ 61.41-49.

or transfers of control,<sup>7</sup> and for certain of Qwest's services, *Computer III* requirements including comparably efficient interconnection (CEI) and open network architecture (ONA) requirements.<sup>8</sup> For the reasons set forth below, we find that the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Qwest seeks, and, accordingly, we deny the requested relief in the four MSAs.

## II. BACKGROUND

### A. Regulatory Requirements

2. *Dominant Carrier Regulation, Section 251(c)(3) and Section 271(c)(2)(B)(ii) Unbundling Obligations.* As noted above, the Qwest Petitions request forbearance from dominant carrier regulation with respect to mass market and enterprise services and forbearance from certain of the unbundling obligations of section 251(c)(3) and 271(c)(2)(B)(ii). Dominant carrier regulations include, among other things, requirements arising under section 214 related to transfer of control and discontinuance, cost-supported tariffing requirements, and price regulation for services falling under the Commission's jurisdiction.<sup>9</sup> Section 251(c)(3) imposes on incumbent local exchange carriers (LECs) "[t]he duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . . in accordance with . . . this section and section 252."<sup>10</sup> Section 271(c)(2)(B)(ii) of the Act, checklist item 2, incorporates and is coextensive with section 251(c)(3). Under this provision, a Bell Operating Company (BOC) must provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."<sup>11</sup> The *Qwest Omaha Forbearance Order* described the relevant dominant carrier, section 251(c)(3) and section 271(c)(2)(B)(ii) unbundling obligations, so we need not repeat that summary here.<sup>12</sup>

3. *Computer Inquiry Requirements.* Facilities-based wireline carriers also are subject to *Computer Inquiry* requirements. In the *Computer III* proceedings,<sup>13</sup> the Commission gave the BOCs the

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<sup>7</sup> 47 C.F.R. §§ 63.03, 63.04. In its petitions, Qwest requested forbearance from Sections 63.60-66 of the Commission's rules, but subsequently withdrew this aspect of its petitions; therefore, we do not include those rule sections in our analysis below. See Qwest June 13, 2008 *Ex Parte* Letter at 4.

<sup>8</sup> Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3. As described more fully below, Qwest subsequently limited the scope of *Computer III* relief it is seeking. See *infra* note 154; Qwest June 13, 2008 *Ex Parte* Letter at 5.

<sup>9</sup> See 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04.

<sup>10</sup> 47 U.S.C. § 251(c)(3).

<sup>11</sup> 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 Corp. v. FCC*).

<sup>12</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417-22, paras. 3-11.

<sup>13</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (continued....)

choice of continuing to comply with the *Computer II* structural separation requirements or of providing enhanced services pursuant to nonstructural safeguards. More specifically, the Commission adopted CEI, ONA, and other nonstructural requirements as an alternative to the *Computer II* structural separation requirements for the BOCs.<sup>14</sup> The *Verizon 6 MSA Forbearance Order* described these obligations in detail, so we do not repeat that discussion here.<sup>15</sup>

## B. Prior Forbearance Relief

4. *Qwest Omaha Forbearance Order*. On December 2, 2005, the Commission released an order granting in part a forbearance petition filed by Qwest seeking forbearance from the application of certain dominant carrier regulation and UNE obligations in the Omaha MSA.<sup>16</sup> Specifically, the Commission forbore from applying its dominant carrier price cap, rate-of-return, tariffing, and 60-day discontinuance and transfer of control rules to Qwest's mass market switched access and mass market broadband Internet access services in the Omaha MSA.<sup>17</sup> The Commission denied forbearance relief with respect to Qwest's enterprise telecommunications services because Qwest had failed to provide sufficient information to meet the statutory forbearance criteria.<sup>18</sup>

5. With respect to Qwest's requested forbearance from unbundling obligations, in the *Qwest Omaha Forbearance Order*, the Commission held that section 251(c)(3) had been "fully implemented" nationwide,<sup>19</sup> and it granted Qwest forbearance from section 251(c)(3) unbundling obligations in nine of the 24 wire centers in the Omaha MSA. In granting this relief, the Commission relied on the state of

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(1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); *see also Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20, 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the ONA framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

<sup>14</sup> *See Computer III Phase I Order*, 104 FCC 2d at 964, para. 4. An ONA plan includes a description of how a BOC unbundles its network to enable its competitors to provide enhanced services generally. *Id.* at 1019-20, para. 113, 1064-67, paras. 214-19. A CEI plan includes a description of how a BOC unbundles its network to enable its competitors to provide a particular enhanced service or set of enhanced services that the BOC intends to provide. *Id.* at 1055-56, paras. 190-91.

<sup>15</sup> *Petition 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, 21295-96, paras. 3-5 (2007) (*Verizon 6 MSA Forbearance Order*), *pet. for review pending*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

<sup>16</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417, para. 2.

<sup>17</sup> *See id.* at 19424, para. 15.

<sup>18</sup> *Id.* at 19426, para. 19.

<sup>19</sup> *Id.* at 19440, para. 53 (concluding that section 251(c) is "fully implemented" because the Commission has issued rules implementing section 251(c) and those rules have gone into effect).

competition, and level of deployment of competitive last-mile facilities in those nine wire centers, as well as certain other regulatory safeguards, such as continued availability of section 251(c)(4) resale and section 271 unbundled elements.<sup>20</sup> The Commission concluded that, in areas served by those nine wire centers, Cox Communications, Inc. (Cox), the local cable operator, had built out “extensive facilities” and was using those facilities to provide service to customers in competition with Qwest.<sup>21</sup> Although Cox leased some wholesale last-mile inputs from Qwest pursuant to voluntary commercial agreements, Cox provided competition to Qwest without accessing UNEs provided by Qwest pursuant to section 251(c)(3).<sup>22</sup> To avoid customer disruption, the Commission adopted a six-month transition period for customers of competitive LECs, other than Cox, that relied on Qwest’s UNEs offered pursuant to section 251(c)(3).<sup>23</sup>

6. The Commission declined to grant Qwest forbearance from its section 251(c)(3) unbundling obligations in the remaining 15 wire centers in the Omaha MSA where Cox’s facilities deployment was less extensive.<sup>24</sup> The Commission also denied Qwest forbearance from certain section 271 obligations, to which Qwest is subject as a BOC.<sup>25</sup> Finally, the Commission denied Qwest forbearance from section 271 checklist items 4, 5, and 6, which establish independent obligations to provide unbundled access to local loops, local transport, and local switching,<sup>26</sup> and it relied on the continued availability of wholesale access to Qwest’s network under section 271 in forbearing from section 251(c)(3).<sup>27</sup>

7. *ACS UNE Forbearance Order*. On September 30, 2005, ACS filed a petition with the Commission seeking relief from section 251(c)(3) unbundling obligations similar to that granted to Qwest in the *Qwest Omaha Forbearance Order*.<sup>28</sup> On December 28, 2006, the Commission, in the *ACS UNE Forbearance Order*, granted in part ACS’s petition for forbearance from section 251 unbundling. Subject to certain specific conditions, the Commission granted ACS forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to sections 251(c)(3) and 252(d)(1) in certain wire centers in the Anchorage study area based on the development of facilities-based competition and other

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<sup>20</sup> See *id.* at 19447, para. 64; see also 47 U.S.C. §§ 251(c)(4) (resale obligation), 271(c)(2)(B) (competitive checklist).

<sup>21</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19444, para. 59; see also *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 04-223, Public Notice, 22 FCC Rcd 13561 (2007) (disclosing, after receiving Cox’s consent to disclose the coverage threshold in the *Qwest Omaha Forbearance Order*, that Qwest was granted unbundling relief in those wire center service areas where, among other things, Cox’s voice-enabled cable plant covered more than 75% of the end-user locations that were accessible from those wire centers).

<sup>22</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19450, para. 69 n.186 (stating that “Cox does not itself rely on Qwest’s UNEs to compete”).

<sup>23</sup> *Id.* at 19452-53, paras. 73-74.

<sup>24</sup> *Id.* at 19444-45, para. 60.

<sup>25</sup> *Id.* at 19460, para. 90; see also 47 U.S.C. § 153(4) (defining “Bell operating company”).

<sup>26</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19465, para. 100; 47 U.S.C. § 271(c)(2)(B)(iv)-(vi).

<sup>27</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19446-47, 19449-50, 19452, 19455, paras. 62, 64, 67-68, 71, 80.

<sup>28</sup> 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 (filed Sept. 30, 2005).

factors.<sup>29</sup> First, the Commission granted ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in the five of the 11 wire centers in the Anchorage study area where it found that the level of facilities-based competition by GCI, ACS's main competitor in the Anchorage study area, ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary. Second, as a condition of the order, the Commission required ACS to make loops and certain subloops available in those five wire centers, by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until reaching agreement on commercially negotiated rates. Third, the Commission provided for a one-year transition period before the forbearance grant would take effect.<sup>30</sup> Since that time, ACS and GCI reached an agreement, governing ACS's continued provision of access to the specified elements in the Anchorage study area during the next five years.<sup>31</sup>

8. *ACS Dominance Forbearance Order.* On August 20, 2007, the Commission conditionally granted in part an additional forbearance petition filed by ACS, which sought forbearance in the Anchorage study area from certain statutory and regulatory dominant carrier obligations.<sup>32</sup> In particular, ACS sought forbearance comparable to the relief from dominant carrier regulation of mass market switched access service the Commission granted to Qwest in the Omaha MSA.<sup>33</sup> In the *ACS Dominance Forbearance Order*, the Commission recognized that ACS's forbearance petition raised significantly different issues from those raised in the *Qwest Omaha* proceeding because ACS is a rate-of-return carrier while Qwest is a price cap carrier. Given the evidence that ACS faced extraordinary facilities-based competition from GCI in Anchorage, the Commission found that granting partial relief, subject to conditions, was justified.<sup>34</sup> Specifically, with respect to the requested relief that was similar to that granted to Qwest in the Omaha MSA, the Commission forbore from applying to ACS's switched access

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<sup>29</sup> *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) (*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); *see also Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting ACS of Anchorage, Inc. Forbearance Relief in the Anchorage, Alaska Study Area*, WC Docket No. 05-281, Public Notice, 22 FCC Rcd 11962 (2007) (disclosing, after receiving General Communication, Inc.'s (GCI) consent to disclose the coverage threshold in the *ACS UNE Forbearance Order*, that ACS was granted unbundling relief in those wire center service areas where, among other things, GCI's voice-enabled cable plant covered more than 75% of the end-user locations that were accessible from those wire centers).

<sup>30</sup> *ACS UNE Forbearance Order*, 22 FCC Rcd at 1960, para. 2.

<sup>31</sup> Letter from Karen Brinkmann, Counsel to ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed May 24, 2007); *see also* Letter from Karen Brinkmann *et al.*, Counsel to ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed June 29, 2007).

<sup>32</sup> *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, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16305-06, para. 1 (2007) (*ACS Dominance Forbearance Order*), *pets. for recon. pending*.

<sup>33</sup> The *ACS Dominance Forbearance Order* also addressed ACS's other requests for forbearance, including forbearance from dominant carrier regulation of enterprise switched access services, broadband Internet access services, and special access services, and forbearance from Title II and *Computer Inquiries* requirements for ACS's enterprise broadband services. *See generally ACS Dominance Forbearance Order*, 22 FCC Rcd 16304.

<sup>34</sup> *Id.* at 16306-07, para. 3.

services the rate-of-return, tariffing, discontinuance, and transfer of control regulations that apply to dominant carriers, subject to various conditions.<sup>35</sup>

9. *Verizon 6 MSA Forbearance Order*. On September 6, 2006, Verizon sought certain forbearance relief in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.<sup>36</sup> Specifically, Verizon sought relief from dominant carrier regulation of its mass market switched access services,<sup>37</sup> from section 251(c)(3) loop and transport unbundling obligations,<sup>38</sup> and from all *Computer III* obligations (e.g., ONA and CEI requirements).<sup>39</sup> On December 4, 2007, the Commission found that the record evidence did not satisfy the section 10 criteria for forbearance and therefore denied the requested relief in the six MSAs.<sup>40</sup> In particular, among other factors, the Commission found that the record did not establish the existence of sufficient facilities-based competition to warrant forbearance.<sup>41</sup>

10. *Qwest Terry, Montana Forbearance Order*. On January 22, 2007, Qwest filed a petition seeking forbearance from section 251(c), 271(c), and from otherwise regulating Qwest as an incumbent LEC in the Terry, Montana local exchange.<sup>42</sup> On April 21, 2008, the Commission granted Qwest's petition for forbearance from certain requirements of sections 251(c), 271(c), and 252, and otherwise denied the petition.<sup>43</sup> The competitive situation in the Terry exchange was unique. The Commission found that the sole competitors in the Terry exchange are Qwest and Mid-River Telephone Cooperative, Inc. (Mid-Rivers), and that there was little potential for additional competitive entry.<sup>44</sup> Qwest and Mid-Rivers each has its own independent network in this market, and both were treated as incumbent LECs for

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<sup>35</sup> *Id.* at 16307, para. 4.

<sup>36</sup> *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1.

<sup>37</sup> Verizon sought forbearance from the following: tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. See *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1 n.4 (citing 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04, 63.60-66).

<sup>38</sup> *Id.* at 21294, para. 1 n.5 (citing 47 C.F.R. § 51.319(a), (b), (e)).

<sup>39</sup> *Id.* at 21294, para. 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 21307-08, para. 27 (dominant carrier analysis), 21312, para. 36 (UNE analysis); see also *id.* at 21318-19, para. 45 (finding insufficient evidence to demonstrate that Verizon no longer possesses exclusionary market power and therefore denying forbearance from *Computer III* requirements). In declining to forbear from unbundling obligations, the Commission found evidence that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers, and therefore concluded that "future relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs." See *id.* at 21312, para. 36.

<sup>42</sup> See 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 (filed Jan. 22, 2007).

<sup>43</sup> *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*).

<sup>44</sup> As the Commission stated in the *Qwest Terry Forbearance Order*, there are only a few hundred access lines in Terry, Montana and the nearest city is approximately 200 miles away. See *id.* at 7264, para. 13 n.45.

purposes of section 251.<sup>45</sup> In granting Qwest forbearance from unbundling obligations, the Commission relied in part on evidence that Mid-Rivers serves approximately 93 percent of the access lines in the Terry exchange, was capable of serving the entire exchange over its own facilities,<sup>46</sup> and did not rely on UNEs from Qwest to provide service in this market.<sup>47</sup>

### III. DISCUSSION

11. Based on the record evidence filed in this proceeding, we find that granting the Qwest Petitions for forbearance would not be consistent with section 10 of the Act. Specifically, we find that the criteria of section 10 are not satisfied with regard to forbearance from the relevant dominant carrier requirements, UNE requirements, and *Computer III* obligations. We therefore deny the four Qwest Petitions in their entirety.<sup>48</sup>

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<sup>45</sup> See *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to Be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Report and Order, 21 FCC Rcd 11506, 11509, para. 8 (2006) (*Mid-Rivers Order*) (determining that Mid-Rivers, among other things had “substantially replaced” Qwest in the Terry exchange under section 251(h)(2), and thus should be treated as an incumbent LEC for the purposes of section 251 in that market). In the *Mid-Rivers Order*, the Commission also determined that Qwest lacks market power in the Terry exchange and should be treated as a non-dominant carrier for its interstate telecommunications services in that exchange. *Id.* at 11519, 11521, paras. 29, 34 (permitting Qwest for purposes of administrative convenience to continue to operate pursuant to dominant carrier regulation if it elected to do so).

