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

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha	)	
Metropolitan Statistical Area	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2005 **Released: December 2, 2005**

By the Commission: Chairman Martin issuing a separate statement; Commissioners Copps and Adelstein concurring and issuing a joint statement.

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I. INTRODUCTION

1. Last year, in the midst of intense facilities-based competition in the Omaha Metropolitan Statistical Area (MSA), Qwest Corporation (Qwest) filed a petition for forbearance pursuant to section 10 of the Telecommunications Act of 1996[1] from many of the statutory and regulatory obligations that apply to it uniquely as the former monopoly telephone company.[2] Today, we grant Qwest substantial relief from many of these obligations, where the level of facilities-based competition ensures that market forces will protect the interests of consumers and regulation is, therefore, unnecessary. Through this Order, we show that we are ready and willing to step aside as regulators and let market forces prevail where facilities-based competition is robust.

[1] 47 U.S.C. § 160; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. We refer to both of these Acts as the Act. When we want unambiguously to refer to the Telecommunications Act of 1996, we refer to it as the 1996 Act.

[2] Qwest seeks forbearance from the application of four categories of regulation in its service territory in the Omaha MSA: (1) dominant carrier regulation; (2) all section 251(c) obligations; (3) section 271(i)-(vi) and (xiv) competitive checklist requirements; and (4) all other regulations to which it is subject as an incumbent LEC. 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 (filed June 21, 2004) (Qwest Petition or Petition). Comments were filed in this proceeding on August 24, 2004, and reply comments were filed on September 23, 2004. *See Pleading Cycle Established for Comments on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 19 FCC Rcd 11374 (WCB 2004); *Wireline Competition Bureau Extends Reply Comment Cycle on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Public Notice, 19 FCC Rcd 14798 (WCB 2004). The Bureau extended the one-year deadline for acting on Qwest's Petition by 90 days. *See Qwest Corporation's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Order, 20 FCC Rcd 2531 (WCB 2005).

2. We grant Qwest forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to section 251(c)(3) in those portions of its service territory in the Omaha MSA[3] where a facilities-based competitor has substantially built out its network. We also are persuaded by the evidence on the record to forbear from applying certain dominant carrier regulation to Qwest's provision of mass market switched access and broadband services in Qwest's service territory. With the exception of minor relief from sections 271 and 251(c)(6) that reflects the relief we grant from section 251(c)(3), we deny Qwest's Petition in all other respects. While each case must be judged on its own merits, and while we adopt herein no rules of general applicability, we expect our Order to provide incentives for facilities-based competitors to expand their deployment and service offerings in Omaha, and we look forward to the day when that competition justifies more of the relief Qwest seeks.[4]

II. BACKGROUND

3. *Section 251(c) Requirements*. The Act includes a number of provisions designed to promote the development of competitive markets.[5] As noted above, Qwest seeks relief from all section 251(c) obligations, which are the duties to negotiate in good faith the terms and conditions of section 251(b) and (c) agreements; provide interconnection at any technically feasible point to any requesting telecommunications carrier at cost-based rates for the transmission and routing of telephone exchange service and exchange access service; provide UNEs for the provision of telecommunications service; offer for resale at wholesale rates any telecommunications service that the carrier provides at retail; provide reasonable notice of network changes; and provide collocation.[6]

4. In light of the scope of the relief we grant Qwest today – relief from many of its section 251(c)(3) obligations – we focus our section 251(c) background discussion on issues related to section 251(c)(3) in particular. The Commission previously has summarized the long and complex history of our unbundling regime since the passage of the 1996 Act.[7] Here, we offer only a brief review of recent regulatory developments as they affect the requirements most relevant to this proceeding.

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[3] Qwest's service territory in the Omaha MSA encompasses 24 wire center service areas in 5 counties in Nebraska and Iowa. Sixteen of these wire centers are located in Nebraska, and eight are located in Iowa. *See* Qwest Petition at 7, 19-20, n.60; *see also* Qwest Petition, Exhibit A, Affidavit of David L. Teitzel (Qwest Teitzel Aff.) at 2 n.3.

[4] This proceeding considers factors unique to the Omaha MSA. It does not consider and does not reach the situation where the incumbent LEC's primary competitor uses unbundled networks elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market. Such a situation necessarily raises different issues with respect to our section 10 analysis. We do not consider or address them here.

[5] *See, e.g.*, 47 U.S.C. § 251.

[6] *See* 47 U.S.C. §§ 251(b), 251(c)(1)-(6); *see also* 47 C.F.R. §§ 51.301 (implementing section 251(c)(1)), 51.305 (implementing section 251(c)(2)), 51.301-19, 51.321, 51.323 (implementing section 251(c)(3)), 51.601-17 (implementing section 251(c)(4)), 51.325-35 (implementing section 251(c)(5)), 51.323 (implementing section 251(c)(6)).

[7] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16992-17007, paras. 8-34 (2003) (*Triennial Review Order*), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, (continued….)

5. Section 251(c)(3) imposes on incumbent 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." The Act does not identify which network elements are subject to the section 251 (c) (3) unbundling obligations.[8] Instead, Congress directed the Commission to determine what non-proprietary network elements must be unbundled under section 251(c)(3) after considering, at a minimum, whether access to a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[9] Under section 252, UNEs that must be offered pursuant to section 251(c)(3) must be made available at cost-based rates, as determined using the TELRIC methodology.[10]

6. In February 2005, the Commission released the *Triennial Review Remand Order*,[11] in which it revised the list of network elements that must be provided as UNEs. The Commission also modified its unbundling framework by making impairment determinations in part by drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets.[12] In making such inferences for high-capacity loops and transport, the Commission

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359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004).

[8] 47 U.S.C. § 251(c)(3).

[9] *See id*. §§ 251(d)(1), (2)(B). For proprietary network elements, the Act directs the Commission to consider whether access to such network elements is "necessary." *See id*. § 251(d)(2)(A). Almost all network elements have been considered "non-proprietary" and analyzed under section 251(d)(2)(B).

[10] *See id.* § 252(d)(1). The Commission established the TELRIC pricing methodology that state commissions must use to determine what are permissible cost-based rates incumbent LECs may charge for UNEs in the *Local Competition First Report and Order*. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15846-50, paras. 679-89 (1996) (*Local Competition First Report and Order*) (subsequent history omitted) (establishing the TELRIC methodology and asking the states to perform the necessary analysis under this methodology). The Supreme Court upheld this allocation of federal and state jurisdiction, *see AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 377-86 (1999), and upheld the TELRIC pricing methodology, *see Verizon Communications v. FCC*, 535 U.S. 467 (2002). The Commission has initiated a separate proceeding in which it is comprehensively reviewing TELRIC. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003).

[11] *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, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *appeal pending*, *Covad Communications Co. v. FCC*, Nos. 05-1095 *et al*. (filed Feb. 24, 2005). In August 2004, the Commission issued the *Interim Order and NPRM*, which sought comment on how to respond to the D.C. Circuit's *USTA II* decision. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004) (*Interim Order and NPRM*). To avoid excessive disruption of the local telecommunications market while it wrote the new rules created in the *Triennial Review Remand Order*, the Commission, among other things, also required incumbent LECs to adhere to the commitments they made in their interconnection agreements, applicable statements of generally available terms (SGATs) and relevant state tariffs that were in effect on June 15, 2004.

[12] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2546, para. 22.

adopted a wire-center-based analysis that used the number of access lines and fiber collocations in a wire center as proxies to determine impairment for high-capacity loop and dedicated transport UNEs.[13] The Commission also concluded on a nationwide basis that incumbent LECs did not have an obligation to unbundle mass market local circuit switching.[14]

7. *Section 271 Unbundling Requirements*. Section 271(c)(2)(B) of the Act sets forth a fourteen point "competitive checklist" of access, interconnection and other threshold requirements that a Bell operating company (BOC) must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services.[15] After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements.[16] Because Qwest is a BOC that has been granted the authority to provide interLATA services in its in-region states, including Iowa and Nebraska, it is subject to the requirements of section 271(c)(2)(B).[17] In its Petition, Qwest seeks forbearance relief from checklist items 1 through 6 and 14.[18] Checklist items 1 through 3 and 14 establish the obligations to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1); nondiscriminatory access to section 251(c)(3) UNEs; nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by the BOC in accordance with the requirements of section 224;[19] and the obligation to provide telecommunications services for resale in accordance with the

[13] Specifically, the Commission found that competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. It also found that competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, the Commission found that competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. *Triennial Review Remand Order*, 20 FCC Rcd at 2536, para. 5. For enterprise loops, the Commission found that competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. It also found that competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. *See id*. The Commission also found that carriers are not impaired on a nationwide basis without access to unbundled dark fiber loops. *See id.* at 2633, para. 182.

[14] *See id.* at 2641-59, paras. 199-226; *see also USTA II*, 359 F.3d at 564-71. The Commission determined that competitive LECs are not impaired without access to unbundled mass market local switching, and that regardless of any potential impairment that may still exist, the costs associated with unbundling justified a decision not to unbundle pursuant to section 251(d)(2)'s "at a minimum" authority. *See Triennial Review Remand Order*, 20 FCC Rcd at 2643-44, paras. 202-04.

[15] 47 U.S.C. § 271(c)(2)(B); *see also* 47 U.S.C. § 153(4) (defining "Bell operating company").

[16] 47 U.S.C. § 271(d)(6).

[17] *See Application by Qwest Communications International, Inc. for Authorization to Provide In-region, InterLATA Services in the Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303 (2002) (*Qwest IA/NE Section 271 Order*).

[18] *See* Petition at 1.

[19] As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section (continued….)

requirements of sections 251(c)(4) and 252(d)(3).[20] Checklist items 4, 5, and 6 establish independent obligations to provide local loops, local transport, and local switching.[21]

8. In the *Triennial Review Order*, the Commission considered the relationship between sections 251 and 271. Based on its interpretation of the Act, the Commission concluded that checklist items 4 through 6, which, unlike the other checklist items listed above, do not incorporate by reference the requirements of section 251(c) or other provisions of the Act, constitute a distinct statutory basis for the requirement that BOCs provide competitors with access to certain network elements. Therefore, a BOC must provide access to network elements encompassed within the scope of checklist items 4 through 6, even if those elements are not subject to unbundling under section 251(c)(3).[22] The Commission explained that rates for network elements made available pursuant to checklist items 4 through 6 are governed not by the TELRIC standard that applies to section 251(c)(3) unbundling but instead by the "just and reasonable" standard of sections 201 and 202.[23] The D.C. Circuit affirmed the Commission's conclusions related to the section 271 obligations.[24]

9. After Qwest filed its Petition in the present proceeding, the Commission determined, in the *MDU Reconsideration Order*, that the section 706 considerations that partly justified the *Triennial Review Order*'s fiber-to-the-home (FTTH) unbundling relief[25] should be extended to encompass FTTH

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224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits or rights-of-way owned or controlled by utility companies, including LECs. *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, 13 FCC Rcd 20599, 20706, para. 171 n.574 (1998) (*Second BellSouth Louisiana Section 271 Order*); *see also* 47 U.S.C. § 224.

[20] *See* 47 U.S.C. §§ 271(c)(2)(B)(i)-(iii), (xiv). Sections 251(c)(2)-(4), and section 224 are discussed above. *See supra* notes 6, 19 and paras. 5-6. Section 252(d)(1), *inter alia*, establishes the pricing standard for UNEs. 47 U.S.C. § 252(d)(1). Section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3).

[21] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi); *see also Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. D/B/A Southwestern Bell Long Distance to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18520, para. 336 (2000); *Second BellSouth Louisiana Section 271 Order*, 13 FCC Rcd at 20722, para. 207. The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers. *See Second BellSouth Louisiana Section 271 Order*, 13 FCC Rcd at 20719, para. 201.

[22] *Triennial Review Order*, 18 FCC Rcd at 17382-91, paras. 649-67, *corrected by Triennial Review Errata*, 19 FCC Rcd 19020, 19022, paras. 30-33; *see also Triennial Review Order*, 18 FCC Rcd at 17384, para. 653.

[23] *Id.* at 17386-89, paras. 656-64, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33.

[24] *USTA II*, 359 F.3d at 588-90.

[25] In the *Triennial Review Order*, the Commission determined that incumbent LECs have no unbundling obligation for new fiber construction and for fiber overbuild situations where the incumbent LEC does not retire existing copper loops. *See Triennial Review Order*, 18 FCC Rcd at 17142, para. 273.

loops serving predominantly residential multiple dwelling units (MDUs).[26] Subsequently, in the *FTTC Reconsideration Order*, the Commission found that the FTTH analysis also applies to fiber-to-the-curb (FTTC) loops – which are loops that bring fiber from the central office to a location near the customer's premises – and granted the same unbundling relief to FTTC as applied to FTTH.[27] In the *Section 271 Broadband Forbearance Order*, the Commission granted all of the BOCs, including Qwest, forbearance from section 271 unbundling obligations for the broadband elements that the Commission, on a national basis, relieved from section 251(c)(3) unbundling in the *Triennial Review Order*, and subsequent reconsideration orders.[28] These elements include FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.[29]

10. *Dominant Carrier Regulation*. Under Title II of the Act, the Commission traditionally has applied a variety of regulations to carriers in order to protect consumers from unjust, unreasonable, and unreasonably discriminatory rates and practices. These regulations include 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.[30] The *Competitive Carrier Proceeding* considered revisions to the Commission's regulations to distinguish between carriers that are subject to effective competition in their respective telecommunications markets and those that are not.[31]

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[26] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15858, paras. 7-9 (2004) (*MDU Reconsideration Order*).

[27] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303, paras. 9-19 (2004) (*FTTC Reconsideration Order*); *see also id*. at 20293, para. 1 n.1.

[28] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21504, para. 19 (2004) (*Section 271 Broadband Forbearance Order*), *appeal pending, AT&T Corp. v. FCC*, No 05-1028 (D.C. Cir., filed Nov. 5, 2004). To the extent Qwest seeks identical relief in its present Petition, we deny its Petition to that degree as moot.

[29] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19.

[30] *See* 47 U.S.C. § 214(a); *see also* 47 C.F.R. § 63.71; 47 C.F.R. §§ 61.38, 61.41-61.49; and 47 C.F.R. §§ 61.41-61.49, 65.

[31] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI* (continued….)

The Commission found that certain regulations that apply to all carriers under Title II are unnecessary for carriers that are subject to competition and therefore lack sufficient market power to engage in anticompetitive activity.[32]

11. Qwest asks us to forbear from applying dominant carrier regulation to its provision of telecommunications services in its service area within the Omaha MSA.[33] Because the Commission has in the past found that incumbent LECs, including Qwest, have market power in the provision of most services within their service areas, the rates that incumbent LECs may charge for certain services currently are subject to dominant carrier regulation.[34] Dominant carriers are subject to price cap or rate-of-return regulation, and must file tariffs for some services – on a minimum of seven days' notice and often more – and usually with cost support data.[35] Non-dominant carriers, on the other hand, are not subject to rate regulation and may file tariffs, on one day's notice and without cost support that are presumed lawful.[36] In addition, non-dominant carriers are required to wait only 30 days for their applications to discontinue, reduce, or impair service to be granted, as opposed to a 60-day grant period for dominant carriers.[37] Finally, dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfer of control under section 214 than non-dominant carriers.[38]

12. *Regulation as an Incumbent Local Exchange Carrier*. Qwest requests forbearance from regulation as an incumbent LEC "pursuant to section 251(h)(l)."[39] Section 251(h)(1) defines an "incumbent LEC" as:

> with respect to an area, the local exchange carrier that – (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of the enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or

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Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier Proceeding*).

[32] *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

[33] *See* Petition at 1, 3, 5-21.

[34] *See Competitive Carrier First Report and Order*, 85 FCC 2d at 21, para. 58 (finding that control of bottleneck facilities is "prima facie" evidence of market power).

[35] *See* 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997).

[36] 47 C.F.R. §§ 1.773(a)(ii) and 61.23(c); *Tariff Filing Requirements for Non-dominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995).

[37] 47 C.F.R. § 63.71(c).

[38] 47 C.F.R. § 63.03(b).

[39] *See* Petition at 38, 39.

after such date of enactment, became a successor or assign of a member described in clause (i).[40]

III. DISCUSSION

A. Forbearance Standard

13. The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."[41] An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.[42] Specifically, 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 charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[43] In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[44] Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented."[45]

14. Consistent with our statutory obligations, in this Order we therefore apply the criteria of section 10 to the regulations and statutory provisions from which Qwest seeks relief.[46] As part of our forbearance analysis, and consistent with Qwest's Petition, we look to the Commission's previous

[40] 47 U.S.C. § 251(h)(1).

[41] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[42] 47 U.S.C. § 160(a).

[43] *Id*.

[44] *Id*. at § 160(b).

[45] *Id*. at § 160(d).

[46] We stress that our decision today is based on the totality of the record evidence particular to the Omaha MSA. The presence of a subset of similar facts in other markets – such as an equivalent degree of coverage by an incumbent cable operator that was not actively engaged in providing competitive telecommunications offerings over its own facilities – might result in a different outcome. *See, e.g.*, Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 2 (filed Sept. 12, 2005) (SBC Sept. 12, 2005 *Ex Parte* Letter) (stating that "[t]he characteristics of retail markets are distinct on many levels, and should be considered on a case-by-case basis. . . . much of the debate in this proceeding appears to have focused on market statistics that are unique to the Omaha area and are likely not applicable to other markets"); *see also* Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 5 (filed Sept. 14, 2005) (Cox Sept. 14, 2005 *Ex Parte* Letter) (stating that in some markets other than the Omaha MSA Cox relies on UNEs for certain facilities, illustrating why it is "important for the Commission to engage in fact-specific, market-by-market analysis in forbearance proceedings").

caselaw on dominance for guidance. We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[47] Accordingly, our sole task here is to determine whether to forbear under the standard of section 10 from the regulatory and statutory provisions at issue, and we do not – and cannot – issue comprehensive proclamations in this proceeding regarding non-dominance, non-impairment, or section 251(h) status in the Omaha MSA.[48]

B. Dominant Carrier Regulation

15. We grant in part and deny in part Qwest's request for forbearance from the application of dominant carrier regulation to its provision of telecommunications services in the Omaha MSA. Specifically, we grant Qwest's request to forbear from applying our price cap, rate of return, tariffing, and 60-day discontinuance regulations for interstate mass market exchange access services and mass market broadband Internet access services, and deny its request for forbearance with regard to its enterprise services. We deny the remainder of Qwest's request for forbearance from applying any other dominant carrier regulation to these services, and to the extent it seeks forbearance from applying any dominant carrier regulation to its provision of other telecommunications services.

