ORAL ARGUMENT REQUESTED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 10-9543

QWEST CORPORATION

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Respondents.

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

FINAL ANSWER BRIEF OF RESPONDENTS
(DEFERRED APPENDIX APPEAL)

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL

KATHERINE B. FORREST
DEPUTY ASSISTANT ATTORNEY
GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF
JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL
COUNSEL

LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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STATEMENT OF RELATED CASES

There are no prior appeals related to the issues presented in this case, and counsel for the Federal Communications Commission (FCC or Commission) are not aware of any case pending in any other court of appeals that is related to this one.

GLOSSARY

1996 Act	Telecommunications Act of 1996
BOC Intervenors Br.	Brief of Intervenors AT&T Inc. and Verizon
FCC	Federal Communications Commission
J.A.	Joint Appendix
LEC	local exchange carrier
MSA	Metropolitan Statistical Area
Qwest Br.	Brief of Petitioner Qwest Corporation
the Act	The Communications Act of 1934, as Amended
UNE	unbundled network element
VoIP	voice over Internet protocol

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STATEMENT OF ISSUES PRESENTED

Petitioner Qwest Corporation, a telephone carrier, challenges an order of the Federal Communications Commission ("FCC" or "the Commission") denying Qwest's request to exempt the carrier from regulation governing incumbent local exchange carriers under the Communications Act of 1934 and the Commission's implementing rules. The Commission, the federal agency entrusted by Congress with executing and enforcing the Communications Act, denied Qwest's request under section 10 of the Act, 47 U.S.C. § 160, to "forbear from applying"

(1) "dominant carrier" regulations that the Commission has imposed on incumbent telephone companies to curb their exercise of excessive market power, and (2) provisions of the Act that require incumbent local exchange carriers to share with competitors certain elements of their networks in order to enable new entrants to enter the market. *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622 (2010) ("*Order*") (J.A. 1487).

Employing a market power analysis similar to that used by the United States Department of Justice, the Federal Trade Commission, and telecommunications regulators, the FCC determined that Qwest had failed to carry its burden under section 10 of the Communications Act by showing that: (1) the requirements from which it sought forbearance were not necessary to ensure just, reasonable and nondiscriminatory rates and practices; (2) those requirements were not necessary to protect consumers; and (3) forbearance would serve the public interest. *See* 47 U.S.C. § 160(a)(1)-(3).

The case presents the following question for review:

Whether the Commission's application of traditional market power analysis to determine that Qwest had not satisfied the prerequisites for forbearance under section 10 of the Communications Act, 47 U.S.C. § 160, was within its discretion and consistent with the statute.

STATUTORY PROVISIONS

Applicable statutes are appended in the addendum to this brief.

COUNTERSTATEMENT

I. The Statutory and Regulatory Framework

A. Dominant Carrier Regulation

The Commission traditionally has applied a variety of regulations to curb the ability of telephone companies to wield market power in a fashion that enables them to charge consumers excessive rates and otherwise engage in unreasonable practices. These regulations, adopted under Title II of the Act, 47 U.S.C. §§ 201 *et seq.*, govern dominant carriers (*i.e.*, those with the power to control price), such as incumbent local exchange carriers ("LECs"). They include: (1) price regulation for interstate services; (2) requirements that incumbent LECs file tariffs setting forth their rates (with supporting evidence of their costs) before the rates take effect; and (3) requirements (known as "*Computer Inquiry* requirements") designed to prevent discrimination and other anticompetitive practices in the provision of regulated and non-regulated services (including certain forms of Internet access service).[1]

Other Commission rules modify the regulatory obligations of non-dominant carriers (*i.e.*, those carriers that lack market power) by, for example, relieving such carriers of their *Computer Inquiry* obligations and certain types of rate regulation.

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[1] *See generally* 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.41-61.49, 61.58, 61.59, 63.03, 63.04; *Petitions of the Verizon Tel. Cos. 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, 21295-96 (¶¶ 3-5) (2007) (J.A. 117-18) ("*Verizon 6 MSA Order*") (describing the *Computer Inquiry* requirements), *remanded in part*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).

See Order ¶ 6 (J.A. 1490) (outlining regulatory treatment of non-dominant carriers). As discussed below, the assumption underlying these more relaxed regulations for non-dominant carriers is that market forces will adequately curb the carriers' ability to impose excessive rates or otherwise unreasonable terms of service upon consumers who need telephone service.

B. Obligations to Offer Unbundled Network Elements

For most of the last century, American consumers could purchase local telephone service from only one source: their incumbent LEC. "Until the 1990s, local telephone companies operated as monopolies." *EarthLink, Inc. v. FCC*, 462 F.3d 1, 3 (D.C. Cir. 2006) (citations omitted). 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. *See AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999).

In the Telecommunications Act of 1996 ("1996 Act"),[2] Congress fundamentally altered this regulatory framework "to achieve the entirely new objective of uprooting the monopolies." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 488 (2002). The 1996 Act created "a new telecommunications regime designed to foster competition in local telephone markets"[3] by imposing upon incumbent LECs "a host of duties."[4] Foremost among those duties is the

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[2] Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended, and was codified within, the Communications Act of 1934 ("the Act"), 47 U.S.C. §§ 151 *et seq.*

[3] *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002).

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

requirement that an incumbent LEC provide its competitors with non-discriminatory access to elements of its network on an unbundled basis. 47 U.S.C. § 251(c)(3). In requiring incumbents to allow new entrants to use their networks, Congress recognized that, at least in the short term, no competitor realistically could be expected to replicate an incumbent's entire network due to the prohibitive cost of doing so. *See* Joint Statement of Managers, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 148 (1996); *Verizon Commc'ns*, 535 U.S. at 502 n.20 (noting that the Act "reduces barriers to entry" by requiring cost-based unbundling of "expensive facilities" that otherwise are "unlikely to be duplicated").

The Commission determines what unbundled network elements ("UNEs") incumbent LECs must make available to competitors by 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)(B). UNEs that must be offered under section 251(c)(3) must be made available at cost-based rates. *See* 47 U.S.C. § 252(c)(2)(D); *see also Verizon Commc'ns*, 535 U.S. 467 (upholding rate methodology).

The Commission's current 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 does not frustrate sustainable, facilities-based competition." *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2535 (¶ 2) (2005) ("*Triennial Review Remand Order*"), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). As relevant here, the Commission's UNE rules require incumbent LECs to unbundle certain elements of their network infrastructure, including "local loops" (wires connecting telephones to carrier switches) and "transport trunks" (wires that carry calls between carrier switches). *See AT&T*, 525 U.S. at 371 (describing network elements). The rules reflect the agency's determination that failure to share these network elements would "impair" a competitor's ability to provide service under section 251(d)(2) of the Act. *See Triennial Review Remand Order*, 20 FCC Rcd at 2604, 2608, 2615 (¶¶ 126, 129, 149).

C. Forbearance

1. *Origins of FCC Forbearance Policies.* The Commission's focus on market power in the context of requests for forbearance from regulation can be traced to the *Competitive Carrier* proceedings of the late 1970s and early 1980s.[5] In *Competitive Carrier*, the Commission first distinguished between dominant carriers (which it defined as those with "market power" – *i.e.*, the "power to control price") and non-dominant carriers (defined as those that lack such power).[6]

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[5] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively, the "*Competitive Carrier*" proceedings).

[6] *Competitive Carrier First Report and Order*, 85 FCC 2d at 20 (¶ 54). *Accord Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558 (¶ 7).

In distinguishing between dominant and non-dominant carriers, the Commission performed careful analyses of market power, relying on, among other things, the Department of Justice's then-existing Merger Guidelines.[7] The Commission considered not only market share, but also structural factors that could pose barriers to entry, including "the control of bottleneck facilities" (*i.e.*, those infrastructure elements that a new entrant would need to use in order to compete).[8] These barriers to entry, the Commission explained, constitute "prima facie evidence of market power requiring detailed regulatory scrutiny."[9]

After performing this market power analysis in the *Competitive Carrier* proceedings, the Commission ultimately relieved the competitive long-distance carriers that it found to be non-dominant (such as MCI and Sprint) from certain rate regulation and tariff-filing obligations, and relaxed (without eliminating) other traditional common carriage obligations governing transfers of control, line acquisitions, and service discontinuance.[10] The Commission reasoned that because these non-dominant carriers lacked market power, they would be unable profitably to charge unjust and unreasonable rates in violation of 47 U.S.C. § 201(b) or to

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[7] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 562-575 (¶¶ 13-30); *see id.* nn.18, 22, & 64.