<sup>46</sup> See *Qwest Terry Forbearance Order*, 23 FCC Rcd at 7264-66, paras. 13, 17-18.

<sup>47</sup> See *id.* at 7266, para. 17.

<sup>48</sup> We deny the requests of some commenters asking the Commission to establish a “complete when filed” policy and, on that basis, dismiss the 4 Qwest Petitions in their entirety. See CLEC Group Comments at 2 (stating that the Commission should establish a “complete when filed” policy similar to that adopted in the section 271 proceedings); Covad Comments at 15 (claiming that Qwest’s petitions should be evaluated and judged by the Commission as they were presented by Qwest at the time of filing); New Jersey Rate Counsel Reply at 1. These commenters in effect are seeking the adoption of new procedural rules to govern forbearance proceedings. The Commission currently is examining whether to adopt new procedural rules for forbearance proceedings and we believe that any new procedural rules would better be addressed in that context. *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Notice of Proposed Rulemaking, 22 FCC Rcd 21212 (2007). We also deny Qwest’s “Petition to Modify Protective Order,” which was filed on June 29, 2007. See Qwest’s Petition to Modify Protective Order, WC Docket No. 07-97 (filed June 29, 2007); see also *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, Order, 22 FCC Rcd 10129 (WCB 2007) (*Qwest 4 MSA First Protective Order*); *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, Second Protective Order, 22 FCC Rcd 10134 (WCB 2007) (*Qwest 4 MSA Second Protective Order*). Although Qwest asks the Commission to allow parties to proceed under the *Qwest 4 MSA First Protective Order* and to revoke the *Qwest 4 MSA Second Protective Order* adopted in this proceeding, we see no reason to do so. A number of parties have relied on the *Qwest 4 MSA Second Protective Order* when submitting highly confidential material in this proceeding and we find that any changes to the *Qwest 4 MSA Second Protective Order* may put sensitive information at risk and would likely discourage parties from submitting sensitive proprietary information to the Commission in future proceedings. See *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21300, para. 13 n.42. We also dismiss Qwest’s motion objecting to the disclosure of confidential information to Integra Telecom Inc.’s (Integra) Chief Executive Officer pursuant to the *Qwest 4 MSA First Protective Order*. See Qwest’s “Motion to Object to the Disclosure of Qwest’s Confidential Information to the Chief Executive Officer of Integra Telecom,” WC Docket No. 07-97 (filed June 19, 2007); Integra Telecom, Inc.’s “Reply to Objection,” WC Docket No. 07-97 (filed Aug. 1, 2007). If an appropriate motion is filed within a procedurally proper period of time, both protective orders in this proceeding prohibit the disclosure of confidential or highly confidential information to the person who is the subject (continued....)

### A. Forbearance Standard

12. 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.<sup>49</sup> In making such determinations, the Commission also must consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."<sup>50</sup>

### B. Application of the Section 10 Forbearance Criteria

13. In this section, we evaluate Qwest's forbearance requests under the statutory criteria of section 10(a) of the Act.<sup>51</sup> Forbearance is warranted under section 10(a) only if all three elements of the

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of the objection prior to a decision by the Commission that would permit such disclosure. See *Qwest 4 MSA First Protective Order*, 22 FCC Rcd at 10130, para. 3(b); *Qwest 4 MSA Second Protective Order*, 22 FCC Rcd at 10137, para. 10. Neither Qwest nor Integra has filed any additional information regarding this dispute since August 1, 2007, and Dudley Slater, the CEO of Integra, has participated in this proceeding. See Letter from Russell C. Merbeth, Assistant General Counsel for Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed June 13, 2008) (stating that the CEO of Integra participated in meetings with the Commissioners on June 11, 2008 and June 12, 2008). We therefore find no reason at this stage of the proceeding to address the merits of Qwest's motion. See also Qwest's Motion to Object to the Disclosure of Qwest's Confidential Information to the Director – Interconnection of New Edge Networks an EarthLink Company, WC Docket No. 07-97 (filed July 6, 2007); Qwest's Withdrawal of Motion to Object to the Disclosure of Qwest's Confidential Information to the Director – Interconnection of New Edge Networks an EarthLink Company, WC Docket No. 07-97 (filed July 18, 2007).

<sup>49</sup> 47 U.S.C. § 160(a). We note that section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or section 271 unless it determines that those requirements are "fully implemented." 47 U.S.C. § 160(d). In the *Qwest Omaha Forbearance Order*, the Commission determined that, for purposes of section 10(d), the requirements of section 251(c) and 271(c) are fully implemented nationwide and may be forborne from. See *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19439-42, paras. 51-56. The D.C. Circuit affirmed the Commission's interpretation, see *Qwest Corp. v. FCC*, 482 F.3d at 477-79, and we therefore reject commenters' requests to revisit the Commission's interpretation of "fully implemented" in this proceeding. See, e.g., Arizona Commission Comments at 17-18; COMPTEL Opposition at 10-17; Arizona Commission Reply at 27; Covad Reply at 24-26.

<sup>50</sup> 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).

<sup>51</sup> See 47 U.S.C. § 160(a). We reject New Jersey Rate Counsel's argument that exercise of the Commission's forbearance authority pursuant to section 10 of the Act violates the Separation of Powers provision, the Equal Protection Clause, and the Tenth and Eleventh Amendments of the U.S. Constitution. See New Jersey Rate Counsel Comments at 6-7; New Jersey Rate Counsel Reply at 9. As we held in previous orders in response to this same argument, the New Jersey Rate Counsel makes no attempt to develop this argument, and we find the assertion insufficient to call into question the constitutionality of section 10. See *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19487, para. 15 n.60 (2007), *pet. for review pending*, No. 07-1452 (D.C. Cir. filed Nov. 5, 2007); *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, 5232, para. 49 n.139 (2007) (*Qwest Section 272 Sunset Forbearance Order*). We also disagree with, and find a similar lack of support for New Jersey Rate Counsel's argument that section 10 proceedings may only lawfully be decided in a formal adjudication or hearing. New Jersey Rate Counsel Reply at 4-5.

forbearance criteria are satisfied.<sup>52</sup> The Commission previously has evaluated requests for relief similar to that sought by Qwest in the *Qwest Omaha Forbearance Order*, the *ACS UNE Forbearance Order*, the *ACS Dominance Forbearance Order*, and the *Verizon 6 MSA Forbearance Order*, and the analytical framework established in that precedent guides our actions here.<sup>53</sup>

## 1. Forbearance Analysis for Dominant Carrier Regulation

### a. Threshold Market Analysis

#### (i) Services for Which Forbearance Is Requested

14. Qwest seeks identical forbearance relief in each of the four petitions at issue in this proceeding. Specifically, Qwest seeks forbearance from the following dominant carrier regulations to the extent they apply to its interstate mass market and enterprise switched access services:<sup>54</sup> tariffing requirements and price cap regulation, as well as dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control.<sup>55</sup>

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<sup>52</sup> 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). As the Commission previously has held, it would be appropriate to deny a petition for forbearance even if only one of the three prongs of section 10(a) is not satisfied. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125, para. 12 (2007), *pet. for review pending*, No. 07-1381 (D.C. Cir. filed Sept. 20, 2007).

<sup>53</sup> The Commission's forbearance analysis is a fact-based inquiry that relies on factors unique to the markets under consideration. See *ACS UNE Forbearance Order*, 22 FCC Rcd at 1963, para 9, n.28; *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19417, para. 2, n.4 & 19423, para. 14, n.46; see also Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 1 (filed June 11, 2008) (Cox June 11, 2008 *Ex Parte* Letter) (arguing that the Commission should continue to require that petitioners show how market conditions justify forbearance for each rule). The decision we reach today is based on the present record and our precedent.

<sup>54</sup> Several parties argue that the market for small business services is sufficiently different from the market for residential services and that the Commission should analyze them differently. In the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order*, however, the Commission divided its analysis of switched access services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). See Arizona Commission Comments at 2, 12-13; CLEC Group Reply at 8; *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19427, para. 22; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318, para. 27. We see no reason to depart from our forbearance precedent based on the record in this proceeding, and we thus will use the same product categories in our dominant carrier forbearance analysis as in those prior decisions. Furthermore, some parties claim that cable providers do not offer a stand-alone local service product and instead offer only bundled products. According to these parties, because cable companies do not offer services in all product markets, Qwest's Petitions do not meet the criteria for granting forbearance. See Colorado Office of Consumer Counsel Comments at 24; Covad Reply at 16; New Jersey Rate Counsel Reply at 12. Contrary to these claims, Cox, for example, in Arizona does offer stand-alone local services. See, e.g., <http://www.cox.com/arizona/phone.asp> (visited July 21, 2008). Moreover, our dominant carrier forbearance analysis is merely informed by our traditional market power analysis, and given our inclusion of competition from cable operators in prior forbearance decisions, we are not persuaded to deviate from that approach here.

<sup>55</sup> See, e.g., Qwest Denver Petition at 3 nn.3-5; Qwest Minneapolis-St. Paul Petition at 3-4 nn.3-5; Qwest Phoenix Petition at 3 nn.3-5; and Qwest Seattle Petition at 3-4 nn.6-8; see also 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-49, 61.58, 61.59, 63.03, 63.04. Qwest later clarified it seeks relief "for both mass market and enterprise switched access services." Qwest has not sought forbearance for its special access services in this proceeding. See Qwest June 13, 2008 *Ex Parte* Letter at 2; see also Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 (filed June 26, 2008) (Qwest June 26, 2008 *Ex Parte* Letter) (stating that "Qwest is not seeking special access relief in this docket"). Therefore, there is no need to (continued....)

**(ii) Geographic Scope of Analysis**

15. Qwest seeks forbearance from dominant carrier regulation of its mass market and enterprise switched access services in the following geographic areas: (1) the Qwest wire centers located within the Denver-Aurora MSA (Denver MSA), except for the Fairplay wire center for which Qwest does not seek relief; (2) the 64 Qwest wire centers located within the boundaries of the Phoenix-Mesa-Scottsdale MSA (Phoenix MSA); (3) the 26 Qwest wire centers located within the boundaries of the Seattle-Bellevue-Everett Metropolitan Division (Seattle MSA);<sup>56</sup> and (4) the 58 Qwest wire centers located within the boundaries of the Minneapolis-St. Paul-Bloomington MSA (Minneapolis-St. Paul MSA).<sup>57</sup> For purposes of analyzing dominant carrier regulation of Qwest in this proceeding, we define the relevant geographic market to be the specific areas identified by Qwest within these four MSAs. As indicated in the Commission's precedent, we perform our forbearance analysis on the geographic basis requested by the petitioner unless the record indicates compelling reasons to narrow it.<sup>58</sup> We find no such evidence here, and thus evaluate each of Qwest's mass market and enterprise switched access forbearance requests on the basis of the specific market areas described above.<sup>59</sup>

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address commenters' arguments regarding whether forbearance for Qwest's special access services is warranted. *See, e.g.*, EarthLink Comments at 44; T-Mobile Reply at 3 (stating that the Qwest Seattle Petition "could be construed as seeking forbearance from special access regulations").

<sup>56</sup> The U.S. Census Bureau has divided the Seattle-Takoma-Bellevue, WA MSA into two Metropolitan Divisions: Seattle-Bellevue-Everett (King and Snohomish counties) and Tacoma (Pierce County). *See* U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table C-1, Metropolitan Areas with Component Counties – Population and Population Characteristics, available at <http://www.census.gov/prod/2006pubs/smadb/smadb-06tablec.pdf> (visited July 21, 2008).

<sup>57</sup> *See* Qwest June 13, 2008 *Ex Parte* Letter at 1 (clarifying the scope of Qwest's petitions); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Denver Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter); Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 1 (filed Apr. 22, 2008) (Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter). As stated above, for convenience, we refer to the 4 geographic markets for which Qwest seeks forbearance in this proceeding as "MSAs," even though the areas Qwest identifies in each case is more limited than an MSA. *See* U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table B-1, Metropolitan Areas – Area and Population, available at <http://www.census.gov/prod/2006pubs/smadb/smadb-06tableb.pdf> (visited July 21, 2008) (listing MSAs). We therefore generally do not invoke the technical meaning of "MSA" when using that term in this Order. The Denver, Minneapolis-St. Paul, Phoenix and the Seattle MSAs are among the most populous in the nation. The corresponding rankings are, respectively: 22nd, 16th, 14th, and 15th. U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, Table E-13, Metropolitan Area Rankings – Population Indicators (MSA Rankings), available at <http://www.census.gov/prod/2006pubs/smadb/smadb-06appe.pdf> (visited July 21, 2008).

<sup>58</sup> *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19428, para. 24; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16320, para. 32; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21304, para. 22.

<sup>59</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19445, para. 61 n.161 (stating that "[w]e are under no statutory obligation to evaluate Qwest's Petition other than as pled"). We decline to accept the recommendation of the Arizona Commission that, within the Phoenix MSA, the Commission's dominant carrier analysis should be conducted for each zip code or, in the alternative, each wire center. *See, e.g.*, Arizona Commission Reply at 7-10. The most reliable competitive data in the record are MSA-level data, which we have found sufficiently granular to evaluate forbearance from dominant carrier regulation of switched access services in prior orders.

**(iii) Marketplace Competitors**

16. We find that Qwest is subject to competition in the four MSAs from both intra- and intermodal competitors.<sup>60</sup> The record indicates that a number of competitive LECs (*i.e.*, intramodal competitors) compete with Qwest for mass market and enterprise customers in certain subsections of the four MSAs. The evidence also shows, however, that, in serving mass market and enterprise customers, these intramodal competitors rely significantly on access to Qwest's last-mile network facilities, including UNEs, and Qwest's other wholesale services in all four MSAs.<sup>61</sup> We also find that, in these four MSAs, Qwest is subject to intermodal competition, particularly from cable operators, primarily for residential services.<sup>62</sup> We do not include providers of "over-the-top" or nomadic voice over Internet Protocol (VoIP) services in our competitive analysis because there are no data in the record that justify finding that these providers offer close substitute services.<sup>63</sup>

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<sup>60</sup> See, e.g., Qwest Denver Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 13-31 (Qwest Denver Brigham/Teitzel Decl.); Qwest Minneapolis-St. Paul Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 13-34 (Qwest Minneapolis-St. Paul Brigham/Teitzel Decl.); Qwest Phoenix Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 14-31 (Qwest Phoenix Brigham/Teitzel Decl.); Qwest Seattle Petition, Joint Declaration from Robert H. Brigham and David L. Teitzel, Attach. at paras. 14-34 (Qwest Seattle Brigham/Teitzel Decl.).