1. Scope of Qwest's Petition Subject to Section 10

16. The Commission's first task is to identify the specific regulatory provisions at issue.[49] We focus our forbearance review to the rules and regulations that Qwest specifically identifies in its Petition: "(1) requirements arising under section 214 that apply to dominant carriers, (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days notice with cost support; and (3) Sections 61.41-61.49, and 65, which impose price cap and rate of return regulation on dominant

[47] Thus, in today's Order, we do not craft any new tests for impairment or incumbent LEC status, or any other generally applicable tests we might fashion were a different category of petition before us. *See, e.g.*, 47 U.S.C. § 251(h)(2) ("The Commission may, *by rule*, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if" certain criteria are satisfied.) (emphasis added). Similarly, we are not persuaded by Qwest's arguments that "a regulation that is subject to a petition for forbearance may be retained only if the current record would justify adoption of the rule today," because neither section 10 nor the Commission's precedent directs us to re-examine whether a rule carries out the goals of a prior rulemaking. *See* Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1-6 (filed Sept. 2, 2005) (Qwest Sept. 2, 2005 *Ex Parte* Letter); *see also* 47 U.S.C. § 160.

[48] Therefore, we reject commenters' proposals that we interpret and apply the section 251(c)(3) impairment standard or the section 251(h) standard to our forbearance analysis. *See, e.g.*, SBC Reply at 9-12; *see also* Letter from Thomas Jones, Counsel to Cbeyond Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 4-6 (filed Sept. 13, 2005) (Cbeyond *et al.* Sept. 13, 2005 *Ex Parte* Letter) (arguing that Qwest has not demonstrated the absence of impairment under section 251(c)(3)). Faced with a similar request for a non-dominance declaration as part of a forbearance petition, the Commission made clear that it did not make any findings regarding whether the petitioner was non-dominant for the provision of any service, and that the tariffing forbearance at issue was limited to the requirements raised in the petition. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27008, para. 14 (2002) (*ASI Forbearance Order*).

[49] *ASI Forbearance Order*, 17 FCC Rcd at 27010, para. 18.

carriers."[50] To the extent Qwest seeks relief from other regulations that apply to dominant carriers, its request is denied for failing to identify specific regulations or to explain how they meet the section 10 criteria.[51]

17. Although Qwest has not formally requested a declaratory ruling that it is non-dominant, 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.[52] 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"[53] closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the regulations at issue pursuant to the section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis.

2. Application of Forbearance Criteria to Qwest's Petition

18. Through the *Competitive Carrier Proceeding*, the Commission established a regulatory framework to distinguish between dominant carriers, which have market power, and carriers classified as non-dominant, which lack market power.[54] Under the framework set forth in the *LEC Classification Order*, the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses

[50] Petition at 31-32 (citations omitted).

[51] Neither Qwest nor any commenter has pointed to any authority that would compel the Commission to comb through its rules to infer which other regulations are encompassed by Qwest's general request, and as our precedent in the *ASI Forbearance Order* and *SBC IP Forbearance Order* indicates, this lack of specificity alone warrants dismissal. *See ASI Forbearance Order*, 17 FCC Rcd at 2705-06, para. 9 ("In addition to seeking forbearance from tariffing requirements, SBC requests that we declare it non-dominant in its provision of advanced services. SBC's petition, however, fails to request any specific forbearance relief, other than relief from tariffing regulation.") (footnote omitted); *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, WC Docket No. 04-29, FCC 05-95, paras. 14-17 (rel. May 5, 2005) (*SBC IP Forbearance Order*) (denying forbearance petition for, *inter alia*, lack of specificity).

[52] 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 and look to all four factors that the Commission traditionally considers. *See AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001). 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.

[53] 47 U.S.C. § 160.

[54] *See supra* paras. 10, 11. Market power is defined as "the ability to raise prices by restricting output," or "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558, paras. 7, 8.

individual market power in that market.[55] The Commission defines relevant product markets by identifying and aggregating consumers with similar demand patterns.[56] The Commission has also explained that "[a] geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area," and that it would "treat as a geographic market, an area in which all customers in that area will likely face the same competitive alternatives for a product."[57]

19. Applying the section 10 criteria as informed by the dominance analysis, we forbear from applying certain dominant carrier regulations to Qwest's provision of mass market exchange access services, as well as mass market broadband Internet access services, because we find that all elements of section 10(a) have been satisfied. We decline to forbear from applying these dominant carrier regulations to Qwest's provision of enterprise services because Qwest has failed to demonstrate satisfaction of *any* of the three conjunctive section 10(a) forbearance criteria.

a. Relevant Markets

(i) Product Market

20. Our inquiry is necessarily limited to those dominance regulations and statutory provisions over which the Commission has jurisdiction – dominant carrier regulation of interstate telecommunications services. Any dominant carrier regulation of local exchange service or other intrastate service is not subject to our forbearance authority.[58]

21. Qwest proposes, without further explanation, that the relevant product market "is the market for services provided under Section 251(c) and selected services under Section 271 provided within the

[55] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15776, 15782 (1997) (*LEC Classification Order*)

[56] *See, e.g.*, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's* Rules, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746, para. 68 (1999) (*SBC/Ameritech Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18119, para. 164 (1998) (*WorldCom/MCI Order*).

[57] *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20016, para. 54 (*BA/NYNEX Order*).

[58] Qwest Reply at 14 (stating that it does not seek the preemption of any existing state authority). We agree with the commenters who note the open-endedness of the scope of services for which Qwest seeks forbearance. *See* CompTel Comments at 20-21 (asserting that it is unclear from the Petition whether Qwest is asking for non-dominant status in the provision of exchange access services, which the Commission regulates, or in the provision of local exchange services, which the Commission does not regulate). We note that purely intrastate telecommunications services generally fall outside the Commission's jurisdiction.

boundaries of the Omaha MSA."[59] We find such a wide scope of services in this proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers.[60] However, consistent with the statute's deregulatory intent,[61] and in an effort to conduct a thorough forbearance analysis that reflects the evidence compiled in the record, we disaggregate the telecommunications services that Qwest provides into more discrete classes.[62]

22. Accordingly, for purposes of evaluating Qwest's request for relief from dominant carrier regulation, we divide these interstate services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers).[63] Our analyses of the mass market and enterprise market are not identical to, but are in accordance with, the Commission's past product market analyses for those services.[64] In addition, we also separate out mass market broadband Internet access services, consistent with the Commission's separate review of that market in prior merger proceedings.[65] Thus, within the mass market we look at both switched access

[59] Petition at 6.

[60] *SBC/Ameritech Order*, 14 FCC Rcd at 14746 para. 68.

[61] The 1996 Act was announced as "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Preamble to the 1996 Act).

[62] We do not include Qwest's provision of interstate, interLATA service in this inquiry, because Qwest is currently non-dominant for these services. Pursuant to section 272 of the Act, Qwest provides these services through a section 272 affiliate, which is treated as non-dominant. *LEC Classification Order*, 12 FCC Rcd at 15802, para. 82 (classifying BOCs' section 272 affiliates as non-dominant in the provision of in-region, interstate, domestic interLATA services and in-region international services).

[63] In light of the evidence submitted into the record, which often distinguishes between residential and business customers but does not generally provide a more granular break-down between small and large businesses or other categories, we do not disaggregate the enterprise market further.

[64] In the past, for purposes of market power assessment, the Commission has divided services into the mass market (residential consumers and small business) and the enterprise market (larger businesses, namely medium-sized and large business customers). *See, e.g.*, *SBC/Ameritech Order*, 14 FCC Rcd at 14746 para. 68; *WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164. Unlike these decisions, which included local exchange service and exchange access services in the same product market, here we only examine exchange access services because section 10(a) focuses our inquiry on the target services to which our regulations apply.

[65] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9861, para. 102 (2000) (identifying "broadband Internet services" to analyze the provision of broadband Internet services to residential customers); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6568 para. 53 (2001) (identifying "high-speed Internet access services" to analyze the provision of residential high-speed Internet access services). Consistent with these decisions, mass market broadband Internet access services include the provision of high-speed Internet access over cable modem platforms as well as DSL platforms. *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. (continued….)

services and broadband Internet access services.[66] For the purposes of assessing forbearance from dominant carrier regulation, we reject suggestions from commenters that our section 251(c)(3) network element unbundling precedent controls our market framework.[67]

(ii) Geographic Market

23. Qwest submits in its Petition that the geographic market where it seeks forbearance is the Omaha MSA, and clarifies in its Reply Comments that its intended geographic market is its service territory within the Omaha MSA.[68] Qwest represents that its service territory falls into only five of the eight counties in the Omaha MSA, and that it seeks relief in only those five counties that it listed in its original Petition.[69] Qwest also states that its service territory in the Omaha MSA includes 24 wire centers in the Omaha MSA, and that it therefore seeks relief throughout the territory served by those wire centers.[70] In its Petition, Qwest filed retail market data regarding the entire MSA, without disaggregating the state of competition by county, zip code, wire center or other more narrow geographic market.[71]

24. For the purposes of analyzing dominant carrier regulation of Qwest in this proceeding, we define the relevant geographic market here to be Qwest's service area in the Omaha MSA.[72] Qwest has proposed its service territory as the market and submitted its case consistent with that definition, so we begin our analysis with that region as the relevant geographic market unless the record indicates compelling reasons to narrow it.

(Continued from previous page)
01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22748, para. 5; *see also Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21506, para. 22-23. Our references in this order to "broadband" service signify high-speed rather than dial-up service.

[66] All special access services are addressed in the enterprise section, below.

[67] *See, e.g.*, McLeodUSA Comments at 4 (contending that the relevant market for a dominance evaluation is the wholesale market of loops and transport); TWTC Comments at 4-5 (arguing that the Commission held in the *Triennial Review Order* that the mass market, small and medium enterprise, and large enterprise segments comprise separate markets of telecommunications services).

[68] *See* Petition at 1; Qwest Reply at 17 (clarifying that Qwest is "only seeking forbearance in the territory *that it serves* within the Omaha MSA").

[69] *See* Qwest Reply at 17. Qwest has clarified these numbers in response to criticism from Cox and AT&T about Qwest's initial statement in its Petition that there are only five counties in the Omaha MSA. *See also* Cox Comments at 16; AT&T Comments at 7.

[70] *See* Petition at 19-20, n.60. Qwest states that it seeks relief in the following wire centers in Nebraska: Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th Street, Omaha 84th Street, Omaha 90th Street, Omaha Bellevue, Omaha 135th Street, Omaha Fort Street, Omaha Fowler Street, Omaha 156th Street, Omaha Izard Street, Omaha Douglas, Omaha O Street, and Springfield and Valley. Qwest also seeks relief in the following wire centers in IA: Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood. *Id.*

[71] Qwest has supplemented certain aspects of the record with wire center-specific data.

[72] We emphasize that we make no findings with regard to the service territory of the other independent LECs in the Omaha MSA.

b. Mass Market Services

25. On the basis of the evidence of competition on the record and the application of the section 10(a) statutory criteria, we conclude that enforcement of the listed dominant carrier regulations for mass market exchange access and broadband Internet access services is unwarranted. In particular, we find most persuasive that Cox has acquired a **[REDACTED]** share of the residential access market **[REDACTED]** Qwest, and that Cox has **[REDACTED]** share of the broadband Internet access market.[73] Our forbearance from the application of the dominant carrier regulations before us today is conditioned upon Qwest's compliance with competitive carrier requirements, and in no instance is Qwest to be subject to less regulation than any competitive LEC. We reach these conclusions by examining the state of competition in Qwest's service territory in the Omaha MSA for mass market services, including market share, demand and supply elasticities, and Qwest's size, resources, and technical capabilities.

(i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

26. Section 10(a)(1) requires that we determine whether enforcement of the regulations at issue is not necessary to ensure that charges, practices, classifications or regulations by Qwest are not unjustly or unreasonably discriminatory.[74] In its Petition, Qwest argues broadly that dominant carrier regulation of Qwest's "local telephone services" in the Omaha MSA is no longer necessary to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory, and that Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[75] More specifically, it contends that the Omaha MSA telecommunications market has become highly competitive, that no carrier has market power, and that there is no longer any regulatory justification for applying unique regulatory requirements to any single carrier as "dominant."[76] Qwest asserts that requirements other than dominant carrier regulation, such as sections 201 and 202 of the Act, are sufficient to protect consumers from any carrier attempting to charge unreasonable rates.[77]

27. We conclude that the Commission's relevant rules on dominant carrier price caps, rate of return, tariffing, rate averaging, and discontinuance are no longer necessary to ensure that Qwest's rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory for the services in the product market at issue below. We recognize, however, the special problem of carrier's carrier charges –

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[73] *See infra* para. 28.

[74] *See* 47 U.S.C. § 160(a)(1).

[75] *See* Petition at 32.

[76] *Id*.

[77] *See id.* at 33 (citing 47 U.S.C. §§ 201, 202). Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. 47 U.S.C. § 201. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions. *Id*. Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons. 47 U.S.C. § 202.

that all LECs have monopoly power over the rates that they charge carriers wishing to terminate calls to LECs' end user customers. Our analysis below discusses the competitive environment in general, and addresses why certain dominant carrier regulations are not necessary to check Qwest rates and practices with regard to its own end users. We address the special problem of carrier's carrier charges separately below.

(a) Market Share

28. *Mass Market Switched Access Service*. For this factor, we find compelling that Qwest has less than **[REDACTED]** percent of the market for residential access lines in Qwest's service territory in the MSA, based upon Qwest's and Cox's own submitted data. To reach a determination with regard to the mass market for switched access services, we find that the data Qwest and Cox have submitted regarding residential customers are a reasonable proxy for the number of mass market customers served by each carrier.[78] Qwest reports that as of December 2004, it had **[REDACTED]** residential retail access lines.[79] Cox submits that as of May 1, 2005, it had **[REDACTED]** residential lines.[80]

29. Although we are confident that the evidence in this record demonstrates that Qwest has less than **[REDACTED]** of the relevant share of the mass market for switched access, we are unable to calculate an absolute figure based on that record.[81] No state regulatory compilations of the number of access lines for the geographic market in question were submitted in this proceeding, and no carriers other than Qwest or Cox submitted data in this proceeding detailing the number of residential access lines. Our market share estimates are also supported by Qwest's evidence regarding E911 data. Relying on estimates from an E911 database administrator from April 2004 as "a directional surrogate for the number of access lines served by facilities-based CLECs," in combination with competitive LEC resale and UNE-P data as of February 2004 and its own retail access line data, Qwest submits that the competitive LEC

[78] Although the Commission's customer class distinction for assessment of dominance traditionally distinguishes between mass market customers and enterprise market customers, Qwest and Cox submitted their customer data grouped in categories of "residential" customers and "business" customers. Due to these similarities between the kinds of services that residential customers and very small business customers purchase, as well as how carriers market and provide service to them, we find that 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. It therefore is reasonable for us to treat the data Qwest and Cox have submitted regarding residential customers as a proxy for the number of mass market customers served by each carrier. Even if Qwest and Cox have omitted very small businesses from their residential access line counts, this omission would have only a negligible affect on our analysis of this market.

[79] Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5 (filed May 20, 2005) (Qwest May 20, 2005 *Ex Parte* Letter). Qwest's retail access line base in the Omaha MSA has declined by **[REDACTED]** percent over the last several years, falling from **[REDACTED]** in December 1997. *Id.*

[80] Letter from J.G. Harrington, Counsel to Cox, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-223 at 3 (filed Jun. 30, 2005) (Cox June 30, 2005 *Ex Parte* Letter).

[81] *See supra* para. 28.

market share of residential access lines in Qwest's service territory in the Omaha MSA is **[REDACTED]** percent.[82]

30. *Mass Market Broadband Internet Access Service*. Qwest has **[REDACTED]** of the market for broadband Internet access service. Cox does not dispute Qwest's contention that Cox **[REDACTED]** of the broadband subscriber base in the Omaha MSA. Qwest submits that, based on Cox's national cable modem subscribership penetration rate of 24.6 percent, Cox has approximately 86,000 cable modem subscribers in the Omaha MSA, compared to **[REDACTED]** DSL subscribers for Qwest as of December 2004.[83] Cox confirms that Qwest's figure is a "reasonable estimate" of Cox's broadband Internet access base.[84] Again, while we are unable to calculate a precise market share figure based on the record before us in this proceeding, there is no dispute that Cox's mass market broadband Internet access subscriber base **[REDACTED]** Qwest's.

(b) Market Elasticities and Structure

31. Apart from strict measurement of market share, as part of our forbearance analysis we also examine other economic factors relevant to determining whether enforcement of dominant carrier regulation is necessary to ensure that Qwest's practices in offering interstate mass market switched access services are just, reasonable, and not unjustly or unreasonably discriminatory. In reaching conclusions regarding dominance, the Commission looks beyond market share, and evaluates factors such as demand and supply elasticities, and the firm's cost, structure, size and resources.[85] While not controlling, such indicia can be of relevance to our analysis, so we examine them accordingly.

32. *Demand Elasticity*. A firm's demand elasticity refers to the willingness and ability of a firm's customers to switch to another provider or otherwise change the amount of services they purchase from that firm in response to a change in price or quality of the service at issue.[86] High firm demand elasticity indicates customer willingness and ability to switch to another service provider in order to obtain price reductions or desired features. Moreover, it also indicates that the market for that service is subject to competition.[87]

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[82] Qwest Teitzel Aff. at 6-8. Qwest has transitioned 90 percent of all of its UNE-P facilities region-wide to the Qwest Platform Plus (QPP) commercial product. Qwest May 20, 2005 *Ex Parte Letter* at 2. Although Qwest's Petition indicates that the E911 database records are from communities in the Omaha MSA, Qwest Teitzel Aff. at 7, Qwest later clarifies that the line counts in the Petition reflect "only . . . E911 records in the wire centers in Qwest's serving territory in the MSA." Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1, Tab 5.

[83] Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at 17.

[84] Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Sept. 15, 2005).

[85] *Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14118-19, para. 67 (1998) (*Comsat Order*); *see also AT&T v. FCC*, 236 F.3d at 731.

[86] *Comsat Order*, 13 FCC Rcd at 14120, para. 71.

[87] *Id.*

33. In assessing demand elasticities for mass market exchange access services, we recognize here as we did in the *CLEC Access Charge Order* that competitive carriers serve two distinct customer groups – end users for long distance calls, and interexchange carriers.[88] With regard to the end user market, we find the demand elasticity in the mass market interstate exchange access market to be high. The Commission has repeatedly found that residential customers are highly demand-elastic, and willing to switch to or from their provider to obtain price reductions and desired features.[89] Nothing in this record indicates otherwise for residential or other mass market customers, and the growth in Cox's residential access line base and corresponding decline in Qwest's base, as described above, fully supports our forbearance determination here. As for concerns of interexchange carriers' inability to switch providers and the terminating access monopoly, we explain below that we impose upon Qwest the same obligations as all other competitive LECs as a condition of our relief, and conditionally modify the pricing mechanism for carriers' carrier charges.[90]

34. We make a similar finding of high demand elasticity for mass market broadband Internet access services. In previous decisions, the Commission has determined that customers can and do choose between competing DSL and cable modem providers, and the record in the instant proceeding is consistent with those cases.[91]

35. *Supply Elasticity*. In general, supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price. The Commission uses this "to determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[92] Two factors determine supply elasticity: (1) whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.*, government imposed restrictions), economic (*e.g.*, capital costs, economies of scale), technological (*e.g.*, a new innovation protected by a patent), or operational (*e.g.*, lack of skilled workers).[93]

36. The record of competition compiled in this proceeding and, significantly, the other market-opening regulations that we leave in place today, support our finding that supply elasticity in this market

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

[89] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, Order, 11 FCC Rcd 3271, 3305, para. 63 (1995) (*AT&T Reclassification Order*).