[8] *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 562 (¶ 13).

[9] *Competitive Carrier First Report and Order*, 85 FCC 2d at 21 (¶ 58).

[10] *Id.*, 85 FCC 2d at 30-38 (¶¶ 85-111); *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 557 (¶ 5), 575-82 (¶¶ 31-40); *see also* 47 U.S.C. §§ 203, 214.

discriminate unreasonably in violation of 47 U.S.C. § 202(a), and that these regulatory requirements therefore were unnecessary.[11]

In 1995, the Commission applied the same approach to determine whether AT&T remained a dominant carrier requiring continued regulation. Undertaking a comprehensive analysis, the Commission concluded that AT&T lacked market power in the interstate interexchange markets and reclassified the carrier as non-dominant with respect to interstate, domestic, interexchange services.[12] Among the factors the Commission cited in support of its finding were: (1) AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors;[13] (2) AT&T's competitors were able to accommodate a substantial number of new customers on their networks with "little or no investment immediately, and relatively modest investment in the short term" (*i.e.*, they had sufficient excess capacity to constrain AT&T's prices);[14] (3) "virtually all customers . . . ha[d] numerous choices of equal access carriers";[15] (4) AT&T's market share had been falling steadily for ten years, and had decreased to approximately "55.2 and 58.6 percent in terms of revenues and minutes

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[11] *Competitive Carrier Notice*, 77 FCC 2d at 334-38 (¶¶ 46-54); *Competitive Carrier Second Report and Order*, 91 FCC 2d at 68 (¶ 16), 69 (¶ 21); *Order on Reconsideration*, 93 FCC 2d at 59 (¶ 10); *Competitive Carrier Sixth Report and Order*, 99 FCC 2d at 1028 (¶ 12).

[12] *AT&T Domestic Nondominance Order*, 11 FCC Rcd 3271, 3273 (¶ 1) (1995).

[13] *Id.* at 3308 (¶ 70).

[14] *Id.* at 3303-04 (¶ 59).

[15] *Id.* at 3308 (¶ 71).

respectively";[16] (5) both business and residential customers frequently switched carriers;[17] and (6) AT&T had not controlled local bottleneck facilities for over ten years.[18]

2. *Section 10 (47 U.S.C. § 160).* In 1994, the Supreme Court ruled that the Communications Act did not authorize the Commission to forbear from enforcing the statutory tariff-filing requirement. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994). But Congress soon supplied the Commission with explicit forbearance authority by enacting section 10, as part of the 1996 Act. *See* 141 Cong. Rec. S7888 (June 7, 1995) (remarks of Sen. Pressler) (noting that the law effectively overruled court decisions holding that the "FCC cannot deregulate"); *see also MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000) (recounting legislative history).

Section 10 largely borrows from the standard that the Commission had previously developed for determining when forbearance is warranted – *i.e.*, authorizing forbearance when the regulation at issue is not necessary to prevent unjust, unreasonable, or unreasonably discriminatory rates or terms of service.[19] Thus, section 10(a) requires the Commission to forbear from applying any

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[16] *Id.* at 3307 (¶ 67).

[17] *Id.* at 3305-07 (¶¶ 63-66).

[18] *Id.* at 3308 (¶ 70).

[19] *Competitive Carrier Notice*, 77 FCC 2d at 334-38 (¶¶ 46-54); *Competitive Carrier Second Report and Order*, 91 FCC 2d at 68 (¶ 16), 69 (¶ 21); *Order on Reconsideration*, 93 FCC 2d at 59 (¶ 10); *Competitive Carrier Sixth Report and Order*, 99 FCC 2d at 1028 (¶ 12).

provision of the Communications Act or the agency's own implementing rules "if [it] determines that": (1) enforcement of the requirement is "not necessary to ensure" that rates and practices are "just and reasonable" and "not unjustly or unreasonably discriminatory"; (2) the regulation is "not necessary for the protection of consumers"; and (3) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a).[20] The Commission may forbear under section 10(a) only if it finds that all three parts of the forbearance standard are met. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006) (citation omitted).

Section 10(c) gives a carrier the right to petition the Commission to exercise its authority to forbear from applying a provision of the Communications Act or the agency's implementing regulations. 47 U.S.C. § 160(c). In such proceedings, "the petitioner bears the burden of proof – that is, of providing convincing analysis and evidence to support its petition for forbearance."[21] This burden of proof, the Commission has explained, "encompasses both the burden of production and the burden of persuasion." *Forbearance Procedures Order*, 24 FCC Rcd at 9556 (¶ 21) (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). Thus, "the petitioner's

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[20] In applying the "public interest" component of the test, the Commission 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).

[21] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, Report and Order, 24 FCC Rcd 9543, 9554 (¶ 20) (2009) ("*Forbearance Procedures Order*").

evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance." *Id.*

While the petitioner bears the burden of proving its entitlement to forbearance under section 10, the statute "sets out strict time limits within which the FCC must act on a petition for forbearance." *Fones4All Corp. v. FCC*, 550 F.3d 811, 815 (9th Cir. 2008). If the Commission fails to issue an order denying such a petition within twelve (or, if extended, fifteen) months, the petition is deemed granted. 47 U.S.C. § 160(c).

3. *Commission Decisions Under Section 10*. In its first major decision under section 10, the Commission recognized that Congress had adopted the forbearance statute against the backdrop of the Commission's own efforts to limit regulation of non-dominant carriers in the *Competitive Carrier* proceedings.[22] Building upon the competitive analysis and findings in those proceedings, as well as the *AT&T Domestic Nondominance Order*, the Commission forbore from requiring non-dominant carriers to file tariffs for interstate, domestic, long-distance services. *See Detariffing Order*, 11 FCC Rcd at 20732-33 (¶ 3). Finding that the prerequisites for forbearance under section 10 had been met, the Commission noted that various factors confirmed that neither AT&T nor other long-distance

[22] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, Second Report and Order, 11 FCC Rcd 20730, 20738 (¶ 13) (1996) ("*Detariffing Order*"), *reconsideration granted in part*, Order on Reconsideration, 12 FCC Rcd 15014 (1997), *further reconsideration granted*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd, MCI WorldCom,* 209 F.3d 760.

carriers possessed the market power to charge unreasonable or discriminatory rates without causing customers to switch to a different carrier. *Id.* at 20742-43 (¶¶ 21-22). These factors included: the high customer churn rate among multiple providers of long-distance service, the supply elasticity in the market, and an analysis of AT&T's cost structure, size and resources. *Id.*

In a subsequent decision, however, the Commission adopted "an abbreviated [market] analysis" that departed from the forbearance inquiry's analytical roots. *Order* ¶ 41 (J.A. 1510). In the *Qwest Omaha Order*,[23] the Commission addressed a request by Qwest for forbearance in the Omaha, Nebraska area from network element unbundling and dominant carrier obligations. In partially granting that request, the Commission primarily relied on competition from an incumbent cable company, Cox.[24]

The forbearance analysis in the *Omaha* order first focused on Qwest's retail market share for mass market telephone subscribers.[25] Second, it considered the geographic reach of Cox's network, and granted relief from unbundling obligations in the retail and business markets with respect to certain switching offices – called

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[23] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Order*") (J.A. 15), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[24] *Qwest Omaha Order* at 19424 (¶ 15), 19443-44 (¶¶ 57-59) (J.A. 24, 43-44).

[25] *Id.* at 19430-31 (¶¶ 28-29), 19434 (¶ 39), 19448 (¶ 66) (J.A. 30-31, 34, 48). *See generally Order* ¶ 27 (J.A. 1499-1500) (describing analysis in *Qwest Omaha Order*).

wire centers – in which Cox facilities reached more than a specified percentage of customers served by those centers.[26] Recognizing that its competitive analysis focused on only two carriers – Qwest and Cox – the Commission predicted that the market would not be left with a duopoly; rather, the Commission posited that Qwest would continue voluntarily to make wholesale facilities available at competitive rates and terms because, despite forbearance from unbundling obligations, it continued to be subject to other regulatory obligations that could benefit potential competitors.[27] The Commission also posited that Cox and others would make further investments in their own facilities in the areas where forbearance was granted.[28] The D.C. Circuit upheld the Commission's decision, deferring to "the Commission's predictive judgment that 'Qwest will not react to [the forbearance] decision . . . by curtailing wholesale access'" to facilities needed by existing and potential competitors. *Qwest*, 482 F.3d at 480 (citation omitted).