<sup>61</sup> Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Denver May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008), corrected by errata (filed May 5, 2008) (Qwest Phoenix May 2, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 7 (filed May 2, 2008) (Qwest Seattle May 2, 2008 *Ex Parte* Letter); AdHoc Comments, Declaration of Lee L. Selwyn (AdHoc Selwyn Decl.) Attach. A at paras. 26-27; CLEC Group Comments at 20-21, 33-38, 54-55; COMPTTEL Opposition at 33.

<sup>62</sup> See AdHoc Selwyn Decl. at paras. 2-3; Arizona Reply at 14 (stating that "the Residential Market is competitive but dominated by two providers: Qwest and Cox" and that there is little evidence to suggest increasing competition from other providers); Colorado Commission Comments at 20-23; CLEC Group Reply at 14-16; Comcast Comments at 6; Letter from J.G. Harrington, Counsel to Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 3-5 (filed June 17, 2008) (Cox June 17, 2008 *Ex Parte* Letter).

<sup>63</sup> See, e.g., *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, 18479-81, paras. 87-89 (2005) (*Verizon/MCI Merger Order*). We do, however, include in our analysis competition from entities that utilize VoIP technology to provide voice services to their customers over their own network facilities – that is, providers of "fixed" VoIP service, including cable operators and Qwest itself. See, e.g., Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Denver May 20, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Phoenix May 20, 2008 *Ex Parte* letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. 8 (filed May 20, 2008) (Qwest Seattle May 20, 2008 *Ex Parte* Letter). Although Qwest suggests that the Commission should include system integrators in our competitive analysis, we decline to do so because, as noted by some parties, there is no MSA-specific data in the record, it is unclear to what extent system integrators use Qwest facilities, and it may be that Qwest is more appropriately characterized as a partner of the system integrators than as a competitor. See Qwest Denver Petition at 24-26; Qwest Minneapolis-St. Paul Petition at 25-26; Qwest Phoenix Petition at 25-26; Qwest Seattle Petition at 24-26; see also COMPTTEL Opposition at 44-45; Cox Comments at 18.

**(iv) Market Share Calculations**

17. Many commenters have addressed how the Commission should calculate market share for purposes of this proceeding. The approach we adopt in this order is consistent with the Commission's methodology in past proceedings.<sup>64</sup>

**(a) Mass Market Switched Access**

18. *Wireline Households*. In support of its petitions, Qwest submitted actual line count data for its own retail switched access lines, data regarding its fixed VoIP subscribers, and line count data regarding its competitors' retail lines provisioned through reliance on Qwest's wholesale last-mile facilities.<sup>65</sup> Qwest disaggregated these retail and wholesale line counts by residential and business customers. We rely on Qwest's data as the most reliable evidence of its competitive presence and find, consistent with the *Qwest Omaha* line of precedent, that the data Qwest has submitted regarding residential customers are a reasonable proxy for the number of mass market switched access customers in each of the four MSAs at issue.<sup>66</sup> In addition, Qwest submitted white page listing data to estimate the

<sup>64</sup> See, e.g., *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21323, App. B; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175; *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*, WC Docket No. 06-120, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16461-63, paras. 41-42 & App. B (2007) (*Section 272 Sunset Order*); *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5225-27, para. 34-35; *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5719-20, para. 107 (2007) (*AT&T/BellSouth Merger Order*); *Verizon/MCI Merger Order*, 20 FCC Rcd at 18484-89, para. 103. The formulas used to calculate market shares for purposes of this order are set forth in Appendix B. As we have done in the past, we include resellers and competitive lines provisioned via Qwest's UNE-P replacement service in our market share calculations (the Qwest Platform Plus (QPP) and Qwest Local Services Platform (QLSP) products). Resale and QPP/QLSP lines historically have been a way for competitors to enter the market, are currently used as a competitive option, and will continue to be available after today's order. Furthermore, the Commission has included resale and QPP/QLSP lines when calculating the incumbent LEC's market share in prior forbearance orders. In any event, there is only a small number of QPP/QLSP and resold lines here and excluding them from the calculation would not significantly affect the market share. See, e.g., Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Covad *et al.* May 15, 2008 *Ex Parte* Letter); Joseph Gillan White Paper, *The Irrelevance of Resale and RBOC Commercial Offers to Competitive Activity in Local Markets*, Attach. at 1 (arguing that a competitive LEC "using resale or a Commercial Offer cannot meaningfully discipline ILEC exercises of market power to increase prices to the detriment of consumers"); Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Group *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8, 12-13 (Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter).

<sup>65</sup> Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 5 & Exh. 2 (filed Mar. 10, 2008) (Qwest Denver Mar. 10, 2008 *Ex Parte* Letter) (Qwest's line count estimates as of December 2007); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 & Exh. 2 (filed Mar. 14, 2008) (Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter) (same); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 & Exh. 2 (filed Mar. 10, 2008) (Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter) (same); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 5 & Exh. 2 (filed Mar. 5, 2008) (Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter) (same); Qwest Denver May 20, 2008 *Ex Parte* Letter, Attach. 8 (Qwest's fixed VoIP subscriber counts as of December 2007); Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Phoenix May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Seattle May 20, 2008 *Ex Parte* Letter, Attach. 8 (same).

<sup>66</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19430, para. 28 n.78. As the Commission explained in the *Qwest Omaha Forbearance Order* in a similar situation, because Qwest and other parties submitted their customer (continued....)

number of competitive wireline residential access lines that do not rely on Qwest's wholesale services.<sup>67</sup> For purposes of this proceeding, we find Qwest's white page listing data, although an inexact estimate, are a reasonable proxy for the number of total residential access lines in service.<sup>68</sup> Therefore, in accord with the Commission's precedent, we rely on these data to estimate market shares in the Denver, Minneapolis-St. Paul, and Seattle MSAs.<sup>69</sup> For the Phoenix MSA, Cox submitted its actual access line counts.<sup>70</sup> Due to the lack of record evidence of substantial additional competition for residential customers in the Phoenix MSA from competitive LECs using self-provisioned last-mile facilities, we find no reason to rely on Qwest's white page listing data in the Phoenix MSA.

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data grouped in categories of "residential" customers and "business" customers, and because the economic considerations that lead to the provision of service to a residential customer are similar to the economic considerations that lead to the provision of service to a very small business customer, we find it reasonable to treat the data submitted in this proceeding regarding residential customers as a proxy for the number of mass market customers served by each carrier. *See id.*; *see also Section 272 Sunset Order*, 22 FCC Rcd at 16461, para. 40 n.115 ("Our analysis of concentration in the mass market relies upon data for residential customers because of the administrative difficulty of distinguishing small business data from data for other classes of businesses."). The methodology we adopt in this order to calculate market shares also avoids an issue raised by commenters that white page listings do not include all competitive activity in the small business sector. *See Covad et al. Apr. 24, 2008 Ex Parte Letter* at 11.

<sup>67</sup> Qwest Denver Mar. 10, 2008 *Ex Parte Letter* at 6 (Qwest's white page estimates as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte Letter* at 11 (same); Qwest Phoenix Feb. 21, 2008 *Ex Parte Letter* at 5 (same); Qwest Seattle Mar. 5, 2008 *Ex Parte Letter* at 6 (same).

<sup>68</sup> We disagree that some adjustments Qwest proposes would improve the accuracy of the white page listings. Specifically, (1) Qwest begins with all white page listings that have an NPA/NXX associated with a rate center that is at least partly within one of the 4 MSAs at issue; (2) Qwest then divides the total number of residential listings by [REDACTED]; (3) Qwest then multiplies the prior figure by the percentage of facilities-based lines that it believes are provided by cable telephony providers in the MSA. *See Qwest Denver Apr. 22, 2008 Ex Parte Letter*, Attach. 4; *Qwest Minneapolis-St. Paul Apr. 22, 2008 Ex Parte Letter*, Attach. 4; *Qwest Phoenix Apr. 22, 2008 Ex Parte Letter*, Attach. 4; *Qwest Seattle Apr. 22, 2008 Ex Parte Letter*, Attach. 4. We find certain of Qwest's assumptions highly questionable, and in any event not in accord with the approach the Commission has used previously when relying on white page listings to estimate the number of residential access lines in a market. *See, e.g., CLEC Group Reply* at 21; *Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1* (filed May 18, 2008) (*Cbeyond et al. May 15, 2008 Ex Parte Letter*).

<sup>69</sup> We clarify that, in accord with the Commission's precedent and the methodology Qwest has followed in prior proceedings, we count each white page listing as a single residential access line in service for purposes of our residential market share calculations. *See, e.g., Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5218 para. 17 n.62 (treating each white page listing as a single residential access line); *Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-333, Attach. 1f* (same) (filed Jan. 10, 2007). We disagree that Qwest's white pages listing data submissions raise concerns under Section 222(b). *See, e.g., CLEC Group Reply* at 19-21. White page listings are "subscriber list information" under the Act, which Qwest submitted as aggregated data. 47 U.S.C. § 222(h)(2)-(3).

<sup>70</sup> *See Cox June 17, 2008 Ex Parte Letter*, Attach. at 3-5. We find that the other market share estimates in the record are based on incomplete data or data that appear not to be fully up-to-date. *See Colorado Office of Consumer Counsel* at 9, Exhs. 2 & 3 (providing data from a survey conducted in 2005 and 2006). The Arizona Commission also provided market shares but it is unclear what timeframe they reflect and whether the estimates are based on actual line data. *See, e.g., Arizona Commission Reply* at 10-17; *Qwest June 26, 2008 Ex Parte Letter* at 5 (stating that Qwest is "unaware of Cox producing any such data to the ACC at any time in the last year in any regulatory docket").

19. *Mobile Wireless-Only Households*. In calculating market shares, we believe it is appropriate to include wireless-only households (*i.e.*, residential telephone customers who have “cut the cord”).<sup>71</sup> In particular, we find 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. Over the past several years, as wireless substitution rates have continued to rise, the Commission has begun including such intermodal substitution in its competitive analyses of the local services market.<sup>72</sup>

20. We recognize, as certain commenters have argued, that mobile wireless service and wireline telephone services are not perfect substitutes.<sup>73</sup> As the Commission stated in the *Competitive ETC Order*, “the majority of households do not view wireline and wireless services to be direct substitutes” and most households purchase mobile wireless telephony service in addition to a customer’s existing wireline service.<sup>74</sup> We therefore limit the inclusion of mobile wireless services in our competitive analysis, and include such services only to the extent a household has elected to forgo wireline telephone service, rather

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<sup>71</sup> Qwest Denver Mar. 10, 2008, *Ex Parte* Letter at 4; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 8; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 2; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 4; *see also* Letter from Christopher M. Heimann, Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed July 18, 2008) (AT&T July 18, 2008 *Ex Parte* Letter) (noting the rapidly growing number of wireless consumers that have “cut the cord”).

<sup>72</sup> *See, e.g., Verizon/MCI Merger Order*, 20 FCC Rcd at 18481-83, paras. 90-91; *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, 18340-42, para. 89-90 (2005) (*SBC/AT&T Merger Order*); *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5711, 5714-15, paras. 90, 95-96. The Commission also included wireless-only households in its market share calculations of bundled local and long distance services in the section 272 sunset proceedings. *See Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5226-27, para. 35; *Section 272 Sunset Order*, 22 FCC Rcd at 16462-63, para. 42. Although the Commission did not include wireless-only households in its mass market switched access market share calculations in the *Qwest Omaha* and *ACS Dominance* forbearance proceedings, the records in those proceedings did not include any data that justified including such services in the analysis. *See Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19452, para. 72; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318-19, para. 28.

<sup>73</sup> *See, e.g.,* Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6 (filed May 7, 2008) (Cbeyond May 7, 2008 *Ex Parte* Letter) (stating that a recent Verizon survey found that “83% of respondents intend to continue to use their landline home phone indefinitely”); Letter from Brad Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed Apr. 22, 2008) (Covad *et al.* Apr. 22, 2008 *Ex Parte* Letter), Attach. 1, Kent W. Mikkelsen White Paper, Mobile Wireless Service to “Cut the Cord” Households in FCC Analysis of Wireline Competition (Mikkelsen White Paper); Letter from Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8 (filed June 12, 2008). As the Mikkelsen White Paper admits, there is no recent empirical study that specifically considers the type of substitution at issue here. We are not persuaded by the purportedly analogous evidence the Mikkelsen White Paper offers in support of completely excluding mobile wireless services from the relevant product market, including a paper by Rodini, Ward and Woroch. *See* Mikkelsen White Paper at 4; Mark Rodini, Michael R. Ward, and Glenn A. Woroch, *Going Mobile: Substitutability Between Fixed and Mobile Access*, 27 TELECOMM POLICY 457, 457-76 (2003) (Rodini/Ward/Woroch Paper). For instance, as the authors of the Rodini/Ward/Woroch Paper state, their focus was on a household’s decision to subscribe to mobile wireless service in lieu of a *second* fixed line and that their data were not “rich enough to estimate the cross-elastic effect from wireless price changes on the decision to subscribe to any fixed line.” *Id.* at 465, 470. We also find the results of the Rodini/Ward/Woroch Paper provide little evidence of current conditions because that study relied on 2000-2001 data and fewer than 2 percent of the sample participants had “cut the cord.” *Id.* at 470.

<sup>74</sup> *High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, Order, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, 8843-44, paras. 19-21 (2008) (*Competitive ETC Order*) (adopting an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (ETCs) may receive).

than use mobile wireless services only as a complement to wireline telephony services. We believe this approach reasonably approximates the extent to which residential telephony customers view mobile wireless and wireline services as substitutes, and is the approach most consistent with the Commission's precedent.<sup>75</sup>

21. Finally, although various commenters suggest that we rely on the national wireless-only household data published by the Center for Disease Control (CDC) or the more localized information provided by Telephia,<sup>76</sup> we decline to do so. First, as explained below, with respect to every MSA but Phoenix, our decision to include or not include these data are not outcome determinative. Second, with respect to the CDC data, we believe it is most consistent with our geographically-specific analysis in the *Qwest Omaha* line of precedent to rely on a similarly geographically-specific measure of wireless substitution.<sup>77</sup> In the present context, Qwest seeks regulatory relief for particular MSAs based on the specific competitive conditions in those markets, but the CDC estimates and the record generally do not contain reliable data of this type. Third, and most importantly, even if we were to consider the CDC or Telephia data, we could not determine with any degree of confidence that the statutory criteria for granting forbearance would be met. For example, Qwest's submission of geographically-specific data regarding the measure of wireless substitution in the four MSAs primarily consists of information Telephia published based on some sort of survey conducted of the wireless-only household rate in specific market areas, including the Denver, Phoenix, Minneapolis-St. Paul, and Seattle metropolitan areas.<sup>78</sup> If we were to rely on the Telephia data, Qwest's market share would be approximately

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<sup>75</sup> See, e.g., *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5711, 5715, paras. 90, 96 (stating that "for certain categories of customers, mobile wireless service is viewed as a close substitute to wireline local service" and that "[e]ven if most segments of the mass market are unlikely to rely solely upon wireless services instead of wireline local services today, our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis") (footnote omitted).

