IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1012

VERIZON TELEPHONE COMPANIES

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1996 Act	Telecommunications Act of 1996
ACS	ACS of Anchorage
Act	Communications Act of 1934
GCI	General Communication, Inc.
Cox	Cox Communications, Inc.
LEC(s)	Local Exchange Carriers(s)
MSA(s)	Metropolitan Statistical Area(s)
Qwest	Qwest Corporation
TELRIC	Total Element Long-Run Incremental Cost
UNE(s)	Unbundled Network Element(s)
USTA	United States Telecommunications Association
Verizon	Verizon Telephone Companies Corporation

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Section 10(a) of the Communications Act of 1934 as amended, 47 U.S.C. § 151, et seq. ("Communications Act" or "Act") authorizes the Federal Communications Commission to forbear from applying provisions of the Communications Act or its rules to a telecommunications carrier if the Commission finds that certain criteria have been met. 47 U.S.C. § 160(a). Invoking that section, Verizon Telephone Companies Corporation ("Verizon") filed petitions with the Commission seeking forbearance, inter alia, from the obligation to unbundle specific elements of its network and to lease those facilities to prospective competitors in six separate markets, including some of the largest markets in the United States. The

Commission had required incumbent local exchange carriers ("LECs"), including Verizon, to unbundle those elements in earlier rulemakings after determining, as required by section 251(d)(2) of the Act, that competitors to the incumbent LECs would be impaired in their ability to provide service without unbundled access to those elements.

Verizon's forbearance request followed the Commission's grant of limited unbundling relief to two other carriers in relatively small markets, where the Commission had relied on several pieces of evidence demonstrating existing, robust competition. Finding that Verizon had failed to come forward with comparable evidence or otherwise satisfy the statutory criteria for forbearance, the Commission in the order on review[1] denied Verizon's six petitions.

The issues before the Court are as follows:

1. Whether the Commission's application of the statutory forbearance standard was reasonable and consistent with administrative precedent.

2. Whether Verizon's attempt to relitigate the nature of unbundling obligations issued under section 251(d)(2) is irrelevant, untimely, and barred by the doctrine of issue preclusion.

3. Whether the Court should not consider a challenge raised solely by an intervenor to the adequacy of the manner in which the Commission obtained market data in this proceeding.

STATUTORY PROVISIONS

The applicable statutes and regulations are set forth in the attached appendix.

[1] Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, 22 FCC Rcd 21293 (2007) ("Order"), (J.A.).

COUNTERSTATEMENT

I. Background

A. Statutory and Regulatory Framework

1. Section 10

Section 10(a) of the Communications Act requires the Commission to forbear from applying any provision of the Communications Act or its rules if it determines: (1) that enforcement of the requirement is not necessary to ensure that rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory; (2) that the regulation is not needed to protect consumers; and (3) that forbearance is consistent with the public interest. 47 U.S.C. § 160(a). The Commission, in applying the "public interest" component of the test, must consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). The Commission may forbear under section 10(a) only if it finds that all three parts of the forbearance standard are met.[2]

Section 10(c) gives a telecommunications carrier the right to petition the Commission to exercise its authority to forbear from applying a provision of the Communications Act or the Commission's regulations. 47 U.S.C. § 160(c). A carrier filing a forbearance petition has the "obligation to provide evidence demonstrating with specificity why" it should receive relief under the applicable statutory standard.[3] A forbearance petition is deemed granted if the

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[2] See In re Core Communications, Inc., 455 F.3d 267, 277 (D.C. Cir. 2006) (quoting CTIA v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003)) ("The[] three prongs of the forbearance test 'are conjunctive,' meaning that '[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.'").

[3] Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H), 18 FCC Rcd 24648, 24658 (¶ 24) (2003).

Commission does not deny it for failure to meet those standards within 12 months, unless the Commission extends the deadline by an additional 90 days. 47 U.S.C. § 160(c).

2. Section 251 and Implementing Regulations

For most of the last century, American consumers could purchase local telephone service from only one source: the incumbent LEC that served the area where they lived. Until the 1990s, regulators treated local telephone service as if it were a natural monopoly. As a result, states typically granted an exclusive franchise in each local service area to the incumbent LEC that owned and operated the local telephone network.[4]

Congress in the Telecommunications Act of 1996 ("1996 Act")[5] fundamentally altered this regulatory framework "to achieve the entirely new objective of uprooting the monopolies."[6] The 1996 Act creates "a new telecommunications regime designed to foster competition in local telephone markets"[7] by imposing upon incumbent LECs "a host of duties."[8] Foremost among these duties is the incumbent LEC's obligation "to share its network with competitors."[9]

Section 251(c)(3) of the Act gives the Commission "broad power[]"[10] to require an incumbent LEC to provide its competitors with non-discriminatory access to elements of its network on an unbundled basis. 47 U.S.C. § 251(c)(3). The Commission determines what

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[4] See AT&T v. Iowa Utilities Board, 525 U.S. 366, 371 (1999).

[5] Pub. L. No. 104-104, 110 Stat. 56.

[6] Verizon Communications Inc. v. FCC, 535 U.S. 467, 488 (2002).

[7] Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 638, (2002).

[8] AT&T, 525 U.S. at 371.

[9] Id. (citing 47 U.S.C. § 251(c)(3)).

[10] Covad Communications Co. v. FCC, 450 F.3d 528, 531 (D.C. Cir. 2006).

nonproprietary unbundled network elements ("UNEs")[11] the incumbent LECs must make available, after considering "at a minimum" whether the failure to provide access to such elements would impair a competitor's ability to provide service. 47 U.S.C. § 251(d)(2). UNEs that must be offered pursuant to section 251(c)(3) must be made available at cost-based rates. See 47 U.S.C. § 252(c)(2)(D).[12]

The Commission's initial attempts to adopt rules implementing the 1996 Act's unbundling provisions were struck down in part on judicial review.[13] After this Court's remand in USTA II, the Commission initiated a further rulemaking and invited comments on how to "establish[] sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act."[14] Taking into account guidance from the Supreme Court and this Court, as well as the comments of Verizon and other interested parties, the Commission in its Triennial Review Remand Order modified its standards for determining impairment and then used those standards to fashion a revised list of network elements that must be provided as UNEs.[15] The modified rules "impos[e] unbundling obligations only in those situations where [the Commission] find[s] that carriers genuinely are impaired without access to particular network elements and where unbundling

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[11] The 1996 Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

[12] To establish cost-based rates, the Commission concluded that UNE prices must be based on each element's Total Element Long-Run Incremental Cost ("TELRIC"). See 47 C.F.R. § 51.505(b). The Supreme Court upheld the TELRIC methodology as lawful and consistent with the statute. Verizon, 535 U.S. 467.

[13] See AT&T, 525 U.S. 366; United States Telecommunications Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); United States Telecommunications Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[14] Unbundled Access to Network Elements, 19 FCC Rcd 16783, 16788 (¶ 9) (2004).

[15] Unbundled Access to Network Elements, 20 FCC Rcd 2533, 2615 (¶ 147) (2005) ("Triennial Review Remand Order"), aff'd, Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

does not frustrate sustainable, facilities-based competition."[16] In addition, the rules "remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit . . . robust competition," [17] and establish standards, i.e., competitive triggers, for the elimination of specific unbundling obligations. By satisfying the competitive triggers, Verizon has been able to obtain unbundling relief in five of the MSAs that are the subject of its forbearance petitions.[18]

As relevant here, the Commission's rules require incumbent LECs to unbundle copper DS0 loops[19] nationwide.[20] The rules also require incumbent LECs to unbundle high-capacity DS1 and DS3 loops[21] and transport[22] unless they can satisfy specific competitive triggers based

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[16] Triennial Review Remand Order, 20 FCC Rcd at 2535 (¶ 2).

[17] Id. at 2536 (¶ 3).

[18] Order ¶ 38 (J.A.).

[19] "[L]oops are the transmission facilities between a [LEC] central office and the customer's premises, i.e., the 'last mile' of a carrier's network that enables the end-user to originate and receive communications." Triennial Review Remand Order, 20 FCC Rcd at 2615 (¶ 147). The Commission's rules also impose certain narrowband unbundling obligations for fiber and hybid fiber-copper loops. 47 C.F.R. § 51.319(a)(2),(3).

[20] 47 C.F.R. § 51.319. See Triennial Review Remand Order, 20 FCC Rcd at 2615 (¶ 149).

[21] A DS1 circuit carries the traffic equivalent to 24 DS0 channels (and thus has the capacity to carry 24 voice calls simultaneously). A DS3 circuit contains the equivalent of 28 DS1 channels or 672 DS0 channels. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, 17211 n.1154 ("Triennial Review Order"), aff'd in part and rev'd in part, United States Telephone Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004). See Covad, 450 F.3d at 535.