[90] *See infra* paras. 39-41.

[91] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd 21496, 21506, para. 22; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22748, para. 5; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148, para. 167 (rel. Aug. 8, 2005).

[92] *Comsat Order*, 13 FCC Rcd at 14123, para. 78.

[93] *See id.* at 14123-24, para. 78; *see AT&T Reclassification Order*, 11 FCC Rcd at 3303, para. 57.

is high for all mass market services. Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers, indicates that the first factor is easily satisfied for both switched access and broadband Internet access services.[94] Moreover, with regard to switched voice services, the number of resold lines and QPP lines are also not insignificant.[95]

37. For many of the same reasons as above, we find that the barriers to entry in the Omaha MSA for switched access services are low. We are mindful that this determination relies heavily on the availability of section 251(c) and other pro-competitive regulations that we leave undisturbed in this Order. In particular, our rejection of Qwest's request for forbearance from its section 251(c) duty to provide interconnection and collocation at cost-based rates, as well its obligation to proved resale at avoided cost rates, helps to ensure that existing and new competitors can enter the exchange access market. Our decision to deny Qwest's request for forbearance from all section 251(c) and 271 obligations – other than those arising under section 251(c)(3) regarding transmission facilities, and the section 271 checklist requirements that correlate to those section 251(c)(3) transmission facilities – addresses many of the concerns raised by the Iowa and Nebraska commissions in particular,[96] as well as other commenters.[97]

38. *Firm Cost, Size, Resources.* We find that the record before us is consistent with forbearance in the context of mass market switched access and broadband Internet access services because compared to Cox, Qwest does not have sufficiently lower costs, sheer size, superior resources, financial strength, or technical capabilities to warrant retaining the regulations in question. Under the relevant precedent, the issue at this point in our dominance analysis would be not whether Qwest has advantages, but "whether any such advantages are so great to preclude the effective functioning of a competitive market."[98] We

[94] We describe Cox's build-out in Part III.E.1.c.(ii), *supra*.

[95] Qwest reports that it provides at least **[REDACTED]** QPP residential lines. *See* Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8. Qwest also reports that as of April 2004, provided to its competitors **[REDACTED]** resold residential lines, and **[REDACTED]** UNE-P residential lines. Qwest Teitzel Aff. at 8. As noted above, Qwest has transitioned 90 percent of all of its UNE-P facilities region-wide to the QPP commercial product. *See supra* note 82.

[96] With regard to Council Bluffs, which is part of Qwest's service territory in the Omaha MSA, the Iowa Utilities Board comments that "[t]he Council Bluffs retail market has developed a level of competition that was envisioned by the passing of the 1996 Telecommunications Act," but that "[i]f the level of retail competition in the Council Bluffs market is to remain at its current level or improve, competitors will need to have access to the wholesale facilities and services as they do today." Iowa Utils. Bd. Comments at 3-4. The Iowa Utilities Board goes on to express particular concerns about removing certain requirements of interconnection, namely, the duty to negotiate in good faith; providing facilities and equipment; allowing nondiscriminatory access and interconnection to network elements and facilities; allowing physical collocation; and providing retail services at wholesale rates for resale by competitors. *Id.* at 4. In disagreeing with Qwest's request for forbearance, the Nebraska Commission notes that all competitive LECs still rely heavily on sections 251(c) and 271, and highlighted the obligations to interconnect at any point; to allow collocation; and to negotiate in good faith. Nebraska PSC Comments at 1-2.

[97] *See, e.g.*, McLeodUSA Comments at 7-8 ("McLeodUSA submits that the fact that competitors have been able to increase their number of lines is simply because they are able to obtain the bottleneck facilities controlled by Qwest under the specific terms of Section 251 and 271.").

[98] *See AT&T Reclassification Order*, 11 FCC Rcd at 3309, para. 73, *citing First Interexchange Competition Order*, 6 FCC Rcd at 5891-92.

find that even if Qwest has some advantages regarding lower costs, sheer size, superior resources, financial strength, or technical capabilities – an issue we do not decide in the abstract – Qwest does not have such advantages relative to Cox in the Omaha MSA. The record reveals that Qwest's most significant competitor in the Omaha MSA is Cox.[99] Cox, like Qwest, is a large business that competes in numerous states in the provision of a range of telecommunications services with demonstrated technical capabilities.[100] For instance, Cox readily submits that it is "the leading competitive provider of facilities-based local telephone service, with well over one million lines in service."[101] Qwest also is subject to competition from other established carriers in the Omaha MSA of significant size.[102] There is no evidence in the record to indicate that Qwest could leverage the factors relevant here to sustain prices profitably above the competitive level.

(c) Specific Forbearance Granted

39. *Price Cap and Tariffing Forbearance for Exchange Access Services*. Due to Qwest's loss of **[REDACTED]** residential access lines and our analysis of the other factors above,[103] we find that, subject to certain conditions, enforcement of our dominant carrier price cap rules is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory with regard to the prices Qwest charges to its own end users. We conclude that enforcing price caps is not necessary, and we forbear from those regulations accordingly. We, however, condition our forbearance from applying section 61.41 price caps to Qwest's mass market access service charges on Qwest's compliance with regulations that apply to all competitive LECs, in particular section 61.26 of the Commission's rules.

40. In the *CLEC Access Charge Reform Order*, the Commission found that interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated.[104] As a result, the Commission has imposed a detariffing regime through section 61.26 that permits the filing of tariffs on one day's notice without cost support (and presumes the access charges that competitive LECs charge their carrier customers to be just and reasonable) where the rates are at or below a benchmark that is "the rate of the competing ILEC."[105] Competitive LECs are subject to mandatory detariffing of any rates that exceed the benchmark;[106]

[99] Petition at 8-9; Qwest Teitzel Aff. at 8.

[100] *See, e.g.*, Qwest Teitzel Aff. at 10-13.

[101] Cox Comments at 1. Cox also provides a number of business services at the national level, which presumably would tend to increase its purchasing power with suppliers. Qwest Teitzel Aff. at 12 (claiming that at EOY 2002, "Cox Business Services was realizing almost $1.2M per month in revenue, from almost 16,000 business customers").

[102] *See, e.g.*, Qwest Teitzel Aff. at 18 (citing McLeodUSA's fourth quarter and total year 2003 results disclosing that nationwide McLeodUSA serves "approximately 28,000 customers valued at $9.5 million of revenue").

[103] *See supra* paras. 28-38.

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

[105] *Id*. at 9925, para. 3; *see also* 47 C.F.R. § 61.26.

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

otherwise, the Commission does not regulate the rates charged pursuant to any other arrangement that competitive LECs may reach with interexchange carriers.

41. To ensure that our forbearance today does not result in rates that are unjust or unreasonable, and in light of the "unique nature" of the access market,[107] we therefore condition this forbearance upon the same regime under which competitive LECs currently operate. Specifically, we extend to Qwest the current benchmark that applies to all of its competitors – Qwest's tariffed rate as of July 1, 2005 – which will also serve as the benchmark for other LECs operating within Qwest's service territory in the MSA. Thus, if Qwest charges switched access rates to its carrier customers equal to or below this benchmark, it is not required to file a tariff at all, or may file a tariff on one day's notice without cost support. If it charges more, it may not file a tariff.[108] As with competitive LECs, we impose no such restriction on the rates Qwest may charge its own end user customers. Rather, for the reasons stated above, we believe competitive forces are sufficient to constrain those rates. For these reasons, we also forbear from applying any dominant carrier tariffing requirements to Qwest for mass market switched access services, conditioned upon its compliance with the same permissive detariffing obligations that apply to Cox and other competitive LECs.

42. *Rate of Return and Tariffing Forbearance for Broadband Internet Access Services.* We find that continued application of our section 61.38 cost support and Part 65 rate of return regulations to Qwest's broadband Internet access transmission services is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as Qwest is subject to the same treatment as non-dominant carriers under those rules. Continuing to subject Qwest to these rules for its DSL services is no longer appropriate in light of its place in the broadband Internet access market in Qwest's service territory in the Omaha MSA. Qwest's DSL offering need not be regulated any more than that of any other competitive LEC to prevent improper discrimination. Thus, Qwest may file tariffs on one day's notice without cost support, or may file no tariffs.

43. *Discontinuance and Streamlined Transfer of Control Forbearance*. For all mass market switched access and broadband Internet access services, we find that continued application of our dominant carrier discontinuance rules is not necessary to ensure that Qwest's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as Qwest is subject to the same treatment as non-dominant carriers under those rules.[109] We conclude that subjecting Qwest to a 60-day automatic grant period for discontinuance of service, and a 30-day comment period for

[107] *Id*. at 9938, para. 39.

[108] We reject Cox's proposal that, to the extent relief is granted, the Commission allow competitive LECs in Omaha to maintain their access charge rates for no less than 60 days after Qwest changes its tariffed rates. Cox Comments at 37. Cox argues that in order for a competitive LEC to keep its rates at or below the incumbent LEC's, it must have "adequate notice" of the incumbent LEC's rates so that it has "the opportunity to analyze Qwest's new rate, to determine whether it is reasonable, and to decide whether to adjust its own rate to conform to Qwest's rate or to challenge the new rate as unreasonable under Sections 201 and 208 of the Act." *Id*. at 37-38. Because we subject Qwest to the *CLEC Access Charge Reform Order*'s benchmark regime, we do not share MCI's concern that price caps are necessary because the Commission previously has found that the switched access market is not structured to constrain competitive LEC rates. MCI Comments at 16-17 (citing *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9936, para. 33).

[109] 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

affected customer notice, is not necessary under section 10(a)(1), where Cox and other competitive LECs are subject to a 30-day automatic grant period and 15-day comment period. Where the majority of customers have selected carriers other than Qwest, we find that continuing to impose more onerous discontinuance requirements is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices. However, to maintain sufficient customer protection to ensure the justness and reasonableness of Qwest's practices, we predicate this relief upon Qwest's compliance with the discontinuance rules that apply to non-dominant carriers. Similarly, we forbear from applying our streamlined transfer of control rules to Qwest as a dominant carrier, conditioned upon treatment of Qwest as a non-dominant carrier.

(ii) Section 10(a)(2) – Protection of Consumers

44. The second criterion under section 10 requires that we assess whether enforcement of our dominant carrier regulations to mass market interstate switched access and mass market broadband Internet access services is unnecessary for the protection of consumers.[110] Qwest claims that it satisfies the criteria of section 10(a)(2) because the "high level of facilities-based competition, the lack of entry barriers, and the vitality of existing competitors will provide all the product, price, service and choice protection that consumers need."[111] It further argues that customers in the Omaha MSA are being deprived of the full benefits of competition because of the continued regulation of Qwest as a dominant carrier.[112]

45. For many of the same reasons that led us to conclude that section 10(a)(1) is satisfied, we also conclude that section 10(a)(2) is satisfied with regard to a limited set of dominant carrier regulation – price caps, rate of return, tariffing and section 214 regulation. Most notably, in light of Cox's capture of **[REDACTED]** residential access lines compared to Qwest's **[REDACTED]**, continuing to subject Qwest to these requirements does not enhance consumer protection."[113] Subjecting Qwest to heightened price cap and rate of return regulation simply hinders its efforts to compete to re-acquire these customers and does not protect consumers. In the interest of enhancing customer choice, forbearance is warranted, and we find that the dominant carrier regulations at issue are no longer necessary to protect consumers.

(iii) Section 10(a)(3) – Public Interest

46. The third criterion of section 10 requires that we determine whether forbearance from applying our dominant carrier regulations, including our tariff filing requirements, our section 214 transfer requirements, and our price cap regulations is consistent with the public interest.[114] In making this determination, the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of

[110] 47 U.S.C. § 160(a)(2).

[111] Petition at 34.

[112] Petition at 35.

[113] *See supra* nn. 79, 80.

[114] 47 U.S.C. § 160(a)(3).

telecommunications services.[115] Qwest argues that if the Commission continues to regulate it as a dominant carrier in the Omaha MSA telecommunications market, it will "hobble Qwest's ability to compete for customers, and would continue competitive distortions that do not serve the public interest."[116] Qwest also notes that in the *AT&T Non-Dominance Order*, the Commission describes the significant costs of continued asymmetric regulation.[117] Qwest insists that continued dominant carrier regulation of its services in the Omaha MSA will involve these same costs.[118]

47. Similarly, we conclude that forbearing from our dominant carrier regulations that apply to interstate switched access and broadband Internet access services is consistent with the public interest.[119] Specifically, we find that it will enhance the vigorous local exchange competition that has emerged in the Omaha MSA, and will serve the public interest, if we no longer apply to Qwest the dominant carrier regulations that apply to such services, including our tariff filing requirements, our section 214 requirements, and our price cap regulations.[120] As stated above, Qwest serves less than **[REDACTED]** percent of the residential access lines in the interstate exchange access services market in the Omaha MSA – a market with high supply and demand elasticities for end user customers.[121] Qwest's share of the broadband market is **[REDACTED]**.[122] In these environments that are competitive for end users, applying these dominant carrier regulations to Qwest limits its ability to respond to competitive forces and, therefore, its ability quickly to offer consumers new pricing plans or service packages.

48. We do not believe that a lack of regulation will harm end user competition or consumers. For instance, regarding price cap requirements and end user selection of competing providers, we believe that market pressures created by Cox and others will force Qwest to price its mass market interstate exchange access services competitively, or face further loss of market share for these services.[123] As another

[115] 47 U.S.C. § 160(b).

[116] Petition at 36.

[117] *Id*. (pointing to the Commission's description of the disincentives to innovate due to loss of the so-called "first-mover advantage" caused by longer tariff notices; the disincentive for AT&T to reduce prices; the ability of AT&T's competitors to delay and undermine its initiatives; and the unique administrative and overhead costs on both AT&T and the Commission which flowed into AT&T's prices).

[118] *See* Petition at 36. Qwest states that the 15-day tariff notice requirement that applies to it gives competitive LECs the opportunity to respond to Qwest's filed rate service changes or to get to market first with a new price or service offering before Qwest's tariff becomes effective. Qwest further states that, as a dominant carrier, it is also uniquely prohibited from responding to competition with deaveraged rates within the study area. *Id*.

[119] 47 U.S.C. § 160(a)(3).

[120] In making our determination under section 10(a)(3), Congress has directed the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *See* 47 U.S.C. § 160(b).

[121] *See supra* para. 28.

[122] *See supra* para. 30.

[123] Again, we rely on the benchmark condition described above to correct for the fact that the access service market otherwise does not allow competition to discipline rates.

example, and for the same reason, we conclude that no longer enforcing against Qwest requirements that it provide cost-support for its tariffs as currently required by section 61.49 of the Commission's rules is consistent with the public interest.[124] Significantly, we also find that our conditional price cap benchmark is a protection against harming competitive harms. Again, we believe that Qwest is subject to sufficient competition from Cox that it will price its mass market interstate switched access and mass market broadband services competitively without this level of burdensome regulatory oversight.

49. Indeed, as Qwest argues, forbearing from the application to Qwest of these dominant carrier requirements will increase competition in the market by freeing Qwest from unnecessary regulatory burdens. At a minimum, we believe that forbearing from dominant carrier regulation in the Omaha MSA will serve the public interest by increasing the regulatory parity among providers of mass market interstate exchange access services in the Omaha MSA. As a result of our decision today, the playing field between Qwest and Cox will be leveled to the extent Qwest will no longer be the only carrier in its service territory in the Omaha MSA subject to dominant carrier regulations that apply to mass market interstate exchange access services. In light of the fact that Qwest's share of this market, when compared with Cox's share, is **[REDACTED]**, we believe this outcome is warranted and serves the public interest.[125] For DSL services, where the market share is approximately 86,000 for Cox compared to **[REDACTED]** for Qwest, the regulatory parity policy is even more compelling."[126]

c. Enterprise Services

50. We deny Qwest's request for forbearance with regard to enterprise services due to a lack of serving area-wide information for the Omaha MSA. The precedent relevant to the Commission's assessment of dominance consistently has distinguished between mass market and enterprise services,[127] and that distinction guides our analysis here. Instead, Qwest has submitted its case for a broader product market.[128] Qwest has not provided sufficient data for its service territory for the entire MSA to allow us to reach a forbearance determination under section 10(a) for the enterprise market, and we therefore deny this aspect of the Petition.[129]

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[124] 47 C.F.R. § 61.49.

[125] *See supra* para. 28.

[126] *See supra* para. 30.

[127] *See, e.g.*, *WorldCom/MCI Order*, 13 FCC Rcd at 18040-42, paras. 24-29.

[128] Petition at 6 (seeking forbearance from "the market for services provided under Section 251(c) and selected services under Section 271 provided within the boundaries of the Omaha MSA").

[129] As we explain above, although Qwest seeks forbearance relief from dominant carrier regulations rather than a declaratory ruling that it is non-dominant, in light of the overlap between the forbearance criteria of section 10 and the Commission's dominance analysis, the forbearance analysis from dominant regulation we undertake today is informed by the Commission's precedent analyzing a carrier's market power. *See supra* para. 17. Historically, the Commission has employed different geographic market definitions to carry out the differing statutory, economic, and policy goals of the proceeding at hand, and our approach to markets in this forbearance proceeding tracks the Commission's precedent regarding what is the appropriate geographic market for analysis. For example, when evaluating whether certain network elements should be made available on an unbundled basis, which implicates issues of economic self-provisioning, the Commission has focused its analysis on wire centers, which also is the (continued….)

C. "Fully Implemented"

51. As a threshold matter, we must consider whether section 10(d) bars the forbearance relief Qwest seeks from section 271 and section 251(c) requirements. Section 10(d) of the Act provides that the Commission may not forbear from applying the requirements of section 271 or section 251(c) unless it determines that those requirements are "fully implemented."[130] We conclude that those sections are "fully implemented" and may be forborne from.

1. Section 10(d) As It Relates to the Requirements of Section 271

52. Qwest seeks forbearance from section 271(c)(2)(B)(i-vi) and (xiv). We conclude that section 10(d) does not prevent us from granting Qwest forbearance relief from these checklist portions of 271(c). Subsequent to the filing of Qwest's Petition and comments in the instant proceeding, the Commission held in the *Section 271 Broadband Forbearance Order* that the checklist portion of section 271(c) is "fully implemented" once section 271 authority is obtained in a particular state.[131] Accordingly, because Qwest has obtained section 271 authority in Nebraska and Iowa[132] (as all the BOCs have in all their states), the checklist requirements of section 271(c) have been "fully implemented" for purposes of section 10(d).