The Commission adopted a broadly similar approach to forbearance in a line of subsequent decisions, granting relief in two additional geographic areas and denying relief in ten others. *See Order* ¶ 17 & n.56 (J.A. 1495-96) (cataloguing proceedings). One such decision involved a petition filed by Verizon seeking forbearance in six geographic areas. In denying the petition, the Commission

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[26] *Qwest Omaha Order*, 20 FCC Rcd at 19446 (¶ 62), 19450-51 (¶ 69) (J.A. 46, 50-51). *See* 47 C.F.R. § 51.5 (defining wire center).

[27] *Id.* at 19448-51 (¶¶ 67-69), 19452 (¶ 71), 19455-56 (¶¶ 79-83) (J.A. 48-51, 52, 55-56).

[28] *Id.* at 19451 (¶ 69) (J.A. 50-51).

again focused on *market share* in the mass retail market as a proxy for *market power* in all markets, but it applied the market share test in a novel way without explaining the reason for the change.[29] As the D.C. Circuit found on judicial review, the agency had – without explanation – "changed tack from its precedent" by "apply[ing] a *per se* market share test that considered only actual, not potential competition in the marketplace." *Verizon Tel. Cos.*, 570 F.3d at 304. "The flaw," the court explained, was not the change itself, "but rather in the FCC's failure to explain it." *Id.* Remanding the case to the Commission for further proceedings, the court emphasized:

> Congress did not [in section 10] prescribe a "particular mode of market analysis." . . . [I]t may be reasonable in certain [circumstances] for the FCC to consider an [incumbent LEC's] possession of [a specified] percent, or any other particular percentage, of the marketplace as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete. It may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition. Nevertheless, it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.

Id. at 304 (internal citations omitted).

While the *Verizon* case was pending in the D.C. Circuit, the Commission adopted another order – the *Qwest 4 MSA Order* – applying a similar analysis to deny a forbearance request by Qwest for dominant carrier and unbundling relief in

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[29] *See Verizon 6 MSA Order*, 22 FCC Rcd at 21,313–21,315 (¶¶ 37-38) (J.A. 135-37).

four geographic areas, including Phoenix.[30] Following the *Verizon* remand, the Commission sought and received a voluntary remand of Qwest's challenge to that order as well. Order, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009).

II. The Qwest Phoenix Forbearance Proceeding

A. Qwest's Phoenix Petition

Qwest filed the forbearance petition at issue in this case on March 24, 2009 – after the Commission had denied its request for forbearance in the *Qwest 4 MSA Order*, but before the D.C. Circuit remanded that decision or issued its *Verizon* decision. *See Order* ¶¶ 1 n.1, 18-20 (J.A. 1488). In its petition, Qwest sought forbearance in the Phoenix area from the requirement that it make certain UNEs available to competitors under section 251(c)(3) of the Act, as well as various dominant carrier regulations, including tariff-filing requirements, price cap rules, entry and exit regulations, and certain *Computer Inquiry* requirements. *See Order* ¶ 22 (J.A. 1498).

Qwest argued that it was subject to effective competition in Phoenix and thus was entitled to forbearance under the *Qwest Omaha Order* and the (subsequently remanded) forbearance orders in the *Verizon 6 MSA* and *Qwest 4 MSA* proceedings. *Order* ¶ 23 (J.A. 1498). Other carriers – joined by the Arizona Corporation Commission (the state entity with regulatory authority over Qwest in Phoenix and associated expertise) – urged the Commission to abandon the flawed

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[30] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 (2008) (J.A. 150) ("*Qwest 4 MSA Order*").

analytical framework of those decisions and return to a more rigorous market power analysis in considering Qwest's request.[31] These parties argued that Qwest would not qualify for forbearance from dominant carrier regulation or network unbundling obligations in either the residential or business markets.[32] The Commission offered Qwest and the other parties another opportunity to address the proposed market power standard in a supplemental round of comments.[33]

B. The *Order* on Review

On June 22, 2010, after reviewing voluminous comments from interested parties, the Commission issued the *Order* on review. Consistent with the D.C. Circuit's acknowledgment that section 10 of the Communications Act does not prescribe any "'particular mode of market analysis,'" *Verizon* 570 F.3d at 304, the Commission comprehensively reviewed its approach to forbearance and explained in detail its decision to return to the more rigorous market power framework that

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[31] *See*, *e.g.*, Opposition of Integra Telecom, Inc., *et al.*, at 2 (Sept. 21, 2009) (J.A. 614); Comments of PAETEC Holding Corp., WC Docket Nos. 06-172, *et al.*, at 40-47 (Sept. 21, 2009) (J.A. 763-70), appended as Attachment 1 to Opposition of PAETEC Holding Corp. (Sept. 21, 2009); Comments of Broadview Networks, Inc., *et al.*, at 12-22 (Sept. 21, 2009) (J.A. 420-30); Comments of Arizona Corporation Commission at 8 (Sept. 21, 2009) (J.A. 402); *see also Order* ¶ 37 n.117 (J.A. 1507) (citing comments).

[32] *See*, *e.g.*, Arizona Corporation Commission Reply Comments at 2-3, 18-20, 24-27 (Mar. 2, 2010) (J.A. 1140-41, 1156-58, 1162-65).

[33] *Request for Additional Comment and Data Related to Qwest Corporation's Petition for Forbearance from Certain Network Element and Other Obligations in the Phoenix, Arizona MSA*, Public Notice, 25 FCC Rcd 3720 (WCB 2010) (J.A. 1198) (inviting comments on revising analytical approach to forbearance petitions).

underpinned its earliest forbearance decisions. *Order* ¶¶ 21, 23-45 (J.A. 1497, 1498-1512). Applying that approach to the record before it, the Commission denied Qwest's forbearance request because Qwest had "fail[ed] to demonstrate that there is sufficient competition to ensure that, if we provide the requested relief, Qwest will be unable to raise prices, discriminate unreasonably, or harm consumers." *Order* ¶ 2 (J.A. 1488).

Return to the Market Power Framework. In revisiting its approach to forbearance following the D.C. Circuit's remands of the *Verizon 6 MSA* and *Qwest 4 MSA* orders, the Commission not only had the benefit of an expanded record (including supplemental comments) but also "the benefit of hindsight." *Order* ¶ 24 (J.A. 1498-99). The Commission explained that the two-fold analysis of competition in the *Qwest Omaha* line of decisions – *i.e.*, a retail mass market share test coupled with a facilities-coverage test – had failed to "adequately assess[] the presence or absence of market power." *Order* ¶ 28 (J.A. 1500). First, focusing on retail mass *market share* did not adequately evaluate whether an incumbent LEC has *market power* in the retail mass market, much less other markets, because it did not involve a careful delineation of product and geographic markets and failed to consider potential competition. *Id.*

The facilities-coverage part of the analysis fared no better. By focusing "on the extent to which a single provider (the incumbent cable company) could provide services in each . . . wire center over its own facilities," the test "inappropriately assumed that a duopoly always constitutes effective competition" sufficient to protect consumers and "to ensure just, reasonable, and nondiscriminatory rates and practices." *Order* ¶ 29 (J.A. 1500-01) (surveying the case law, Commission precedent, and economic literature). *See also id.* ¶¶ 30-32 (J.A. 1502-04).

Moreover, the Commission found "little evidence . . . that the [Bell Operating companies] or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were [lifted]." *Order* ¶ 34 (J.A. 1505). To the contrary, the record showed that following the Commission's grant of forbearance to Qwest in Omaha, the only competitor of significant size (other than Cox) largely exited the Omaha market, while another potential competitor, "which had been contemplating entry into the Omaha market, abandoned its plans to do so." *Id.* (J.A. 1505-06). In short, there was "no record evidence . . . of significant new deployment of competitive facilities by non-incumbent[s] . . . in any of the Omaha wire centers where unbundling forbearance was granted." *Order* ¶ 36 (J.A. 1506). The *Qwest Omaha Order*'s predictions that forbearance would lead to more robust competition had proved to be wrong. *See Order* ¶¶ 34-36 (J.A. 1504-07).