[22] Dedicated transport or transport "are facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its local network to the incumbent LEC's network." Triennial Review Remand Order, 20 FCC Rcd at 2576 (¶ 67).

upon minimum numbers of fiber-based collocators[23] and/or business lines[24] in wire centers.[25] The unbundling rules embody the agency's impairment determinations regarding those network elements.[26]

In addition, pursuant to its "at a minimum" authority to consider factors in addition to impairment,[27] the Commission "decline[d] to order unbundling of network elements to provide service in the mobile wireless services market and long distance services market" where "competition has evolved without access to UNEs."[28] However, the Commission did "not believe that it is appropriate at [that] time to render similar judgments regarding other services specified in the Act — namely, telephone exchange service and exchange access service, the two services local exchange carriers provide."[29]

The revised unbundling rules and impairment framework were affirmed by this Court in Covad, 450 F.3d at 531. In particular, Verizon and other incumbent LECs contended that the Commission's impairment standard for DS1 and DS3 loops required too much unbundling, because, they contended, "the Commission denied unbundling only in those markets that are experiencing 'extraordinary levels of competition,' without considering 'the class of markets in

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[23] "A fiber-based collocator is an arrangement that allows a [competitive LEC] to interconnect its facilities with those owned and operated by an [incumbent] LEC." Covad, 450 F.3d at 535 n.2.

[24] "A business line is a loop that runs from the wire center to a business customer." Id. A wire center is the part of the incumbent LEC's network where loops and transport facilities attach to the switch.

[25] Triennial Review Remand Order, at 2588-97, 2625-29 (¶¶ 93-106, 167-73). See 47 C.F.R. § 51.319(a)(4)-(5); Order, 22 FCC Rcd at 21312 (¶ 36) (J.A.).

[26] See Triennial Review Remand Order, 20 FCC Rcd at 2604, 2608, 2615 (¶¶ 126, 129, 149).

[27] See 47 U.S.C. § 251(d)(2).

[28] Triennial Review Remand Order, 20 FCC Rcd at 2554-56 (¶¶ 36-37).

[29] Id. at 2556 (¶ 38).

which competition is *possible* without UNEs.'"[30] This Court rejected that claim, concluding that the Commission's impairment standard for DS1 and DS3 loops was the product of appropriate "line-drawing" based on "a thorough analysis of the economic realities surrounding high-capacity loop deployment."[31] The unbundling rules for copper DS0 loops — which, as discussed above, include a nationwide impairment finding — were adopted in the prior Triennial Review Order and not even challenged on review of that order.[32]

B. Prior Orders Ruling on Petitions for Forbearance of Unbundling Rules

Qwest Omaha Order. On December 2, 2005, the Commission released an order that granted in part and denied in part a petition filed by Qwest Corporation ("Qwest") seeking forbearance in the Omaha Metropolitan Statistical Area ("MSA") from section 251(c) unbundling obligations and other statutory and regulatory requirements.[33] As an initial matter, the Commission "reject[ed] commenters' proposals that [it] interpret and apply the section 251(c)(3) impairment standard" in its section 10 forbearance analysis. 20 FCC Rcd at 19424 n.48. The Commission stated that it would not make any "national impairment findings," or "issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort . . . properly ma[de] in a rulemaking proceeding on a fuller record." Id., 20 FCC Rcd 19424, 19449 (¶ 14 & n.177). The Commission also rejected Qwest's argument that "a regulation that is subject to a petition for forbearance may be retained only if the current

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[30] Covad, 450 F.3d at 540 (quoting Incumbent LEC Brief at 33).

[31] Id. at 542-43.

[32] See Triennial Review Order, 18 FCC Rcd at 17438 (¶ 777).

[33] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, 20 FCC Rcd 19415 (2005) ("Qwest Omaha Order"), aff'd, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007).

record would justify adoption of the rule today," explaining that "neither section 10 nor the Commission's precedent directs [the agency] to re-examine whether a rule carries out the goals of a prior rulemaking." Id. at 19424 n.47.[34]

Therefore, applying only "the criteria of section 10,"[35] the Commission, inter alia, granted Qwest forbearance from the obligation to provide unbundled loops and dedicated transport under section 251(c)(3) in nine of the 24 wire centers in the Omaha MSA "based upon the development of sufficient facilities-based competition and other factors." Qwest Omaha Order, 20 FCC Rcd at 19443 (¶ 57).[36] The Commission said that the "[m]ost important[]" factor in its analysis was that Cox Communications, Inc. ("Cox"), the incumbent cable operator, "has been *successfully* providing local exchange and exchange access service in these wire center service areas without relying on Qwest's loops or transport." Id. at 19447 (¶ 64) (emphasis added). The Commission explained that the principal evidence that "Cox has proven [itself] capable of competing very *successfully* using its own network" was the fact that it had **"[confidential [redacted]]** voice customers in this MSA **[confidential [redacted]]** Qwest" in the residential market. Id. at 19448 (¶ 66) (emphasis added).[37] Against this back-drop of present, successful competition by Cox, the Commission found forbearance from unbundling obligations

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[34] See also id. at 19423 n.45 (The Commission's section 10 ruling does "not craft any new tests for impairment . . . or any other generally applicable tests [it] might fashion were a different category of petition before [the agency].").

[35] Id. at 19423-24 (¶ 14).

[36] See also Qwest Omaha Order, 20 FCC Rcd at 19450 (¶ 69) (Commission's forbearance decision as to unbundling is based upon "competitive factors other than facilities-based competition from Cox.").

[37] The Commission also relied on the fact that Cox had "a demonstrated and growing capacity – and inclination – to compete for enterprise customers." Id. n.177. Enterprise market services are services that are offered to medium and large business customers. Id. at 19427 (¶ 22).

warranted in those wire centers where "Cox's voice-enabled cable plant covers at least 75 percent of the end user locations that are accessible from that wire center." Id. ¶ 62.[38]

In making its forbearance decision, the Commission also "examine[d] the role of the wholesale market." 20 FCC Rcd at 19448 (¶ 67). The Commission determined that the Omaha MSA was characterized by substantial competition from providers using Qwest's wholesale inputs. Id. at 19449-50 (¶¶ 67-68). Here again, the Commission relied on "the very high levels of retail competition that do not rely on Qwest's facilities." Id. at 19449 (¶ 67). Since "Qwest receives little to no revenue" from such competition, the Commission explained that Qwest would retain an "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." Id.

The Commission denied Qwest's request for forbearance from its section 251(c)(3) unbundling obligations in the 15 wire centers in the Omaha MSA where facilities-based competition from Cox was not as extensive. The Commission explained that in those wire center service areas Qwest had failed to "demonstrate[] that it is subject to significant competition from competitors that do not rely heavily on Qwest's wholesale services." Id. at 19444 (¶ 60).

ACS Anchorage Order. In January 2007, the Commission released an order that conditionally granted in part a petition filed by ACS of Anchorage, Inc. ("ACS") for forbearance from the obligation to provide unbundled loops and dedicated transport under section 251(c)(3) and 252(d)(1) in five of the 11 wire centers in the Anchorage, Alaska study area, one of "the

[38] A 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." Id. at 19444 n.156.

most competitive telecommunications markets in the country."[39] As it had done in the Qwest Omaha Order, the Commission emphasized at the outset that its "sole task" was "to determine whether to forbear under the standard of section 10." 22 FCC Rcd at 1965 (¶ 11). The Commission accordingly rejected ACS's contention that the agency should instead determine whether ACS's competitors had "prove[n] impairment without access to UNEs." Id. at 1965 n.36. The Commission pointed out that the standards used in a section 251(d)(2) impairment analysis were different from those specified in section 10(a) and "do[] not bind the Commission's forbearance review." Id. at 1961 n.13. Accordingly, the Commission explained that "we do not — and cannot — issue comprehensive proclamations in this proceeding regarding non-impairment status in the Anchorage study area." Id. at 1965 (¶ 11).

In deciding whether to forbear from unbundling requirements, the Commission explained that it would follow the two-step "analytic framework" it had adopted in the Qwest Omaha Order. 22 FCC Rcd at 1963 (¶ 9):

> In each case, the Commission begins by examining the level of retail competition to the incumbent LEC and the role of the wholesale market. The Commission then evaluates the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought.

Id.; see also id. at 1974 (¶ 26) (same). At step one, the Commission concluded that "[r]etail competition in the Anchorage study area is robust," as ACS's primary competitor, General Communication, Inc. ("GCI") "has captured **[confidential ***** **]** percent of the residential lines" and **[confidential ***** **]** percent of the voice-grade business lines in the Anchorage

[39] Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, 22 FCC Rcd 1958, 1975 n.84 (2007) ("ACS Anchorage Order").

study area. Id. at 1975 (¶ 28). However, the Commission also found it "significant" that GCI "relies upon ACS's loop elements, including UNE loops, for many of the access lines [it] provides or uses in its retail services." Id. at 1976 (¶ 30). The Commission then turned to the second step in its analysis, i.e., the coverage of competitive facilities. Id. at 1977-83 (¶¶ 31-38). Because "continued access to the incumbent's loop facilities is important even in wire centers where there already is extensive competition," the Commission determined that forbearance relief was warranted only in the five wire center service areas in which a competitor had facilities coverage of at least 75 percent of the end user locations. Id. at 1976-77 (¶¶ 31-32).

II. The Verizon Proceeding

On September 6, 2006, Verizon filed six petitions seeking forbearance from section 251(c)(3) loop and transport unbundling requirements,[40] and a number of other regulatory obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.[41] A number of parties, including telecommunications carriers, cable companies, wireless carriers, state regulators, and consumer groups filed comments on Verizon's petitions. See

[40] See 47 C.F.R. § 51.319(a)-(b), (e).