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approach we adopt today when analyzing Qwest's unbundling obligations arising under section 251 and section 271 of the Act. *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2581-85, paras. 79-85 (analyzing dedicated transport impairment at the "very detailed level" of specific routes between wire centers); *see also id*. at 2619-25, paras. 155-65 (conducting a wire center-based impairment analysis for high capacity loops); *see also infra* Parts III.D, III.E (analyzing forbearance from section 251 and section 271 obligations on a wire center basis). By comparison, the Commission previously has conducted its dominance analysis in broader geographic markets, which also is the approach we adopt today when evaluating Qwest's request for relief from dominant carrier regulations. *See, e.g.*, *AT&T Reclassification Order*, 11 FCC Rcd at 3286, para. 22 (adopting a national geographic market).

[130] 47 U.S.C. § 160(d).

[131] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17 (rejecting the argument that the "fully implemented" language contains competitive thresholds); *see id*. at 21512, para. 35 (rejecting the argument that section 271(d)(4) precludes a grant of forbearance relief under section 10 as "inconsistent with the plain terms of the statute"); *see id*. at 21502-04, paras. 12-18. We therefore reject the arguments of several commenters that the Commission cannot forbear from application of a checklist requirement, either because section 271 has not been "fully implemented," *see, e.g.*, AT&T Comments at 26; Sprint Comments at 13, or because section 271(d)(4) prohibits the Commission, "by rule or otherwise," from "limit[ing] or extend[ing] the terms used in the competitive checklist," *see, e.g.*, Sprint Comments at 3; McLeodUSA Comments at 3. CompTel suggests that section 271 is not fully implemented until a minimum of three years after long-distance authority has been granted in a particular state. *See* CompTel Comments at 8. The Commission has rejected this argument. *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18 (holding that the "fully implemented" language of section 10(d) must be read in context and that the section 272 requirements, which sunset at a minimum three years after section 271 approval has been granted, are distinct from the other requirements of section 271).

[132] *See Qwest IA/NE Section 271* Order, 17 FCC Rcd 26303.

2. Section 10(d) As It Relates to the Requirements of Section 251(c)

53. We conclude that section 251(c) is "fully implemented" for all incumbent LECs nationwide. Specifically, we conclude that section 251(c) is "fully implemented" because the Commission has issued rules implementing section 251(c) and those rules have gone into effect. We believe the interpretation we adopt today is the most natural reading of statute.[133] The Commission is the entity that "implements" section 251(c), and hence the full implementation of section 251(c) is triggered by action taken by this Commission. In contrast, incumbent LECs *comply* with section 251(c) and the Commission's rules, but in this context are not properly said to be implementing this statutory provision. Our interpretation that the Commission is the entity that implements section 251(c) also is the interpretation most consistent with section 251(d)(1), which directs the Commission within six months after section 251(c) was enacted to "complete all actions necessary to establish regulations to *implement* the requirements of" section 251.[134] Therefore, it is these rulemaking activities, by which the Commission established regulations to implement the requirements of section 251(c), that most properly represent the threshold activity that must occur before the Commission can forbear from applying the requirements of section 251(c).

54. The interpretation we adopt today regarding when section 251(c) is fully implemented is similar in approach to the Commission's previous interpretation of section 10(d) as applied to section 271(c).[135] To the extent there are differences in our interpretation of section 10(d) as it applies to sections 251(c) and 271(c), those differences result from and track statutory differences.[136] In the *Section 271*

[133] Section 10(d) provides in relevant part that "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). As used in this context, we find that the phrase "until it determines that those requirements have been fully implemented" refers to the Commission and indicates that Congress intended for us to determine when the requirements of section 251(c) have been fully implemented. We believe, therefore, that when the D.C. Circuit stated in 2001 that the requirements of section 251(c) had not been fully implemented, it merely referred to the fact that the Commission had not yet found that the requirements of section 251(c) were fully implemented. *Association of Communications Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

[134] 47 U.S.C. § 251(d)(1) (emphasis added).

[135] In the present context, we conclude that section 251(c) is fully implemented once the Commission has completed its work of promulgating rules implementing section 251(c) and those rules have taken effect. In the context of the competitive checklist items of section 271(c), the Commission previously has determined that the checklist items are fully implemented once "there is nothing further the Commission or the BOC needs to do in order to implement the checklist." *Section 271 Broadband Forbearance Order*, 19 FCC Rcd 21503, para. 16. In each case, the statutory provision to which section 10(d) applies is fully implemented as soon as whatever predicate actions must occur in order to create ongoing legal obligations under the statutory provision at issue have transpired.

[136] For example, where the obligations of the Act are not ongoing obligations but instead have a sunset date, the Commission has held that such obligations are fully implemented after that sunset date has passed. *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(A)(2) of the Commission's Rules*, CC Docket No. 96-149, Memorandum Opinion and Order, 18 FCC Rcd 23525, 23530, para. 7 (2003) (denying a request for forbearance from the separate operating, installation, and maintenance functions of section 272 – as referenced in section 271(d) – on the basis that the section 272 separate affiliate requirements are not "fully implemented" until three years past the date that the Commission has granted section 271 in-region interLATA service to a BOC in a particular state). In the *Advanced Services Order*, the Commission denied the petitions of several BOCs requesting forbearance from the requirements of sections 251(c) and/or section 271 and concluded that "Congress did not provide us with the statutory authority (continued….)

Broadband Forbearance Order, the Commission explained that the language of section 10(d) must be viewed in the context of the particular requirements at issue.[137] With respect to the requirements of section 251(c), Congress designated the Commission as the entity to implement the section 251(c) requirements. With respect to the competitive checklist requirements of section 271(c), however, these requirements first attach to the BOCs *as obligations* only after the BOCs have sufficiently opened their markets to competition under the standards set forth in section 271(c)(2)(B), and after the Commission has granted the BOC approval under section 271(a) to provide in-region interLATA services.[138] Thus, the BOCs have a role in implementing section 271(c) that incumbent LECs do not have in implementing section 251(c) – a role recognized in the statute.[139] It therefore would be inappropriate for the Commission to interpret section 10(d) as applied to section 251(c) as if the incumbent LECs had a role in implementing section 251(c) similar to the role the BOCs have in implementing section 271(c); doing so would ignore the Commission's conclusion that the language of section 10(d) must be viewed in the context of the particular requirements at issue.[140]

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to forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24018, para. 12 (1998) (*Advanced Services Order*) (subsequent history omitted). However, the Commission declined to reach the issue of whether sections 251(c) and 271(c) are fully implemented. *See id*. at 24048, para. 77.

[137] In particular, the Commission reasoned that the section 272 requirements referenced in section 271(d) differ from the rest of section 271, so that the three-year timeframe under which separate affiliate obligations apply following a section 271 grant should not apply to the section 271(c) competitive checklist. *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18.

[138] Under the Act, BOCs were not required to comply with any of the section 271(c) competitive checklist items prior to obtaining section 271 approval (except to the extent those items restate obligations imposed on them by other independent provisions). Following the grant of section 271 approval, which is when the Commission held that section 271(c) is fully implemented, the checklist items became binding legal obligations the violation of which may result in injunction, forfeiture or other penalty under Title V of the Act, or suspension or revocation of section 271 authority. 47 U.S.C. § 271(d)(6)(A); *see also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4174-77, paras. 446-53 (1999) (describing the Commission's section 271 application post-approval enforcement framework, as well as its various section 271(d)(6) enforcement powers).

[139] 47 U.S.C. § 271(d)(3)(A)(i); *see also Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503, para. 16 (stating that the meaning of "fully implemented" under section 10(d) is consistent with the language in section 271(d)(3)(A)(i), under which "a BOC has met the requirements of section 271(c)(1) if, among other obligations, it has 'fully implemented' the competitive checklist").

[140] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 18. We therefore do not accept Qwest's argument that whether section 251(c) has been "fully implemented" in a particular state turns on whether the carrier seeking forbearance has been granted section 271 authority to provide in-region long distance services in that state. *See* SBC Reply at 3; *see also* Petition at 4; Qwest Reply at 7-12; Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5-6 (filed July 25, 2005) (Qwest July 25, 2005 *Ex Parte* Letter). In addition, the fact that *all* incumbent LECs – rather than just BOCs – are subject to section 251(c) undercuts a reading that such a statutory provision would be "fully implemented" based upon a standard that applies only to BOCs and thus that only BOCs could satisfy.

55. We are not persuaded by the arguments in the record that we should adopt a competition-based test to determine when section 251(c) has been fully implemented.[141] Qwest and others assert that the Commission should read section 10(d) to mean that particular measurements of market power, market share, or other indicators of competition should serve as the threshold barrier for the forbearance inquiry.[142] However, as the Commission explained in the *Section 271 Broadband Forbearance Order*, such an interpretation would require inquiries redundant to the Commission's analysis under section 10, which already requires the Commission to consider the competitive market conditions in its forbearance analysis, including whether a grant of forbearance will enhance competition.[143] We do not believe Congress intended section 10(d) to require duplicative analyses.

56. Finally, some commenters argue that section 10(d) precludes forbearance in the absence of "permanent" unbundling rules.[144] We disagree. We believe that such an interpretation would render section 10(a) a nullity with respect to requirements arising under section 251(c). The extensive and necessarily detailed rules promulgated under section 251(c) frequently are revised as the Commission addresses petitions for rulemaking, reconsideration, or declaratory rulings and as it updates those regulations to reflect marketplace developments. Indeed, Congress requires the Commission biennially to evaluate its regulations that apply to telecommunications service providers and to determine whether economic competition has made those regulations no longer necessary in the public interest.[145] The Commission must modify or repeal any such regulations that it finds are no longer in the public interest.[146] In addition, the Commission's section 251(c) rules often are subject to court challenges.[147] To wait for a set of "permanent" rules that have survived every court challenge would presume a static state of technological and economic development, and would give the "fully implemented" clause a meaning more akin to that of an absolute bar than a threshold standard.[148]

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[141] *See, e.g.*, McLeodUSA Comments at 4-6, 12; AT&T Comments at 26; MCI Comments at 19.

[142] Petition at 31; *see also, e.g.*, USTA Reply at 1.

[143] 47 U.S.C. § 160(a), (b); *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17.

[144] *See, e.g.*, Sprint Comments at 11 (noting that the court in *USTA II* struck down some of the Commission's section 251(c) rules).

[145] 47 U.S.C. § 151(a); *see also The 2002 Biennial Regulatory Review*, GC Docket No. 02-390, Report, 18 FCC Rcd 4726, 4726, para. 3 (2003) (stating that "[t]he process of reviewing our rules subject to Section 11 is, in essence, ever-continuing").

[146] 47 U.S.C. § 161(b).

[147] *See, e.g.*, *USTA II*, 359 F.3d 554 (affirming in part, remanding in part, and vacating in part the *Triennial Review Order*, 18 FCC Rcd 19020).

[148] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21503-04, para. 17 (stating that "section 10(d) is reasonably interpreted as a threshold standard"). Interpreting section 10(d) to preclude forbearance in the absence of permanent unbundling rules would force the Commission to choose between not updating its rules when in the public interest to do so pursuant to section 11 or exercising its plenary rulemaking authority, on the one hand, or not granting a particular carrier or service forbearance from a rule when doing so would be in the public interest and otherwise satisfy the criteria of section 10, on the other. 47 U.S.C. §§ 160-61. We do not believe this result is one Congress intended when enacting section 10(d). We further note that the interpretation urged by Sprint and others (continued….)

D. Forbearance from Section 251(c) Requirements

57. We grant Qwest's Petition in part, and forbear from applying to Qwest the requirements arising under section 251(c)(3) to provide unbundled access to loop and transport elements[149] in certain wire centers in the Omaha MSA based upon the development of sufficient facilities-based competition and other factors we explain below. We deny Qwest's Petition to the extent it seeks forbearance relief from all of the remaining obligations of section 251(c). Specifically, we deny Qwest's request for relief from obligations arising under section 251(c) to negotiate in good faith the terms and conditions of its section 251(b) and section 251(c) obligations; to provide other carriers with interconnection to Qwest's network at any technically feasible point; to offer its retail services for resale at avoided-cost wholesale rates; to provide access to UNEs other than loops and transport;[150] to provide reasonable public notice of changes in its network that would affect interoperability; and to satisfy certain collocation obligations.

58. In the Petition, Qwest contends that the growth of retail competition in the Omaha MSA has given enterprise and mass market customers multiple competitive options to satisfy their telecommunications needs.[151] On the basis of this retail competition, Qwest argues that it is no longer necessary or appropriate that it remain subject to the requirements of section 251(c) in the Omaha MSA. To support its position, Qwest presents evidence that the number of retail lines it uses to serve customers has fallen steadily since 1997, and claims that retail competition from wireline carriers and intermodal competitors accounts for this decline.[152] In particular, Qwest submits that an incumbent cable operator in the Omaha MSA, Cox, uses its own extensive facilities, including its own loop equivalents, to provide

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would give the Commission the ability to deny all forbearance relief so long as it updated its section 251(c) rules on an annual basis, which is in tension with the mandatory language contained in sections 10 and 11 of the Act. *See* 47 U.S.C. §§ 160-61.

[149] By "UNE loops and transport" we mean all analog, DS0, DS1 and DS3 loop and dedicated transport network elements that are subject to section 251(c)(3) unbundling. *See* 47 C.F.R. §§ 51.319(a) (loops), 51.319(e) (dedicated transport). In addition, for purposes of this Order, our discussion of UNE loops and transport extends to subloops and network interface devices as defined in sections 51.319(b) and (c) of the Commission's rules, regarding which we also forbear from the requirements arising under section 251(c)(3) as applied to Qwest in the Omaha MSA. 47 C.F.R. §§ 51.319(b), (c).

[150] We expressly do not forbear today from requirements arising under section 251(c)(3) with respect to 911 and E911 databases or operations support systems as defined in sections 51.319(f) and (g) of the Commission's rules. *See id*. at §§ 51.319(f), (g).

[151] Petition at 3; Qwest Teitzel Aff. at 1.

[152] Relying on estimates from an E911 database administrator from April 2004 as "a directional surrogate for the number of access lines served by facilities-based CLECs," in combination with competitive LEC resale and UNE-P data as of February 2004 and its own retail access line data, Qwest submits that the market share of competitive LECs is **[REDACTED]** percent of residential access lines in the Omaha MSA, and **[REDACTED]** percent of business voice grade equivalent (VGE) access lines. Qwest Teitzel Aff. at 6-8. Qwest concedes that a precise calculation of competitive LEC market share is difficult because it does not have access to its competitors' proprietary customer information, and that the number of E911 records is not directly equivalent to the number of access lines in service. *See id*. at 6-7.

telecommunications services in parts of this MSA; has captured significant market share for narrowband voice customers in this MSA; and is actively competing for enterprise customers.[153]

59. As explained below, we find that the substantial intermodal competition for telecommunications services provided over Cox's own extensive facilities is sufficient to grant Qwest forbearance from the application of its section 251(c)(3) obligations with respect to loops and transport, in light of the continued application in the Omaha MSA of other statutory and regulatory provisions designed to promote the development of competitive markets for telecommunications services and the actual competition these regulations have facilitated. Over two years ago, in the *Triennial Review Order*, the Commission determined that intermodal competition from cable had not "blossomed into a full substitute for wireline telephony."[154] Today, as a result of Cox's investment in network infrastructure in the Omaha MSA, Cox, like Qwest, is providing telecommunications services over its own extensive last-mile facilities. On the basis of this competition, combined with other statutory and regulatory safeguards that facilitate additional competition, we find that the criteria of section 10(a) are satisfied with respect to Qwest's section 251(c)(3) obligation to unbundle loop and transport elements in 9 of Qwest's 24 wire centers in the Omaha MSA where competitive deployment is greatest. Therefore, we forbear from the application of section 251(c)(3) to Qwest to the extent it requires Qwest to provide access to loops in and transport to those 9 wire centers.[155]

60. However, for the remainder of the section 251(c) obligations from which Qwest seeks relief in the present Petition, we find that Qwest has not satisfied any of the criteria of section 10(a) that might allow us to grant its Petition. Except in limited geographic areas, Qwest has not demonstrated that it is subject to significant competition from competitors that do not rely heavily on Qwest's wholesale services. Cox does not have any coverage[156] at all in **[REDACTED]** of Qwest's 24 wire center service

[153] Petition at 8, 13; Qwest Teitzel Aff. at 10-17.

[154] *See Triennial Review Order*, 18 FCC Rcd at 17127, para. 245.

[155] The Commission already has relieved Qwest and certain other carriers from unbundling obligations arising under section 251(c)(3) and section 271 to provide access to certain loop and transport facilities, which limits the scope of today's Order. *See supra* notes 25-29. The 9 wire centers in which we grant Qwest forbearance from the application of section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA are: Omaha Douglas, Omaha Izard Street, Omaha 90th Street, Omaha Fort Street, Omaha Fowler Street, Omaha O Street, Omaha 78th Street, Omaha 135th Street, and Omaha 156th Street. *See also* Cox June 30, 2005 *Ex Parte* Letter at 2 (disclosing Qwest's wire center service areas where Cox's network covers at least **[REDACTED]** of the end user locations); *see also infra* n.156 (defining "covers"). Cox does not include Multiple Tenant Environments (MTEs) to which it does not have access to provide telecommunications services in either the numerator or denominator of its calculation of which wire centers it "covers." *See* Letter from J.G. Harrington, Counsel to Cox, WC Docket No. 04-223, Attach. at 1 (filed Sep. 16, 2005) (Cox Sept. 16, 2005 *Ex Parte* Letter). However, Cox contends that including MTEs to which it does not have access in its calculations would not have a material effect on its coverage estimates. *See id.*

[156] As we use the term in this Order, an intermodal competitor "covers" a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings. Therefore, and for example, a carrier covers an MTE if that carrier would be willing and able, within a commercially reasonable time, of providing service to that MTE even if the building owner has not already granted the carrier the right to provide service within that particular building.

areas in the Omaha MSA, and in other wire center service areas has only limited coverage.[157] Cox is not able to provide the same level of competition where it does not have extensive coverage as where it has such coverage. We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last-mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA. Furthermore, all competitors in all areas of the Omaha MSA rely on Qwest for certain inputs and services mandated by section 251(c), such as direct interconnection under section 251(c)(2).[158] Forbearance from these remaining section 251(c) provisions similarly is unwarranted at present.

1. Unbundled Access to Loops and Transport

61. We determine that continued application to Qwest of the section 251(c)(3) obligation to provide unbundled access to loops and transport to competitors in certain parts of the Omaha MSA is unnecessary under the standards set forth in section 10(a) of the Act.[159] While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the MSA, as evident from our discussion below, the criteria of section 10(a) are not satisfied in all of Qwest's territory in this MSA. The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a).[160] We are persuaded by record evidence, some of which Qwest and Cox submitted on a wire center basis, that such a level of competition exists in certain of Qwest's wire center service areas located in the Omaha MSA. We are equally convinced that in other wire center service areas in this market, Qwest is not subject to this level of competition.[161]

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[157] *See* Cox June 30, 2005 *Ex Parte* Letter at 2.