Given this background, the Commission explained that it would "return to" the "traditional market power framework" that it had initially established in the *Competitive Carrier* proceedings (and since refined) to evaluate competition in forbearance proceedings. *Order* ¶ 37 (J.A. 1507-08). As the Commission pointed out, the United States Department of Justice, Federal Trade Commission, and telecom regulators employ similar approaches for evaluating market power. *Id.*

Under this restored approach to market power, the Commission explained, Qwest could try to satisfy its burden of proof under section 10 by demonstrating that "the relevant wholesale markets are effectively competitive," or that there are "a sufficient number of significant, full facilities-based competitors providing the relevant *retail* services, so as to make those markets effectively competitive." *Order* ¶ 43 (J.A. 1512). The statutory prerequisites for forbearance would "not be met," however, "if Qwest, either individually or in conjunction with a small number of firms, could profitably sustain supracompetitive prices." *Id.*

The Commission's Application of Market Power Analysis. Applying this analysis to Qwest's forbearance petition, the Commission addressed in detail the relevant product and geographic markets implicated by the petition. *Order* ¶¶ 46-65 (J.A. 1512-22). As relevant here,[34] the Commission determined that traditional telephone services offered to consumers by carriers such as Qwest and cable operators such as Cox were in the same product markets. Consistent with past

[34] Qwest "challenges the *Order* only as it relates to the *mass market*" (Qwest Br. 4 n.1 (emphasis added)) – that is, the market for residential customers and small businesses. Thus, Qwest does not challenge the Commission's conclusion that Qwest lacked significant competition for any *wholesale* elements (including loops and dedicated transport elements) in Phoenix. *Order* ¶¶ 47-49 (J.A. 1513-14). Nor does Qwest challenge the Commission's conclusion that Qwest had not established that it is subject to sufficient "actual and potential competition to constrain effectively the price of Qwest's *enterprise services*" (*i.e.*, services provided to medium and large businesses) in Phoenix, *id.* ¶ 91 (J.A. 1535-36) (emphasis added).

precedent, the Commission also included "facilities-based" VoIP services[35] in the relevant product market, but concluded that the record was insufficient to place "over-the-top" VoIP in that market. *Order* ¶ 54 & n.162 (J.A. 1515).

The parties to the proceeding disputed whether mobile wireless services should be included in the same telephone "mass market" for purposes of the market power analysis. Qwest asserted that such services should be included based on studies estimating the percentage of households in Phoenix that relied exclusively on wireless service. *Order* ¶ 59 (J.A. 1519-20). The Commission found, as a preliminary matter, that even if customers relying exclusively on wireless service for their telephone calling should be included in the relevant product market, Qwest's proffered analysis of such customers in Phoenix was analytically flawed and therefore too unreliable to be useful. *Order* ¶ 59 n.179 (J.A. 1519).

More fundamentally, however, the Commission concluded – citing economic studies – that simply "[k]nowing the percentage of households that rely exclusively on wireless" does not answer the determinative question for product market definition purposes – *i.e.*, "whether mobile wireless services have a *price-constraining* effect on wireline access services." *Id.* & n.179 (J.A. 1519)

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[35] Voice over Internet protocol (or VoIP) services are Internet telephony services offered by companies such as Vonage and Skype. Unlike "facilities-based" VoIP providers (*i.e.*, some cable television companies and other VoIP providers that rely on their own physical networks), "over-the-top" VoIP providers do not operate their own wired networks. Instead, they require customers to obtain broadband access facilities from the incumbent LEC or a competitor. *Order* ¶ 54 n.163 (J.A. 1515).

(emphasis added). *See also id.* ¶ 56 (J.A. 1516-17) (citing, *e.g.*, U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines § 1.11 (1992, revised 1997) ("1997 *Merger Guidelines*")). The Commission explained that factors other than the relative price of wireline and wireless services – such as "differences in consumers' age, household structure, and underlying preferences" – may explain a customer's decision to subscribe only to wireless service. *Order* ¶ 59 (J.A. 1519-20). For example, the Commission noted that such "cord-cutting" is more prevalent among younger users, *see Order* ¶ 59 n.180 (J.A. 1520) (noting rate for the 25-29 year-old demographic), which may be explained more by their personal preferences and familiarity with cell phones (including "smartphones" that perform multiple functions) than by any differences in price.

The Commission noted a number of ways Qwest might have attempted to demonstrate that mobile wireless service constrains wireline service pricing, including econometric analyses of demand, evidence that Qwest had reduced prices or adjusted its marketing strategies for wireline services in response to wireless competition, or marketing studies or surveys addressing the degree to which consumers view wireless and wireline services as close substitutes. *Order* ¶ 58 (J.A. 1518-19). But Qwest did not offer any such evidence. *Id.*

Having concluded that Qwest failed to provide a sound basis for including mobile wireless in the mass market for phone services in Phoenix, the Commission determined that Cox was the only Qwest competitor "that now provides or is soon likely to provide retail service to mass market customers over its own last-mile network to any significant extent in the Phoenix [area]." *Order* ¶ 80 (J.A. 1529).[36] Accordingly, the Commission found that Qwest and Cox constituted an effective duopoly in the Phoenix mass market for local telecommunications services. *Order* ¶ 81 (J.A. 1529-30).

Despite this duopoly, the Commission explored whether potential competition from companies that could timely convert their existing facilities to competitive use ("supply-side substitution") or otherwise build new ones ("*de novo* entry") might constrain Qwest's exercise of market power. The Commission noted that, prior to entering the Phoenix mass market, Cox had been a potential rival through supply-side substitution in areas where its cable network was deployed and upgradeable at relatively low incremental cost. *Order* ¶ 83 (J.A. 1531). But Cox was now an actual competitor and the record contained no evidence that other providers were contemplating *de novo* entry, given the prohibitive costs of constructing their own facilities. *Order* ¶¶ 84-85 (J.A. 1531-32).

While the Commission acknowledged that, "under [certain theoretical] models and in some situations," a duopoly "can result in a competitive equilibrium," it found "no evidence in the record" that the prerequisites for such theoretical competition were present in Phoenix, "nor . . . [any] direct evidence that

[36] Several other wireline providers served some mass market customers in the area, but those providers were "'fringe' competitors that are able to compete only by relying extensively on UNEs and other Qwest wholesale services," *i.e.*, the very offerings that Qwest was seeking permission to withdraw. *Id.* (J.A. 1529).

the markets at issue are behaving in a competitive manner." *Order* ¶ 86 (J.A. 1532-33).

Evaluating its market power analysis in light of the statutory criteria for forbearance under section 10(a) of the Act, the Commission explained that Qwest had not met its burden of showing that each of the three forbearance criteria had been met with respect to the regulatory requirements from which it sought relief. *Order* ¶¶ 92-120 (J.A. 1536-48). In particular, there was "no evidence that, absent section 251(c)(3) regulation, Qwest would be subject to effective retail competition for mass market customers" sufficient "to ensure that the rates and practices for retail mass market services would be just, reasonable, and non-discriminatory," as section 10(a)(1) requires in order to grant forbearance. *Order* ¶ 98 (J.A. 1538).

<u>SUMMARY OF ARGUMENT</u>

In the *Order*, the Commission properly denied Qwest's petition for forbearance from statutory and regulatory unbundling and dominant carrier obligations in Phoenix, because Qwest had not satisfied its burden under section 10's three-part test to demonstrate: (1) that those requirements were not necessary to ensure just, reasonable and nondiscriminatory rates and practices; (2) that the requirements were not necessary to protect consumers; and (3) that forbearance would serve the public interest.

Qwest attempts to reverse the burden of proof by insisting that the Commission was required to disprove each of the predicates that otherwise would justify forbearance under the statute. But its argument – which does not even acknowledge a contrary FCC order squarely on point – is at odds with the plain language of the statute. It also would have the perverse effect of forcing the Commission to produce evidence to preserve provisions of the Communications Act whenever a carrier simply requests forbearance from those provisions of law and produces nothing else. It is hard to imagine that Congress intended the competition-enhancing provisions of the Act to be so easily nullified. In any event, Qwest's burden-of-proof argument is not properly before the Court because it was not first presented to the Commission, as required by 47 U.S.C. § 405(a).