[41] Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area (filed Sept. 6, 2006) ("Boston Petition") (J.A.); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area (filed Sept. 6, 2006) ("New York Petition") (J.A.); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area (filed Sept. 6, 2006) ("Philadelphia Petition"); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area (filed Sept. 6, 2006) ("Pittsburgh Petition") (J.A.); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area (filed Sept. 6, 2006) ("Providence Petition") (J.A.); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Virginia Beach Metropolitan Statistical Area (filed Sept. 6, 2006) ("Virginia Beach Petition") (J.A.).

Order, App. A (J.A.). Virtually all the commenting parties opposed Verizon's forbearance requests.

In an order released December 5, 2007, the Commission denied Verizon's petitions. Order, 22 FCC Rcd 21293 (J.A.). Applying the forbearance test set forth in section 10(a), the Commission concluded that the record evidence did not establish that: (1) the unbundling requirements were no longer necessary to ensure that the rates for Verizon's mass market[42] switched services in the six MSAs were just, reasonable, and not unjustly or unreasonably discriminatory; (2) the unbundling requirements were no longer necessary to protect consumers; and (3) forbearance from the unbundling requirements would further the public interest. Order, ¶¶ 36-45 (J.A.). See 47 U.S.C. § 160(a).[43]

Section 10(a)(1). As it had in its prior unbundling forbearance orders, the Commission began its analysis of the first part of the section 10(a) test by "examining competition in the retail and wholesale markets in the relevant MSAs." Order ¶ 37 (J.A.). Based upon the record evidence, the Commission concluded that Verizon was not subject to a sufficient level of facilities-based competition in the six MSAs to justify a grant of forbearance from the unbundling obligations at this time. Id.

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[42] Mass market services are services offered to residential consumers and small business customers. Qwest Omaha Order, 20 FCC Rcd at 19427 (¶ 22).

[43] The Commission also concluded that the record evidence did not justify forbearance from dominant carrier regulation on the basis, inter alia, that competition from competitive LECs and cable operators for mass market switched services in the six MSAs was not sufficiently high to justify such relief under the section 10 criteria. Id. ¶ 27 (J.A.). In addition, the Commission denied forbearance from the so-called Computer Inquiry requirements. Id. ¶ 45 (J.A.). See id. ¶¶ 3-5 (J.A.). Verizon does not seek judicial review of those decisions.

The Commission explained that Verizon's market share in the six MSAs for mass market services, even if wireless "cut the cord" competition,[44] competition from section 251(c)(4) resale, and Verizon's Wholesale Advantage service[45] were taken into account, was a factor indicating that forbearance from section 251(c)(3) loop and transport unbundling obligations was not justified. Order ¶ 37 & n.113 (J.A.). On the basis of record evidence, the Commission estimated, for example, that Verizon's market share in the Boston, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs was **[confidential** [redacted] **]**, respectively, even including estimates of wireless substitution. Id. ¶ 27 (J.A.). The Commission explained that competition from cable operators for mass market services in the six MSAs "does not present a sufficient basis for relief." Id. ¶ 37 (J.A.). The Commission pointed out that the record evidence did not show that cable operators, even in the aggregate, have more than a **[confidential** [redacted] **]** percent share of the market for mass market telephone services in any of the six MSAs. Id. ¶ 27 (J.A.).

Based upon record evidence, the Commission also found that cable operators have a "comparatively limited role" in serving enterprise customers and that no other class of competitors have "deployed their own extensive last-mile facilities" in the enterprise market. Id. ¶ 37 (J.A.). In addition, the Commission concluded that much of the competition from competitive LECs for enterprise services in the six MSAs is dependent upon Verizon's facilities,

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[44] A wireless telephone customer "cuts the cord" when he or she "no longer subscribe[s] to local or long distance service from a wireline carrier" and uses the wireless service as his or her primary telephone service. Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 22 FCC Rcd 16440, 16462 n.119 (2007).

[45] According to Verizon, its Wholesale Advantage service is a service that "provides the same features and functionality of the UNE platform but at negotiated market rates." Boston Petition at 14 (J.A.).

including the same UNEs that Verizon wanted to stop unbundling. Id. The Commission thus concluded that the record in this proceeding did not show the "significant evidence of the type of last-mile facilities-based competition the Commission relied on in the Qwest Omaha and ACS [Anchorage] forbearance proceedings to grant relief." Id. ¶ 37 (J.A.).[46]

The Commission in evaluating Verizon's requests also examined the role of the wholesale market. Id. ¶ 38 (J.A.). The Commission found no "significant alternative sources of wholesale inputs for carriers in the [six] MSAs." Id. The Commission determined that Verizon's citation to a "significant amount of retail enterprise competition relying on Verizon's special access services and UNEs" did not justify forbearance. Id. ¶ 38 (J.A.). The Commission pointed out that it could not "readily determine the extent to which these wholesale inputs are used to compete for local exchange services, interexchange [i.e., long distance] services, or mobile wireless services." Id. The Commission noted that it already had eliminated UNE obligations used solely for mobile wireless and interexchange services and had granted unbundling relief based upon the competitive triggers established in the Triennial Review Remand Order in five of the six MSAs. Id. (citing Triennial Review Remand Order, 20 FCC Rcd at 2551-58 (¶¶ 34-40)). The Commission found it not to be in the public interest to grant further relief on the basis of that same competition under the guise of forbearance. Order ¶ 38 (J.A.).

The Commission rejected Verizon's suggestion that the Commission in prior cases had granted forbearance from unbundling requirements "simply on cable coverage." Id. n.113 (J.A.

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[46] The Commission recognized that "cable operators have deployed facilities that meet the 75 percent coverage threshold in some wire centers" and stated that "future relief from unbundling obligations might be warranted in such wire centers upon a showing of a more competitive environment in these MSAs." Id. ¶ 36 (J.A.).

). The Commission explained that in its Qwest Omaha Order the "'most important[]' factor" in its analysis "was evidence of 'successful' facilities-based competition." Id. (quoting Qwest Omaha Order, 20 FCC Rcd at 19447 (¶ 64)). And the Commission pointed out that "[i]n measuring such success, the Commission did not look solely at facilities coverage." Id. The Commission also noted "the importance of retail competition" in its decision to forbear from applying the unbundling requirements in the ACS Anchorage Order. Id.

Section 10(a)(2). The second part of the forbearance test asks whether enforcement of the rule is "necessary for the protection of consumers." 47 U.S.C. § 160(a)(2). For reasons similar to those that supported a denial of forbearance under section 10(a)(2), the Commission found that UNEs are still necessary to protect consumers. Order ¶ 43 (J.A.). The Commission explained that "[t]here is insufficient evidence of competition from other last-mile facilities-based providers" for the Commission "to determine that consumers will be protected" if it grants forbearance. Id.

Section 10(a)(3). The final part of the forbearance test asks whether forbearance from applying the regulation "is consistent with the public interest." 47 U.S.C. § 160(a)(3). Having determined that UNEs remain necessary (1) to ensure that rates, terms and conditions are just, reasonable, and not unduly discriminatory, and (2) to protect consumers, the Commission concluded that "forbearing from UNE obligations is not in the public interest" and would not "enhance competition." Order ¶ 44 & n.140 (J.A.).

III. Subsequent Events

On February 14, 2008, Verizon filed a petition for forbearance seeking substantially the same regulatory relief that it had requested in the proceeding on review for the State of Rhode

Island.[47] On March 31, 2008, Verizon filed a similar petition again seeking forbearance from the same regulatory requirements for certain areas in the Virginia Beach MSA.[48] Both petitions are pending before the Commission.

STANDARD OF REVIEW

Verizon bears a high burden to establish that the Order on review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential standard of review," the court presumes the validity of agency action.[49] The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.[50] In other words, "the question is not what [the Court] think[s] about the [forbearance] petition, but whether the Commission's view of the petition is reasonable."[51] In addition, the Commission's "'interpretation of its own precedent is entitled to deference.'"[52]

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[47] "Petition of Verizon New England Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island," WC Docket No. 08-24 (Feb. 14, 2008). Verizon seeks forbearance in its incumbent LEC territory in Rhode Island except the Block Island rate center. The Providence MSA, which substantially overlaps the state of Rhode Island, is one of the MSAs that is the subject of the Verizon forbearance petition in this case.

[48] Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area," WC No. 08-49 (Mar. 31, 2008). The Virginia Beach MSA is one of the MSAs for which Verizon sought forbearance in the proceeding on review.

[49] Islamic American Relief Agency v. Gonzales, 477 F.3d 728, 732 (D.C. Cir. 2007). See Cellco Partnership v. FCC, 357 F.3d 88, 93 (D.C. Cir. 2004).

[50] E.g., Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); AT&T Corp. v. FCC, 349 F.3d 692, 698 (D.C. Cir. 2003).

[51] AT&T Inc. v. FCC, 452 F.3d 830, 837 (D.C. Cir. 2006) (emphasis omitted).

[52] Id. (quoting Cassell v. FCC, 154 F.3d 478, 483 (D. C. Cir. 1998)).