<sup>76</sup> See Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed May 15, 2008) Attach., Centers for Disease Control, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007, Table 1 (*CDC Wireless Estimates*) (reporting that as of December 2007, 15.8 percent of households nationally have at least one mobile wireless phone but no wireline phone, a significant increase since December 2004 when the estimate was 6 percent); Covad *et al.* Apr. 22, 2008 *Ex Parte* Letter, Attach. 2, Joseph Gillan White Paper, Properly Estimating the Size of the Wireless-Only Market at 1 (*Gillan White Paper*).

<sup>77</sup> Where the Commission has relied on national estimates of wireless substitution, it has been to evaluate market conditions throughout a BOC's franchise area within a state in a context where the BOC was seeking a single result over a very wide geographic area. See, e.g., *Verizon/MCI Merger Order*, 20 FCC Rcd at 18481-83, 18488, paras. 90-91, 103; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18340-42, 18347, paras. 89-90, 102; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5714-15, 5719-20, paras. 95-96, 107; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5226-27, para. 35; *Section 272 Sunset Order*, 22 FCC Rcd at 16462-63, para. 42. In the *Verizon 6 MSA Order*, the Commission found that even assuming *arguendo* that the relevant estimate of wireless substitution in the markets at issue was equal to that of the CDC's national wireless substitution estimate, competition in those MSAs was not yet sufficiently extensive to warrant the requested forbearance. See, e.g., *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21308, para. 27. See also, e.g., *infra* para. 27 (citing Qwest's estimated market shares in the Denver, Minneapolis-St. Paul, and Seattle MSAs even assuming *arguendo* that the CDC's national wireless-only household data are the appropriate measures of wireless substitution). By determining that forbearance was unwarranted even under an approach favorable to the petitioner, the Commission was not endorsing the use of a national estimate of wireless substitution as *sufficient* to support forbearance in all future forbearance proceedings. In any event, the evidence of significant demographic variations in wireless substitution was directly raised in the record of this proceeding, and the Commission's analysis thus accounts for that evidence.

<sup>78</sup> See, e.g., Qwest Denver Brigham/Teitzel Decl. at para. 38 & Exh. 5 (attaching the Telephia news release); Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 41 & Exh. 5 (same); Qwest Phoenix Brigham/Teitzel Decl. at para. 30 & Exh. 5 (same); Qwest Seattle Brigham/Teitzel Decl. at para. 41 & Exh. 5 (same). In addition, on July 21, (continued....)

[REDACTED] percent in the Phoenix MSA, which, in conjunction with other evidence, likely would be sufficient to grant forbearance under the Commission's precedent.<sup>79</sup> However, the only substantive information in the record regarding the Telephia survey is a news release that does not describe Telephia's methodology or provide any other information to support the significance of the data. To the contrary, the news release states that the "[d]ifferences in wireless penetration rates between cities may not be statistically significant."<sup>80</sup> Thus, the margin of error in such a survey alone would not allow us to draw any firm conclusion as to whether the criteria had been met. Reliance on the CDC survey is similarly problematic, as the CDC regional and metropolitan estimates present methodological problems, yielding inconclusive results.<sup>81</sup> For instance, if we were to rely on CDC's regional wireless substitution estimate for the "West" – which CDC defines to include Arizona, and hence, the Phoenix MSA – Qwest's market share would be approximately [REDACTED] percent in the Phoenix, MSA.<sup>82</sup> However, we find that the geographic subcategories in the CDC survey are not sufficiently disaggregated for purposes of evaluating competition in particular MSAs. Additionally, with respect to CDC's metropolitan estimates, we find significant evidence in the record that the wireless substitution rate varies substantially depending on differences between urban and rural areas.<sup>83</sup> Finally, in terms of methodology, the CDC estimates regional wireless substitution by adults, rather than households; if we relied on these estimates in our market share calculations, we could overstate the percentage of wireless-only households, suggesting that forbearance might not be warranted in the Phoenix MSA under our precedent. In any event, the measure of wireless substitution by adults is not consistent with the other competitive data in the record, nor with the data the Commission has relied upon in prior proceedings. Nor does the record reveal a reliable methodology for adapting these data for use in evaluating competition in particular MSAs.<sup>84</sup> The record also contains additional arguments and estimates of the appropriate measure of wireless substitution, though no estimates that are not subject to concerns similar to those identified above.

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2008, Qwest submitted a letter claiming that Nielsen Mobile has conducted research indicating that the wireless only household rate in the Phoenix MSA is [REDACTED] percent. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed July 21, 2008) (attaching letter from Eric Fogle, a vice president of Nielsen Mobile). We are unable to find this estimate reliable on the present record in part because Qwest's submission does not describe Nielsen Mobile's methodology or provide any other information to support the significance of the data. *See* Letter from Thomas Jones *et al.*, Counsel for Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 23, 2008) (arguing, among other things, that the methodology of such studies must be transparent on the record to permit the Commission and interested parties to test the accuracy, completeness and reliability of the data).

<sup>79</sup> Under this approach, we would not have sufficient basis under the criteria of section 10 to grant Qwest relief in the other 3 MSAs. *See infra* para. 27.

<sup>80</sup> *See* Qwest Denver Brigham/Teitzel Decl. Exh. 5 at 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 5 at 4; Qwest Phoenix Brigham/Teitzel Decl. Exh. 5 at 6; Qwest Seattle Brigham/Teitzel Decl. Exh. 5 at 7. We also reject certain commenters' reliance on geographic or demographic subcategories of data from the CDC study. *See Gillan White Paper* at 4-7; Letter from Brad E. Mutschelknaus and Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Covad *et al.* July 2, 2008 *Ex Parte* Letter).

<sup>81</sup> *See supra* note 76.

<sup>82</sup> The CDC defines the West region to include Washington, Oregon, California, Nevada, New Mexico, Arizona, Idaho, Colorado, Montana, Wyoming, Alaska and Hawaii. *See* CDC Report, Table 2, n.5.

<sup>83</sup> *See CDC Wireless Estimates*, Table 2; *see also SBC/AT&T Merger Order*, 20 FCC Rcd at 18341, para. 90.

<sup>84</sup> We reject an attempt to adjust the CDC's regional estimate from "the percentage of adults in wireless-only households" to a "percentage of households." Covad *et al.* July 2, 2008 *Ex Parte* Letter at 3. The methodology the commenters used is apparently based on conversations with CDC staff and is not sufficiently supported on the record. *See id.* at 4 n.8.

22. For these reasons, Qwest has not sufficiently supported its case for forbearance on the basis of reliable, geographically-specific data regarding the measure of wireless substitution in the four MSAs.<sup>85</sup> We understand the importance of our decision to insist upon reliable data and recognize that Qwest might have qualified for some forbearance upon a better evidentiary showing. Qwest may, of course, refile its petitions and our decision in this instance does not prejudice the outcome in any future proceeding.<sup>86</sup> We emphasize that petitioners relying on mobile wireless substitution to support forbearance relief should submit complete and reliable data that is geographically specific to the areas for which forbearance is sought.

**(b) Enterprise Switched Access**

23. In the absence of sufficient record evidence to reliably estimate the total number of enterprise switched access lines in service in any of the four MSAs,<sup>87</sup> we find the record cannot support forbearance for these services in any of the four MSAs. As noted above, Qwest submitted actual line count data for its own retail switched access lines, data regarding its fixed VoIP subscribers, and line count data regarding its competitors' retail lines provisioned through reliance on Qwest's wholesale last-mile facilities.<sup>88</sup> Several of Qwest's intramodal competitors for enterprise switched access services also submitted actual line count data totals for their retail access lines in various markets, as did Cox in the Phoenix MSA.<sup>89</sup> In none of the four MSAs did all of the major competitors for enterprise switched access services submit their own actual access line data. Because it lacks access to its competitors' internal data, Qwest submitted white page listing data to estimate the number of enterprise switched

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<sup>85</sup> We disagree with Qwest that its submission of the data identified above entitles it as a matter of law to forbearance and that the Commission may not use the absence of certain evidence as a basis for denial of a forbearance petition. *See, e.g.*, Letter from Craig J. Brown, Counsel to Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2-6 (filed July 15, 2008) (Qwest July 15, 2008 *Ex Parte* Letter). The Commission need not grant forbearance based on evidence it finds unreliable merely because the record is incomplete.

<sup>86</sup> 47 U.S.C. § 160(c) (stating that “[a]ny telecommunications carrier . . . may submit a petition to the Commission requesting that the Commission exercise the authority granted under [section 10] with respect to that carrier . . . or any service offered by that carrier”).

<sup>87</sup> In particular, we reject Qwest's market share estimates based on a comparison of the number of channel terminations Qwest provides over DS0 and DS1 switched access lines to the number of wholesale voice-grade equivalent circuits Qwest provisions as UNE loops, UNE Enhanced Extended Links (EELs) and platform-based and resold business lines. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-7 (filed June 25, 2008). We do not find this estimate reliable for several reasons. First, we find Qwest's estimate biased because Qwest compares its actual number of channel terminations to the maximum capacity of its competitors' access lines. Qwest's methodology also conflates mass market and enterprise switched access services by counting all DS0 switched access lines regardless of customer category. Finally, some of the voice-grade equivalent circuits Qwest counts as competitive switched access lines presumably are used to provide data services rather than switched access services.

<sup>88</sup> *See supra* para. 18.

<sup>89</sup> Cox June 17, 2008 *Ex Parte* Letter, Attach. at 3-5 (setting forth Cox's enterprise access line totals in the Phoenix MSA); *see also* Letter from Genevieve Morelli, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed May 20, 2008) (XO May 20, 2008 *Ex Parte* Letter) (providing the number of lit buildings it serves in all 4 MSAs); Letter from Thomas Jones and Nirali Patel, Counsel to Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 (filed June 30, 2008) (Time Warner Telecom June 30, 2008 *Ex Parte* Letter) (same); Letter from William A. Haas, V.P. Regulatory of Public Policy for PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 2 (filed June 30, 2008) (PAETEC June 30, 2008 *Ex Parte* Letter) (same), redacted version corrected by errata (filed July 1, 2008); Letter from Thomas Jones and Nirali Patel, Counsel to Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1 (filed July 1, 2008) (Integra July 1, 2008 *Ex Parte* Letter) (providing the number of lit buildings it serves in the Phoenix and Seattle MSAs).

access lines that do not rely on its wholesale services. Although we find that white page listing data provides a reasonable estimate of residential lines, we find such data to be unreliable in estimating the number of enterprise switched access lines in service.<sup>90</sup>

#### b. Forbearance Analysis

24. Qwest asks the Commission to forbear from applying certain dominant carrier rate and tariff regulations to its provision of mass market and enterprise switched access services in the Phoenix, Denver, Minneapolis-St. Paul, and Seattle MSAs.<sup>91</sup> Forbearing from these dominant carrier requirements would free Qwest from dominant carrier price cap rules.<sup>92</sup> Further, Qwest would no longer be required to file tariffs for these services on seven or more days' notice, but could file tariffs on one day's notice or could offer these services under negotiated rates and terms.<sup>93</sup> Qwest also seeks forbearance in these four MSAs from dominant carrier requirements governing the section 214 processes for transfers of control and discontinuance of service.<sup>94</sup> As explained below, we conclude that Qwest is not entitled relief from dominant carrier regulation under the section 10 criteria.

25. We begin our section 10(a)(1) analysis by considering the market for the services for which Qwest seeks relief and the customers that use them.<sup>95</sup> Qwest seeks forbearance from dominant carrier

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<sup>90</sup> Qwest's own data shows a low correlation between the number of business white page listings and the number of enterprise switched access lines in service. See Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 4; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 4. Moreover, the business white page listings include listings for a significant number of mass market switched access customers in addition to enterprise switched access customers. There is no reason to assume that other carriers' distributions of mass market business switched access customers and enterprise switched access customers are approximately identical to Qwest's distribution, nor that each customer purchases approximately the same number of switched access lines from each service provider. See, e.g., Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 7-11 (filed June 12, 2008) (Cbeyond *et al.* June 12, 2008 *Ex Parte* Letter). In addition, Qwest's white page listings data include lines served via special access, which should not be included in the present analysis. See Qwest Reply at 10-11 (acknowledging that the white page listings include competitive LEC lines "utilizing CLEC-owned switches along with either an unbundled loop or Special Access services purchased from Qwest"). See also Time Warner Telecom Opposition at 26-27; Cbeyond *et al.* May 15, 2008 *Ex Parte* Letter at 1.

<sup>91</sup> See Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3; see also Qwest June 13, 2008 *Ex Parte* Letter at 2-4.

<sup>92</sup> Compare 47 C.F.R. Part 61, Subpart C, with *id.* at Subpart E; see also *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19434, para. 39. The Part 61 rules are designed to implement the provisions of sections 201, 202, 203, and 204 of the Act to ensure that rates are just, reasonable, and not unjustly or unreasonably discriminatory. Qwest specifically asks the Commission to forbear from the rules in Subpart E of Part 61; that Subpart applies exclusively to dominant carriers.

<sup>93</sup> Compare 47 C.F.R. § 61.58 (tariff notice requirements for dominant carriers), with *id.* § 61.23 (tariff notice requirements for nondominant carriers), § 61.26 (tariffing requirements for competitive interstate switched access services); see also *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435, para. 41.

<sup>94</sup> See Qwest June 13, 2008 *Ex Parte* Letter at 4; see also *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435-36, para. 43.