In denying Qwest's forbearance petition, the Commission acted well within its discretion when it returned to the market power analysis that underpinned its earliest forbearance decisions and rejected the contrary approach of the *Qwest Omaha* line of decisions. In doing so, the Commission explained in detail why the *Qwest Omaha* approach was unsound as a matter of economic theory and had proved mistaken in actual practice. In the intervening years since the *Omaha* order, experience had shown that its approach to forbearance had harmed – rather than helped – competition, with one competitor exiting the Omaha market and another potential rival canceling plans to enter following the grant of forbearance in that proceeding. The Commission is not forever locked into a policy when that policy has proved unsound, and the law is clear that an agency is free to change its policies, with only the same burden of explanation than accompanies initial policy decisions. *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009)).

Applying its market power framework to Qwest's petition, the Commission found that Qwest had failed to demonstrate that the Phoenix market for residential telephone service was anything other than a duopoly consisting of Qwest and Cox. Although the record contained evidence that an increasing number of residential customers now rely exclusively on wireless service, Qwest had failed to present any direct or indirect evidence that wireless service actually constrains the price of traditional landline service – the critical fact that determines whether the two services fall within the same product market. Nor was a Qwest-Cox duopoly sufficient to satisfy the statutory requirements for forbearance. As the Commission explained, a large body of economic literature, case law, and Commission precedent confirms that duopolies raise a substantial risk of supracompetitive pricing and other competitive harms. The Commission therefore rationally concluded – based on abundant empirical evidence and economic analysis – that Qwest had failed to carry its burden in establishing that a Cox-Qwest duopoly was sufficiently competitive to relieve Qwest of regulation.

In relying on the contrary theories of its own economists, Qwest invites the Court to substitute its judgment for that of the agency charged with implementing the Communications Act. The Court, however, "do[es] not sit as a panel of referees on a professional economic journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

The Court should deny Qwest's petition for review.

STANDARD OF REVIEW

The Court reviews the Commission's interpretation of the Communications Act in accordance with the standards articulated in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1229-30 (10th Cir. 2005); *Mainstream Marketing Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004) . 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." *Id.* at 842-43. But 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." *Id.* at 843. Under those circumstances, the Court should "uphold the FCC's interpretation as long as it is reasonable, even if 'there may be other reasonable, or even more reasonable, views.'" *Earthlink*, 462 F.3d at 7 (citation omitted)). *See id.* at 12 (court owes deference to Commission's reasonable construction of section 10).

In order to prevail on its challenges to the Commission's decision-making process, Qwest must 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). "An agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson*, 567 F.3d at 1221. Under this highly deferential standard of review, the

Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *See, e.g.*, *Motor Vehicle Mfr. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). 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." *AT&T Inc. v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006) (emphasis omitted). *See also Mainstream Marketing Servs.*, 358 F.3d at 1248 (court is "not empowered to substitute [its] own judgment for that of the administrative agency"). This "same standard of review," moreover, "applies to both initial policy decisions and subsequent changes in policy." *Sorenson*, 567 F.3d at 1221 (citing *Fox Television Stations*, 129 S. Ct. at 1810-11).

Judicial deference to the Commission's "expert policy judgment" is especially appropriate where, as here, the "'subject matter . . . is technical, complex, and dynamic.'" *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005) (citation omitted). *Accord Earthlink*, 462 F.3d at 9 ("[A]n 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.'") (citation omitted). In addition, courts accord substantial deference to the Commission's "predictive judgments" about areas that are "within the agency's field of discretion and expertise," *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1146 (10th Cir. 1991), including its predictive judgments about market competition in the context of forbearance petitions under section 10 of the Communications Act, *Earthlink*, 462 F.3d at 12.

ARGUMENT

I. The Commission Reasonably Interpreted the Forbearance Statute.

A. The Commission Correctly Placed the Burden of Establishing Entitlement to Forbearance on the Petitioner.

In the *Order*, the Commission found that Qwest had failed to carry its burden of establishing entitlement to forbearance under the three prerequisites set forth in section 10(a) of the Communications Act, 47 U.S.C. § 160(a). *See, e.g.*, *Order* ¶¶ 94, 95, 96, 97, 100, 101, 105 (J.A. 1536-39, 1540-41). Qwest attempts to reverse the burden of proof – *i.e.*, to place the burden on the Commission to affirmatively *disprove* each of the conditions that a petitioning carrier must satisfy to obtain forbearance. Qwest Br. 21-32; BOC Intervenors Br. 2. Qwest's argument is not properly before the Court, because no party raised it before the Commission. As this Court has explained, "[u]nder 47 U.S.C. § 405(a), when 'the party seeking [] review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass,' a petition for reconsideration is a condition precedent to judicial review." *Sorenson*, 567 F.3d at 1227 (quoting section 405(a)). Qwest did not seek reconsideration and its burden of proof claim, accordingly, should be dismissed. *Id.* at 1228.

The argument also fails on the merits because it flies in the face of the statutory text and precedent. Section 10(a) requires the Commission to forbear from applying a statute or regulation "if [it] determines that": (1) the provision is "not necessary" to ensure just, reasonable and non-discriminatory rates and terms of service; (2) the provision is "not necessary" to protect consumers; and (3) forbearance" – that is, not applying a provision – is "consistent with the public interest." 47 U.S.C. §160(a)(1)-(3). It is well established that "[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.'" *In re Core Commc'ns*, 455 F.3d at 277 (citation omitted); *see also AT&T Corp. v. FCC*, 236 F.3d 729, 732 (D.C. Cir. 2001) (summarizing the three findings the Commission must make before it may forbear from applying statutory obligations or FCC rules).

Qwest argues that section 10 establishes a "substantive default rule requiring forbearance whenever the FCC does not make affirmative findings that the regulations at issue remain necessary." Qwest Br. 26, 27 (emphasis added). In other words, under Qwest's reading of section 10, one presumes that the statutory prerequisites for forbearance are satisfied – unless the Commission affirmatively proves otherwise. That reading, however, turns the statutory text on its head. As shown above, the text provides that the Commission shall forbear only "if" it "determines" that the regulatory obligation at issue is "*not*" needed and that forbearance would serve the public interest. 47 U.S.C. § 160(a)(1)-(3) (emphasis added). As Qwest would have it, the Commission must forbear if it fails to make even one affirmative finding that the provision *is* needed.

Qwest's argument also conflicts with the Commission's rules interpreting the burden of proof in forbearance proceedings. As the Commission noted in the *Order* on review (¶¶ 14, 92 (J.A. 1494, 1536)), Qwest's burden in this case was clearly explained in the Commission's *Forbearance Procedures Order*, 24 FCC Rcd 9543 – a notice-and-comment rulemaking decision that Qwest attempts to collaterally attack in this proceeding but never mentions in its brief.[37] In that order, the Commission explained that the "'ordinary default rule'" in American jurisprudence provides "'that plaintiffs bear the risk of failing to prove their claims.'" *Id.* at 9554 (¶ 20 & n.75) (quoting *Shaffer v. Weast*, 546 U.S. 49, 56 (2005)).[38] That general rule, the Commission found, likewise applies in administrative proceedings, where the burden of proof is "properly placed upon the party seeking relief." *Id.* at 9554 (¶ 20 & n.75) (citing *Shaffer*, 546 U.S. at 56). *See also* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

The Commission in the *Forbearance Procedures Order*, moreover, directly addressed and rejected Qwest's current argument that section 10(c) – a processing rule that deems a forbearance petition granted if the Commission fails to deny it in a timely fashion – should be construed as requiring forbearance absent "affirmative [agency] findings that the regulations at issue remain necessary." Br. 27. The Commission explained that section 10(c) simply means that it "must attend promptly to forbearance petitions." *Forbearance Procedures Order*, 24 FCC Rcd

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[37] Qwest and its supporting intervenors AT&T and Verizon filed comments opposing the Commission's assignment of the burden of proof in that rulemaking proceeding. *See id.* at 9554 n.74, 9556 n.87 (citing comments).

[38] *See also Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-76 (1994) (describing the history of the burden of proof in American jurisprudence).

at 9556 (¶ 22); *accord Fones4All*, 550 F.3d at 815 (section 10(c) "sets out strict time limits within which the FCC must act on a petition for forbearance"). Thus, contrary to Qwest's claims, section 10(c)'s processing timetable does not amount to a "substantive default rule" "in favor of forbearance" (Br. 27, 30), much less a rule that reverses the well-established burden of proof. A statutory directive that the Commission must act on a forbearance petition within a specified period is very different from a statutory requirement that the Commission bear the burden of proof in "mak[ing] affirmative findings that the regulations at issue remain necessary." Qwest Br. 27.