Judicial deference to the Commission's "expert policy judgment" is especially appropriate where, as here, the "'subject matter . . . is technical, complex, and dynamic.'"[53] Moreover, the courts accord "substantial deference" to the Commission's "'predictive judgments about areas that are within the agency's field of discretion and expertise,'"[54] including its predictive judgments concerning the competitive nature of telecommunications markets in ruling upon section 10 forbearance petitions.[55]

The Court must review the Commission's interpretation of the Communications Act in accordance with the standard of review articulated in Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, reh. denied, 468 U.S. 1227 (1984). Under Chevron, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843 n.9, 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Under those circumstances, the Court should "uphold the FCC's

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[53] National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 1002-03 (2005) (quoting National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 339 (2002)). Accord Earthlink v. FCC, 462 F.3d 1, 9 (D.C. Cir. 2006) (quoting AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000)) ("An extra measure of deference is warranted where the decision involves a 'high level of technical expertise' in an area of 'rapid technological and competitive change.'")

[54] Nuvio Corp. v. FCC, 473 F.3d 302, 306-07 (D.C. Cir. 2006) (quoting International Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 821 (D.C. Cir. 1983)). See also FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference.").

[55] Earthlink, 462 F.3d at 12. See also In re Core Communications, Inc., 455 F.3d 267.

interpretation as long as it is reasonable, even if 'there may be other reasonable, or even more reasonable, views.'"[56]

SUMMARY OF ARGUMENT

1.a. The Commission reasonably applied the section 10(a) standard in denying Verizon's forbearance petitions and reasonably concluded, on the basis of record evidence, that there was insufficient facilities-based competition in each of the six MSAs to warrant a grant of forbearance. The substantial record shows, among other things, that Verizon retains **[confidential** [redacted] **]** market shares in the mass market services market, that there is an absence of substantial facilities-based competition to Verizon in the enterprise market, and that Verizon faces no significant competition in its role as a wholesale provider. Contrary to Verizon's contention, it was reasonable for the Commission to consider Verizon's retention of **[confidential** [redacted] **]** market shares for mass market services in the six MSAs in conjunction with other factors, since market share is a good indicator of whether facilities-based competition has been successful. Congress in section 10(a) did not prescribe a particular mode of market analysis that the Commission must use in making the predictive judgments that are required by section 10(a), let alone forbid the Commission from considering an incumbent LEC's market share. To the contrary, section 10(b) affirmatively requires the Commission, in considering the public interest, to assess whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among telecommunications providers. And Verizon's **[confidential** [redacted] **]** market shares clearly are relevant to an

[56] Earthlink, 462 F.3d at 7 (quoting AT&T, 220 F.3d at 631 (internal citation omitted)). See id. at 12 (Court gives deference to Commission's reasonable construction of section 10); CTIA, 330 F.3d at 504 (same).

assessment of whether eliminating Verizon's unbundling obligations will promote competitive market conditions.

1.b. The Order is fully consistent with the Qwest Omaha Order and the ACS Anchorage Order. The Commission in the two earlier orders granted forbearance in specific wire centers only after finding both that (1) there was sufficient evidence of successful facilities-based competition in the MSA and (2) the incumbent cable company had at least 75 percent facilities' coverage measured on a wire center basis. In the earlier cases, the Commission found that the incumbent cable company's capture of a **[confidential** [redacted] **]** share of the residential voice market, when considered along with other factors, showed that the incumbent LEC was facing successful facilities-based competition. In applying the same legal analysis in this case, the Commission determined, on the basis of record evidence, that facilities-based competition to the incumbent LEC was not sufficiently developed to warrant forbearance. The Commission thus denied forbearance in this case not because it applied a different legal standard than it had used previously in evaluating unbundling forbearance petitions, but because the evidence of extensive facilities-based competition that characterized the two earlier cases was lacking here.

2.a. The Commission properly applied the section 10(a) standard that Congress explicitly directed it to use in ruling on Verizon's forbearance petitions, rather than Verizon's own version of the section 251(d)(2) impairment standard. The Commission has made clear in the Qwest Omaha Order and the ACS Anchorage Order that the section 10 forbearance standard is different than the section 251(d)(2) impairment standard and that the Commission, in ruling on forbearance petitions, need not interpret and apply section 251(d)(2). Verizon itself has acknowledged the difference between the two standards in past filings with this Court. Verizon's current attempt to conflate the forbearance and impairment standards is legal error.

2.b. Even if the impairment and forbearance inquiries were not analytically distinct, the particular impairment arguments Verizon asserts here would be barred. Verizon impermissibly seeks to use this forbearance proceeding as a vehicle in which to challenge the statutory validity of the Commission's unbundling rules and the impairment determinations upon which they are premised. Advancing its own construction of section 251(d)(2), Verizon asserts its competitors are not impaired without access to UNEs in the six MSAs and thus the Commission, in requiring unbundling, violates section 251(d)(2). The Court should not entertain that argument for two reasons. First, as to the high capacity circuits (DS1 and DS3 circuits and equivalent facilities), Verizon's challenge is barred under the doctrine of issue preclusion, since it asserted the same challenge and lost in Covad. Second, Verizon's claim is an untimely attempt to challenge the lawfulness of the impairment determinations that the Commission made in its 2003 and 2005 unbundling rulemakings. Application of the Commission's unbundling regulations determines whether or not competitors are impaired, and Verizon is effectively claiming that those regulations strike the wrong balance. That claim is untimely. See CTIA v. FCC, 330 F.3d 502.

3. The Court should not consider intervenor Qwest's challenge to the timing and adequacy of the information requests the Commission issued to gather market information in this case. In the absence of extraordinary circumstances, which are not present here, an intervenor is barred from raising issues not presented by the party invoking the Court's jurisdiction. Because only Qwest, an intervenor not aggrieved by the Order on review, raises this procedural challenge to the adequacy of the Commission's information gathering procedures, the Court should not consider it. In any event, the Commission has broad authority to determine how to obtain evidence in its own proceedings and has no statutory duty to adhere to the specific information gathering procedures that Qwest prefers.

ARGUMENT

I. THE COMMISSION REASONABLY DENIED VERIZON'S REQUESTS FOR FORBEARANCE OF THE UNBUNDLING RULES.

A. The Commission Reasonably Applied the Section 10 Forbearance Standard in Denying Verizon's Petitions.

Section 10 establishes the standard under which the Commission must evaluate forbearance petitions. Under this statute, the Commission may grant a forbearance petition only if it determines: (1) that enforcement of the requirement is not needed to ensure that rates are just, reasonable, and non-discriminatory; (2) that the regulation is not necessary to protect consumers; and (3) that a grant of forbearance is consistent with the public interest. 47 U.S.C. § 160(a). Given the "important role that competition plays in ensuring reasonable rates, protecting consumers, and furthering the pubic interest,"[57] the Commission properly assessed the role of retail and wholesale competition in the six MSAs in determining whether to grant Verizon's forbearance petitions. Indeed, as section 10(b) explicitly directs the Commission to "consider whether forbearance . . . will promote competitive market conditions" in assessing the public interest,[58] the Commission was required to analyze the state of competition in these markets.

On the basis of the record evidence, the Commission reasonably determined that facilities-based competition in the six MSAs is insufficient to warrant an agency finding that any part of the section 10 standard is met.[59] Unlike the situations in Omaha and Anchorage, the record shows that Verizon, in the mass services market, retains a **[confidential** [redacted] **]**

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[57] Earthlink, 462 F.3d at 7.

[58] 47 U.S.C. § 160(b).

[59] Order ¶ 36 (J.A.).

market share in the six MSAs, and in certain MSAs retains an **[confidential** [redacted] **]** market position — data that are not sufficient to support the grant of forbearance.[60] Moreover, the record evidence reflects that cable operators have a "comparatively limited role" in the enterprise market and that no other providers "have deployed their own extensive last-mile facilities" to compete with Verizon in that market.[61]

The Commission's examination of the wholesale market also did not show sufficient competition to justify a grant of forbearance under the section 10 standard. The record reveals no "significant alternative sources of wholesale inputs for carriers in the six MSAs."[62] Nor did the record show that competition arising from providers using Verizon's non-UNE wholesale inputs warranted forbearance. Although Verizon claimed that there was substantial retail enterprise competition relying on Verizon's special access services, it failed to demonstrate the extent to which its competitors were using these wholesale inputs to provide the only relevant services: local exchange services.[63] By contrast, Qwest had demonstrated that in Omaha "reliance on UNEs constituted 'only a fraction of the overall local exchange and exchange access market,'"[64] suggesting that most wholesale inputs would remain available even after forbearance.

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[60] Id. ¶ 37 (J.A.). For example, the Commission found that Verizon's market share in the Boston, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs is **[confidential** [redacted] **]** percent, respectively, even if wireless 'cut the cord' competition, competition from section 251(c)(4) resale and Verizon's Whole Advantage service were included. Id. ¶ 27 (J.A.). The Commission found the cable operators' combined market shares in the Boston, Philadelpphia, Pittsburgh, Providence, and Virginia Beach MSAs to be **[confidential** [redacted] **]** percent, respectively, if wireless 'cut the cord' competition, competititon from section 251(c)(4) resale and Verizon's Wholesale Advantage service were included. Id. ¶ 27 n.90 (J.A.).

[61] Id. ¶ 37 (J.A.).

[62] Id. ¶ 38 (J.A.).

[63] Id.

[64] Id. n.122 (quoting Qwest Omaha Order, 20 FCC Rcd at 19449-50 (¶ 68)).