<sup>95</sup> We recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers. Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets" closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. 47 U.S.C. § 160(a). We are mindful that, when determining whether a carrier has market power in conducting a dominance analysis, the Commission must not limit itself to market share, but rather look to all four factors that the (continued....)

regulation in its provision of mass market and enterprise switched access services in four MSAs.<sup>96</sup> Switched access services use local exchange switches to route originating and terminating interstate toll calls. As explained in the *Qwest Omaha Forbearance Order*, *ACS Dominance Forbearance Order*, and the *Verizon 6 MSA Forbearance Order*, the Commission has recognized that providers of access services serve two distinct customer groups: (1) interexchange carriers, which purchase access service 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.<sup>97</sup> Qwest's switched access charges have two essential rate components: (1) the Subscriber Line Charge, or SLC, which is a flat-rated charge imposed on end-users to recover the interstate-allocated portion of local loop costs<sup>98</sup> and (2) carrier's carrier charges, which Qwest imposes on interexchange carriers for access to its end user customers for the purpose of originating or completing interstate toll calls.<sup>99</sup>

26. To grant forbearance, we first must determine that enforcement of dominant carrier regulations is unnecessary to ensure that charges, practices, classifications, or regulations for Qwest's interstate switched access services are just and reasonable and not unjustly or unreasonably discriminatory.<sup>100</sup> In its petition, Qwest argues that retail customers throughout the relevant MSAs have access to a wide range of competitive alternatives for affordable local telephone service offering ubiquitous facilities-based alternatives to Qwest's service.<sup>101</sup> Qwest argues that, due to this extensive competition, dominant carrier regulation is no longer necessary in these MSAs to ensure just, reasonable

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Commission traditionally considers. See *AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (*AT&T v. FCC*). Because we do not undertake a stand-alone market power inquiry in this proceeding, this four-factor test does not bind our section 10 forbearance analysis.

<sup>96</sup> Qwest Denver Petition at 3; Qwest Minneapolis-St. Paul Petition at 3-4; Qwest Phoenix Petition at 3; Qwest Seattle Petition at 3-4. In both the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order*, the Commission divided its analysis of retail switched access services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). See *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19427, para. 22; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16318, para. 27.

<sup>97</sup> *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; see also *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).

<sup>98</sup> See generally *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 559 (8th Cir. 1998). Pursuant to the jurisdictional separations process, 25% of the cost of the loop is allocated to the interstate jurisdiction. 47 C.F.R. § 36.154(c). To promote economically efficient competition and to avoid cross-subsidization, the Commission has recognized that, to the extent possible, LECs should recover costs of interstate access in the same way that they are incurred. Because the cost of using a price cap carrier's common line does not increase with usage, the costs associated with the provision of this line are recovered through this flat, non-traffic sensitive fee. See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 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, 12969-70, para. 18 (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).

<sup>99</sup> Carrier's carrier charges include local switching, tandem switched transport and direct-trunked transport. 47 C.F.R. § 69.4(b).

<sup>100</sup> 47 U.S.C. § 160(a)(1).

<sup>101</sup> See, e.g., Qwest Denver Petition at 5; Qwest Minneapolis-St. Paul Petition at 5; Qwest Phoenix Petition at 5; Qwest Seattle Petition at 5.

and nondiscriminatory rates but that market forces will protect the interests of consumers; thus the regulations at issue no longer are necessary for that purpose.<sup>102</sup> As discussed above, in support of its argument that it is entitled to relief from dominant carrier regulation, Qwest submitted data including its own switched access lines, the number of resale and QPP/QLSP lines, and estimates of facilities-based residential and enterprise access line counts disaggregated by capacity for each of the four MSAs.<sup>103</sup> Qwest primarily bases the estimates of facilities-based residential and enterprise switched access line counts upon its competitors' white page listings data.<sup>104</sup>

(i) **Mass Market Switched Access.**

27. Based on this record, we find that Qwest does not satisfy section 10(a)(1) for mass market switched access services in any of the four MSAs. In particular, Qwest's market shares in the MSAs at issue, measured consistent with our approach in the *Qwest Omaha Forbearance Order*, *ACS Dominance Forbearance Order*, and *Verizon 6 MSA Forbearance Order* are sufficiently high to suggest that competition in these areas is not adequate to ensure that the "charges, practices, classifications, or regulations . . . for [] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" absent the regulations at issue.<sup>105</sup> The record evidence does not reflect that in any of the four MSAs do the cable operators, even in the aggregate, have more than a [REDACTED] percent share of the market for mass market telephone services in an MSA.<sup>106</sup> In addition, at least in the Denver, Minneapolis-St. Paul and Seattle MSAs, even if we were to rely on the national wireless-only household data published by the CDC as Qwest advocates, Qwest's estimated market shares for residential telephone services do not approach levels at which the Commission has granted forbearance in prior proceedings. Specifically, even including competition that relies on section 251(c)(4) resale and Qwest's QPP/QLSP service, and assuming *arguendo* that 15.8 percent of households in each of these three MSAs is a wireless only household, Qwest's estimated

<sup>102</sup> Qwest Denver Petition at 28-31; Qwest Minneapolis-St. Paul Petition at 28-32; Qwest Phoenix Petition at 28-31; Qwest Seattle Petition at 27-31.

<sup>103</sup> See *supra* paras. 17-23.

<sup>104</sup> *Id.* paras. 18 & 23.

<sup>105</sup> We rely on Cox's actual line count data for the Phoenix MSA that Cox submitted on the record. The record does not include similar information from the cable providers that compete in the Denver, Minneapolis-St. Paul, and Seattle MSAs. Therefore, as noted above, we rely on the actual white page listings count for purposes of calculating Qwest's mass market switched access market shares in the Denver, Minneapolis, and Seattle MSAs. See *supra* para. 18. The wholesale services we include in this calculation are section 251(c)(4) resale and Qwest's QPP/QLSP service. See Appendix B for the market share calculation methodology. We note that section 251(c)(4) resale services are made available at regulated rates. Qwest's QPP/QLSP service is a service that includes loops and switching functionality. There is no evidence to suggest that UNEs constrain the prices of Qwest's QPP/QLSP service, and we note that switching is not available at TELRIC rates, which tends to support this conclusion. As discussed above, consistent with our precedent, we would include mobile wireless-only households in our market share calculation but in this instance we do not have reliable geographically-specific data to allow us to do so. See, e.g., *Verizon/MCI Merger Order*, 20 FCC Rcd 18481-83, paras. 90-91; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5714, para. 95.

<sup>106</sup> The market share for Cox, the sole cable provider operating in the Phoenix MSA, is less than [REDACTED]%. Assuming *arguendo* that the cable operators provide every competitive residential line in service in the other three MSAs that is not provided by Qwest or by a competitive LEC using Qwest's resold or QPP/QLSP facilities, the implied market shares of the cable operators in the other 3 MSAs are less than: Denver [REDACTED]%, Minneapolis-St. Paul [REDACTED]%, and Seattle [REDACTED]%. For the reasons explained above, we are unable to make any specific findings regarding the percentage of wireless substitution in the 4 MSAs on the present record. These estimates of the cable operators' market shares were calculated without including any wireless substitution. Including wireless substitution when calculating the market shares of the cable operators would result in even lower market share estimates.

market shares are approximately: Denver [REDACTED] percent, Minneapolis-St. Paul [REDACTED] percent, and Seattle [REDACTED] percent.<sup>107</sup> Qwest's market share in the Phoenix MSA is lower, although in part for the reasons explained above,<sup>108</sup> we are unable to find on the present record that Qwest is subject to sufficient competition to warrant the requested forbearance.

28. Although record evidence here shows competitive facilities deployment used in the provision of mass market telephone service by cable operators in the four MSAs at issue, we find that it does not match the evidence of competition relied upon in previous orders granting forbearance. In the absence of comparable evidence of facilities-based competition, we are not persuaded by Qwest's suggestion that its market shares in the four MSAs are sufficient to justify forbearance from dominant carrier regulation here. Indeed, where the Commission has found an incumbent carrier to be nondominant in the provision of access services, it had a retail market share of less than 50 percent and faced significant facilities-based competition.<sup>109</sup> Although our forbearance analysis here is merely guided by our dominance precedent, we find it significant that, in granting forbearance from dominant carrier regulation of mass market switched access services in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*, the Commission similarly emphasized the evidence of the competitive

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<sup>107</sup> *Id.* As explained above, we are not endorsing the use of a national estimate of wireless substitution as sufficient to support forbearance in particular local markets. See *supra* note 77. Although Qwest submitted partial updated line count estimates as of May 2008, it did not submit updated fixed VoIP subscriber counts or updated white page listings data. See Letters from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 2, 2008) (filing four separate letters updating line count estimates in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs). Rather than relying on data from Qwest from different time periods, we base the market shares on Qwest's December 2007 data. See *infra* App. B notes 163-7. Nevertheless, we note that relying on Qwest's data as of May 2008 would not materially affect the market shares or the outcome we reach today. To support its claim that there is significant competition in the residential markets, Qwest provided a study by TNS Telecom (TNS) that calculates quarterly "shares of customer connections." See Qwest Denver Brigham/Teitzel Decl. at para. 6; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 6; Qwest Phoenix Brigham/Teitzel Decl. at para. 6; Qwest Seattle Brigham/Teitzel Decl. at para. 6. According to Qwest, TNS collects actual billing information from a statistically-reliable sample of customers in each state and tabulates the number of residential customers subscribing to Qwest service (landline, DS1, or wireless) as well as services of non-Qwest landline and wireless competitors. *Id.* We declined to rely on a similar TNS study in the *Qwest Section 272 Sunset Forbearance Order* and we do not rely on these estimates here. See *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 47. The estimates are based upon consumer purchases of any telecommunications services rather than purchases for the relevant product, which is local service and the estimates have not been shown to be based on a representative sample. In particular, we are not able to determine on the present record the size of the sample or the response rate.

<sup>108</sup> See *supra* paras. 19-22.

<sup>109</sup> *Mid-Rivers Order*, 21 FCC Rcd at 11519-21, paras. 29-34 (declaring Qwest to be nondominant in its provision of all interstate telecommunications services, including access services, in Terry, Montana, where a facilities-based competitor served between 85 and 93% of the access lines); cf. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23959, para. 161 (1997) (establishing a presumption that foreign carriers with less than 50% market share in each of the relevant foreign markets, including the market for local access, lack sufficient market power to adversely affect competition in the U.S., and noting that "[a]s the authors of the 1997 edition of the American Bar Association *Antitrust Law Developments* publication recently concluded, '[c]ourts virtually never find monopoly power when market share is less than about 50 percent.'" (Quoting A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-36 (4th ed.) (1997))).

gains of facilities-based competitors, in conjunction with the incumbent LECs' overall market shares, in its marketplace analysis.<sup>110</sup>

29. With respect to elasticity of demand and firm cost, size, and resources, we find no basis to reach different conclusions than those in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*.<sup>111</sup> However, we do not find those factors, in and of themselves, adequate to conclude that competition is sufficient to ensure just, reasonable, and not unreasonably discriminatory rates and practices under section 10(a)(1), given the concerns identified above.

30. Moreover, we find no other basis in the record for concluding that section 10(a)(1) is satisfied with respect to Qwest's requested forbearance from dominant carrier regulations for mass market switched access services. We find that the evidence considered in our market analysis above provides the best evidence regarding the state of competition in the relevant markets. In particular, we reject Qwest's attempt to demonstrate that a particular MSA is competitive by calculating percentage reductions in retail lines.<sup>112</sup> There are many possible reasons for such decreases unrelated to the existence of last-mile

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<sup>110</sup> *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, para. 36 (relying on "Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers"); *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323-24, paras. 40-41 (relying on evidence that "GCI has extensive and modern facilities throughout much of Anchorage, and that its network has sufficient capacity such that GCI could easily expand the number of customers it serves," and that "the growth in GCI's residential access line base and corresponding decline in ACS's base support our forbearance determination here"). We note that the Commission relied, as a secondary matter, on competition based on wholesale inputs obtained from the incumbent LEC. See, e.g., *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, para. 36. However, we do not find the evidence regarding competition in the 4 MSAs based on resale and Qwest's QPP/QLSP service sufficient to overcome the less convincing evidence regarding Qwest's market shares and the success of its facilities-based competitors that was present in the *Qwest Omaha Forbearance Order* and *ACS Dominance Forbearance Order*.

<sup>111</sup> See, e.g., *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19432-33, paras. 33, 38; *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16323-24, paras. 40, 42.

<sup>112</sup> Qwest has submitted tables summarizing its loss of switched access lines from 2000 to 2006. Qwest Denver Brigham/Teitzel Decl. at para. 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 5; Qwest Phoenix Brigham/Teitzel Decl. at para. 5; Qwest Seattle Brigham/Teitzel Decl. at para. 5. Qwest updated these tables with its loss of switched access lines from 2006 to 2007. See Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 4; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 6. We also note that Qwest's requested forbearance could have impacts beyond the MSA level. As we noted in the *Verizon 6 MSA Forbearance Order*, our rules require incumbent LECs to geographically average their access rates. See *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 (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 ones at issue in this matter) would be to increase the cost to Qwest's rural operations. Because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve the issue here. 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."). As a separate matter, Qwest's petitions raise issues about universal service support that are not 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 revenues from their SLCs. See *CALLS Order*, 15 FCC Rcd at 13043, para. 195; 47 C.F.R. § 69.152. The SLC cap would not apply in an area where relief is granted. Accordingly, a carrier should explain whether it (continued....)

facilities-based competition. For example, as the Commission explained in the *ACS UNE Forbearance Order*, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.<sup>113</sup>

31. As discussed above, section 10(a)(1) requires that we determine that enforcement of the regulations at issue is unnecessary to ensure that charges, practices, classifications or regulations for the services for which Qwest seeks relief are not unjustly or unreasonably discriminatory.<sup>114</sup> On the basis of the record evidence and the application of the section 10(a) statutory criteria, we find that forbearance from dominant carrier regulation for the services and geographic areas at issue is unjustified. This matter is distinguishable from the cases cited by Qwest and from prior orders in which the Commission granted dominant carrier relief. Specifically, there is inadequate evidence of facilities-based mass market competition and we are unable to conclude from the evidence in the record that Qwest no longer holds a significant market share of the services at issue.<sup>115</sup> Thus we deny Qwest's request for forbearance.

32. For the same reasons, we find that Qwest has not demonstrated that enforcement of the Commission's dominant carrier regulations as they apply to Qwest's interstate switched access services is unnecessary for the protection of consumers.<sup>116</sup> Nor has Qwest demonstrated that forbearance from the application of these regulations to these services is consistent with the public interest.<sup>117</sup> Accordingly, Qwest's request for forbearance from such regulations is denied.<sup>118</sup>

#### (ii) Enterprise Switched Access

33. There is insufficient information in the record to reasonably assess market shares for enterprise switched access services, and the record evidence suggests Qwest faces more limited facilities-

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should continue to receive IAS, and, if so, what conditions should apply. Further, if a carrier asserts that it should continue to receive IAS after a forbearance grant of this type, it must address how to ensure that grant of relief does not significantly reduce the amount it contributes to the universal service fund. As the Commission discussed in the *ACS Dominance Forbearance Order*, a grant of forbearance relief would allow a carrier to reduce its SLC rates. This, in turn, would reduce the amount the carrier contributes to the universal service fund. *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16338, para. 72. As noted, because we deny Qwest's request for forbearance from dominant carrier regulation, we need not resolve these issues here.

<sup>113</sup> *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88 (citing Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005) (noting that the decline of lines provided by wireline carriers might be due to some households eliminating second lines when they move from dial-up Internet service to broadband service)); *see also infra* para. 38. Moreover, even if Qwest's line loss data accurately captured the extent of competition (a position we reject above), neither Qwest nor others offered any persuasive rationale for determining a particular level of line loss to be sufficient evidence of competition to justify forbearance.