Placing the burden of proof on the petitioner not only is consistent with the language of section 10, Commission precedent, and longstanding principles of American jurisprudence. It would make little sense to read section 10 otherwise. As the Commission observed, "[i]f the petitioner does not support the case for forbearance with sufficient evidence and persuasive arguments, the Commission cannot make an informed and reasoned determination that the statutory criteria are met." *Forbearance Procedures Order*, 24 FCC Rcd at 9556 (¶ 21). This difficulty has particularly far-reaching implications in the context of section 10, because that provision contemplates forbearance not only from Commission-made regulations, but also from congressionally enacted statutory provisions. It is implausible that Congress – in comprehensively amending the Communications Act in 1996 to add, among other things, unbundling obligations designed to foster robust competition – would have placed upon the Commission the burden of proving that these obligations remain necessary in every case in which a carrier requests forbearance, with the "default" position (Qwest Br. 27) that those provisions are a nullity. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms . . . . [I]t does not, one might say, 'hide elephants in mouseholes.'" *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (citation omitted).

Accordingly, the Commission correctly read the "deemed granted" provision on which Qwest relies simply as a mechanism to require timely Commission action on forbearance petitions, not as a reversal of normal burden of proof principles. Furthermore, even if the text of section 10 were sufficiently ambiguous to make Qwest's reading a plausible one – which it is not – the Commission's reasonable reading of the statute would be controlling under *Chevron*. *See Earthlink*, 462 F.3d at 7 (Commission's reasonable interpretation of section 10 is owed deference, even if there are other, more reasonable interpretations).

In an effort to tie its counter-textual reading of the statute to the *Order* in this case, Qwest asserts that the Commission's finding that Qwest had failed to satisfy its evidentiary burden under section 10 was simply "inaction" or "bureaucratic indecision" (Br. 28) – equating the *Order* (¶¶ 30, 86 (J.A. 1502, 1532-33)) with a hypothetical statement by the Commission "thank[ing] petitioner for its submission" and adding that the agency is "uncertain whether those [forbearance] standards are the right ones." Br. 29. Because of this supposed similarity, Qwest suggests that its petition should be "deemed granted" by operation of law. Br. 29 (citing *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007)). Qwest's argument is baseless.

The "deemed grant" in *Sprint Nextel* involved a deadlocked Commission that was unable to issue *any* ruling on a forbearance petition. The D.C. Circuit, in those circumstances, held that the deadlock "cannot be considered an order of the Commission nor . . . agency action," and hence deemed the petition granted by operation of law. 508 F.3d at 1131. By contrast, the Commission in this case did not "suspend judgment" of Qwest's forbearance petition or equivocate as to the record before it. Qwest Br. 28.[39] Rather, it expressly denied the petition and explained in detail – citing extensive empirical and theoretical economic analysis – its reasons for doing so.[40] There is a great difference between a complete failure to act on a petition and an order that denies the relief requested for failure to establish the statutory prerequisites for such relief. In any event, Qwest's quarrel with the

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[39] Qwest contends that the Commission's statements about the Qwest-Cox duopoly suggest that the Commission "withheld judgment" on the necessity for regulation. Br. 28 (citing *Order* ¶¶ 30, 86 (J.A. 1502, 1532-33)). To the contrary, the portions of the *Order* cited by Qwest make clear the Commission's unequivocal finding that "the move from monopoly to duopoly" did *not* justify forbearance in this particular case, even though "duopolies may yield competitive results in certain circumstances." *Order* ¶ 30 (J.A. 1502); *see also id.* ¶ 86 (J.A. 1532-33) (while "under some models and in some situations, duopoly can provide sufficient competition," "[w]e have no evidence in the record here . . . suggesting that these conditions are present in the markets at issue").

[40] *See*, *e.g.*, *Order* ¶¶ 95-96 (J.A. 1537-38) (finding "no record evidence of significant competition for the wholesale products used to serve" mass market customers and, thus, that the wholesale market was "insufficiently competitive" to justify forbearance from UNE unbundling); *id.* ¶ 98 (J.A. 1538) (finding "no evidence that, absent [UNE unbundling], Qwest would be subject to effective retail competition for mass market customers" so as to satisfy section 10(a)(1)); *id.* ¶ 110 (J.A. 1542-43) ("find[ing] that the section 10 criteria are not met" with respect to the application of dominant carrier regulation to mass market services).

adequacy of the Commission's analysis would not establish a "deemed grant" even if its criticisms of the *Order* had merit. *See*, *e.g., Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1232 (D.C. Cir. 2004) (rejecting contention that the Commission violates the statutory deadline and triggers a "deemed grant" when it rejects a petition on procedural grounds and fails to rule on the merits).

Qwest further suggests that, even if the Commission would not ordinarily bear the burden of proof, when it alters the analytic framework that it has applied in prior orders, it must affirmatively find that the regulations at issue are still necessary under each prong of the section 10(a) test. Qwest Br. 22-26, 30. Not so. When changing course, the Commission simply must acknowledge the change and rationally explain why it is making it. *Fox Television Stations*, 129 S.Ct. at 1811. Once the Commission has done so, as this Court has held, neither section 10 nor the Administrative Procedure Act imposes more stringent standards on the Commission to justify "changes in policy" than "initial policy decisions."

Sorenson, 567 F.3d at 1221. Rather, it falls upon the petitioner to establish compliance with the new policy or standard.[41]

Here, the Commission explained at length the "problematic elements of the [two-step analytical] framework used in the *Qwest Omaha Forbearance Order*," including the order's failure adequately to assess "the presence or absence of market power" and its "inappropriate[] assum[ption] that a duopoly always constitutes effective competition." *Order* ¶¶ 24, 28, 29 (J.A. 1498-99, 1500-01); *see generally id*. ¶¶ 23-45 (J.A. 1498-1512). The agency's decision to revisit the *Omaha* order – coupled with its comprehensive explanation for doing so (*Order* ¶¶ 23-45 (J.A. 1498-1512)) – was reasonable, and hardly surprising, given that the D.C. Circuit remanded the Commission's *Verizon 6 MSA* decision with instructions that section 10 "did not prescribe a 'particular mode of market analysis.'" *Verizon*, 570 F.3d at 304 (citation omitted). In sum, Qwest is wrong in

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[41] Qwest suggests that a higher burden of justification applies because the "prior policy . . . engendered serious reliance interests." Br. 41 (quoting *Fox Television Stations*, 129 S. Ct. at 1811) (emphasis omitted). But Qwest fails to explain how it possibly could rely upon a *future* grant of forbearance based on the market performance of other carriers beyond its control. Moreover, Qwest could not reasonably be surprised by the analysis the Commission adopted in the *Order* in light of (a) the Commission's issuance of a Public Notice – before issuing the *Order* – seeking a supplemental round of comments on whether, among other things, it should revisit its forbearance framework, *see* p. 16 n.33, above, and (b) the D.C. Circuit's remands of the *Verizon 6 MSA* and *Qwest 4 MSA* orders, inviting the Commission to undertake a fresh look at the issue. Even if Qwest could establish "serious reliance interests" predicated on earlier Commission decisions, the elaborate explanation that the agency provided for its revised approach was more than sufficient to satisfy the standard Qwest cites.

asserting that the Commission "overrule[d]" its own precedent "without reasoned explanation." Br. 33 n.16.

B. The Commission Reasonably Interpreted Section 10's Substantive Prerequisites for Forbearance.

Qwest and its supporting intervenors next contend that the Commission misinterpreted the substantive content of section 10's three-part forbearance test. That claim also is meritless.

First, with respect to Qwest's request for relief from network element unbundling obligations, Qwest and its intervenors contend that the Commission erroneously applied the forbearance prerequisites in a manner inconsistent with the "impairment" standard (*see* 47 U.S.C. §§ 251(c)(3) & 251(d)(2)) that governs whether network element unbundling should be ordered in the first place. Qwest Br. 33-34; BOC Intervenors Br. 30-33. In particular, they contend that because network element unbundling obligations may impose "'administrative and social costs,'"[42] unbundling must be limited to "bottleneck" facilities and to circumstances "'linked (in some degree) to natural monopoly.'"[43] According to Qwest and its intervenors, those concerns are not congruent with a market power analysis; accordingly, they assert, it must have been unlawful to make forbearance

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[42] BOC Intervenors Br. 28 (quoting *AT&T*, 525 U.S. at 428-29 (Breyer, J., concurring)); *see also* Qwest Br. 33.