The Commission was "not able to reach a similar conclusion based on the record [in this case]."[65]

Verizon and its supporting intervenor, Qwest, generally do not dispute the specific factual bases underlying the Commission's conclusion that facilities-based competition in the MSAs was not sufficiently developed to warrant a grant of forbearance under the three-part section 10 standard. Verizon and Qwest do not challenge, for example, the Commission's findings that cable companies in the aggregate do not have more than a **[confidential** [redacted] **]** market share for mass market services in each of the six MSAs,[66] that neither cable operators nor any other class of competitor use their own last-mile facilities to compete significantly in the enterprise market, or that Verizon is the only significant provider of wholesale inputs in the six MSAs.[67] Instead, they contend that the Commission in ruling on Verizon's petitions "ignored the statutory standard" — which they claim is the section 251(d)(2) impairment standard — and instead applied a "newly minted, bright-line market-share" test under which the Commission considers only whether the incumbent LEC has retained **[confidential** [redacted] **]** market

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[65] Id.

[66] Order ¶ 27 (J.A.). Each of Verizon's petitions contained data showing that its competitors, in the aggregate, had **[confidential** [redacted] **]** of both residential and business service in the respective MSA. See Boston Petition, Att. A, ¶¶ 7, 41 (J.A.); New York Petition, Att. A, ¶¶ 8, 47(J.A.); Philadelphia Petition, Att. A, ¶¶ 8, 43 (J.A.); Pittsburgh Petition, Att. A, ¶¶ 9, 37 (J.A.); Providence Petition, Att. A, ¶¶ 7, 39 (J.A.); Virginia Beach Petition, Att. A, ¶¶ 9, 43 (J.A.). Two days before the statutory deadline for agency action on Verizon's petitions, Verizon submitted revised data allegedly showing that it had less than **[confidential** [redacted] **]** percentage market share in the Virginia Beach and Providence MSAs. Letter from Evan Leo, Counsel for Verizon, to Marlene Dortch, Secretary, FCC (filed Dec. 3, 2007) (J.A.). The Commission reviewed that data and found that they did not justify forbearance. Order, n.91 (J.A.). Verizon on review does not challenge the Commission's finding in the Order that its estimated market shares in the Virginia Beach and Providence MSAs exceed **[confidential** [redacted] **]** percent. See id. ¶ 27 (J.A.).

[67] Id. ¶¶ 37, 38 (J.A.).

share.[68] According to Verizon and Qwest, the Commission's alleged use of this "market share" test is unlawful because it is inappropriate for the Commission to consider market share in unbundling forbearance cases.

As explained below, the carriers erroneously attempt to substitute an impairment analysis (and one of their own creation) for the forbearance standard. See, infra, Section II. Verizon here sought forbearance pursuant to section 10(a), and the only question before the Commission was whether Verizon carried its burden of demonstrating that the section 10(a) standards were met. In answering that question, the Commission did not adopt a new "market share" test for forbearance from unbundling regulations,[69] i.e., a test that requires the denial of a forbearance petition whenever the incumbent LEC is shown to retain a **[confidential** [redacted] **]** market share. To be sure, record evidence showing Verizon's retention of a **[confidential** [redacted] **]** market share for mass market services in each of the six MSAs — which in this case exceeded **[confidential** [redacted] **]** in all MSAs and was at least as high as **[confidential** [redacted] **]** in one — was an important factor in the Commission's ultimate finding that "the current evidence of facilities-based competition in [the six] MSAs is insufficient to justify forbearance."[70]

Market share data, however, were only part of the evidence the Commission considered in deciding whether it could make the findings required for forbearance under section 10.[71] After

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[68] E.g., Verizon Brief at 2, 23.

[69] E.g., id. at 23.

[70] Order ¶ 36 (J.A.). See also Covad, 450 F.3d at 542 ("Congress gave the Commission – not the petitioners or this Court – discretion in regulatory line-drawing. The mere fact that the Commission's exercise of its discretion resulted in a line that the [petitioners] would have drawn differently is not sufficient to make it unlawful.").

[71] Order ¶¶ 36-37 (J.A.).

conducting a comprehensive analysis of "competition in the retail and wholesale markets in the relevant MSAs,"[72] the Commission denied Verizon's petitions on the basis that Verizon's retention of a **[confidential [redacted]]** share of the market for mass market services in each of the MSAs in conjunction with other factors — including, inter alia, the "comparatively limited role" of the cable operators in serving enterprise customers, the lack of any other competitors deploying their own extensive last-mile facilities for use providing enterprise services, and Verizon's dominant role in providing wholesale inputs for carriers.[73] The Commission's decision thus was based on a multi-faceted evaluation of the state of retail and wholesale competition in the six MSAs,[74] not "solely on [the Commission's] conclusion that Verizon still served **[confidential [redacted]]** of the residential customers in each of the six MSAs," as Verizon claims.[75] Indeed, were Verizon's claim correct, the Commission's analysis would have ended in the middle of paragraph 37 of the Order rather than continuing for several more paragraphs.

It is Verizon, not the Commission, that errs by attempting to make one factor dispositive in the forbearance analysis. Verizon's position is that the Commission cannot conduct such a multi-factor examination of the state of competition in the relevant market but must instead rely on only one factor: competitive facilities coverage. According to Verizon, the Commission must forbear from unbundling requirements whenever "carriers have deployed their own facilities and are using those facilities to serve customers."[76] In other words, if a competitive

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[72] Id. ¶ 37 (J.A.).

[73] Id. ¶¶ 37-38 (J.A.).

[74] Id. ¶¶ 36-44 (J.A.).

[75] Verizon Brief at 23.

[76] Verizon Brief at 6. See, e.g., id. at 2, 21.

LEC uses its own facilities to reach some unspecified percentage of end user locations[77] to "serve customers" — Verizon does not quantify how many — the Commission must eliminate unbundling irrespective of the incumbent LECs' market power, market share, or other indicia of market dominance.

Contrary to Verizon's belief that the Commission may consider only facilities coverage when weighing requests to forbear from unbundling requirements, Congress did not prescribe a "particular mode of market analysis" or otherwise dictate how the Commission must make the predictive judgments "within [its] field of discretion and expertise" that are required under section 10(a).[78] Verizon's single-minded focus on facilities coverage also flies in the face of Congress's directive in section 10(b) that the Commission consider whether forbearance will promote competitive market conditions and enhance competition among telecommunications providers.[79] The mere existence of competitive facilities, without more, does not establish that a market is truly competitive or that jettisoning unbundling requirements that keep competitors in the market will "promote competitive market conditions."[80] As the Commission has explained, the proper inquiry is whether the market has seen "*successful[],*" not theoretical, competition.[81]

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[77] According to Verizon, the 75 percent facilities' coverage threshold test applied in the Qwest Omaha Order and the ACS Anchorage Order "is likely too high." Verizon Brief at n.27. See id. at 22.

[78] Earthlink, 462 F.3d at 8, 12. Qwest relies upon data submitted in the Omaha forbearance proceeding after forbearance was granted in support of its claim that unbundling forbearance "will spur new deployment and invigorate competition." Qwest Brief at 12. Those data were not submitted in the record in this proceeding and thus should not be considered by the Court in this case. In any event, the data at most show that the Commission was correct in granting forbearance in the Qwest Omaha Order, not that it erred in denying forbearance under the different circumstances presented in this case. See Section I.B, infra.

[79] 47 U.S.C. § 160(b).

[80] Id.

[81] Qwest Omaha Order, 20 FCC Rcd at 19447 (¶ 64) (emphasis added).

In a market where the competitor "has proven it is capable of competing very successfully using its own network to provide services," as demonstrated by its market share, forbearance from unbundling requirements may be warranted.[82] The absence of such proven capability (as in the MSAs at issue here), however, suggests that forbearance would not "promote competitive market conditions"[83] and is therefore a factor that properly weighs against forbearance from unbundling requirements.

Verizon and Qwest do not even attempt to explain how the Commission could find that eliminating unbundling obligations on an incumbent LEC that retains at least a **[confidential** [redacted] **]** share of the mass service market in an MSA would "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[84] They also fail to acknowledge the far-reaching consequences use of their single-factor test could have. Since cable companies pass 86.3 percent of occupied American households and many such companies offer voice service,[85] Verizon's standard could require elimination of unbundling requirements in nearly every MSA in the nation, even in MSAs like Pittsburgh, where Verizon controls at least **[confidential** [redacted] **]** of the market.

Finally, Verizon mounts two brief challenges to the Commission's analysis of the evidence, but both fail. First, Verizon is wrong in claiming that the Commission "refus[ed] to

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[82] Id. at 19448 (¶ 66).

[83] 47 U.S.C. § 160(b).

[84] Id.