[158] 47 U.S.C. § 251(c); *see also, e.g.*, Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Chairman Martin and Commissioners Abernathy, Copps and Adelstein, FCC, WC Docket No. 04-223 at 2 (Aug. 30, 2005) (arguing that in the absence of interconnection under section 251(c), "competitors would not be able to provide consumers with meaningful alternatives to incumbent LEC offerings").

[159] We deny as moot those aspects of the Petition in which Qwest seeks forbearance from the application of unbundling obligations the Commission has since affirmatively determined to withdraw nationwide pursuant to section 251(c)(3). After Qwest filed its Petition, the Commission determined that certain dedicated transport and loop facilities, and mass market local circuit switching, do not need to be unbundled under section 251(c)(3). *Triennial Review Remand Order*, 20 FCC Rcd at 2575-2661, paras. 66-228. Therefore, the question of whether to forbear from the application of those unbundling duties is no longer before us.

[160] As explained below, in order to avoid customer disruption, we establish a six-month transition period to facilitate the transition from UNEs to alternative options in those wire centers where we eliminate Qwest's unbundling obligations. *See infra* para. 74.

[161] We are under no statutory obligation to evaluate Qwest's Petition other than as pled; nevertheless, sections 10(a) and 10(c) each provide this Commission sufficient authority to grant Qwest's Petition in part – that is, only in certain wire centers. *See* 47 U.S.C. § 160(a) (granting the Commission forbearance authority independent of a filed petition), (c) (authorizing the Commission to grant to grant or deny a forbearance petition in whole or in part). We see no reason categorically to deny Qwest relief in a broader geographic area when the evidence in the record is presented on a basis that allows us, in an administrable fashion and consistent with the Commission's precedent, to make findings on a wire center basis. *See* supra n.13 (describing the wire-center-based analysis the Commission (continued….)

62. We tailor Qwest's relief to specific thresholds of facilities-based competition from Cox. Specifically, we grant Qwest forbearance from obligations to unbundle loops and transport pursuant to section 251(c)(3) in wire centers where Cox's voice-enabled cable plant covers at least **[REDACTED]** percent of the end user locations that are accessible from that wire center. Our decision today also is based on other actual and potential competition, which we find either is present, or readily could be present, in 100 percent of Qwest's service area in the Omaha MSA. Carriers are still able to rely on section 251(c)(4) resale and the other market-opening provisions from which we do not forbear today everywhere in Qwest's service area in this MSA. For instance, competitive LECs continue to have section 251(c) interconnection rights throughout Qwest's service area, and have rights under section 271(c)(2)(b)(iv)-(vi) to access Qwest's loops, switching and transport throughout Qwest's service area, except where Qwest's obligations already have been lifted by the *Section 271 Broadband Forbearance Order*.[162]

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

63. Although the Commission's unbundling analysis does not bind our forbearance review, we find it instructive for purposes of rendering our section 10(a) determination. In the *Triennial Review Remand Order*, the Commission declined 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.[163] 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 might justify forbearance from UNE obligations.[164] Today, that expectation is realized. We find that competition for telecommunication services is sufficiently developed in certain wire centers that

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used in the *Triennial Review Remand Order* to determine impairment for high-capacity loop and dedicated transport UNEs); *cf. also* SBC Sept. 12, 2005 *Ex Parte* Letter at 1-2 (arguing that the Commission should use "much broader geographic areas" than wire center services areas to evaluate whether to grant Qwest forbearance relief, such as MSA boundaries). We believe that our action today serves the deregulatory goals of the Act. *See supra* note 61.

[162] 47 U.S.C. § 251(c)(2); *see also id*. § 271(c)(2)(B)(iv); *see also Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19. We therefore reject the argument that our decision today will result in a duopoly. *See infra* para. 71.

[163] *Triennial Review Remand Order*, 20 FCC Rcd at 2553, 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.").

[164] *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, paras. 38-39; *see also id*. at 2556, para. 39 n.116. The Commission noted that incumbent LECs "are free to seek forbearance from the application of our unbundling rules in specific geographic markets where they believe the aims of section 251(c)(3) have been 'fully implemented' and the other requirements for forbearance have been met;" that Qwest had already sought such relief; and that incumbent LECs were encouraged to file similar petitions where appropriate. *Id.* at 2557, para. 39. We therefore disagree with CompTel that forbearing from UNE obligations based upon sufficient facilities-based competition amounts to a reversal of course from the *Triennial Review* proceeding. *See* Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 3-4 (filed Sept. 9, 2005) (CompTel Sept. 9, 2005 *Ex Parte* Letter).

the section 251(c)(3) obligation to provide unbundled access to loops and transport is no longer necessary to ensure that, in the Omaha MSA, Qwest's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[165] As the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[166]

64. As discussed below, we conclude that sufficient facilities-based competition for local exchange and exchange access services exists in certain of Qwest's Omaha MSA wire center service areas to justify forbearance relief for several reasons. Most importantly, we find that Cox has been successfully providing local exchange and exchange access services in these wire center service areas without relying on Qwest's loops or transport.[167] We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today.[168] We are convinced that this facilities-based competition, combined with the other competition made possible by our rules, suffices to satisfy the section 10(a) criteria with respect to Qwest's UNE loop and transport obligations arising under section 251(c)(3).

65. *Competition in the Omaha MSA.* In today's Order, consistent with our prior decisions, we examine the status of competition in the retail market as well as the role of the wholesale market in the Omaha MSA.[169] We begin by examining the retail market, and in so doing we agree with Qwest that, in evaluating the level of competition in a market, the Commission should not focus exclusively on competition provided using "identical technology that is currently deployed by the incumbent LECs."[170]

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[165] 47 U.S.C. § 160(a)(1).

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

[167] Cox claims that "less than **[REDACTED]** percent of Cox's current service to the business market" is based on DS1 and higher bandwidth facilities leased from Qwest to reach specific customer locations. Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Aug. 22, 2005) (Cox Aug. 22, 2005 *Ex Parte* Letter).

[168] *See* Qwest Teitzel Aff. at 8 (providing number of residential and business resold lines).

[169] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21 (considering the wholesale market in conjunction with the retail market given the nature of relief requested).

[170] *See* Qwest Reply at 6; *see also United Stated Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (*USTA I*) (holding in the context of broadband services that the Commission must consider intermodal competition). ALTS argues that competition for voice services by cable operators should not factor into the Commission's analysis. ALTS Comments at 6; *see also* Sprint Comments at 7 (arguing that cable facilities tend to be concentrated in residential areas and that Cox's service territory does not cover all of the Omaha MSA and overlaps only part of Qwest's service territory). Rather than ignore competition from Cox because its network only partially overlaps with Qwest's service area, we find that a better approach is to grant Qwest relief only in those areas where its network sufficiently overlaps with Cox's network to justify such relief under section 10.

In accord with this determination, we take account of telecommunications services provided over intermodal facilities to the extent these services compete as substitutes for Qwest's wireline telecommunications service offerings. Of greatest importance in our analysis is competition from Cox, which uses its cable plant to provide circuit-switched local exchange and exchange access services in this market.

66. Cox has extensive facilities in the Omaha MSA capable of delivering both mass market and enterprise telecommunications services.[171] Cox has proven it is capable of competing very successfully using its own network to provide services in the mass market where the revenue potential, compared with the enterprise market, is relatively low. Indeed, in the residential market, Cox has **[REDACTED]** voice customers in this MSA **[REDACTED]** Qwest.[172] In addition, Qwest has provided evidence that Cox is actively marketing itself to enterprise customers, has succeeded in attracting a large number of significant Omaha businesses as customers, and has doubled its enterprise sales in the Omaha MSA each year for five consecutive years.[173] While Cox has captured a larger share of mass market customers to date, in light of record evidence of Cox's strong success in the mass market, its possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success in the enterprise market, we must conclude that Cox poses a substantial competitive threat to Qwest for higher revenue enterprise services as well.[174] In addition, Qwest has provided maps and other evidence that competitors have deployed their own transport facilities primarily concentrated within the boundaries of the 9 wire center service areas where we grant Qwest forbearance.[175]

67. We also examine the role of the wholesale market. The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.[176] We find,

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[171] *See* Cox Aug. 22, 2005 *Ex Parte* Letter, Attach. at 1 (stating that Cox can provide service up to the OCn level to each of the enterprise customers passed by its network).

[172] Cox submits that as of May 1, 2005, it has **[REDACTED]** residential lines (accounting for second lines in some residential locations). Cox June 30, 2005 *Ex Parte* Letter at 3. Qwest reports that as of December 2004, it has **[REDACTED]** residential retail access lines (accounting for second lines). Qwest May 20, 2005 *Ex Parte* Letter, Attach., Tab 7, at 1.

[173] Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at Attach. 1, Tab 16 (filed Jul. 27, 2005) (Qwest July 27, 2005 *Ex Parte* Letter) (providing a Cox sales PowerPoint presentation).

[174] For the reasons above, we do not find dispositive Cox's claims that it currently reaches what it characterizes as **[REDACTED]** of potential enterprise customers with its own facilities. *See* Cox Sept. 14, 2005 *Ex Parte* Letter, Attach. at 2; *see also* Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1 (stating that Cox, over its own facilities, can reach **[REDACTED]** percent of the business locations in the 9 wire center service areas where the Commission grants Qwest forbearance relief).

[175] Cox June 30, 2005 *Ex Parte* Letter.

[176] *See* Letter from William A. Haas, Associate General Counsel, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 2 (filed Sept. 14, 2005) (McLeodUSA Sept. 14, 2005 *Ex Parte* Letter) ("McLeodUSA is the only alternative provider of wholesale local services to other competitive local exchange carriers in the Omaha MSA market. No provider other than Qwest offers a commercial local wholesale solution to (continued….)

however, that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings.[177] First, for mass market offerings, we note that Qwest provides **[REDACTED]** residential QPP arrangements[178] (*i.e.*, combinations of DS0 loops, switching, and shared transport) and **[REDACTED]** residential resale arrangements[179] in the 9 wire centers in which we grant unbundling relief. Indeed, Qwest's section 251(c)(4) and section 271(c) wholesale obligations remain in place. The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little to no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest. This gives us enormous comfort that in the mass market, unbundling loops and transport pursuant to section 251(c)(3) is "not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[180]

68. Similarly, with regard to the enterprise market, Qwest has provided evidence that a number of carriers have had success competing for enterprise services using DS1 and DS3 special access channel terminations obtained from Qwest, presumably in addition to loops at least some of these competitive carriers self-provision where economically feasible.[181] Specifically, Qwest reports that competitive carriers rely on it to provide **[REDACTED]** DS1 and **[REDACTED]** DS3 interstate special access channel terminations in the 9 wire centers in which we grant unbundling relief.[182] In addition, Qwest

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CLECs in the Omaha MSA."). Several commenters are unaware that any carrier in the Omaha MSA other than Qwest provides wholesale telecommunications services. *See* ALTS Comments at 3-10; Sprint Comments at 2; MCI Comments at 3, 6; CompTel Comments at i; AT&T Comments at 11.

[177] Contrary to the arguments of some commenters, our decision today is consistent with the Commission's determination in the *Triennial Review Remand Order* not to rely on wholesale offerings in making impairment determinations. *See, e.g.*, CompTel Sept. 9, 2005 *Ex Parte* Letter at 1-2. In the *Triennial Review Remand Order*, the Commission determined that the availability of incumbent LECs' tariffed wholesale offerings was not a sufficient basis to prevent the Commission from finding that requesting carriers are impaired without unbundled access under section 251(c)(3) to certain facilities that may also be available as tariffed offerings. *See Triennial Review Remand Order*, 20 FCC Rcd at 2560-75, paras. 46-65 (holding that this conclusion is the best interpretation of the Communications Act, and best addresses the Commission's concerns about administrability and risk of abuse, among other reasons). In today's Order, rather than making national impairment findings, we are applying the statutory standards of section 10 in a specific geographic market. 47 U.S.C. § 160(a). The record in the current proceeding reveals that Qwest in certain parts of the Omaha MSA is subject to significant competition from Cox; Cox already has constructed an extensive competitive network and has captured **[REDACTED]** of the residential voice market in the Omaha MSA, and has a demonstrated and growing capacity – and inclination – to compete for enterprise customers. *See supra* text accompanying n.175.

[178] *See* Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8.

[179] *See id*.

[180] 47 U.S.C. § 160(a)(1).

[181] *See supra* note 177.

[182] *See* Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1, Tab 7, Attach. 2 (showing Qwest's combined retail and wholesale provisioned special access circuits by wire center); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 (filed Sept. 6, 2005) (Qwest Sept. 6, 2005 *Ex Parte* Letter) (submitting Tab 7B showing Qwest's retail special access provisioned (continued….)

reports that it provides **[REDACTED]** business QPP arrangements and **[REDACTED]** business resale arrangements in the 9 wire centers where we grant unbundling relief.[183] We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that relies on Qwest's wholesale inputs – which must be priced at just, reasonable and nondiscriminatory rates[184] and is subject to Qwest's continuing obligations under section 251(c)(4) and section 271(c) – supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of Qwest's telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1). We emphasize that we do not take account in our analysis of competitive telecommunications services being offered over UNE loops and transport provisioned under section 251(c)(3), and note that competition based on UNE loops and transport make up a minor portion of the competition in the Omaha MSA. Qwest provides at most **[REDACTED]** DS1 UNE loops, at most **[REDACTED]** DS3 UNEs loops, and only **[REDACTED]** DS0 UNE loops in the Omaha MSA – constituting only a fraction of the overall local exchange and exchange access market in this MSA.[185]

69. While our decision today relies on competitive factors other than facilities-based competition from Cox, to the extent our decision today is based on competition from Cox, we find such competition to be sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to **[REDACTED]** percent of the end user locations accessible from that wire center.[186] We believe that requiring that Cox cover at least **[REDACTED]**

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circuits by wire center). In comparison to what it is providing at wholesale to competitive carriers, Qwest discloses that, as of December 2004, it had the following number of retail lines in service that it provides to end users for each of the following categories: **[REDACTED]** DS1s; **[REDACTED]** DS3s; **[REDACTED]** OCn lines; and **[REDACTED]** local area networks (LANs). *See* Qwest Sept. 6, 2005 *Ex Parte* Letter, Attach. 1 (Tab 7B).

[183] *See* Qwest May 20, 2005 *Ex Parte* Letter, Attach. 1 at Tab 8.

[184] *See* 47 U.S.C. §§ 201, 202.

[185] *See* Qwest May 20, 2005 *Ex Parte* Letter at Attach. 1, Tab 8, Attach. Granting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification. *See, e.g.*, Letter from Tina M. Pidgeon, Vice President, Federal Regulatory Affairs, GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, at 1 (filed, Sept. 13, 2005) (arguing that "a situation where the primary competitor has relied on UNE-L for customer acquisition raises very different issues than those before the Commission in the instant proceeding").

[186] A primary reason we use wire centers as opposed to some other measure to geographically limit the forbearance we grant Qwest today is that both Qwest and Cox submitted data to us on a wire center basis. We have considered and reject the idea of measuring facilities-based coverage on the basis of individual end users. The costs of implementing this approach would far exceed the benefits. As an initial matter, implementing this approach would require Cox to provide Qwest with a list of every potential customer in the Omaha MSA and to report whether Cox's network covers that customer, even though Cox does not itself rely on Qwest's UNEs to compete. Even if the burdens of this large task were otherwise reasonable, because Cox is a direct competitor of Qwest, providing a list of every potential customer in the Omaha MSA and disclosing whether Cox is willing and able, within a commercially reasonable time, of providing service to that customer does not serve the goal of a competitive marketplace. In addition, such an approach would be of limited utility unless updated on a regular basis. Here again, we do not believe it in the public interest to impose on a new entrant the requirement to constantly update a direct incumbent competitor as to precisely where it is expanding service. We also have considered and rejected the idea of measuring facilities-based coverage on an MSA basis. Using such a broad geographic region would not (continued….)

percent of the end user locations in a wire center service area before Qwest obtains forbearance from section 251(c)(3) unbundling obligations in that wire center will ensure that all of the customers capable of being served by Qwest from that wire center will benefit from competitive rates, terms and conditions.[187] In support of these findings, the record shows that in these 9 wire center service areas, Cox provides approximately **[REDACTED]** residential access lines, **[REDACTED]** DS0 loops to business customers, **[REDACTED]** DS1 loops, **[REDACTED]** DS3 loops and **[REDACTED]** OCn loops, and covers approximately **[REDACTED]** percent of the business locations.[188] In contrast, in the remaining 15 wire center service areas, Cox provides only approximately **[REDACTED]** residential access lines, **[REDACTED]** DS0 loops to business customers, **[REDACTED]** DS1 loops, **[REDACTED]** DS3 loops and **[REDACTED]** OCn loops and covers a lower percentage of business locations.[189] In addition, the service areas of these 9 wire centers in which we partially grant Qwest's Petition for forbearance are precisely the geographic areas where we expect to see further investment and deployment by Cox, and where we are most likely to see other competitors make the investments necessary to provide service without resorting to unbundled loops and transport. If we were to require that Cox's network must cover 100 percent of the end user locations in a wire center service area before granting Qwest forbearance in that wire center, Qwest would only be entitled to forbearance relief in **[REDACTED]** today, despite the fact that Cox provides mass market services to **[REDACTED]**.

70. Furthermore, as the record confirms, a facilities-based competitor such as Cox that does not compete through reliance on section 251(c)(3) access to unbundled loops is unlikely to pattern the architecture of its network after wire center service area boundaries.[190] We do not believe that we should require that Cox's network neatly map to Qwest's wire center service area boundaries as a precondition of

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allow us to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations. *See supra* note 161.

[187] Wire center boundaries do not necessarily follow political or demographic boundaries; do not necessarily correspond to newspapers' circulation boundaries, television or radio reception boundaries or advertising boundaries (whether broadcast or cable); and are not identical to zip code boundaries. Wire center boundaries are most relevant only to the incumbent LEC and competitors that make use of an incumbent LEC's last mile facilities. There is no evidence in the record to suggest that Qwest is able to discern exactly where its facilities-based competitors are capable of providing service or to suggest that where a facilities-based competitor covers as much as **[REDACTED]** percent of the end user locations in a wire center that Qwest could impose prices, terms and conditions on the remaining **[REDACTED]** percent of customers that are less favorable than the prices, terms and conditions available to the other **[REDACTED]** percent of customers in that wire center. See Qwest Teitzel Aff. at 6-7 (stating that it is difficult to obtain information about competitors' market shares in Qwest's territory).

[188] *See* Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1. We find Cox's submission of actual evidence of the number of business locations to which it provides service more compelling than estimates that are based on inferences of the number of business locations Cox serves. *See* Cbeyond *et al*. Sept. 13, 2005 *Ex Parte* Letter at 7-8.