<sup>114</sup> 47 U.S.C. § 160(a)(1).

<sup>115</sup> Similarly, in the *Verizon 6 MSA Forbearance Order*, the Commission distinguished prior nondominance orders cited by Verizon. *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21309, paras. 28-29.

<sup>116</sup> 47 U.S.C. § 160(a)(2).

<sup>117</sup> 47 U.S.C. § 160(a)(3).

<sup>118</sup> Because Qwest relies on the same competitive evidence in support of its request for forbearance from dominant carrier section 214 discontinuance and transfer of control requirements, we deny such forbearance for the same reasons expressed above. *Cf. Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19435-36, para. 43 (evaluating forbearance from dominant carrier section 214 discontinuance and transfer of control requirements on the basis of the same competitive evidence relied upon to analyze forbearance from other dominance carrier regulations); *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16333-34, para. 63 (same).

based competition in these MSAs.<sup>119</sup> The record does not include sufficient data for Qwest's service territory in the MSAs to demonstrate sufficient competition to satisfy the section 10(a) criteria for enterprise switched access services,<sup>120</sup> nor does it include any other basis for such relief. Consistent with our precedent, we therefore deny this aspect of the Petitions.<sup>121</sup>

## 2. Forbearance Analysis for Section 251(c)(3) Unbundling Obligations

34. This proceeding represents the fifth time an incumbent LEC has sought forbearance from section 251(c)(3) UNE obligations based on claims of robust facilities-based competition. In the *Triennial Review Remand Order*, the Commission tailored its unbundling rules to account for the presence of competition by establishing "triggers" designed to eliminate high-capacity loop and transport unbundling obligations with respect to wire centers with significant demand, such as in central business districts,<sup>122</sup> and by declining to order unbundling of network elements to provide service in the mobile wireless services market and long distance services market, due to the evolution of retail competition that has not relied upon UNE access.<sup>123</sup> The Commission did not believe it was appropriate at that time to render similar judgments for local exchange service and exchange access service. Nevertheless, the Commission announced that it might one day be appropriate to conclude, based upon sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition would justify forbearance from UNE obligations.<sup>124</sup> The Commission now has granted such

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<sup>119</sup> See AdHoc Comments at 10-12; Arizona Commission Reply, Attachs. C, D1, D2 and D3; Comcast Comments at 6-7 (stating that it serves fewer than [REDACTED] enterprise business customers in the Seattle, Minneapolis-St. Paul and Denver markets combined; and that Comcast [REDACTED]); Cox June 17, 2008 *Ex Parte Letter* Attach. at 3-5; see also BT Americas Comments at 9; Covad Comments at 28; Time Warner Telecom Opposition at 31-32; Washington Public Counsel Comments at 9.

<sup>120</sup> We note that, under Commission precedent, a carrier that has been found to possess market power, and thus be dominant, with respect to particular services remains so classified absent an affirmative finding of changed competitive conditions. See, e.g., *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21318-19, para. 45; *Section 272 Sunset Order*, 22 FCC Rcd at 16473, para. 64; see generally *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

<sup>121</sup> See, e.g., *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19438, para. 50 (denying forbearance from dominant carrier regulation of enterprise services); see also *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16342-43, paras. 84-85 (denying forbearance from dominant carrier regulation of special access services).

<sup>122</sup> *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, 2588-96, 2625-29, paras. 93-106, 167-73 (2004) (*Triennial Review Remand Order*), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>123</sup> *Triennial Review Remand Order*, 20 FCC Rcd at 2553-55, para. 36; 47 C.F.R. § 51.309(b) ("A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.").

<sup>124</sup> *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, paras. 38-39; see also *id.* at 2556, para. 39 n.116. Some parties suggest that the Commission should analyze "impairment" in determining whether to grant forbearance from UNE obligations. See, e.g., Colorado Commission Comments at 23-27; CLEC Group Reply at 5. As we have stated in the past, the Commission's unbundling framework, while instructive in a section 10(a) forbearance proceeding, does not bind the Commission's forbearance review. See, e.g., *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19423-24, 19445, paras. 14 n.47 & 61 n.161; *ACS UNE Forbearance Order*, 22 FCC Rcd at 1961, para. 5 n.13. In a forbearance proceeding, Congress has charged the Commission with determining whether the standards of section 10(a) are satisfied; those standards are not identical to the standards of section 251(d)(2). Compare 47 U.S.C. § 160(a) with 47 U.S.C. § 251(d)(2); see also *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, para. 39 (stating that incumbent LECs are free to seek forbearance from unbundling rules in specific geographic markets once section 251(c) has been fully implemented "and the other requirements for forbearance (continued....)

relief in the *Qwest Omaha Forbearance Order*, the *ACS UNE Forbearance Order* and the *Qwest Terry Forbearance Order*<sup>125</sup> based on evidence that, among other things, the incumbent LEC had lost significant market share to facilities-based competitors that had substantial deployment of last-mile facilities capable of providing competing services in the wire center service areas where forbearance was granted.

35. We continue to follow the approach that the Commission adopted in the *Qwest Omaha Forbearance Order* and subsequent decisions for determining whether forbearance from unbundling obligations is warranted under the section 10 criteria.<sup>126</sup> By carefully applying this precedent, we determine that forbearance from the application to Qwest of the section 251(c)(3) obligations to provide unbundled access to loops, subloops, and transport to competitors in the four MSAs does not meet the standards set forth in section 10(a). Specifically, the record evidence in this proceeding demonstrates that Qwest is not subject to a sufficient level of facilities-based competition in the four MSAs to grant relief under the Commission's precedent. We therefore deny the Qwest Petitions with respect to the request for forbearance from UNE obligations. While the current evidence of facilities-based competition in these MSAs is insufficient to justify forbearance, we note that the evidence does show that cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers.<sup>127</sup> Thus, future

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have been met"); *AT&T v. FCC*, 236 F.3d at 738 (stating that Congress established § 10 as an "independent means" of obtaining deregulatory relief).

<sup>125</sup> Given the characteristics of the markets at issue in the instant proceeding, we look for guidance first to the Commission's precedents involving Omaha, Anchorage, and the markets addressed in the Verizon 6 MSA proceeding. See *supra* para. 10 (stating that the Terry exchange was unique as compared to the other markets at issue in the Commission's UNE forbearance precedents); see also *Qwest Terry Forbearance Order*, 23 FCC Rcd at 7264, para. 13 (noting the "relatively small size of the Terry exchange, its relative isolation from major metropolitan areas, and the absence of any large business customers").

<sup>126</sup> We reject Qwest's argument that the Commission's analysis of market share in the *Verizon 6 MSA Forbearance Order* marked a departure from the ACS and Omaha decisions. See, e.g., *Qwest Denver* Mar. 10, 2008 *Ex Parte* Letter at 1-2; *Qwest Minneapolis-St. Paul* Mar. 14, 2008 *Ex Parte* Letter at 6-7; *Qwest Phoenix* Feb. 21, 2008 *Ex Parte* Letter at 1-2; *Qwest Seattle* Mar. 5, 2008 *Ex Parte* Letter at 1-2; see also *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37 n.113 (rejecting a similar argument made by Verizon). The framework the Commission used to determine whether forbearance was warranted in the Verizon 6 MSA proceeding was patterned after, and no more stringent than, the framework the Commission used for determining whether forbearance was warranted in the Qwest Omaha and ACS UNE forbearance proceedings. See, e.g., Letter from John T. Nakahata, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-4 (filed Apr. 14, 2008) (disputing Qwest's contention that the *Verizon 6 MSA Forbearance Order* was not based on precedent and explaining why the Commission's approach was reasonable); Time Warner Telecom Opposition at 11 (stating that the Commission's UNE forbearance precedent requires that an "intermodal competitor has demonstrated substantial success in winning retail market share by providing service over its own network"). In any event, pursuant to section 10(b), the Commission is required to consider competition when evaluating forbearance petitions and considering market shares in our analysis fits squarely within this directive. See 47 U.S.C. § 160(b).

<sup>127</sup> Cox submitted coverage estimates for its network in the Phoenix MSA, which show that Cox satisfies the 75 percent coverage threshold in certain Qwest wire centers in this market. See *Cox* June 17, 2008 *Ex Parte* Letter, Attach at 2; see also Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 10 (filed July 7, 2008) (seeking clarification of Cox's coverage estimates). Because we do not find sufficient facilities-based competition in the Denver, Minneapolis-St. Paul or Seattle MSAs to warrant forbearance, we need not make any specific findings regarding the sufficiency of Qwest's methodology in estimating cable coverage in those MSAs. See Letters from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed April 2, 2008) (three separate letters showing cable coverage estimates in the Denver, Minneapolis-St. Paul, and Seattle MSAs); *Covad et al.* Apr. 24, 2008 *Ex Parte* Letter at 25 (arguing that the Commission should dismiss Qwest's information).

relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs.

36. *Section 10(a)(1) – Charges, Practices, Classifications, and Regulation.* We begin our analysis by examining competition in the retail and wholesale markets in the relevant MSAs.<sup>128</sup> As we held above, with respect to retail competition for mass market customers,<sup>129</sup> we are unable to find that Qwest's MSA-wide mass market market shares, even including competition from section 251(c)(4) resale and Qwest's QPP/QLSP service,<sup>130</sup> and taken in conjunction with other factors, are sufficient to warrant forbearance from dominant carrier regulation.<sup>131</sup> Consistent with our precedent, we likewise are not persuaded that these data, in themselves, support the grant of forbearance from UNE obligations.<sup>132</sup> Moreover, the record evidence indicates that competition from cable operators in the four MSAs currently

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<sup>128</sup> See *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19447, para. 65; *ACS UNE Forbearance Order*, 22 FCC Rcd at 1974, para. 27; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37. In accord with our precedent, we see no benefit in limiting our competitive analysis solely to the wholesale market as some commenters have suggested. See, e.g., Arizona Commission Reply at 30-31; CLEC Group Reply at 5. We also decline to follow the recommendation of the Arizona Commission to use zip codes as the relevant geographic area for purposes of UNE analysis in the Phoenix MSA. See Arizona Commission Comments at 14-15; Arizona Commission Reply at 7 (stating that the use of data at the zip code level would produce better and more accurate results). Although we appreciate the efforts of the Arizona Commission, the approach we adopt in this order is consistent with the Commission's prior orders and appropriately balances the deregulatory aims of section 10 with interests in administrability. *ACS UNE Forbearance Order*, 22 FCC Rcd at 1968-69, para. 16. In addition, we find the most up-to-date and reliable data submitted for the Phoenix MSA was submitted on an MSA or wire center basis rather than zip code basis. Zip code boundaries generally do not correspond to wire center boundaries, and no party suggested a reliable way to translate zip code based data to wire center based data. See Arizona Commission Reply at 11 (showing [REDACTED] zip codes are shared by the Qwest wire centers for which Qwest seeks relief and that only [REDACTED] zip codes within the area covered by these wire centers are in a single Qwest wire center service area). In any event, the underlying data on which the Arizona Commission based its summaries were not submitted to the record in the instant proceeding, making comparisons between the two records infeasible.

<sup>129</sup> In accord with our precedent, we decline to formally define product markets pursuant to a market power analysis for purposes of our UNE forbearance analysis as certain commenters requested. See, e.g., CLEC Group Comments at 8-9 (asking the Commission to divide the product markets into the mass market, small business, and enterprise, and for each category of transport or loop facility that must be unbundled); CLEC Group Reply at 8-9; Arizona Commission Reply at 31-32 (claiming that the business market should be completely separate from the mass market and then disaggregated into small, medium and large segments); Time Warner Telecom Opposition at 8. The Commission has never formally defined product markets for purposes of its UNE forbearance analysis, and nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here. See *ACS UNE Forbearance Order*, 22 FCC Rcd at 1965-66, para. 12.

<sup>130</sup> For purposes of our UNE analysis, some parties argue that the Commission should exclude Qwest's QPP/QLSP and resold lines from the market share calculation. See, e.g., Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 8; Letter from Thomas Jones and Nirali Patel, Counsel to Cbeyond Inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6 (filed July 9, 2008). However, these services are not affected in this proceeding and, as explained above, the Commission has included these lines in the past and we see no reason to exclude them here. See *supra* note 64.

<sup>131</sup> See *supra* paras. 21 & 27 (setting forth Qwest's market shares in the 4 MSAs). For the reasons explained above, we find the record does not contain data sufficient to evaluate the extent of wireless substitution in the specific markets at issue. We therefore do not need to address the merits of arguments regarding the inclusion of wireless substitution in our UNE forbearance analysis.

<sup>132</sup> See *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21313, para. 37 n.113 (citing precedent). Our analysis extends beyond this point because we do not rely on market share as the "sole determining factor in deciding" the outcome of this proceeding. See Qwest July 15, 2008 *Ex Parte* Letter at 7-8.

does not, without more, provide a sufficient basis for relief.<sup>133</sup> Nor does the record reveal that other competitors in these MSAs have deployed their own extensive last-mile facilities for use in serving the enterprise market.<sup>134</sup> Although Qwest and others submitted data regarding competitive LEC lit buildings, the facilities “coverage” suggested by those data do not approach the 75 percent threshold relied upon by the Commission in the past.<sup>135</sup> Indeed, there is record evidence that some of the competition from competitive LECs for enterprise services in these MSAs instead depends on access to Qwest’s own facilities, including UNEs.<sup>136</sup> Lacking significant evidence of the type of last-mile facilities-based competition the Commission relied on in the *Qwest Omaha* and *ACS UNE* forbearance proceedings to grant relief, we find that the criteria of section 10(a) are not satisfied with respect to Qwest’s request for forbearance from UNE obligations in these MSAs.

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<sup>133</sup> See *supra* note 106.

<sup>134</sup> See XO May 20, 2008 *Ex Parte* Letter at 2 (revealing that XO has constructed its own high-capacity loops to at most [REDACTED] commercial buildings in any of the 4 MSAs); PAETEC June 30, 2008 *Ex Parte* Letter at 2 (revealing that PAETEC has lit fiber connected to at most [REDACTED] commercial buildings in any of the 4 MSAs); Time Warner June 30, 2008 *Ex Parte* Letter at 4 (revealing that Time Warner has constructed its own high-capacity loops to at most [REDACTED] commercial buildings in any of the 4 MSAs); Integra July 1, 2008 *Ex Parte* Letter at 1 (revealing that Integra provides high-capacity retail circuits to, at most [REDACTED] commercial buildings in the Phoenix and Seattle MSAs). See also CLEC Group Reply at 15-16 (“As of August 2007 there were 125,379 commercial buildings in Minneapolis, of which only [REDACTED] had a lit CLEC presence.”); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 4, 8 (noting that cable providers provide the “vast majority” and “by far the largest source of facilities-based competition” in the Minneapolis-St. Paul MSA); Arizona Commission Comments at 21; BT Americas Comments at 6; COMPTTEL Opposition at 40-41; Covad Comments at 40-41; Cox Comments at 17.