[85] Letter from Andrew Lipman, et al., Counsel for CLEC Companies to Marlene Dortch, Secretary, FCC (Nov. 20, 2007) at 5 (J.A.).

consider Verizon's line-loss evidence." Verizon Brief at 41.[86] The Commission addressed specifically Verizon's line-loss evidence and rejected it as unpersuasive for two separate reasons. Order ¶ 39 & nn. 128-29 (J.A.). The Commission first determined that some of Verizon's line losses may well have been second lines used for dial-up Internet access that a customer converted to an incumbent LEC broadband line for Internet access. See Order ¶ 39 & n.128 (J.A.). Although Verizon quibbles with that finding, see Verizon Brief at 41,[87] it is supported by substantial record evidence.[88] Verizon does not challenge the Commission's second reason for rejecting this evidence: substantial record evidence showed that "Verizon's access line loss percentages are invalid and overstated, because they do not attribute MCI data to Verizon."[89] Specifically, Verizon's line-loss data are misleading because they include lines lost to MCI, even though MCI subsequently has become part of Verizon.[90] Verizon's failure to attack this separate rationale for rejecting its data is fatal to its claim. See Casino Airlines, Inc. v. NTSB, 439 F.3d

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[86] Verizon's arguments regarding market share data are internally inconsistent. On the one hand, Verizon contends that the Commission "violates the statutory [impairment] standard" by considering market share data in ruling on its petition for forbearance from unbundling requirements. Verizon Brief at 27. On the other hand, Verizon argues that the Commission's alleged "refusal to consider Verizon's line-loss evidence [i.e., evidence purporting to show that it had lost market share to its competitors], [is] arbitrary and capricious." Id. at 41-42. Apparently Verizon would have this Court hold that the Commission must consider market share data that Verizon believes supports forbearance but cannot consider market share data that shows Verizon's continued market dominance. There is no warrant for such an inconsistent and unprincipled approach.

[87] Even the data on which Verizon relies suggests that a substantial portion of the line losses were second lines. See Verizon Br. at 41 (only claiming that 65 percent of line losses were "primary lines").

[88] See, e.g., Ad Hoc Telecommunications Users Comments, Dec. of Lee Selwyn (Mar. 8, 2007) (J.A.).

[89] Order, n.129 (J.A.) (citing CLEC Group Comments (Mar. 5, 2007) (J.A.) & COMPTEL Opposition (Mar. 5, 2007)) (J.A.)).

[90] COMPTEL Opposition at 16 (J.A.).

715, 717-18 (D.C. Cir. 2006) (when alternate grounds support agency decision, only one need be valid); Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C.Cir. 2001) (argument not raised in opening brief is waived).

Second, Verizon misunderstands the Commission's reasoning when it criticizes the agency's handling of "Verizon's evidence of CLEC fiber-optic networks in these MSAs." Verizon Brief at 42. The Commission had before it evidence from GeoResults, a commercial data provider, that showed very little facilities-based competition from competitive LECs in the enterprise market in these MSAs. Indeed, the percentage of buildings served by CLECs' fiber-optic networks in the six MSAs ranged between 0.1 percent and 2 percent, with no wire center in any of the six MSAs reaching 5 percent.[91] Verizon argued below that these data were understated, even though Verizon itself had relied on GeoResults data in the proceeding.[92] The Commission in the Order pointed out that even assuming arguendo that Verizon's understatement contention were correct, "the facilities 'coverage' suggested by those data" "are so far below the 75 [percent] level, that it appears unlikely that any understatement would affect the ultimate result." Order, ¶ 37 & n.118 (J.A.). Verizon argues on review that this statement shows that the Commission erroneously had "claimed that it previously applied a coverage-threshold test specific to enterprise-customer locations." Verizon Brief at 42. That claim is wrong. The Order makes clear that "the 75 [percent] threshold" to which the Commission referred was the one "relied upon in the context of cable facilities deployment in prior orders." Order, n.118 (J.A.). The Commission referenced that threshold because Verizon had not

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[91] See Letter from Brad Mutschelknaus, Competitive LECs' Attorney, to Marlene Dortch (Oct. 1, 2007) (J.A.).

[92] Letter from Joseph R. Jackson, Verizon, to Marlene Dortch, Secretary, FCC (Nov. 20, 2007) at 4 (J.A.).

"attempted to justify the use of a different threshold when evaluating competitive LEC lit buildings." Id.

B. The Order Is Fully Consistent With The Commission's Prior Forbearance Rulings.

Verizon and intervenor Qwest argue that the Commission in denying Verizon's forbearance petition unlawfully departed from the standards and analyses established in the Qwest Omaha Order and the ACS Anchorage Order. That argument is wrong. As shown below, the Commission in the Order on review applied the same section 10(a) forbearance standard in the same manner that it did in the Qwest Omaha Order and the ACS Anchorage Order. The Commission reached in part a different result not because the Commission applied a different standard, but because the evidence of extensive facilities-based competition that warranted a partial grant of forbearance in those earlier cases was not present here.

In ruling on the forbearance petitions, the Commission in both the Qwest Omaha Order and the ACS Anchorage Order determined "as a threshold matter [that] the study area [was] sufficiently competitive to support forbearance."[93] The Commission in the Qwest Omaha Order found, inter alia, the facilities-based cable provider had captured **[confidential *** [redacted]]** of the market for residential voice market and had proven to be a "substantial competitive threat to Qwest" for enterprise services.[94] It characterized this evidence of "successful" facilities-based competition as the "[m]ost important[]" factor supporting forbearance.[95] In light of the evidence of actual, MSA-wide competition, the Commission then gave Qwest forbearance relief in those wire centers where the level of competitor network coverage suggested that the

[93] ACS Anchorage Order, 22 FCC at 1974 (¶ 26) (emphasis added).

[94] Qwest Omaha Order, ¶ 66 & n.177.

[95] Id. ¶ 64.

"success[]" of competition was attributable to facilities-based competition.[96] Moreover, the Commission in the Qwest Omaha Order relied on "the very high levels of retail competition that do not rely on Qwest's facilities" again when conducting its analysis of the wholesale market in the MSA.[97]

The Commission in the ACS Anchorage Order similarly viewed the level of actual competition, measured by market share, as an important factor in its analysis. The Commission "beg[an]" its forbearance analysis "by examining the level of retail competition to the incumbent LEC and the role of the wholesale market"[98] Indeed, the Commission devoted an entire subsection of the ACS Anchorage Order to an evaluation of whether "competition for telecommunications services is sufficiently developed."[99] The Commission explicitly found, inter alia, that "[r]etail competition in the Anchorage MSA area is robust," as ACS's primary competitor, GCI, "has captured **[confidential** [redacted] **]** percent of the residential lines" and **[confidential** [redacted] **]** percent of the voice-grade business lines in the Anchorage study area.[100] After examining the level of actual competition, the Commission "then evaluate[d] the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought."[101] Because the Commission was satisfied that the relevant MSA was sufficiently competitive, it considered on a wire center basis "the extent to

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[96] Id. ¶ 62.

[97] Id. ¶ 67.

[98] 22 FCC Rcd at 1963 (¶ 9) (emphasis added).

[99] Id. at 1973 (¶ 25). See id. at 1973-77 (¶¶ 25-30).

[100] Id. at 1975 (¶ 28).

[101] Id. at 1963-64 (¶ 9) (emphasis added); see also id. at 1974 (¶ 26) (describing Commission's sequential process of analysis).

which competitive facilities deployment is responsible for this level of competition"[102] and in a separate section applied its facilities-coverage test.[103]

The Commission in the Qwest Omaha Order and ACS Anchorage Order thus granted forbearance only in particular wire center service areas when: (1) there was sufficient evidence of successful facilities-based competition in the MSA or study area, and (2) the cable operators' facilities covered at least 75 percent of the end user locations that are accessible from that wire center.[104] In other words, the Commission in those cases determined that 75 percent facilities coverage was necessary, but not sufficient, to support forbearance in particular wire centers.

The Commission followed the same analytical approach here. As we have shown above, the record in this case does not show that Verizon as a threshold matter is subject to sufficient facilities-based competition to justify forbearance in any of the six MSAs. In contrast to the evidence of extensive competition to the incumbent LECs in the Omaha and Anchorage markets from facilities-based cable providers, the record evidence in this case shows that Verizon continues to dominate the market in the 6 MSAs in this case. For example, as noted above, Verizon retains at least an **[confidential** [redacted] **]** market share in Pittsburgh and **[confidential** [redacted] **]** percent of the market for mass market services in all the MSAs;[105] it faces no substantial facilities-based competition in the enterprise market; and it lacks significant competition in its role as a wholesale provider.[106] The factual difference in the level

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[102] Id. at 1974 (¶ 26).

[103] Id. at 1977-83 (¶¶ 31-38).

[104] Id. at 1977-78 (¶¶ 31-33); Qwest Omaha Order, 20 FCC Rcd at 19450-51 (¶ 69).

[105] Order ¶ 27 (J.A.).

[106] Id. ¶¶ 37-38 (J.A.).

of facilities-based competition, not any difference in legal analysis, fully justified the different result here.

Verizon also errs in claiming that any consideration of market-share evidence in the two prior cases was only in "respect to the petitioners' separate requests for forbearance from dominant-carrier regulations."[107] As noted above, the Commission explicitly relied on market share data in the unbundling sections of both the Qwest Omaha Order and the ACS Anchorage Order.[108] Indeed, the ACS Anchorage Order did not even address dominant carrier regulations,[109] so the discussion of market share in that order obviously could not have pertained to it.

II. VERIZON'S DISCUSSION OF THE IMPAIRMENT STANDARD IS NOT RELEVANT, AND ITS ATTEMPT TO RELITIGATE THAT STANDARD IS NOT PROPERLY BEFORE THE COURT.