[189] *See* Cox Sept. 16, 2005 *Ex Parte* Letter, Attach. at 1. We emphasize that because our analysis relies on the extent to which facilities-based competition has taken root in the Omaha MSA and the specific nature of that competition, the appropriate coverage threshold for forbearance relief – if any – may differ in other geographic markets exhibiting different characteristics.

[190] *See* Cox June 30, 2005 *Ex Parte* Letter.

granting Qwest forbearance relief. In addition, if we were to require Cox's network to cover 100 percent of a wire center before granting Qwest forbearance in that wire center, Cox would be able to prevent Qwest from obtaining forbearance relief (and may have the incentive to do so) by declining to provide telecommunications services to only a relatively small percentage of potential customers in each wire center service area.

71. For the reasons explained above, we disagree with commenters who contend that forbearing from application of unbundling obligations to Qwest will result in a duopoly.[191] In the present context, we believe that the facilities-based competition between Qwest and Cox, in addition to the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market.[192] We note that the Commission previously has rejected arguments "that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied."[193]

72. Apart from intermodal competition from Cox, Qwest contends that it subject to additional intermodal competition from VoIP and wireless providers, and that it is "appropriate and necessary" for the Commission to consider competition from these sources as well. Because Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.

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

73. Section 10(a)(2) of the forbearance analysis requires us to determine whether the section 251(c)(3) access obligations for loop and transport elements are necessary to protect consumers.[194] For reasons similar to those that persuade us that the section 251(c)(3) access obligations for loop and transport elements are not necessary under section 10(a)(1), we also determine that these access obligations are no longer necessary for the protection of consumers in light of the transition period we describe in the following paragraph. As we conclude above, Qwest faces competition in the local exchange and exchange access markets in the Omaha MSA from Cox, which provides service without relying on Qwest's loops and transport, as well as from other carriers. We also conclude above that the continued application in the Omaha MSA of regulatory provisions designed to promote the development

[191] *See, e.g.*, Sprint Comments at 16; MCI Comments at 3, 10, 12-16; CompTel Comments at 19; AT&T Comments at 17; AT&T Comments, Declaration of Lee L. Selwyn on Behalf of AT&T Corp. (AT&T Selwyn Decl.) at 63-68, paras. 76-82; Letter from Andrew D. Lipman et al., Counsel for McLeodUSA, MPower & Pac-West, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 at 3 (filed Sept. 12, 2005).

[192] AT&T argues that "the presence of Cox in the Omaha market makes further facilities-based entry even less likely than it would be absent an incumbent cable telephony provider." AT&T Selwyn Decl. at 33, para. 41. Even assuming AT&T's contention is correct, it does not constitute a reason to deny Qwest forbearance from unbundling obligations under section 251(c)(3).

[193] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21509, para. 27.

[194] 47 U.S.C. § 160(a)(2).

of competitive markets other than section 251(c)(3) will ensure that customers in the Omaha MSA have competitive choices, and will continue to have competitive choices if we forbear from applying most section 251(c)(3) requirements to Qwest. Therefore, for the reasons we explained above, in those areas of the Omaha MSA where Qwest faces this competition, we find that the 251(c)(3) access obligation for loop and transport elements is no longer necessary to protect consumers in part because we adopt a six-month transition period for the protection of consumers.

74. *Transition Period.* Because we remove some unbundling obligations formerly placed on Qwest in certain wire centers, and as a foundation of our section 10(a)(2) finding, to avoid customer disruption we establish a plan to facilitate the transition from section 251(c)(3) unbundling to alternative options – an approach similar to the Commission's adoption of transition plans in other contexts in which it eliminated UNE obligations.[195] Specifically, we adopt a six-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, or services offered by Qwest. This transition plan shall apply only to the embedded customer base, and does not permit competitive LECs to add new loop or transport UNEs pursuant to section 251(c)(3) where the Commission has determined to forbear from a section 251(c) unbundling requirement. We believe this transition period provides adequate time for both competitive LECs and Qwest to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities, obtain other wholesale facilities, or take other actions. Consequently, carriers have six months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the six-month period, requesting carriers must transition all of their affected UNE loops and dedicated transport elements to alternative facilities or arrangements. The relief we grant Qwest today is conditioned upon compliance with the requirements of this paragraph.

c. Section 10(a)(3) – Public Interest

75. We also conclude that relieving Qwest from the section 251(c)(3) access obligations for loop and transport elements is in the public interest under section 10(a)(3). We determined above that Qwest is subject to a significant amount of competition in the Omaha MSA. Based on this level of competition, in conjunction with other regulatory safeguards, we determined that requiring Qwest to provide access to loops and transport under section 251(c)(3) is no longer necessary for the protection of consumers or to ensure that Qwest will not engage in unjust or unreasonable pricing or practices.[196] The factors upon which we based those conclusions also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section 10(a)(3). In addition, we conclude that granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).[197]

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[195] *See Triennial Review Remand Order*, 20 FCC Rcd 2639-41, paras. 195-98; *see also, e.g.*, 47 C.F.R. §§ 51.319(a)(4)(iii) (establishing DS1 loop transition period), 51.319(a)(5)(iii) (establishing DS3 loop transition period), 51.319(a)(6)(ii) (establishing dark fiber loop transition period).

[196] *See supra* at Part III.D.1.a.

[197] Section 10(b) directs the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of (continued….)

76. Moreover, we conclude that the forbearance we grant Qwest today is in the public interest for two significant additional reasons: first, we conclude that the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits, and second, we find that our decision today will increase the regulatory parity in this market. *First*, we conclude that it is in the public interest under section 10(a)(3) to forbear from section 251(c)(3) loop and transport element unbundling obligations because the costs of these unbundling requirements in parts of the Omaha MSA outweigh the benefits. One of Congress's primary goals in the 1996 Act was the creation of competitive local exchange and exchange access markets. To foster such competition, Congress gave new market entrants, which in 1996 lacked sufficient economies of scale and scope to compete effectively in the local exchange and exchange access markets, the right to compete with the incumbent LEC in these markets by leasing at cost-based rates key components (*i.e.*, UNEs) of the incumbent LEC's own telecommunications network.[198] Under this approach, a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers. Such regulatory intervention results in a number of costs, including reducing the incentives to invest in facilities and innovation, and creating complex issues of managing shared facilities.[199]

77. While the costs of such regulatory intervention may be warranted in order to foster competitive entry into the local exchange and exchange access markets where such competition would not otherwise be generated, we find that these costs are unwarranted and do not serve the public interest once local exchange and exchange access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA. Specifically, we conclude that in the 9 wire center service areas in the Omaha MSA we identified above, the costs of unbundling under section 251(c)(3) are outweighed by the benefits of such unbundling in light of the vibrant emerging competition for local exchange and exchange access services. In addition to furthering the congressional goal of creating competitive local exchange markets, our decision today also furthers another of Congress's primary aims in the 1996 Act – to deregulate telecommunications markets to the extent possible.[200] We act today in accord with Congress's clear intent in section 10 to sunset in a narrowly tailored fashion any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected.

78. *Second*, we conclude that our decision today will further the public interest by increasing regulatory parity in the telecommunications services market in the Omaha MSA. Some of the requirements of the Act and our regulations impose greater burdens on some carriers than others. The marketplace for local exchange services is a product of its history, and in order to develop and maintain

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telecommunications services," and provides that such a determination may be the basis for finding that forbearance is in the public interest. 47 U.S.C. § 160(b).

[198] *See* 47 U.S.C. § 251(c).

[199] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2559, para. 44 n.131 (justifying a finding of no impairment in certain cases in part due to the "known costs of unbundling, including reducing the incentives to invest in facilities and innovation and creating complex issues of managing shared facilities"); *see also USTA II*, 359 F.3d at 572 (stating that the Commission's impairment determinations may take into account the costs of unbundling, "such as discouragement of investment in innovation"); *Triennial Review Order*, 18 FCC Rcd at 17148, para. 284 (considering the costs of unbundling).

[200] *See supra* note 61.

competition in the local exchange markets, Congress established some obligations that apply only to incumbent LECs. Once the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities, we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms. Even though Qwest and Cox each provide service over their own facilities to **[REDACTED]** narrowband customers in the Omaha MSA,[201] Qwest is subject to unbundling obligations while Cox is not. Our action today places Qwest and Cox on more equal footing in those wire center service areas where facilities-based competition is sufficiently developed such that taking this step to increase the level of parity in the local exchange market is appropriate.

79. We make a predictive judgment, based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0-, DS1-, or DS3-capacity facilities. We thus reject arguments that our decision today will strand competitive carriers' investments by denying those competitors the opportunity to use their own existing facilities in conjunction with Qwest facilities that cannot economically be duplicated.

80. To begin with, we note that a withdrawal of these loop and transport offerings would be impermissible under section 271, which requires Qwest to make its loop and transport facilities (among others) available to competitors at just and reasonable rates and terms.[202] In addition, Qwest offers similar special access services pursuant to tariffing or contract filing requirements, and cannot cease offering such services to customers without authority under section 214.

81. Moreover, given Cox's ability to absorb customers without any reliance on Qwest's local exchange facilities, Qwest will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so. Faced with aggressive "off-net" competition from Cox, we predict that Qwest will endeavor to maximize use of its existing local exchange network, providing service at retail *and at wholesale*, in order to minimize revenue losses resulting from customer defections to Cox's service. In short, Qwest will prefer that a customer be served by a wireline competitor using Qwest's facilities at wholesale rates above that customer's use of Cox's network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs.[203]

82. Indeed, our experience indicates that this is precisely what has happened in the past: When the D.C. Circuit called into question the Commission's rules requiring incumbent LECs to unbundle mass market local circuit switching, Qwest responded by introducing a commercial product designed to replace UNE-P – and to keep customers on its network – even in the absence of a legal mandate to do so. Qwest

[201] *See supra* para. 28.

[202] See 47 U.S.C. § 271(c)(2)(B)(iv) (loops), (v) (transport); *Triennial Review Order*, 18 FCC Rcd at 17384-89, paras. 653-64 (requiring that facilities made available under section 271 be provided at section 201 rates).

[203] *See* Qwest July 25, 2005 *Ex Parte* Letter, Attach. at 2-3 (arguing that Qwest "has a powerful economic and market incentive to provide" wholesale products to its wireline competitors due to the intense competition in the Omaha MSA and that it would be "irrational economic behavior" for Qwest not to maximize the use of its existing network).

has entered into **[REDACTED]** commercially negotiated QPP arrangements in the MSA, of which **[REDACTED]** are in the 9 wire centers where we grant unbundling relief.

83. Here, too, we predict that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.[204]

2. Other Requirements of Section 251(c)

84. We decline to forbear from applying to Qwest the requirements of section 251(c) other than section 251(c)(3) (with an exception for certain collocation obligations). Specifically, we decline to forbear from the requirements of section 251(c) that Qwest negotiate in good faith the terms and conditions of its section 251(b) and section 251(c) obligations; provide other carriers with interconnection to its network at any technically feasible point; offer its retail services for resale at wholesale rates; provide reasonable public notice of changes in its network that would affect interoperability; and satisfy certain collocation obligations.[205] These requirements facilitate existing and potential competition in this market and Qwest fails to provide sufficient evidence or justification for why these requirements are no longer necessary under the standards of section 10(a). We continue to believe the requirements of sections 251(c)(1)-(2) and (4)-(6) remain necessary to ensure just and reasonable and nondiscriminatory prices in the Omaha MSA and to protect consumers' interests. We also conclude that granting Qwest forbearance from these obligations would not be consistent with the public interest.

85. *Interconnection-Related Obligations.* We decline to grant Qwest forbearance from the application of sections 251(c)(2), (5) and (6) of the Act, with an exception discussed below.[206] Qwest contends that the Commission should forbear from applying the obligations of section 251(c) that are uniquely imposed on incumbent LECs, because competition in the Omaha MSA has developed to the point where Qwest "is just one of several facilities-based competitors."[207] Qwest in this context is using "facilities-based competitor" to mean a competitor that does not rely exclusively on Qwest's facilities to

[204] To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. *See Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, FCC 05-165 (rel. Sept. 8, 2005); *see also Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21509, para. 26 n.85; *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004); *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998).

[205] 47 U.S.C. §§ 251(c)(1) (duty to negotiate in good faith), (2) (interconnection), (4) (resale), (5) (notice of changes), (6) (collocation).

[206] 47 U.S.C. §§ 251(c)(2), (5), (6).

[207] Petition at 24.

compete.[208] But while a substantial portion of customers within the 9 wire centers at issue receive service from a Qwest competitor not relying on a Qwest loop, a Qwest switch, or Qwest dedicated transport, *all* of its competitors in the Omaha MSA rely extensively on access to Qwest's network in order to exchange telecommunications traffic.[209] Even Cox, which is the competitive LEC with the most extensive facilities-based coverage in Qwest's territory in the Omaha MSA, depends on Qwest for interconnection, collocation, and reasonable notice of changes in Qwest's network in order to exchange telecommunications traffic in the Omaha MSA. Cox reports that approximately **[REDACTED]** percent of all the traffic that it sends and receives in the Omaha MSA depends on section 251(c)(2) interconnection and collocation – the effectiveness of which depends in part on reasonable notice of network changes.[210] Other competitive LECs, which have less network coverage in this geographic market than Cox, presumably depend even more than Cox on Qwest's satisfaction of its section 251(c) obligations.

86. Qwest does not discuss collocation or its obligations with respect to providing reasonable notice of network changes in detail.[211] Regarding interconnection, Qwest states that section 251(c)(2) direct interconnection at any technically feasible point is not necessary in the Omaha MSA because competitive LECs can still rely on the general duty of section 251(a)(1) that requires all telecommunications carriers to interconnect directly or indirectly.[212] Qwest argues that competitive LECs' right to indirect interconnection is sufficient to protect the interests set forth in section 10(a) because Qwest's business interests will force it to negotiate agreements with wholesale providers of interconnection.[213] We reject Qwest's position on this issue. Forbearing from section 251(c)(2) interconnection and related section 251(c) requirements such as collocation likely would give Qwest, which is the only carrier in the Omaha MSA to have a ubiquitous network, the ability to exercise market

[208] Qwest clarifies that when it refers to competitors as "facilities-based," it means that the competitors have "placed fiber in portions of the Omaha MSA that 'overbuild' portions of Qwest's legacy network, primarily for purposes of interoffice transport and carriage of long distance traffic." Qwest Reply at 29.

[209] *See* Nebraska PSC Reply at 2; Iowa Utils. Bd. Comments at 3; Cox Comments at 31-32; ALTS Comments at 3, 5-6; TWTC Comments at 2; McLeodUSA Comments at 8-9; Sprint Comments at 7; MCI Comments at 9, 11; CompTel Comments at 1; AT&T Comments at 32; Qwest Reply at 29.

[210] *See* Cox June 30, 2005 *Ex Parte* Letter at 2; *see also* Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1 (filed Aug. 24, 2005) (stating that "[e]ven though Cox uses its own network to provide competitive phone services to Omaha consumers, Cox still must rely on the rights granted it" as a competitive LEC for interconnection and other items under section 251(c)).

[211] *See, e.g.*, Qwest July 25, 2005 *Ex Parte* Letter, Attach. at 5-6 (arguing that Qwest has "fully implemented" section 251(c)(6) through its collocation policies); Letter from Cronan O'Connell, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. 1 at 5 (filed Aug. 30, 2005) (Qwest Aug. 30, 2005 *Ex Parte* Letter) (noting that Cox has collocated in two Qwest offices for the purpose of interconnection). Indeed, some commenters assumed from the evidence Qwest provided that it was not seeking relief from section 251(c) obligations other than section 251(c)(3). *See, e.g.*, Sprint Comments at 2, 8-9.

[212] Petition at 26-27; *see also* 47 U.S.C. § 251(a)(1) (providing that each telecommunications carrier has the duty "to interconnect directly *or indirectly* with the facilities and equipment of other telecommunications carriers") (emphasis added).

[213] Qwest Reply at 32-33.

power over interconnection in this market.[214] Due to the ubiquity of Qwest's network and its direct connection obligations, competitive carriers have constructed their networks using direct interconnection with Qwest and collocation as a way to interconnect with all of the carriers in the Omaha MSA.[215] If we were to forbear from section 251(c)(2), we believe Qwest would be able to exercise market power by refusing directly to connect to its competitors and forcing them to reconfigure their networks in order to exchange traffic – an expensive proposition – or pay Qwest significantly higher interconnection fees. Qwest has not made any showing that alternative interconnection arrangements are available.[216] In the absence of any substantial record evidence to the contrary, we determine that forbearance from the obligations of sections 251(c)(2), (5) and (6) is not justified under any of the three prongs of section 10(a). We find that these interconnection-related obligations are necessary to ensure just, reasonable and nondiscriminatory prices and practices in the Omaha MSA, and necessary to protect competition and consumers. Consistent with and ancillary to our decision above to forbear from section 251(c)(3) loop and transport unbundling obligations, however, we forbear from section 251(c)(6) collocation obligations in the same 9 wire centers to the extent such collocation would be used to access UNEs, but not to the extent it is used to access interconnection.[217]

87. *Good Faith Negotiation*. We also decline to grant Qwest forbearance from its section 251(c)(1) duty to negotiate in good faith the terms and conditions of agreements to fulfill its obligations under sections 251(b) and (c).[218] Qwest does not provide any compelling justification for why it should be exempt from this obligation, nor does it address the reciprocal nature of section 251(c)(1). Congress placed the duty to negotiate the agreements necessary under sections 251(b) and (c) in good faith not only on incumbent LECs such as Qwest, but also on the other parties to such agreements – *i.e.*, the requesting

[214] *See, e.g.*, AT&T Selwyn Decl. at 68-9 (arguing that in the absence of section 251(c)(2) interconnection obligations Qwest would no longer be obligated to provide efficient points of interconnection, thus driving up interconnection costs by forcing competitive LECs to incur substantial backhaul and transport costs).

[215] *See, e.g.*, Letter from J.G. Harrington, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. at 1-2 (filed Aug. 12, 2005) (Cox Aug. 12, 2005 *Ex Parte* Letter) (reporting that Cox relies on Qwest for interconnection with about half of the other carriers in the Omaha market). *See also* Cox Comments at 26. It rarely would be efficient for each competitor in a market to interconnect directly to every other competitor, and carriers therefore generally interconnect directly only with those carriers with whom they exchange a significant amount of traffic. *See* Cox Comments at 27 (stating that "for more than half of the carriers to which Cox sends traffic, call volumes are simply too low to warrant direct interconnection and the same is true for carriers that send traffic to Cox"). Competitive carriers that do not directly connect to one another then rely on the incumbent LEC to provide a transit service to carry traffic between their points of connection with the incumbent LEC, which often are collocated. *See, e.g.*, Cox Comments at 27.