[43] BOC Intervenors Br. 31 (quoting *USTA v. FCC,* 290 F.3d 415, 427 (D.C. Cir. 2002)).

from unbundling obligations turn upon a market power analysis. Qwest Br. 33-34; BOC Intervenors Br. 32.

This claim is a thinly veiled attempt to re-litigate in this Court an identical argument that Qwest's intervenor (Verizon) unsuccessfully presented to the D.C. Circuit – with Qwest's support as an intervenor – in the forbearance case addressing the Commission's *Verizon 6 MSA Order*. *See Verizon*, 570 F.3d 294. Basic principles of issue preclusion prevent Qwest from doing so because this issue was "actually litigated and necessary to the outcome" in *Verizon* and "no unfairness results" from denying Qwest a second bite at the apple. *Qwest Corp. v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001). As an intervenor, Qwest was a party to the *Verizon* litigation and is therefore bound by the court's holding that the FCC need not apply the section 251 unbundling standard when considering a forbearance petition under section 10 involving unbundling obligations. Hence, the judgment in *Verizon* bars Qwest from re-litigating this issue now.[44]

In any event, Qwest's "argument fails because it unnecessarily conflates the FCC's impairment standard [under § 251] with the forbearance standard under § 10." *Verizon*, 570 F.3d at 300. "Section 10," the *Verizon* court stressed, "does

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[44] *See Securities Indus. Ass'n v. Bd. of Governors*, 900 F.2d 360, 363 (D.C. Cir. 1990) ("When a court determines an issue of fact or law that is actually litigated and necessary to its judgment, that conclusion binds the same parties in a subsequent action," including intervenors in the earlier litigation) (citations omitted); *United States v. Hooker Chemical & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985) ("because intervenors have participated fully in litigating" an issue in a prior case, "this is a clear case of issue preclusion").

not ask the FCC to [determine whether a network element still meets the section 251 impairment test]," but instead "contemplates that the FCC will evaluate [the forbearance petition under the three-part test of section 10]." *Id.* Qwest is, of course, free to file "a petition for a new rulemaking requesting that the FCC reassess its unbundling requirements under § 251," *id.*, but it may not compel the Commission to undertake an impairment analysis in the distinct procedural and substantive setting of a section 10 proceeding.

In short, Qwest had two independent paths to obtain relief from unbundling requirements. It could have attempted to persuade the Commission *under section 251* that competitors are no longer impaired without access to a particular network element. Or it could have filed a forbearance petition and attempted to show, pursuant to the three-part section 10 test, that section 251(c) no longer should apply in Phoenix. Qwest took the latter path. What Qwest may not do – as the D.C. Circuit held – is conflate the two distinct statutory standards.

Qwest's intervenors contend more generally (and without regard to the impairment test of section 251) that the Commission's forbearance framework unlawfully substitutes market power analysis for the statutory criteria set out in section 10(a) itself. BOC Intervenors Br. 27-28, 37-43; *see also* Qwest Br. 33. That argument also fails. Although the section 10(a) criteria do not *compel* the use of a market power analysis, courts have underscored that the criteria *permit* the Commission – the agency entrusted with administering the Communications Act – to adopt such analysis in evaluating petitions for forbearance. *See EarthLink*, 462 F.3d at 9 (traditional market power analysis under section 10 "is no doubt appropriate in some circumstances," but the Commission was not unreasonable in "taking another tack"); *see also Verizon*, 570 F.3d at 304 (observing that section 10 "'imposes no particular mode of market analysis'" and that the Commission may "change[] tack from its precedent" in considering market share provided that it explains its decision) (citation omitted).

As discussed above, section 10 was adopted in the wake of the Commission's unsuccessful attempts to implement detariffing for nondominant long-distance carriers and was intended to give the Commission express statutory authority to achieve that goal through forbearance. Indeed, the test set out in section 10(a) is closely patterned on the analytical framework the Commission developed in the *Competitive Carrier* proceedings. *See* pp. 6-10, above.

In the *Order* on review, the Commission – in response to remands by the D.C. Circuit – comprehensively revisited its analytical framework for forbearance and explained in detail why it made sense to return to its longstanding approach of considering market power. *See Order* ¶¶ 23-45 (J.A. 1498-1512); *see also* pp. 17-19, above. Thus, Qwest and its intervenors are wrong in asserting that the Commission focused on market power without any "reasoned justification" for doing so. Qwest Br. 33; BOC Intervenors Br. 34-35 n.40, 35-37.

Finally, Qwest and its intervenors contend that because the only firms using UNEs to provide competitive residential services in Phoenix are "fringe" competitors that play a "negligible role" in that market, mandatory unbundling could not reasonably be considered "necessary" for purposes of section 10(a). Qwest Br. 55-56; BOC Intervenors Br. 27-28, 37-43. This argument reduces to the contention that although UNEs are necessary, they are not sufficient to ensure significant residential wireline telephone competition from rivals other than Cox. It does not justify *further* weakening the prospects of such competition by withdrawing UNEs as an avenue for competitive entry. In this regard, the record demonstrated that, in other markets, competitive LECs use incumbent loop facilities as a means of providing mass market telecommunications packages and view the availability of such elements as the "'only realistic access to the vast majority of customers.'" *Order* ¶ 103 (J.A. 1540) (quoting submissions by Cavalier Telephone Company). The Commission properly declined Qwest's crimped reading of "necessary" in section 10, which would "foreclose important choices" for such prospective carriers. *Order* ¶ 103 (J.A. 1540). That choice was within the agency's mandate. *See Earthlink*, 462 F.3d at 9.

II. The Commission Reasonably Concluded That Qwest Had Not Met Its Burden of Establishing Entitlement to Forbearance.

A. The Commission Reasonably Defined the Relevant Product Market.

After reviewing the record, the Commission concluded that the relevant residential product market in which to assess Qwest's market power was the market for access to wired telephone services, including such services offered by facilities-based VoIP providers, but excluding mobile wireless service and over-the-top VoIP services. *Order* ¶¶ 51-61 (J.A. 1514-21). The contours of this product market were consistent with many prior FCC decisions. *See Order* ¶¶ 53 n.159, 54 nn.162-163, 55 n.166 (J.A. 1515-16) (compiling agency precedent).

And, to the extent that other FCC decisions had included "cut-the-cord" wireless customers in calculating wireline carriers' market shares for residential telephone service, the Commission explained that those decisions "incorrectly deviated from economically sound standards for defining product markets," because they included wireless despite affirmatively finding that it "does *not* appear to have a price-constraining effect on wireline service." *Order* ¶ 57 & n.169 (J.A. 1517) (emphasis added). Based on sound economic analysis, "[t]he key empirical test is how much switching between wireline and wireless access is due to changes in the relative prices." *Id.* ¶ 56 n.167 (J.A. 1516) (citation, internal quotation marks, and italics omitted). Here Qwest failed to present evidence that the prices of local wired telephone services in Phoenix were constrained by services in a broader product market. *Order* ¶¶ 51-61 (J.A. 1514-21).

Before addressing the individual components of the Commission's analysis, Qwest argues generally that the Commission arbitrarily "assum[ed] away" allegedly relevant evidence of product substitution by looking at each purported source of competition in isolation while "blind[ing] itself to th[e] big picture." Br. 35, 36; *see generally id.* at 35-41. Qwest suggests that, even if the Commission did not accept all of its market definition arguments *in full*, the Commission's assessment of Qwest's position in the relevant residential service product market nevertheless should have reflected in some numerical way evidence that: (1) many Phoenix households subscribe exclusively to mobile wireless service; (2) many others that subscribe to both wireline and wireless service are increasingly substituting wireless for wireline usage; (3) over-the-top VoIP services are, to some degree, replacing traditional wireline services; and (4) Qwest has lost residential customers to Cox and other wireline rivals in recent years. Br. 35-36.

Qwest is mistaken. First, Qwest's proposed practice of assigning a partial share – to account either for ambiguities in proof or the possible competitive impact of only tangentially substitutable products that are not in the delineated market – is foreign to antitrust principles. Those principles dictate that "market shares should be shares of some real and measurable industry quantity" and "should not be subject to all manner of adjustments" that risk "making them no longer market shares at all." Gregory J. Werden, *Assigning Market Shares*, 70 Antitrust L.J. 67, 104 (2002).