<sup>135</sup> See Qwest Denver Brigham/Teitzel Decl. at para. 34 (stating that the number of non-Qwest fiber is now being used to serve almost [REDACTED] buildings in the Denver MSA); Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 37 (similar); Qwest Phoenix Brigham/Teitzel Decl. at para. 34 (similar); Qwest Seattle Brigham/Teitzel Decl. at para. 37 (similar). We note that certain competitive LECs placed data in the record regarding the number of commercial buildings located within 300 or 1000 feet of the competitive LEC’s fiber network. See *supra* note 134 (citing these submissions). As these competitive LECs explain, it frequently would not be economically feasible to construct loops over that distance in the absence of a demand level that exceeds levels for which UNEs are available, and we lack sufficient record data to make any specific conclusions regarding the coverage of these competitive LECs’ networks. Finally, Qwest does not attempt to justify the use of a different threshold when evaluating competitive LEC lit buildings, other than the 75 percent threshold relied upon in the context of cable facilities deployment in prior orders. Nor do we find any other basis in the record here to adopt a different approach. See also *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21314, para. 37 n.118.

<sup>136</sup> Qwest Denver Brigham/Teitzel Decl. Exh. 2; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 2; Qwest Phoenix Brigham/Teitzel Decl. Exh. 2; Qwest Seattle Brigham/Teitzel Decl. Exh. 2. To illustrate, in the Phoenix MSA, Qwest states that it provides more than [REDACTED] DS1 UNEs loops and approximately [REDACTED] DS1 UNE EELs in addition to a significant number of other categories of UNEs, and the data from the other 3 MSAs also demonstrate competitive LECs’ significant reliance on UNEs to compete. Qwest Phoenix May 2, 2008 *Ex Parte* Letter, Attach. 7; see also Qwest Denver May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Seattle May 2, 2008 *Ex Parte* Letter, Attach. 7; AdHoc Selwyn Decl. paras. 26-27; CLEC Group Comments at 20; CLEC Comments at 20-21, 33-38, 54-55; COMPTTEL Opposition at 33 (stating that in contrast to Omaha, a significant number of competitors in the Denver, Minneapolis, Phoenix and Seattle MSAs use Qwest UNE loops as the primary vehicle for serving and acquiring customers); Letter from Genevieve Morelli, Counsel to Covad Communications Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. at 10-17 (filed June 10, 2008).

37. We also examine the role of the wholesale market. The record does not reflect any significant alternative sources of wholesale inputs for carriers in the four MSAs.<sup>137</sup> Although Qwest cites a significant amount of retail enterprise competition relying upon Qwest's special access services and UNEs,<sup>138</sup> we found above that the levels of facilities-based competition do not justify forbearance and the evidence of additional competition that relies on Qwest's wholesale services is insufficient to warrant forbearance. We note that Qwest has received relief, or has pending claims of entitlement to relief, from unbundling obligations in wire centers in all four MSAs, based on the competitive triggers established in the *Triennial Review Remand Order*.<sup>139</sup>

38. The other evidence that Qwest has submitted does not overcome the findings above regarding the levels of facilities-based competition. First, we reject Qwest's attempt to demonstrate the MSAs are competitive by calculating percentage reductions in retail lines.<sup>140</sup> As the Commission has

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<sup>137</sup> See, e.g., Letter from Arizona Corporation Commission, Commissioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4 (filed June 18, 2008) (Arizona Commission June 18, 2008 *Ex Parte* Letter) (noting the lack of significant wholesale alternatives in the wire centers where Qwest seeks relief); Letter from John T. Nakahata and Stephanie Weiner, Counsel to EarthLink, Inc. and New Edge Networks, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 15, 2008 (contending that EarthLink and New Edge Networks are not aware of any mass market or enterprise wholesale alternatives that do not rely on Qwest's facilities in the areas in the 4 MSAs where these providers offer service). We acknowledge that Qwest submitted some evidence that Cox offers wholesale DS1 and DS3 loop and transport services, which can be channelized, in the Phoenix MSA. See Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4-5 (filed May 22, 2008). But we are unable to determine on this record that Cox is a significant provider of wholesale enterprise services in this MSA. Qwest also submitted evidence that Nextlink provides fixed wireless alternatives for wholesale customers seeking DS3 or multiple DS1 loop and transport alternatives. See Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 8-9 (filed May 15, 2008) (Qwest May 15, 2008 *Ex Parte* Letter). For similar reasons, we decline to find that Nextlink is a significant provider of wholesale enterprise services in this MSA. See, e.g., Letter from Brad Mutschelknaus & Genevieve Morelli, Counsel to Covad Communications Group *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 6-7 (filed June 16, 2008) (Covad *et al.* June 16, 2008 *Ex Parte* Letter) (explaining that the GeoResults survey data includes Nextlink which supports that this provider has very few last-mile facilities in the markets at issue and providing additional evidence that fixed wireless has not become a significant wholesale alternative to date); see also Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 1, 2008).

<sup>138</sup> Qwest Denver Brigham/Teitzel Decl. Exh. 2; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. Exh. 2; Qwest Phoenix Brigham/Teitzel Decl. Exh. 2; Qwest Seattle Brigham/Teitzel Decl. Exh. 2; Qwest Denver May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Minneapolis-St. Paul May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Phoenix May 2, 2008 *Ex Parte* Letter, Attach. 7; Qwest Seattle May 2, 2008 *Ex Parte* Letter, Attach. 7.

<sup>139</sup> See Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 5; see also Arizona Commission June 18, 2008 *Ex Parte* Letter at 4 (stating that the Arizona Commission “will act on [Qwest's] petition shortly” in which Qwest purports that it meets certain *Triennial Review Remand Order* UNE triggers in eight additional wire centers in the Phoenix MSA); Letter from Melissa E. Newman, Vice-President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attach. (filed June 27, 2008) (listing 3 additional wire centers in the Phoenix MSA, and 8 additional wire centers in the Minneapolis-St. Paul MSA, where Qwest contends it satisfies the non-impairment thresholds for loop and transport facilities established in the *Triennial Review Remand Order*).

<sup>140</sup> Qwest has submitted tables summarizing its loss of switched access lines from 2000 to 2006. Qwest Denver Brigham/Teitzel Decl. at para. 5; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at para. 5; Qwest Phoenix Brigham/Teitzel Decl. at para. 5; Qwest Seattle Brigham/Teitzel Decl. at para. 5. Qwest updated these tables with its loss of switched access lines from 2006 to 2007. See Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 4; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 6.

explained, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but, for example, may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.<sup>141</sup> The record in this proceeding also indicates that there are other possible reasons for such decrease.<sup>142</sup>

39. Further, we acknowledge that Qwest has submitted assorted competitive fiber network data, including fiber network maps; the number of route miles on these networks; the percentage of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors' web-sites describing their service offerings and territories.<sup>143</sup> We are not persuaded that they overcome the shortage in facilities-based competition shown above. For example, the fiber maps submitted by Qwest do not contain sufficient detail upon which the Commission could base a forbearance determination, and the Commission previously has found that such maps provide only limited evidence of market-wide deployment.<sup>144</sup> Similarly, just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the Commission's unbundling rules,<sup>145</sup> we also find that such data have limits for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center.

40. Finally, we address record evidence of the number of lit buildings.<sup>146</sup> Qwest does not provide any comparative data for the number of buildings with demand for high-capacity services that

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<sup>141</sup> *ACS UNE Forbearance Order*, 22 FCC Rcd at 1975, para. 28 n.88 (citing Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005) (noting that the decline of lines provided by wireline carriers might be due to some households eliminating second lines when they move from dial-up Internet service to broadband service)).

<sup>142</sup> See, e.g., Covad Comments at 24; Covad Reply at 9; Cbeyond *et al.* June 12, 2008 *Ex Parte* Letter at 2 (stating that Qwest's own responses confirm that there are many reasons why customers disconnect service for reasons other than successful competition); Letter from Brad Mutschelknaus and Genevieve Morelli, Counsel to Covad Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3-4 (filed July 11, 2008), redacted version corrected by errata (filed July 15, 2008) (arguing that Qwest's switched access line losses are more than offset by Qwest's increases in non-switched access lines due to customer migration); see also Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 3; Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 3; Qwest Phoenix Apr. 22 *Ex Parte* Letter, Attach. 3; Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 3.

<sup>143</sup> E.g., Qwest Denver Petition at 26-27; Qwest Denver Brigham/Teitzel Decl. at paras. 34-35 & Exh. 4; Qwest Minnesota Petition at 26-27; Qwest Minneapolis-St. Paul Brigham/Teitzel Decl. at paras. 37-38 & Exh. 4; Qwest Phoenix Petition at 26-27; Qwest Phoenix Brigham/Teitzel Decl. at paras. 34-35 & Exh. 4; Qwest Seattle Petition at 26; Qwest Seattle Brigham/Teitzel Decl. at paras. 37-38 & Exh. 4.

<sup>144</sup> See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2583, para. 82 ("These maps confirm that competitive fiber consistently is located in and around the core business district of every major city – and not necessarily elsewhere. Due to the wide variability in market characteristics within an MSA, MSA-wide conclusions would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy." footnotes omitted); *Verizon/MCI Merger Order*, 20 FCC Rcd at 18455-56, para. 45 n.123 (cautioning that the evidence such maps provide is limited).

<sup>145</sup> *Triennial Review Remand Order*, 20 FCC Rcd at 2597, para. 110 ("These data are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions."). Similarly, to the extent Qwest introduces evidence that competitors advertise various telecommunications services, we find that such evidence lacks the specificity needed to grant forbearance and, for example, does not distinguish between competitive services that are self-provisioned from those provided using UNEs. See, e.g., Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 2-3 (citing press releases and news reports).

<sup>146</sup> See *supra* notes 134-135. Based on GeoTel database, Qwest reports the number of buildings in each of the 4 MSAs that are served by competitive fiber. Qwest Reply at 49.

Qwest serves, and the percentage of all commercial buildings that competitors serve with their own fiber facilities is extremely small on a relative basis – 0.17 percent to 0.26 percent.<sup>147</sup> Also, in those MSAs where relief has already been partially granted by virtue of the impairment triggers, Qwest’s submission counts all lit buildings indistinguishably. Although the accuracy and reliability of these data are challenged on our record,<sup>148</sup> we do not reach the question of whether we could forbear based on these data.

41. In support of its request for UNE relief, Qwest also argues that competitors are competing extensively using special access rather than UNEs when providing service over Qwest’s facilities.<sup>149</sup> While Qwest can demonstrate a fair amount of retail enterprise competition using Qwest’s special access services and UNEs, consistent with the Commission’s precedent, competition that relies on Qwest’s own facilities is not a sufficient basis to grant forbearance from UNE requirements.<sup>150</sup>

42. *Section 10(a)(2) – Protection of Consumers.* The second prong of section 10(a) states that the Commission shall forbear if “enforcement of such regulation or provision is not necessary for the protection of consumers.”<sup>151</sup> For reasons similar to those set forth in the previous section, we conclude that UNEs are still necessary for the protection of consumers in these MSAs. There is insufficient evidence of competition from other last-mile facilities-based providers for us to determine that consumers will be protected if we forbear from Qwest’s unbundling obligations.

43. *Section 10(a)(3) – Public Interest.* We also find that relieving Qwest from the section 251(c)(3) access obligations for loop, certain subloop, and transport elements is not in the public interest under section 10(a)(3).<sup>152</sup> Having found above that UNEs remain necessary for the protection of consumers and to ensure just and reasonable and not unjustly and unreasonably discriminatory, prices,

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<sup>147</sup> See, e.g., Covad *et al.* Apr. 24, 2008 *Ex Parte* Letter at 20; see also Letter from Brad E. Mutschelknaus *et al.*, Counsel to Covad Communications Company *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, Attach. (filed Apr. 23, 2008) (GeoResults data) (showing by wire center service area the number of commercial buildings, the percent of commercial buildings served by facilities-based competitive LECs, and the total aggregated demand in DS0 equivalents); Covad *et al.* June 16, 2008 *Ex Parte* Letter at 5-7 (explaining the scope of the GeoResults data); Time Warner Telecom Opposition at 3-4 (citing GAO statistics showing that competitors have deployed loop facilities to only 5.7 percent of the commercial buildings with demand of DS1 or greater in Minneapolis-St. Paul, 3.7 percent of such buildings in Phoenix and 3.8 percent of such buildings in Seattle, and providing the actual percentage of commercial buildings in the 4 MSAs to which Time Warner Telecom has constructed loops); see also *id.* at 21 (stating that “Eschelon relies exclusively on Qwest loops to serve business customers” in the markets at issue in this proceeding). Although Qwest claims that the GeoResults data are in error because they include 141 wire center service areas where Qwest does not seek forbearance, we find it highly unlikely that removing these areas from the data would result in a coverage estimate approaching the 75 percent threshold relied upon by the Commission in the past. See Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 1-2 (filed July 21, 2008); see also *supra* note 135.

<sup>148</sup> See, e.g., Time Warner Telecom Opposition at 28; Qwest May 15, 2008 *Ex Parte* Letter at 7-8.

<sup>149</sup> See Qwest Denver Petition at 24; Qwest Minneapolis-St. Paul Petition at 24-25; Qwest Phoenix Petition at 24-25; Qwest Seattle Petition at 24.

<sup>150</sup> See, e.g., Verizon 6 MSA Forbearance Order, 22 FCC Rcd at 21317-18, para. 42.

<sup>151</sup> 47 U.S.C. § 160(a)(2).

<sup>152</sup> 47 U.S.C. § 160(a)(3). In making its public interest determination, the Commission must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *Id.* § 160(b).

terms and conditions in these MSAs, we conclude that forbearing from UNE obligations is not in the public interest.<sup>153</sup>

### 3. Forbearance Analysis for *Computer III* Requirements

44. We deny Qwest's request for forbearance from *Computer III* requirements.<sup>154</sup> We cannot find on the record before us that the application of the *Computer III* requirements is unnecessary within the meaning of section 10(a) of the Act.<sup>155</sup> Although Qwest asserts that forbearance from the *Computer III* requirements is justified, 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 . . . 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.<sup>156</sup> As we explained in the *Verizon 6 MSA Forbearance Order*, the Commission adopted the *Computer II* structural safeguards and the *Computer III* non-structural safeguards in order 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.<sup>157</sup> The record here does not

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<sup>153</sup> Because we otherwise are denying Qwest's request for forbearance from UNEs in the 4 MSAs, we need not specifically address the remaining arguments why these forbearance requests should be denied. *See, e.g.*, Covad Comments at 22 (stating that the Commission cannot rely here on the same predictive judgment it exercised in Omaha regarding Qwest's future behavior and how that conduct would impact competition if forbearance is granted); Washington Commission Comments at 3 (claiming that if the Commission were to grant Qwest's forbearance petition, it "would undercut the very foundation and delicate balance" of past state decisions").