[216] We reject Qwest's Petition for the reasons above and are not convinced by Qwest's argument that we should grant its Petition because no carrier opposing its Petition – and specifically, Cox – has explained why it could not interconnect with Qwest through an alternative means. *See* Qwest Aug. 30, 2005 *Ex Parte* Letter, Attach. 1 at 5. In any event, Cox has subsequently explained in detail why it believes interconnection and collocation are important to competition and why forbearance for these regulatory obligations should be denied. *See* Cox Sept. 14, 2005 *Ex Parte* Letter, Attach. at 2-5.

[217] For the sake of brevity, we incorporate here by reference the reasons for forbearance given above in Part III.D.1.

[218] *See* Petition at 22-29.

telecommunications carriers.[219] We do not believe it would be in the public interest to grant Qwest forbearance from this duty, particularly when the requesting telecommunications carrier would remain subject to the obligations of section 251(c)(1). Nor are we convinced that the other prongs of section 10(a) are satisfied. In the absence of evidence to the contrary, we believe that section 251(c)(1) remains necessary to ensure just and reasonable and nondiscriminatory pricing and practices in this market.

88. *Resale*. We deny Qwest's Petition to the extent it seeks forbearance from the resale obligations of section 251(c)(4).[220] Qwest contends that competitors in the Omaha MSA no longer depend on section 251(c)(4) resale, and argues that to the extent such reliance remains necessary, its competitors could rely instead on resale offered pursuant to section 251(b)(1).[221] Qwest has not persuaded us that section 251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that consumers' interests and the public interest are protected under section 10(a). Particularly because we have determined to forbear from section 251(c)(3) loop and transport element unbundling obligations,[222] we conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.[223] As Qwest itself states:

> [R]esale of Qwest's existing retail services represents a non-capital intensive means for CLECs to enter the market and build a core customer base, albeit with profit margin potential lower than that available via delivery of service via CLEC-owned facilities or wholesale network facilities leased from Qwest. . . . [E]specially for new market entrants, resale remains a viable option as a means to quickly and with little investment enter any portion of the Omaha-Council Bluffs market to

[219] *See* 47 U.S.C. § 251(c)(1).

[220] *See, e.g.*, Petition at 21, 23, and 26; *see also* Qwest Reply at 32; Petition at 24 ("It is clear that the Commission cannot maintain resale . . . [and other] requirements that are uniquely imposed on ILECs and BOCs in markets where competition has developed to the point where the LEC/BOC is just one of several facilities-based competitors.").

[221] *See, e.g.*, Petition at iv (stating that "the competition in the Omaha MSA is mature and does not rely on resale"); *id.* at 26.

[222] *See supra* Part III.D.1.

[223] Some competitors in the Omaha MSA currently rely on section 251(c)(4) resale to compete. For example, while McLeodUSA today has constructed some of its own facilities in the Omaha MSA, *see* Qwest May 20, 2005 *Ex Parte* Letter at Attach. 1, Tab 3, Map 3B (showing McLeodUSA fiber routes), McLeodUSA also relies on section 251(c)(4) resale in order to compete in this market. *See* McLeodUSA Comments at 8; Qwest Teitzel Aff. at 18; CompTel Comments at 3 (reporting that McLeodUSA competes in part through resale). In addition, we find that forbearing from section 251(c)(4) resale requirements likely would restrict the ability of new entrants to enter the telecommunications market in the Omaha MSA in the future. *See Local Competition Order*, 11 FCC Rcd at 15499, 15954, para. 907 (stating that "[r]esale will be an important entry strategy for many new entrants"); *cf. also* Petition at 16-17 ("With the adoption of the 1996 Act, Congress implemented a comprehensive system of market-opening provisions that benefit both facilities-based carriers and pure resellers. This flexibility allows competitive providers to increase their market presence through resale beyond the reach of their existing networks. It also allows them to increase their market share more quickly than would be possible solely through expansion of their own networks."); Qwest Teitzel Aff. at 5-6.

> attract a customer base of sufficient size to justify further investment in CLEC-owned switches and facilities.[224]

89. We are not persuaded by Qwest's argument that section 251(c)(4) resale is unnecessary in the Omaha MSA because competitors would still have a right to resell Qwest's services pursuant to section 251(b)(1).[225] Under the Act, all LECs must allow the resale of their telecommunications services and not place unreasonable or discriminatory conditions or limitations on that resale.[226] However, unlike the section 251(c)(4) resale obligation, section 251(b)(1) has no wholesale pricing requirement. Despite the amount of retail competition in the Omaha MSA, particularly for narrowband voice services, Qwest has not demonstrated that resale at avoided-cost discount is no longer necessary to competition in the Omaha MSA. Unlike access obtained under a facilities unbundling regime, in a resale service situation the incumbent LEC continues to have control of the physical lines, making it difficult for competitive LECs to distinguish their resale offering from the offering of the incumbent LEC on the basis of innovative products or features. Hence, if a competitive LEC is unable to distinguish its resale service on the basis of price, the value of a resale option to the creation of competitive markets is diminished. In addition, because the incumbent LEC continues to receive a high percentage of the revenue from resale pursuant to section 251(c)(4), we find that resale does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3).[227] Moreover, we granted Qwest forbearance from its section 251(c)(3) loop and transport unbundling obligations in part due to competitive LECs' continued right to access certain regulated wholesale services in the Omaha MSA, including resale pursuant to section 251(c)(4). We conclude that Qwest therefore has not shown that section 251(c)(4) is no longer necessary to protect consumers' interests or ensure just and reasonable and nondiscriminatory pricing, and has not shown that forbearing from section 251(c)(4) would enhance competitive market conditions.[228]

E. Forbearance from 271(c)(2)(B) Checklist Requirements

90. For the reasons discussed below, we decline pursuant to section 10(a) to forbear from the requirements of section 271(c)(2)(B) as they apply to Qwest in the Omaha MSA with the exception of section 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth what commonly are referred to as the competitive checklist requirements. Before a BOC lawfully may provide interLATA services in a state, it must demonstrate that it satisfies these competitive checklist items.[229] In addition, after a BOC has obtained such authority, it must continue to satisfy the competitive checklist requirements of section

[224] *See* Qwest Teitzel Aff. at 5-6.

[225] *See* Petition at 26; *see also* Qwest Reply at 32-33; 47 U.S.C. §§ 251(b)(1), (c)(4).

[226] 47 U.S.C. § 251(b)(1).

[227] *See Telecommunications Competition Survey for Retail Local Voice Services in Iowa*, Iowa Utils. Bd. January 2004 Report, at 12 (reporting that in Iowa Qwest receives 89.73 percent of its tariffed retail rate when a competitive LEC resells Qwest's residential basic exchange access lines).

[228] In light of other relief the Commission recently has given for broadband services, it is likely that we could find the obligation to offer resale of broadband services under section 251(c)(4) unnecessary on a more developed record.

[229] 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."); *see also id*. § 271(d).

271(c)(2)(B).[230] Because Qwest is a BOC that has received section 271 authority in Nebraska and Iowa,[231] it is subject to the section 271 competitive checklist requirements.

91. We conduct our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.[232] The Commission previously has considered "the statutory language, the framework of the 1996 Act, its legislative history, and Congress's policy objectives," to conclude that the Act "directs [the Commission] to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[233] The statutory language and framework of the 1996 Act, along with other factors, also reveal that with regard to legacy elements, which already are ubiquitously deployed, Congress's primary aim is to foster a competitive marketplace for telecommunications services provided over those facilities. Our analysis below is informed by and remains faithful to the direction we have received from Congress. The Commission already has granted Qwest substantial forbearance relief from obligations arising under section 271 related to certain broadband facilities; we decline to grant Qwest comparable relief it now seeks related to certain legacy elements.

1. Forbearance Analysis

92. Section 10(a) of the Act requires that we forbear from applying the section 271(c)(2)(B) checklist requirements to Qwest if we determine that each of three statutory forbearance criteria is satisfied. Qwest seeks forbearance from seven of the fourteen competitive checklist items contained in section 271(c)(2)(B), namely checklist items 1 through 6 and 14. In our analysis below, we group these requirements into three categories. The first category consists of checklist items 1, 2, and 14, which each incorporate obligations of section 251(c) by reference. The second category consists of checklist item 3, which incorporates the obligations of section 224 by reference. The third category consists of checklist items 4 through 6, which are independent obligations under the Act. Except as specifically provided below, we conclude with respect to all three categories and based on the current record that forbearance is not warranted.

a. Checklist Items 1, 2 & 14 (Interconnection, UNEs & Resale)

93. We conclude that Qwest has demonstrated that it is entitled to forbearance from its obligations to provide interconnection, UNEs and resale pursuant to section 271(c)(2)(B)(i), (ii), and (xiv) (*i.e.*, checklist items 1, 2, and 14) only to the same extent that it has demonstrated that it is entitled to forbearance from the requirements of sections 251(c)(2)-(4).[234] Therefore, we grant Qwest's Petition to

[230] 47 U.S.C. §§ 271(c)(2)(B) (competitive checklist requirements), (d)(6) (ongoing nature of requirements).

[231] *See Qwest IA/NE Section 271 Order*, 17 FCC Rcd 26303 (2002).

[232] *See* Preamble to the 1996 Act, 110 Stat. 56, 56 (1996); *see also* Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

[233] *Advanced Services Order*, 13 FCC Rcd 24012, 24047, para. 77 (1998) (discussing the relationship between section 10 and section 706).

[234] Checklist item 1 requires Qwest to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i). Checklist item 2 requires Qwest to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and (continued….)

the extent it seeks forbearance from checklist item 2 as that requirement applies to UNE loops and transport in the 9 wire centers where we have granted relief from the analogous section 251(c)(3) obligation. In all other respects, we decline to grant Qwest forbearance from the application of checklist items 1, 2, and 14.

94. The scope of the requirements of checklist items 1, 2, and 14 is coextensive with specific requirements set forth in section 251(c) and section 252(d). Specifically, under checklist items 1, 2, and 14, a BOC must provide interconnection, UNEs and resale "in accordance with the requirements of" the relevant subsections of 251(c) and 252(d).[235] As a result, as the Commission and reviewing courts previously have stated, if a BOC must provide interconnection, UNEs or resale pursuant to sections 251(c)(2)-(4), it must also provide interconnection, UNEs or resale pursuant to checklist items 1, 2, and 14 of section 271(c)(2)(B).[236] Therefore, it would not make sense for the Commission to forbear from sections 271(c)(2)(B)(i), (ii), and (xiv) while the obligations of sections 251(c)(2)-(4) remain in effect. Similarly, it would not make sense for the Commission to deny forbearance from sections 271(c)(2)(B)(i), (ii), and (xiv) if a carrier has no corresponding obligations under sections 251(c)(2)-(4).

95. With the exception of Qwest's obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3) discussed separately just below, Qwest remains subject to the requirements of sections 251(c)(2)-(4). We therefore find it would not make sense for us to forbear from the obligations of checklist items 1, 2, and 14 except for the obligation to provide unbundled access to loops and transport, and we decline to do so for the reasons we state below. Our decision also is based on the section 10(a) analysis that we explained above regarding sections 251(c)(2)-(4), which is relevant to and also supports our decision regarding 271(c)(2)(B)(i), (ii), and (xiv).[237] In addition, again due to the linkage between these two sets of statutory provisions, even if the Commission were to grant Qwest forbearance from the application of checklist items 1, 2 and 14 other than as applied to narrowband loops, Qwest would not obtain any material regulatory relief today. Qwest has not identified a single action it takes or obligation it incurs pursuant to sections 271(c)(2)(B)(i), (ii) or (xiv) that it would no longer need to perform or incur if we were to grant forbearance relief from the application of those checklist items if we did not also grant Qwest forbearance relief from requirements arising under section 251(c)(2)-(4). We

(Continued from previous page)

252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Checklist item 14 requires Qwest to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. § 271(c)(2)(B)(xiv); *see also Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17519-30, 17542, paras. 17-44, 67 (2001) (*Verizon Pennsylvania Section 271 Order*).

[235] *See* 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiv).

[236] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4742, n.374 (2005) (seeking comment on whether the statutory language regarding the duty to interconnect directly or indirectly under section 251(a) should be read to encompass an obligation to provide transit service and stating that "a determination that incumbent LECs have a transiting obligation pursuant to section 251(c)(2) would also trigger an obligation to provide such a service under section 271(c)(2)(B)(i)"); *see also Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (stating that some of the section 271(c)(2)(B) "requirements are simply incorporations by reference of obligations independently imposed on the BOCs by §§ 251-52 of the Act").

[237] For the sake of brevity, we do not restate our section 10(a) analysis in full here.

therefore deny Qwest's request for forbearance from checklist items 1 and 14, and checklist item 2 except as discussed below.

96. *Unbundled Loops and Transport Under Checklist Item 2*. Unlike network elements for which the Commission has found impairment and that Qwest must continue to provide on an unbundled basis under section 251(c)(3), loops and transport are a special case because the Commission has found impairment but in today's Order we determine not to apply to Qwest the section 251(c)(3) obligation to unbundle these elements in the Omaha MSA. Because checklist item 2 incorporates and is coextensive with section 251(c)(3), we grant Qwest forbearance from checklist item 2 requirements for loops and transport.[238] Just as it would not make sense to forbear from this checklist item if Qwest's correlative obligation in section 251(c)(3) remains in effect, now that we have forborne from section 251(c)(3) as applied to loops and transport, it also would not make sense to decline to forbear from checklist item 2. As explained above, the scope of these obligations is identical because checklist item 2 simply requires Qwest to provide UNEs in accordance with the requirements of sections 251(c)(3) under the applicable pricing requirement set forth in section 252(d)(1). We stress, however, that Qwest remains subject to the obligation to provide wholesale access to loops as required by checklist item 4 and to provide wholesale access to transport as required by checklist item 5. As we discuss below, the scope of checklist items 4 and 5 and the pricing requirements that apply to those obligations differ from the scope and pricing standard of checklist item 2. In addition, part of the reason we are able to grant Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport is because a comparable wholesale access obligation exists under section 271(c).

b. Checklist Item 3 (Poles, Ducts, Conduits, and Rights of Way)

97. We deny Qwest's Petition for forbearance to the extent it seeks relief from its obligations arising under checklist item 3 in the Omaha MSA, which requires Qwest to provide nondiscriminatory access to the poles, ducts, conduits, and rights of way it owns or controls at just and reasonable rates in accordance with the requirements of section 224.[239] Qwest has not asked for relief from section 224 or section 251(b)(4),[240] or any regulations promulgated pursuant to those statutory provisions, and we decline at the present time to grant such relief *sua sponte*.[241] Because Qwest's obligations under checklist item 3 incorporate the obligations of section 224 by reference, and are mirrored in section 251(b)(4), even if the Commission were to grant Qwest relief from its obligations under checklist item 3, Qwest would not obtain any material regulatory relief today in the absence of comparable relief under section 224 and section 251(b)(4). It therefore would not make sense for the Commission to grant such relief and we decline to do so.

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[238] In accord with our decision above, we do not forbear from checklist 2 requirements with respect to 911 and E911 databases or operations support systems. *See supra* note 150.

[239] *See* 47 U.S.C. § 271(c)(2)(B)(iii).

[240] 47 U.S.C. § 251(b)(4) (providing that all LECs have the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224"); *see also* Qwest July 27, 2005 *Ex Parte* Letter, Attach. 1, at 1 (stating that Qwest "is not seeking relief from the normal rules applicable to other LECs . . . under Section 251(b)").

[241] *See, e.g.*, 47 C.F.R. §§ 1.1401-18; *see also* 47 U.S.C. § 160(a) (granting the Commission authority to grant forbearance if certain criteria are satisfied).

98. In addition, we find that enforcement of checklist item 3 in the Omaha MSA remains necessary under the standards of sections 10(a)(1) and (2). Qwest has not submitted evidence in this proceeding to show why this provision is no longer necessary to ensure that Qwest's charges and practices for access to its poles, ducts, conduits and rights of way are just, reasonable and nondiscriminatory or that this provision is unnecessary for the protection of consumers, nor does any commenter support Qwest's Petition in this regard.[242] Particularly because the Commission has never granted forbearance from requirements to make poles, ducts, conduits and rights of way available – obligations closely linked to the creation of facilities-based competition – we believe it is incumbent on Qwest to explain in detail why the Commission should forbear from those sections. In the absence of record evidence to the contrary, we continue to believe that the requirements of checklist item 3 remain necessary in the Omaha MSA to ensure that Qwest's charges and practices are just and reasonable and are not unjustly or unreasonably discriminatory, as well as being necessary for the protection of consumers.

99. Furthermore, we believe that such a grant would be contrary to the public interest under section 10(a)(3) and would be harmful to competition among telecommunications services providers in this market. As amended by the 1996 Act, Congress in section 224 intended to ensure, *inter alia*, that incumbent LECs' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services and certain other services.[243] It therefore amended section 224 in 1996 to give competitive LECs and cable operators a right of access to utility poles, ducts, conduits and rights of way, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable. We do not believe, as Qwest seems to assume, that the presence of some retail competition in the Omaha MSA necessarily demonstrates that it would enhance competition to grant Qwest forbearance relief from its obligation to provide competitors nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates. In the absence of evidence to the contrary, we find that facilities-based competition depends on access to poles, ducts, conduits, and rights-of-way at reasonable rates to reach customers and provide competition in the provision of telecommunications services. Qwest has not submitted any evidence nor provided any explanation to show that granting such relief would be consistent with the public interest as required by section 10(a)(3), or that shows how forbearance would promote competitive market conditions.[244]

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[242] 47 U.S.C. § 160(a)(1), (2); *see also, e.g.*, Sprint Comments at 4; CompTel Comments at 10; AT&T Comments at 32.

[243] As initially enacted in 1978, Congress in section 224 sought to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. The 1996 Act amended section 224 in important respects. As amended by the 1996 Act, section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a). The 1996 Act, however, specifically excluded incumbent LECs from the definition of telecommunications carriers with rights as pole attachers. *See* 47 U.S.C. § 224(a)(5). Because an incumbent LEC is a utility and not a telecommunications carrier for purposes of section 224, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though an incumbent LEC has no rights under section 224 with respect to those of other utilities. This is consistent with Congress's intent that section 224 promote competition by ensuring the availability of access to new telecommunications entrants. *See* Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113.