At various points in its brief, Verizon argues that Verizon's competitors are not "impaired" without access to UNEs in the six markets, as that term is used in section 251(d)(2). See, e.g., Verizon Brief at 39. Verizon likewise argues that the Commission's decision in the order on review conflicts with section 251(d)(2) because, in Verizon's view, its competitors in these markets are "capable" of competing with it (whether or not they actually are). See, e.g., id. at 27. These arguments are misplaced, however, because they are based on an erroneous attempt to conflate the distinct statutory impairment and forbearance standards. Even if these claims

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[107] Verizon Brief at 23.

[108] See, e.g., ACS Anchorage Order, ¶ 28; Qwest Omaha Order, ¶ 66 & n.177, ¶ 67.

[109] ACS Anchorage Order, ¶ 1 n.2.

were relevant, they would not be properly before the Court because they are both barred in part by the doctrine of issue preclusion and untimely.

A. Verizon Erroneously Conflates the Impairment and Forbearance Standards.

Verizon filed a forbearance petition under section 10(a) of the Act, and the only question before the Commission was whether Verizon had carried its burden of meeting the section 10(a) criteria. As shown above, the Commission properly answered that question in the negative. On appeal, Verizon poses a separate question, i.e., whether maintaining unbundling in these markets is consistent with the statutory impairment standard. That question is not part of this case. Order ¶ 38 & n.125 (J.A.)

In the Qwest Omaha Order, which Verizon says "established" the proper "standard for forbearance from unbundling requirements," Verizon Brief at 25, the Commission "rejected commenters' proposals that [it] interpret and apply the section 251(c)(3) impairment standard" in its section 10 forbearance analysis. 20 FCC Rcd at 19424, n.48. The Commission stated that it would not make any "national impairment findings," or "issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort . . . properly ma[de] in a rulemaking proceeding on a fuller record." Id., 20 FCC Rcd 19424, 19449 (¶ 14 & n.177). The Commission also rejected Qwest's argument 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," explaining that "neither section 10 nor the Commission's precedent directs [the agency] to re-examine whether a rule carries out the goals of a prior rulemaking." Id. at 19424 n.47.

In defending the Qwest Omaha Order before this Court, Verizon and Qwest said that "the Commission correctly found that its impairment analysis in the Triennial Review Remand Order, while 'instructive,' did not 'bind' its forbearance analysis."[110] The two carriers went on to tell this Court that "the Commission's impairment analysis" could not "control its decision whether to forbear from § 251(c)(3)": "While § 251(c)(2) sets forth the impairment standard that the Commission must apply in determining which network elements are to be provided under § 251(c)(3), Congress in § 10(a) and (b) set forth a different set of criteria that the Commission must apply in determining whether forbearance is warranted."[111]

Now, however, Verizon suggests that the two standards are essentially the same, and as support it relies on a portion of the ACS Anchorage Order in which the Commission noted that in the Triennial Review Remand Order it had invited geographically-targeted forbearance petitions "[r]ather than initiating a number of separate proceedings to address, case-by-case, situations where the Commission's impairment findings did not perfectly match local market realities." ACS Anchorage Order, 22 FCC Rcd at 1961 (¶ 5). Verizon fails to acknowledge, however, that at the same time the Commission expressed this procedural preference for forbearance over impairment rulemaking, it stressed the substantive difference between the two inquiries. The Commission in the ACS Anchorage Order emphasized that when evaluating a request to forbear from unbundling requirements its "sole task" was "to determine whether to forbear under the standard of section 10." Id. at 1965 (¶ 11). The Commission accordingly rejected ACS's contention, which mirrors Verizon's claim here, that the agency should instead

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[110] Brief for Intervenors Qwest Corporation and the Verizon Telephone Companies in Support of Respondents, Qwest Corp. v. FCC, 482 F.3d 471 (No. 05-1469) at 7.

[111] Id.

determine whether ACS's competitors had "prove[n] impairment without access to UNEs." Id. at 1965 n.36. The Commission pointed out that the standards used in a section 251(d)(2) impairment analysis were different from those specified in section 10(a) and "do[] not bind the Commission's forbearance review." Id. at 1961, n.13. Accordingly, the Commission explained that "we do not – and cannot – issue comprehensive proclamations in this proceeding regarding non-impairment status in the Anchorage study area." Id. at 1965 (¶ 11). Here too, the Commission's only obligation was to determine whether Verizon's petition satisfied the standard of section 10(a), and it clearly discharged that duty, see, supra, Section I.

B. Verizon Is Barred from Collaterally Attacking the Commission's Impairment Regulations.

Even if it were appropriate for Verizon to argue non-impairment in a forbearance proceeding, the particular challenges that it asserts here are barred. Verizon has already received relief from unbundling requirements in certain wire centers in all the MSAs at issue here (except for Virginia Beach) through normal operation of the Commission's unbundling rules. Order ¶ 38 (J.A.). In those wire centers, competitive triggers have been met, competitors are therefore deemed not impaired when provisioning DS1 and DS3 loops, and unbundling requirements no longer apply.[112] In all other wire centers, the triggers have not been met, so competitors under the rules are deemed impaired with respect to those loops. Competitors also are deemed impaired in all wire centers in these MSAs with respect to DS0 loops pursuant to the Commission's national impairment finding.[113]

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[112] Triennial Review Remand Order, 20 FCC Rcd 2536-37, 2575, 2604-07, 2614 (¶¶ 5, 66, 126-30, 146). See Qwest Omaha Order, 20 FCC Rcd at 19419 n.13. The Commission's impairment determinations as to DS1 and DS3 (and equivalent facilities) were challenged in this Court by a number of parties, including Verizon, and affirmed on review. See Covad, 450 F.3d at 541-43.

[113] Triennial Review Order, 18 FCC Rcd at 16978, 17438 (¶¶ 226, 777). The Commission's impairment determination as to DS0 loops was not challenged on judicial review.

Verizon argues that a proper interpretation of the statutory impairment standard leads to the conclusion that its competitors in these MSAs are in fact not impaired, even though the Commission's regulations indisputably say they are. In Verizon's view, there is no impairment in these wire centers because competitors "have deployed their own facilities and are using those facilities to serve customers."[114] In essence, therefore, Verizon is attempting to challenge the Commission's impairment regulations on the ground that they are not faithful to the statutory standard. There are two independent barriers to the Court's consideration of that claim.

(1) Issue Preclusion Bars Verizon from Challenging the Lawfulness of the Impairment Determinations and Unbundling Rules as to DS1 and DS3 Transport and Loop Circuits.

Issue preclusion bars "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim."[115] The doctrine "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy,"[116] "'conserve[s] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions.'"[117]

This Court has held repeatedly that issue preclusion bars a party from relitigating an issue decided adversely to that party in a prior litigation where three conditions are met. First, the

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[114] Verizon Brief at 6. See, e.g., id. at 2, 4.

[115] Taylor v. Sturgell, 128 S.Ct. 2161, 2171 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001)).

[116] Securities Industries Ass'n v. Board of Governors of Federal Reserve System, 900 F.2d 360, 363 (D.C. Cir. 1990) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979)).

[117] Taylor, 128 S.Ct. at 2171 (quoting Montana v. United States, 440 U.S. 147, 153-54 (1979)). Issue preclusion is a component of the law of collateral estoppel. Consolidated Edison Co. of New York v. Bodman, 449 F.3d 1254, 1258 (D.C. Cir. 2006).

issue must have been contested by the party and submitted for judicial determination in the prior litigation. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction. Third, preclusion must not work a basic unfairness to the litigant bound by the earlier determination.[118] Where, as here, preclusion is sought by the former adversary, only a "compelling showing of unfairness" would justify a refusal to give the first judgment preclusive effect.[119]

Under these standards, issue preclusion bars Verizon from arguing in this case that the Commission's unbundling rules for high-capacity loop and transport circuits (DS1, DS3 and equivalent facilities) in the six MSAs violates section 251(d)(2). First, the statutory impairment issue that Verizon seeks to raise here was "'contested by the parties and submitted for judicial determination in the prior case.'"[120] Verizon argued in Covad that the Commission's unbundling rules violated section 251(d)(2) because the agency found impairment by "determin[ing] not where competition is possible . . . but rather where competition is already most intense."[121] Verizon also claimed that the unbundling rules unlawfully eliminated unbundling "only [in] those markets with the most extreme levels of existing competition" and required "unbundling in

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[118] E.g., Martin v. Department of Justice, 488 F.3d 446, 454 (D.C. Cir. 2007) (citing Yamaha Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993)). See Hall v. Clinton, 285 F.3d 74, 80 (D.C. Cir. 2002); Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996).

[119] Otherson v. Department of Justice, 711 F.2d 267, 277 (D.C. Cir. 1983).

[120] Martin, 488 F.3d at 454 (quoting Yamaha, 961 F.2d at 253).

[121] Brief for Incumbent LEC Petitioners, Covad, 450 F.3d 528 (No. 05-1095) at 16 (internal citation omitted).

markets that are already characterized by facilities-based competition."[122] The Commission in turn defended the lawfulness of its rules and its impairment analysis.[123]

Second, the Court squarely rejected Verizon's argument that the high-capacity unbundling rules violate section 251(d)(2).[124] It concluded that the Commission's impairment standard for DS1 and DS3 loops was the product of appropriate "line-drawing" based on "a thorough analysis of the economic realities surrounding high-capacity loop deployment."[125]

Finally, no unfairness will result from preclusion of the impairment issue in this case. Verizon had every incentive in Covad to litigate the impairment issue fully and vigorously. Verizon devoted substantial resources to its unsuccessful effort to have the unbundling rules (and the impairment analysis underlying those rules) overturned on judicial review. Although Verizon in its brief relies heavily upon judicial opinions invalidating earlier versions of the Commission's unbundling rules, it does not — and cannot — claim that Covad is "inconsistent with any previous decision."[126] Because the three conditions for issue preclusion are met, Verizon should be barred from effectively challenging the validity of the Commission's previous impairment determinations and unbundling rules governing DS1 and DS3 transport and loop circuits.