<sup>154</sup> Qwest clarified that it was seeking relief "from the application of the Commission's *Computer III* requirements, including [CEI and ONA] requirements, to the mass market and enterprise switched access services at issue here to the extent that Qwest offers information services in conjunction with such services" and "formally withdraws its request for forbearance from the *Computer III* requirements of transmission access and nondiscrimination in light of earlier Commission decisions." *See* Qwest June 13, 2008 *Ex Parte* Letter at 5. Qwest also clarified that its forbearance request does not extend to Qwest information services to the extent that they incorporate telecommunications components other than the services at issue here and maintains its request as to the BOC-specific *Computer III* obligations, which will allow Qwest to respond quickly to customer demands for information services with innovative offerings. *Id.* We note that Qwest previously has obtained significant relief from *Computer III* requirements. *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14875-76, para. 41 (2005), *aff'd*, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. Oct. 16, 2007). Our actions in this Order do not disturb regulatory relief from *Computer III* requirements that Qwest already has obtained.

<sup>155</sup> 47 U.S.C. § 160(a).

<sup>156</sup> *See* Qwest Reply at 55-56 (arguing that the traditional reason for the *Computer Inquiry* rules was that the telephone was the primary, if not exclusive means through which information service providers can gain access to their customers).

<sup>157</sup> *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21318, para. 45; *see also Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, 466-67, para. 216 (1980) (subsequent history omitted); *Computer III Phase I Order*, 104 FCC 2d at 1013, para. 100. "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 Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, 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, 15802-03, para. 83 (1997) (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)), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999).

demonstrate that Qwest no longer possesses exclusionary market power, and thus as in the *Qwest Section 272 Sunset Order*, we must assume that Qwest still possesses such market power.<sup>158</sup> Qwest's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations . . . for[] or in connection with" Qwest's interexchange services that are unjust, unreasonable, or "unjustly or unreasonably discriminatory" and could harm consumers. Such results would be contrary to the public interest. We thus are unable to find on this record that forbearance from the *Computer III* requirements satisfy any of the criteria of section 10(a).

#### IV. EFFECTIVE DATE

45. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, July 25, 2008.<sup>159</sup> The time for appeal shall run from the release date of this order.

#### V. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the Qwest Corporation's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs, filed April 27, 2007, ARE DENIED as set forth herein.

47. IT IS FURTHER ORDERED that, for the reasons set forth above, Qwest's Motion to Object to the Disclosure of Qwest's Confidential Information to the Chief Executive Officer of Integra Telecom, filed on June 19, 2007, IS DISMISSED.

48. IT IS FURTHER ORDERED that, for the reasons set forth above, Qwest's Petition to Modify Protective Order, filed on June 29, 2007, IS DENIED.

### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>158</sup> See *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 47 (stating that "Qwest has failed, however, to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network."); see also *Section 272 Sunset Order*, 22 FCC Rcd at 16449-50, para. 17.

<sup>159</sup> See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a) ("The Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action.").

## APPENDIX A

**Comments/Oppositions to the Qwest 4 MSA Petitions for Forbearance  
in WC Docket No. 07-97**

<u>Commenter/Opponent</u>	<u>Abbreviation</u>
Ad Hoc Telecommunications Users Committee	AdHoc
Affinity Telecom, Inc. <i>et al.</i>	CLEC Group
Ann P. Bowling	Ann P. Bowling
Arizona Corporation Commission	Arizona Commission
BT Americas Inc.	BT Americas
Colorado Office of Consumer Counsel	Colorado Office of Consumer Counsel
Colorado Public Utilities Commission	Colorado Commission
Comcast Corporation	Comcast
COMPTEL	COMPTEL
Covad Communications Group, NuVox Communications, XO Communications, LLC	Covad
Cox Communications, Inc.	Cox
EarthLink Inc. and New Edge Network, Inc.	EarthLink
Independent Business Association	IBA
National Association of State Utility Consumer Advocates	NASUCA
New Jersey Division of Rate Counsel	New Jersey Rate Counsel
The Public Counsel Section of the Washington State Attorney General's Office and the Washington Electronic Business and Telecommunications Coalition	Washington Public Counsel
The Voice on the Net Coalition	VON Coalition
Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom, Inc.	Time Warner Telecom
Washington Utilities and Transportation Commission	Washington Commission

**Replies to the Qwest 4 MSA Petitions for Forbearance  
in WC Docket No. 07-97**

<u>Replies</u>	<u>Abbreviation</u>
Affinity Telecom, Inc. <i>et al.</i>	CLEC Group
Arizona Corporation Commission	Arizona Commission
Colorado Office of Consumer Counsel	Colorado Office of Consumer Counsel
Covad Communications Group, NuVox Communications, XO Communications, LLC	Covad
EarthLink Inc. and New Edge Network, Inc.	EarthLink
Independent Business Association	IBA
National Association of State Utility Consumer Advocates	NASUCA
New Jersey Division of Rate Counsel	New Jersey Rate Counsel
Qwest Corporation	Qwest
Sprint Nextel Corporation	Sprint Nextel
T-Mobile USA, Inc.	T-Mobile

## APPENDIX B

## Residential Market Share

We estimate Qwest's residential market share for each MSA by employing a two step procedure.<sup>160</sup>

Step 1. We estimate the total number of households that have telephone service (whether wireline or mobile wireless) and the number of households that exclusively subscribe to mobile wireless service (*i.e.* households that are wireless only).<sup>161</sup> We further assume that the typical wireline household has one wireline phone.<sup>162</sup>

$$(\text{Qwest} + \text{CLEC}) = (1 - \text{WOH}) * C_{\text{telephone}}$$

Where,

WOH = The percentage of wireless-only households expressed in decimal notation.

$C_{\text{telephone}}$  = The total number of households with telephone service (whether wireline or mobile wireless).

Qwest = Qwest residential local service lines<sup>163</sup> + Qwest residential fixed VoIP subscriber counts<sup>164</sup>

CLEC = Qwest residential resold lines + Qwest residential platform service lines (QPP+ QLSP lines)<sup>165</sup> + facilities-based residential access lines<sup>166</sup>

<sup>160</sup> This approach is consistent with our methodology for calculating market share in prior orders. *See Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21323, App. B.

<sup>161</sup> *See supra* paras. 19-22 (explaining the need for reliable geographically-specific data).

<sup>162</sup> In December 2006, there were 72.8 million primary residential lines and 8.5 non-primary residential lines nationwide. *See Statistics of Common Carriers*, Table 2.4 - Access Lines in Service by Customer for Reporting Incumbent Local Exchange Carriers as of December 31, 2006, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-282813A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282813A1.pdf). This suggests that 88% of households with wireline service have a single wireline phone.

<sup>163</sup> Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 5 (providing residential data as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10 (same); Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter at 4 (same); Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter at 5 (same).

<sup>164</sup> Qwest Denver May 20, 2008 *Ex Parte* Letter, Attach. 8 (providing Qwest's fixed VoIP subscriber counts as of December 2007); Qwest Minneapolis-St. Paul May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Phoenix May 20, 2008 *Ex Parte* Letter, Attach. 8 (same); Qwest Seattle May 20, 2008 *Ex Parte* Letter, Attach. 8 (same). Qwest's residential VoIP counts include customers that are using the service for "both inbound and outbound local calling." *Id.*

<sup>165</sup> Qwest Denver Mar. 10, 2008 *Ex Parte* Letter, Exh. 2; Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter, Exh. 2; Qwest Phoenix Feb. 21, 2008 *Ex Parte* Letter, Exh. 2; Qwest Seattle Mar. 5, 2008 *Ex Parte* Letter, Exh. 2.

<sup>166</sup> For facilities-based residential access lines in Denver, Minneapolis-St. Paul, and Seattle, we undo the adjustments Qwest made to its estimate of facilities-based competitive LEC access lines in service in accord with the Commission's precedent. *See* Qwest Denver Mar. 10, 2008 *Ex Parte* Letter at 6 (Qwest's white page estimates as of December 2007); Qwest Minneapolis-St. Paul Mar. 14, 2008 *Ex Parte* Letter at 10-11 (same); Qwest Seattle Mar. 5, (continued....)

Rearranging the expression yields,

$$C_{\text{telephone}} = (\text{Qwest} + \text{CLEC}) / (1 - \text{WOH}).$$

We estimate,  $\text{Wireless}_{\text{CTC}}$ , the total number of mobile wireless-only households, by

$$\text{Wireless}_{\text{CTC}} = C_{\text{telephone}} - \text{Qwest} - \text{CLEC}.$$

Step 2. We estimate Qwest's market share as follows:

$$\text{MS}_{\text{Qwest}} = [\text{Qwest} + \text{Qwest-wireless}_{\text{CTC}}] / [\text{Qwest} + \text{CLEC} + \text{Wireless}_{\text{CTC}}]$$

Where,

$$\text{Qwest-Wireless}_{\text{CTC}} = \text{Wireless-only households subscribing to Qwest wireless service.}^{167}$$

(Continued from previous page) \_\_\_\_\_

2008 *Ex Parte* Letter at 6 (same); *see also supra* note 68. For facilities-based residential access lines in the Phoenix MSA, we rely on data provided by Cox. Cox June 17, 2008 *Ex Parte* Letter, Attach. at 3-5.

<sup>167</sup> Qwest submitted various estimates of its share of mobile wireless households and Qwest's wireless subscribers. *See* Qwest Denver Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (estimating Qwest's share of mobile wireless households in the MSA using TNS Telecoms data and statewide wireless data and Qwest's wireless subscribers); Qwest Minneapolis-St. Paul Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); Qwest Phoenix Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); Qwest Seattle Apr. 22, 2008 *Ex Parte* Letter, Attach. 2 (same); *see also* Qwest June 13, 2008 *Ex Parte* Letter at 5 (clarifying that Qwest's wireless subscriber counts are the same as the number of wireless phone numbers). In light of our questions about the reliability of certain data in this proceeding, we do not address the merits of Qwest's estimates of its share of mobile wireless households. Rather, as in prior proceedings, we use the Numbering Resource and Utilization Forecast (NRUF) database and the number of Qwest's wireless phone numbers to estimate Qwest's share of mobile wireless-only households in the geographic area at issue. We reiterate our insistence on reliable and geographically specific data in future forbearance proceedings, but find that Qwest has not sufficiently supported its case for forbearance on the basis of such evidence here. *See supra* paras. 19-22. We do not find sufficient evidence in the record to exclude other incumbent LEC-affiliated wireless carriers operating in Qwest's region from the competitors' market share. *See, e.g.,* Letter from Thomas Jones, Counsel for Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 4-6 (filed July 22, 2008). Nor do we find sufficient evidence in the record to exclude Qwest's wireless service from its market share. *See* Letter from Daphne E. Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 at 3-5 (filed July 1, 2008), corrected by errata (filed July 2, 2008); AT&T July 18, 2008 *Ex Parte* Letter at 5-6.

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Petitions of Qwest 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*

The Commission adopted an Order denying forbearance petitions by Qwest for relief from network sharing and other obligations in four Metropolitan Statistical Areas (MSAs). Qwest requested relief similar to the relief the Commission granted the company in Omaha. Although significant competition exists in Qwest's markets, particularly in Phoenix, the Commission determined based on the specific market facts provided to us that Qwest's petitions did not provide sufficient evidence to conclude that regulatory relief like that afforded the company in Omaha was warranted. As competition in these markets continues to develop, I am happy to reevaluate these markets based on updated market facts.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97*

I support today's Order which denies petitioner forbearance relief from dominant carrier regulation and from its UNE and Computer III obligations. In doing so the Commission continues to advance the notion that its decisions in *Qwest-Omaha*, *ACS-Anchorage*, and *Qwest-Terry, Montana* were based on some truly unique sets of circumstances. In contrast, the Commission's denial of the *Verizon 6 MSA Forbearance Petitions* and today's denial of Qwest's petition for regulatory relief in Denver, Minneapolis-St. Paul, Seattle and Phoenix should hopefully send a signal to those considering similar requests that the Commission is cautious, even skeptical, of granting this kind of hurried and ill-considered relief. I support the denial of these petitions because to do otherwise would result in less competition and higher prices – to the clear detriment of consumers in the aforementioned metropolitan areas. As I have previously done in these types of cases, however, I limit myself to concurrence in this decision because the Commission herein relies too heavily on the intermodal efforts of a single alternative provider to decide whether we should forbear from the incumbent's retail and wholesale obligations. That is not the level of competition envisioned by our governing statute.

I continue to believe that the Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace. For example, as the Commission looks to establish policies that promote broadband the lack of competitive alternatives in this market are a severe drag on these efforts. As a recent study by the Pew Internet and American Life Project points out, 35% of dial-up users would switch to broadband if it were more affordable. More competition would certainly put downward pressure on broadband prices and yet the current cable-telephone form of competition has been insufficient to reach those with the least disposable income. Accordingly, I have always been extremely leery of the test established in *Qwest-Omaha* and its progeny that rely so heavily on cable-telephone competition to determine whether there is sufficient competition in the marketplace. I would have been more comfortable with an analysis less accepting of duopoly as a competitive marketplace and that did not lead us further down this road.

There was much debate in the record as to the role that "cut-the-cord" customers (those who use a wireless phone service in place of a wireline phone service) should play in the Commission's market share analysis. This is certainly an important question to be answered, particularly as the number of cut-the-cord customers grows. The Order concludes – too quickly in my view – that these customers should be included in the market share analysis. Important questions about what is the appropriate market, does wireless substitution act to constrain pricing, how do you account for the fact that wireless service is generally not a substitute in the business market, and what type of survey data is appropriate to be used are all questions that were not sufficiently considered. The Order's conclusion that cut-the-cord customers should be included in the market analysis may or may not withstand such a rigorous analysis but it is important to conduct such an analysis if we are going to grant such widespread relief on this basis in the future.

It is also important to note that the public service commissions in Colorado, Washington, Arizona, and Minnesota, as well as NASUCA and numerous consumer and public interest organizations strongly opposed these petitions. These commissions and organizations have a front row seat as to the level of competition that exists in the relevant cities today and the consumer harm that forbearance would cause. Certainly their strong concern is evidence that Qwest has not met the forbearance standard set forth in section 10 – permitting forbearance only where, among other things, current regulations are no longer needed to protect consumers and to serve the public interest.

Finally, while the final outcome in this case is a good one, I continue to be less than enthused about the forbearance process generally. Recent Congressional hearings suggest that some help may be on the way. Nevertheless, I continue to hope that the Commission begins to tack on our own towards industry-wide rulemakings, where appropriate, rather than continue with the piecemeal, time consuming, and resource heavy forbearance process. At a bare minimum, the Commission should complete its NPRM on forbearance procedures as expeditiously as possible.

For the foregoing reasons, I concur in today's decision.