[244] 47 U.S.C. §§ 160(a)(3), (b).

c. Checklist Items 4-6 (Loops, Transport and Switching)

100. We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (*i.e.*, checklist items 4-6).[245] In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 to provide unbundled access to such elements.[246] We conclude that Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory, nor unnecessary to ensure that consumers' interests are protected.[247] We instead conclude that granting Qwest's Petition would not be in the public interest and would likely harm competition in the provision of telecommunications services in the Omaha MSA.[248]

101. As an initial matter, we clarify that the scope of our inquiry in this section is limited. The analysis below pertains only to loop, transport and switching elements that need not be unbundled pursuant to section 251(c)(3) and for which we have not already forborne from section 271 access obligations. *First*, we deny Qwest's forbearance Petition to the extent it seeks relief from obligations to provide access to loops, transport and switching under section 271 when Qwest also has an obligation to provide the same network elements – for example, loops in those wire centers where we have neither forborne from section 251(c)(3) in this Order nor found non-impairment in the *Triennial Review Remand Order* – pursuant to section 251(c). For this class of network elements, even if we were to forbear from sections 271(c)(2)(B)(iv)-(vi), which require just and reasonable pricing under sections 201 and 202, Qwest would still be obligated to provide access to these network elements pursuant to section 251(c)(3) at more specific TELRIC prices.[249] To the extent that section 271(c)(2)(B) imposes an obligation no greater than section 251(c)(3), and where that section 251(c)(3) obligation still applies, we deny Qwest's

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[245] Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv). Section 271(c)(2)(B)(v) requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Section 271(c)(2)(B)(vi) requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services." 47 U.S.C. § 271(c)(2)(B)(vi); *see also Verizon Pennsylvania Section 271 Order*, 16 FCC Rcd at 17532-536, paras. 48-56.

[246] *See Triennial Review Order*, 18 FCC Rcd at 17384, para. 653; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3905, para. 471 (1999) (*UNE Remand Order*). As the Commission previously has explained, this interpretation of the Act best comports with the plain meaning of the statute and avoids other problems of statutory construction. The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. *See Triennial Review Order*, 18 FCC Rcd at 17385, para. 655.

[247] 47 U.S.C. § 160(a)(1)-(2).

[248] *Id*. at § 160(a)(3).

[249] *See Triennial Review Order*, 18 FCC Rcd 17386, para. 656.

Petition for the reasons articulated above.[250] *Second*, after Qwest filed its Petition in the present proceeding, the Commission in the *Section 271 Broadband Forbearance Order* granted forbearance petitions filed by Qwest and the other BOCs to the extent they sought relief from section 271 unbundling obligations applicable to the broadband network elements that the Commission, on a national basis, relieved from section 251(c)(3) unbundling obligations in the *Triennial Review Order* and subsequent reconsideration orders.[251] These elements include FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching.[252] Because the Commission already has granted Qwest forbearance from its section 271 obligations for such broadband elements, its Petition to that extent is moot.

102. In the remainder of this section, therefore, we address only loops, switching and transport elements not subject to unbundling requirements pursuant to section 251(c)(3) that Qwest must provide pursuant to sections 271(c)(2)(B)(iv)-(vi), which for convenience we refer to in this order as "legacy elements."[253] The legacy elements encompassed by the discussion below include network elements that the Commission has determined do not require unbundling pursuant to section 251(c)(3). Such network elements include, among other elements, local circuit switching; transport in wire centers in cases in which the impairment measurements set forth in the *Triennial Review Remand Order* are not satisfied; and loops and transport in the 9 wire center service areas where we forbear from applying Qwest's section 251(c)(3) unbundling obligations today.[254]

(i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations

103. We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from Qwest's wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi). We find that while section 10(a) is satisfied with respect to forbearance from certain section 251(c)(3) unbundling requirements for loops and transport, that measure of deregulation is predicated upon the availability of other regulatory protections that function as a backstop to prevent harm to competition – including, most notably here, section 271(c). In the absence of sufficient competition, we are concerned that the telecommunications services available to customers might not be offered on just, reasonable and nondiscriminatory terms. This concern is heightened because the Commission has determined that the appropriate pricing inquiry for network elements made

[250] *See supra* Part III.E.1.a (explaining that it would not make sense to forbear from a section 271 obligation when the same obligation applies under a different provision of the Act).

[251] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19; *see also MDU Reconsideration Order*, 19 FCC Rcd 15856 (extending FTTH rules to MDUs that are predominantly residential); *FTTC Reconsideration Order*, 19 FCC Rcd 20293 (2004).

[252] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21504, para. 19.

[253] We clarify that our use of the terms "legacy elements" and "legacy services" are intended simply as a shorthand to help explain our reasoning in the present case. We are not defining legacy services to be a new regulatory category and our use of "legacy elements" and "legacy services" in this order has no application beyond the scope of the present order.

[254] *See generally Triennial Review Order; Triennial Review Remand Order*.

available pursuant to section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis. We therefore are concerned that relieving Qwest from this obligation might result in prices that do not satisfy that standard.[255] On the basis of the analysis above, we conclude that Qwest's Petition does not satisfy the standard for forbearance set forth in section 10(a)(1) for any services Qwest must provide pursuant to checklist items 4 through 6.

104. The economic barriers to self-providing facilities can be substantial,[256] and "can differ from city to city, within the same city, or between a city and its suburbs because of differences in municipal right-of-way and permitting policies, as well as conduit availability," among other factors.[257] When the Commission established its impairment determinations, it did so at a level designed to provide incentives for self-provisioning competitive facilities, rather than based on a finding that in all cases self-provisioning of competitive facilities is economically feasible.[258] As a result, the Commission's impairment determinations necessarily sometimes are under-inclusive.[259] In other words, it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities.[260] In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, "the construction of local loops generally takes between six to nine months absent unforeseen delay."[261] In order to provide service to customers, competitive LECs therefore may require wholesale access to Qwest's network on a temporary basis while they construct their own facilities to their customers' premises.[262] If carriers lacked wholesale access to Qwest's network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.

105. In addition, if we would now forbear from sections 271(c)(2)(B)(iv) and (v), we could no longer fully rely on two of the three bases upon which we based our conclusion that forbearance from section 251(c)(3) obligations for loops and transport in certain wire centers is warranted. Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest's wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v). Specifically, we determined above to forbear in certain wire

[255] *See Triennial Review Order*, 18 FCC Rcd 17386, para. 656.

[256] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54.

[257] *See, e.g., id*. at 2579, para. 73 n.209.

[258] *See id*.

[259] *See USTA II*, 359 F.3d at 570 (noting "the inevitability of some over-and under-inclusiveness in the Commission's unbundling rules").

[260] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2547-49, paras. 24-28 (discussing the reasonably efficient competitor standard).

[261] *See id*. at 2616, para. 151 (discussing factors that might create much longer delays).

[262] *See id.* at 2635, para. 185 (explaining that carriers will only construct fiber loops in order to serve a demand for service from a customer).

centers from the application of section 251(c)(3) to loops and transport in the Omaha MSA based on facilities-based competition provided by Cox, *and* based on retail competition that in part depends on Qwest's wholesale offerings, *and* based on the potential competition facilitated by the Commission's other rules, including the checklist items under discussion here. We therefore see no tension in granting Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport even though we do not grant Qwest forbearance from section 271 wholesale access obligations. We note that in granting Qwest forbearance from its obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3), consistent with the language of the Act, we determined that the application of *section 251(c)(3)* with its TELRIC pricing standard was not necessary in certain wire centers to ensure that the standards of section 10(a) are satisfied. We did *not* determine that Qwest's provision of wholesale access to loops and transport was no longer necessary to ensure that the standards of section 10(a) are satisfied. As just explained, we reached the opposite conclusion, and affirm that conclusion here as applied to Qwest's wholesale access obligations under checklist items 4 through 6, which operate under the just, reasonable and non-discriminatory pricing standard.

106. Our determination today not to grant Qwest additional forbearance relief from its unbundling obligations under sections 271(c)(2)(B)(iv)-(vi) for its legacy elements also finds support in the Commission's *Section 271 Broadband Forbearance Order*. There, the Commission found that the "broadband market is still an emerging and changing market, where . . . the preconditions for monopoly are not present."[263] Specifically, the Commission recognized that numerous intermodal broadband competitors are beginning to emerge and that cable modem providers have already had success in acquiring residential and small-business customers.[264] Further, the Commission recognized that, in order effectively to compete for the provision of broadband services, the BOCs generally would need to upgrade their networks substantially with new fiber technologies. However, because section 271 unbundling obligations create disincentives for the BOCs to make substantial investments in these new fiber technologies, in accord with our nation's policy goals of trying to provide all carriers, including BOCs, with incentives to make such investments, the Commission concluded that forbearance relief was justified.[265] As additional support for its decision in the *Section 271 Broadband Forbearance Order*, the Commission stressed its expectation that the emerging competition from "*multiple sources and technologies* in the retail broadband market," would be likely to "pressure the BOCs to utilize wholesale

[263] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 22.

[264] The Commission noted at the time that focusing its analysis to this degree on the retail market was unusual. *See id*. at 21505, para. 20 (noting that "[a]lthough in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong," with respect to its analysis of these new fiber technologies, it was "appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market").

[265] Specifically, the Commission concluded that "the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest – particularly at the retail level – and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted." *Id.* at 21505, para. 21; *see also* 47 U.S.C. § 157 nt (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment").

customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business."[266] Furthermore, the Commission held that even if its prediction were wrong that competitive providers of retail broadband services would be able to rely on reasonably priced wholesale broadband offerings, these competitive providers would "still be able to access other network elements to compete in the broadband market."[267] Qwest now seeks additional forbearance relief from any obligation to make these "other network elements" available.

107. The reasoning that formed the basis of the Commission's decision to forbear from applying the section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements. The supply market for legacy services is quite different from the supply market for broadband services. As explicitly recognized in section 706, it is important for this Commission to remove investment disincentives that apply to *broadband* services in order to encourage the construction of next generation facilities to customers nationwide. In contrast, the policies of section 706 do not apply to already-constructed legacy elements.[268] In this context, we see no reason to forbear from section 271(c) obligations in order to provide Qwest additional incentive to upgrade its legacy network facilities. We also see no reason to forbear from section 271(c) obligations to give Qwest's competitors additional incentive to construct their own facilities, because the section 271(c) obligations do not require Qwest to provide wholesale access under a cost-based pricing requirement.[269] Instead, we believe that the competitive market pressures evident in the Omaha MSA create appropriate incentives that will guide Qwest and its competitors in their decisions regarding when to upgrade their facilities or construct new facilities to better serve legacy customers.

(ii) Section 10(a)(2) – Protection of Consumers

108. In order to forbear from applying to Qwest the section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA, section 10(a)(2) requires us to analyze whether such application is necessary to ensure the protection of consumers.[270] For reasons similar to those that persuade us that Qwest has not demonstrated that these requirements as applied to its legacy elements are not necessary within the meaning of section 10(a)(1), we also conclude that Qwest has not demonstrated that these requirements are unnecessary for the protection of consumers under section 10(a)(2). Because we have explained these reasons at length above, we do not repeat that discussion here.

(iii) Section 10(a)(3) – Public Interest

109. Finally, Qwest has not shown that it satisfies the requirements of section 10(a)(3). Section 10(a)(3) requires us to analyze whether forbearance would be consistent with the public interest.[271]

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[266] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21508, para. 26 (emphasis added).

[267] *Id*.

[268] *See* CompTel Sept. 9, 2005 *Ex Parte* Letter at 2 (arguing that there is no linkage between deregulation of existing legacy telecommunications facilities and new investment).

[269] *See supra* Part III.D.1.c (discussing the costs of unbundling).

[270] 47 U.S.C. § 160(a)(2).

[271] *Id*. at § 160(a)(3).

Specifically, we must consider whether forbearance from the application to Qwest of its obligations under checklist items 4 through 6 "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[272] We do not believe eliminating Qwest's section 271 access obligations for legacy facilities would enhance competition in the Omaha MSA as contemplated in section 10.

110. In the Omaha MSA, where retail competition often is based on the use of Qwest's facilities, eliminating the requirement to provide wholesale access to Qwest's loops, switching and transport elements is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition.[273] We find that competitors in the Omaha MSA continue to need access to Qwest's facilities to serve many locations. For instance, AT&T claims that even in the most densely populated areas of the MSA, where competitive deployment is in general most likely, it "is still dependent upon Qwest facilities for the vast majority of its enterprise customer locations."[274] Cox appears to be Qwest's only competitor in this market to compete primarily over its own last-mile facilities – and yet Cox does not provide coverage in a significant portion of Qwest's service area.[275] The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.[276] We are not willing, nor are we able under the Act, to undercut the basis of this competition in the absence of a demonstration that relieving Qwest from its section 271 obligations would be consistent with the public interest and promote competitive market conditions by enhancing competition among providers of telecommunications services. Qwest has not made this showing and we must therefore deny its request.

F. Regulation as an Incumbent Local Exchange Carrier

111. We reject Qwest's request for forbearance from regulation as an incumbent LEC in the Omaha MSA, because Qwest fails sufficiently to identify the objects of its request and fails to explain how granting its request would affect the public interest and other criteria of section 10(a).[277] Qwest states that it seeks "forbearance from regulation as an ILEC pursuant to section 251(h)(1)."[278] Section 251(h)(1) is the section of the Act that defines "incumbent LEC."[279] Qwest does not point to any

[272] *Id*. at § 160(b).

[273] *Id*. at § 160(b). While Qwest contends that "[c]ompetitive providers have other market entry options in those areas where they choose not to deploy facilities," the record does not support this contention to the extent Qwest claims a wholesale market exists for telecommunications services relevant to this proceeding. Qwest Petition at 17.

[274] AT&T Selwyn Decl. at paras. 18, 51.

[275] Cox, which Qwest cites as its strongest competitor in the Omaha MSA, apparently has no coverage whatsoever in **[REDACTED]** of the 24 wire centers that make up Qwest's territory, and only limited coverage in many of Qwest's other wire centers in this market. *See* Cox June 30, 2005 *Ex Parte* Letter.

[276] *See supra* note 176.

[277] *See* Petition at 37-39.

[278] *Id*. at 38.

[279] *See* 47 U.S.C. § 251(h)(1). Qwest states that one route to granting its forbearance request would be first to declare Cox an incumbent LEC, based in part on a finding that Cox has "substantially replaced" Qwest as the incumbent LEC in the Omaha MSA, and then forbear from incumbent LEC regulation as applied to both Qwest and (continued….)

substantive obligations of incumbent LECs from which it might seek relief. Other than the section 251(c) claims that Qwest pleads and we evaluate separately, the only regulation Qwest identifies as applying to it as a result of its status as an incumbent LEC – section 54.309(a) of the Commission's rules – is a regulation from which Qwest does not seek forbearance.[280] Neither Qwest nor any commenter has pointed to any authority that would compel the Commission to infer which regulations or statutory provisions are encompassed by Qwest's general request. We decline to speculate from what regulations or provisions of the Act Qwest would like forbearance other than those it specifically identifies, and then to compose on Qwest's behalf an affirmative case for such relief.[281]

IV. EFFECTIVE DATE

112. Consistent with Section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, September 16, 2005.[282] The time for appeal shall run from the release date of this order.[283]

V. ORDERING CLAUSES

113. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Qwest Corporation's Petition for Forbearance is GRANTED to the extent described herein and is otherwise DENIED.

(Continued from previous page)

Cox. *See* Petition at 38 (acknowledging that such a process would be inefficient). Section 251(h) provides that the Commission may "*by rule*, provide for the treatment of a LEC" as an incumbent LEC if certain conditions are met. 47 U.S.C. § 251(h)(2) (emphasis added); *see also 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, Notice of Proposed Rulemaking, 19 FCC Rcd 23070 (2004) (opening a rulemaking proceeding to determine how section 251(h)(2) should be applied to the specific factual situation in Terry, Montana as well as to future petitions filed under section 251(h)(2)). Because the present proceeding is not a rulemaking proceeding, we do not reach the merits of Qwest's suggestion. *See* Letter from David Cosson, Counsel to Mid-Rivers Telephone Cooperative, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (filed Sept. 7, 2005) (stating that the petition filed by Mid-Rivers pursuant to section 251(h) and Qwest's Petition "are brought under different provisions of the Communications Act").

[280] *See* Petition at 38 n.108.

[281] *Cf. Petition of SBC Communications Inc., for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, WC Docket No. 04-29, 20 FCC Rcd 9361, 9366-67, paras. 14-17 (2005) (denying forbearance petition for, *inter alia*, lack of specificity).

[282] *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).

[283] *See* 47 C.F.R. §§ 1.4, 1.13.

114. IT IS FURTHERED ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), the Commission's forbearance decision SHALL BE EFFECTIVE on September 16, 2005. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX
LIST OF COMMENTERS

Comments in WC Docket No. 04-223

Comments	Abbreviation
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
CompTel/ASCENT	CompTel
Cox Communications, Inc.	Cox
Independent Telephone & Telecommunications Alliance	ITTA
Iowa Utilities Board	Iowa Utils. Bd.
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
MCI, Inc.	MCI
Sprint Corporation	Sprint
Time Warner Telecom	TWTC

Replies in WC Docket No. 04-223

Replies	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
BellSouth Corporation	BellSouth
Nebraska Public Service Commission	Nebraska PSC
Qwest Corporation	Qwest
SBC Communications Inc.	SBC
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order (WC Docket No. 04-223)

With this Order, we witness the fruits of the Telecommunications Act of 1996. In the nearly 10 years since the passage of this Act, Cox has become a formidable competitor to Qwest in the Omaha MSA. Accordingly, based on the specific market facts that have been placed before us, we are compelled under the "pro-competitive, deregulatory" framework established by Congress, as well as under section 10's forbearance criteria, to grant Qwest relief from the continued application of legacy regulations.

This Order is significant in two respects. First, it is first time that we have forborne from enforcing unbundling requirements under section 251(c). Second, it is the first time that we have relieved an incumbent LEC of legacy dominant carrier regulation in the mass market. Cox has made a substantial infrastructure investment in the Omaha MSA and has used these facilities to provide competing telephone services to over a hundred thousand residential and business customers.

This success of intermodal competition warrants the Commission's careful exercise of its forbearance authority. Notably, the relief we grant today is balanced and limited to the areas in which Cox has the most significant facilities presence. For example, we grant unbundling relief only in those wire centers where Cox facilities pass a substantial number of end-user locations served by a particular wire center. In those areas where Cox does not have such an extensive presence, no unbundling relief is granted. Accordingly, I believe this Order strikes the right balance.

CONCURRING STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order (WC Docket No. 04-223)

In today's decision, the Commission grants forbearance from certain unbundling and dominant carrier obligations in areas of the Omaha MSA where a facilities-based carrier has extensively built out its network and taken significant market share from the incumbent wireline provider. While we support the outcome in this Order and believe it is clearly superior to an automatic grant of the underlying petition, we have concerns with the analysis in this decision. As a result, we choose to concur.

The goal of the Telecommunications Act of 1996 is to establish a "pro-competitive, de-regulatory national policy framework." Today's decision lives up to this charge only in part. This item certainly reduces regulation by eliminating some incumbent obligations and demonstrates that the Commission can respond to the dynamic marketplace. But we fall short when it comes to promoting competition. The Commission relies on the intermodal efforts of a single alternative provider—a provider with substantially greater resources than other competitors—to conclude that the Omaha MSA is fully competitive and to carve away both retail and wholesale obligations. While we agree that there is especially strong evidence of competition between the incumbent cable and wireline providers in this market, we believe the statute contemplates more than just competition between a wireline and cable provider—and that both residential and business consumers deserve more.