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[122] Id. at 34. Preclusion "results from the resolution of a question in issue, not from the litigation of specific arguments directed to the issue." Securities Industries Ass'n, 900 F.2d at 364 (emphasis in original). "[I]t is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." Yamaha, 961 F.2d at 254. Thus, where, as here, "the previously litigated 'issue was one of law, new arguments may not be presented to obtain a different determination of that issue.'" Id., 961 F.2d at 254 (quoting Restatement (Second) of Judgments § 27, cmts at 253).

[123] Brief for Respondents, Covad, 450 F.3d 528 (No. 05-1095) at 52-63.

[124] Covad, 450 F.3d at 542-43.

[125] Id. at 542-43.

[126] Parklane, 439 U.S. at 332.

(2) Verizon's Challenge to the Impairment Regulations Is Untimely.

The Court also lacks jurisdiction to consider Verizon's impairment claim (with respect not only to DS1 and DS3 transport and loop circuits but also DS facilities) because the time period in which to challenge the statutory validity of the agency's unbundling rules (and the impairment determinations underlying those rules) has long passed. See 28 U.S.C. § 2344 (Hobbs Act establishes that a petition for review of an FCC final rulemaking order must be filed within 60 days after its entry.). This Court in CTIA held that a petition for review of an agency's denial of forbearance from agency regulations does not invoke the Court's jurisdiction to review the statutory validity of those regulations. 330 F.3d at 508. In CTIA, wireless companies filed a section 10 petition for forbearance from the Commission's wireless number portability rule[127] arguing, inter alia, that forbearance was required because the rule was beyond the agency's statutory authority. This Court held that the statutory challenge was untimely because the rules in question were promulgated in 1996 and the petition for review was not filed until 2002. The Court recognized that parties in limited circumstances can challenge the statutory validity of a rule beyond the statutory 60-day time limit following an enforcement of the regulation or the agency's rejection of a petition to amend or rescind the rule.[128] But it refused to carve an exception to that deadline where, as here, the petitioner seeks to challenge the statutory validity of a rule in a section 10 forbearance proceeding. The Court ultimately dismissed the untimely petition for review for want of jurisdiction.

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[127] Number portability is "the ability of users of telecommunications services to retain, at the same location, existing telecommujnications numbers without impairment of quality, reliability or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30).

[128] CTIA, 330 F.3d at 508.

The Court should do the same in this case. Under the rule established in CTIA, Verizon's 2008 petition for review of the forbearance order does not invoke the Court's jurisdiction to review the statutory validity of requirements the Commission adopted in its 2003 and 2005 unbundling rulemakings. Verizon is free to raise its section 251(d)(2) claim to the Commission in a petition for rulemaking — and to seek judicial review if the Commission denies that petition. But Verizon cannot use this forbearance proceeding to argue that the Commission's unbundling rules violate section 251(d)(2).

III. QWEST'S CHALLENGE TO THE TIMING AND SCOPE OF THE COMMISSION'S INFORMATION REQUESTS IS NOT PROPERLY BEFORE THE COURT AND OTHERWISE LACKS MERIT.

Qwest contends that the Commission violated "the Act" — Qwest does not identify any particular section — because the requests the agency issued to Verizon's competitors to obtain market information relevant to Verizon's forbearance petition allegedly were untimely and inadequate. Qwest Brief at 13-15. Qwest's challenge is not properly before the Court and in any event has no merit.

Qwest's limited role as intervenor precludes it from challenging on review the timing and scope of the Commission's information requests. In the absence of "extraordinary" circumstances, this Court has long held that "'[a]n intervening party may join issue only on a matter that has been brought before the court by [the petitioner].'"[129] This Court has strictly applied this bar where, as here, "[t]he intervenor has not been aggrieved and the [a]gency has not

[129] State of New York v. Reilly, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992) (quoting Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990)). See Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155, 159 n.1 (D.C. Cir. 2003). See also Vinson v. Washington Gas Light Co., 321 U.S. 489, 498 (1944) ("[A]n intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.).

expressed its opinion on the question."[130] Because Verizon — the only party that has invoked the Court's jurisdiction and has suffered aggrievement — has not raised this procedural issue, the Court may not consider it and should dismiss Qwest's claim.[131]

In any event, there is no merit to Qwest's contention that the Commission violated unstated "statutory obligations"[132] in the manner in which it obtained evidence in the proceeding below. Section 4(j) of the Act gives the Commission wide discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j).[133] By this statute, "Congress has left largely to [the Commission's] judgment the determination of the manner of conducting its business. . . ."[134] The "broad procedural authority"[135] in section 4(j) empowers the Commission to determine whether it should issue information requests in its own proceedings, and if so, the timing and manner of such inquiries.

Qwest's contention that the Commission "failed . . . to exercise [its] authority" to "require competitors to provide it with [market] data"[136] is wrong and irrelevant. As Qwest itself

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[130] Reilly, 969 F.2d at 1154 n.11.

[131] Verizon briefly discusses the timing and scope of the Commission's information requests in its "Statement of Facts," but it does not argue that the Commission's action in this regard was unlawful. See Verizon Brief at 15; American Wildlands v. Kempthorne, __ F.3d __, No. 07-5179, 2008 WL 2651091, at *8 (Jul. 8, 2008) (merely "explaining the factual basis" for an argument in the statement of facts in an opening brief insufficient to preserve it).

[132] Qwest Brief at 14.

[133] See FCC v. Schreiber, 381 U.S. 279, 289 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940); City of Angels v. FCC, 745 F.2d 656, 664 (D.C. Cir. 1984).

[134] Schreiber, 381 U.S. at 289 (internal quotations omitted).

[135] Id. at 290.

[136] Qwest Brief at 14.

acknowledges, the Commission in fact requested such data from Verizon's cable competitors.[137] Qwest's complaint involves a quibble about the timing and scope of the agency's information requests. Qwest provides no explanation of how a broader information request at an earlier time would have led to a different result here. In any event, a claim that the agency failed to exercise authority does not establish a statutory violation unless the agency had a duty to act. See Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461, 491 (2004) (noting the "obvious difference between a statutory requirement . . . and a statutory authorization") (emphasis and ellipsis in original). Qwest identifies no such duty that the Commission violated in this case.

IV. THE RELIEF VERIZON REQUESTS IS UNWARRANTED.

For the reasons set forth in this brief, the Court should deny the petition for review, thereby making it unnecessary to address Verizon's request for relief. If the Court does rule in Verizon's favor, however, it should not grant the relief Verizon requests for three reasons. First, the Court should deny Verizon's request to vacate the Order in its entirety.[138] Verizon's challenge is limited to the Commission's denial of forbearance from the unbundling requirements, and there is no basis for the Court to overturn agency rulings, i.e., the Commission's denial of Verizon's requests for forbearance from dominant carrier regulation and the Computer Inquiry requirements, that are not challenged on review.

Second, the Court should deny Verizon's request to order the Commission to complete remand proceedings within 30 days of the issuance of the mandate.[139] Although section 10(c)

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[137] Id.

[138] Verizon Brief at 43, 44.

[139] Id.

contains a deadline for initial forbearance decisions, the statute sets no time limits on remand decisions, let alone the stringent 30-day deadline proposed by Verizon. This Court, in remanding section 10 forbearance cases to the Commission, has not directed the agency to complete action on remand within a specified time period.[140] Moreover, the Court's practice generally is not to establish a deadline in remanding an order to the Commission, even in proceedings, such as tariff and complaint proceedings, where the statute establishes a specific deadline for the initial agency decision.[141] There is no basis for the Court to depart from that practice, particularly where, as here, there is no suggestion in this case of bad faith or unlawful delay.

Finally, the Court should not grant Verizon's request to declare its petitions "deemed granted" if the agency does not complete remand proceedings in 30 days.[142] Under section 10(c), a forbearance petition is "deemed granted" only if the Commission fails to deny the petition within the statutory time limit. Because the Commission denied Verizon's petitions within the prescribed period, the "deemed granted" provision is inapplicable. The Court should not rewrite section 10(c) by expanding the scope of the "deemed granted" provision to include remand proceedings.

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[140] See AT&T, 452 F.3d 830 (remanding forbearance case without setting a deadline for agency action). Verizon Telephone Cos. v. FCC, 374 F.3d 1229, 1235 (D.C. 2004), upon which Verizon relies, imposed no deadline for agency action on remand.

[141] See, e.g., 47 U.S.C. §§ 204(a)(2)(A), 208(b)(1). See, e.g., AT&T Corp. v. FCC, 317 F.3d 227 (D.C. Cir. 2003).

[142] Verizon Brief at 43, 44.

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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July 22, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERIZON TELEPHONE COMPANIES PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	)	NO. 08-1012

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13717 words.

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