Moreover, unlike in the case Qwest cites for the proposition that an accumulation of individual pieces of evidence – each not independently decisive – nevertheless may be probative when taken together,[45] Qwest's evidence of product substitution was equally deficient both in the aggregate and in isolation with respect to the product market definition issue. *Order* ¶¶ 56-59 (J.A. 1516-20). In particular, because service substitution can result from numerous causes unrelated to the relative prices of services,[46] the first three types of evidence – involving

[45] Qwest Br. 36-37 (citing *Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010)). In *Adahi*, the district court had erroneously discounted the relevance of multiple contacts between a Guantanamo Bay detainee and al-Qaeda personnel and facilities, on the ground that no individual piece of evidence standing alone was sufficiently probative of al-Qaeda membership. *Id.* at 1105.

[46] *See Order* ¶ 59 (J.A. 1519-20) (listing potential causes – other than relative price – for choosing wireless rather than wireline service); *see also* pp. 20-21, above (noting different preferences depending on age demographics).

buyers switching from wireline to either mobile wireless or over-the-top VoIP – say nothing about whether such substitution "constrains the price of wireline service" to such an extent that these products should be included in the relevant market for wireline service. *Order* ¶ 56 (J.A. 1516-17).[47] Nor does the fourth type of evidence cited by Qwest – evidence of buyer substitution between Qwest and Cox wireline services – support its argument; that evidence involves substitution between services that everyone agrees are in the same product market and thus has no bearing on whether *other* products should be included in that market. In short, Qwest made no showing that the relevant product market should be expanded to include wireless or any other service.

Qwest contends that the Commission misapplied antitrust concepts in concluding that Qwest had not established that the relevant product market should include residential customers subscribing exclusively to mobile wireless service. Br. 42-49. Qwest suggests first that the Commission erred in drawing market definition guidance from the Department of Justice/Federal Trade Commission *Merger Guidelines*, because Qwest is subject to a degree of rate regulation at the state and federal levels, while the product market definition provision in the

[47] Taking out of context language from paragraph 55 of the *Order* (J.A. 1516), Qwest asserts that the Commission acknowledged in this case that "'wireless service may materially constrain the price of residential wireline voice service.'" Br. 39-40. The Commission there was simply observing that, although Qwest had not borne its burden of proof on the issue in this case, it remained possible that a different record in a *future proceeding* might warrant a different conclusion.

Guidelines assumes a hypothetical monopolist "*not* subject to price regulation."[48] *See* Br. 42-43. Qwest misconstrues the *Guidelines*.

The antitrust principles reflected in the *Guidelines*[49] define relevant product markets with reference to a test that determines whether a hypothetical profit-maximizing vendor of goods or services could profitably impose a "small but significant and nontransitory increase in price." 1997 *Merger Guidelines* § 1.1; 2010 *Merger Guideline* § 4.1.1. The "not subject to price regulation" qualification that Qwest cites simply acknowledges that a rate-regulated hypothetical monopolist might be unable to impose a "small but significant and nontransitory increase in price" – not as a result of competitive market forces (which is what the market definition test is designed to measure), but because the regulator would not permit such an increase. In order to avoid that conceptual problem, the "not subject to price regulation" caveat provides that the hypothetical inquiry examines only whether *market* competition from another product would prevent the hypothetical monopolist from profitably raising its price. Qwest's reading of that caveat would render the *Guidelines* inapplicable to all mergers involving price-regulated industries, which is not the case.

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[48] *Merger Guidelines* § 4.1.1 (2010) (emphasis added); *accord* 1997 *Merger Guidelines* § 1.0 (emphasis added).

[49] Although the Commission looked to the market definition and market power principles of the *Merger Guidelines*, the issues presented by a forbearance petition are distinct from the competition inquiries that the Department of Justice conducts in enforcing the antitrust laws, and the analyses may lead to different results.

Qwest also argues that, even if the *Merger Guidelines* are applicable, the Commission erroneously applied them by demanding "evidence that Qwest or other [incumbent LECs] have 'reduced' prices below regulated levels to counter wireless substitution." Br. 44 (citing *Order* ¶ 58 (J.A. 1518-19) (emphasis omitted)). Qwest vaguely states (with no record support or even carrier-specific citation of authority) that, due to state and federal rate regulation, it is forced "to sell mass market telephone services at or below cost to many residential subscribers." Br. 43-44. Qwest then speculates that a *hypothetical* price-regulated incumbent LEC "may well rationally choose to keep its capped and geographically averaged rates at current levels rather than reduce them even further below cost." Br. 44.

Because Qwest did not proffer any carrier-specific documentation of below-cost caps on residential rates in Phoenix, the Commission was not required affirmatively to identify evidence refuting Qwest's speculative and unsubstantiated argument. In any event, the Commission made clear that "evidence that [Qwest] ha[d] reduced prices for its wireline services . . . in response to changes in the price of mobile wireless service," was only one of the ways in which the carrier might have attempted to demonstrate that mobile wireless service should be included in the same product market as its residential wireline service. *Order* ¶ 58 (J.A. 1518-19). In this regard, the Commission noted that Qwest could have submitted (but did not) non-quantitative evidence that it had shifted its marketing strategies in response to wireless competition or submitted marketing studies or consumer surveys "show[ing] the extent to which consumers view wireless and wireline access services as close substitutes." *Order* ¶ 58 (J.A. 1518-19).[50]

Given the Commission's past conclusions that wireless substitution does not appear to have a price-constraining effect on wireline prices,[51] and the conflicting views and conclusions on this issue in other proceedings,[52] it was entirely reasonable for the Commission to insist that Qwest produce some evidence that mobile wireless service actually constrains the price of residential wireline service in Phoenix. *See Order* ¶ 56 n.167 (J.A. 1516) (quoting testimony from economist that "[t]he key empirical test is how much switching between wireline and wireless access is due to changes in the relative prices") (citation, internal quotation and

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[50] *See* 2010 *Merger Guidelines* § 4.1.3 (listing other types of quantitative and non-quantitative evidence bearing on product market definition, including buyer surveys and industry participants' monitoring of competitors' price changes and product introductions); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129, 139-41 (2007) (same).

[51] *Order* ¶ 57 & n.169 (J.A. 1517) (citing *Verizon/MCI Merger Order*, 20 FCC Rcd 18433, 18483 (¶ 91 n.276) (2005); *SBC/AT&T Merger Order*, 20 FCC Rcd 18290, 18340-42 (¶¶ 89-90) (2005); and *AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, 5711 (¶ 90), 5714-15 (¶¶ 95-96) (2007)).

[52] *See Order* ¶ 57 & n.170 (J.A. 1517) (citing U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* 65 (2008), *available at* http://www.justice.gov/atr/public/reports/239284.pdf ("The existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on prices for access to landline services. . . . [T]here are reasons . . . to think that wireless is not by itself an effective competitive constraint today."). *See also Order* ¶ 57 nn.171-172 (J.A. 1517) (noting split among state regulators on this issue).

italics omitted). In relying on the contrary theories expressed by its own economists (*see* Qwest Br. 45), Qwest would have the Court "substitute [its] judgment for that of the agency," *Earthlink*, 462 F.3d at 9, contrary to basic principles of administrative law. *See Cablevision*, 597 F.3d at 1314 (court does not sit as a "panel of referees on a professional economic journal") (citation omitted); *Franklin Savings Ass'n*, 934 F.2d at 1146 (deference to agency's expert judgments).[53]

While it is undisputed that the Commission included in its market power analysis facilities-based VoIP, Qwest and (to a greater degree) its supporting intervenors also contend that the agency acted arbitrarily in excluding over-the-top VoIP from the relevant product market. Qwest Br. 36; BOC Intervenors Br. 7-8. But Qwest's own expert acknowledged the absence of reliable data on the extent of such service offerings in the Phoenix area.[54] Similarly, the Arizona Corporation Commission, having unsuccessfully "attempted to obtain [over-the-top subscribership] information," urged the FCC to exclude such services from the product market because "there is no reliable information in the record on the

[53] In all events, even if a concrete demonstration of the number of Phoenix customers relying exclusively on wireless service were sufficient, without more, to include them in the relevant product market, Qwest's proffered studies of such customers in Phoenix were too unreliable to credit, *Order* ¶ 59 n.179 (J.A. 1519).

[54] *See* Qwest Forbearance Petition, attached Declaration of Robert H. Brigham ¶ 27 (J.A. 310) (noting that "it is very difficult to obtain accurate subscribership information regarding VoIP services in the Phoenix MSA"); *see also Order* ¶ 54 n.163 (J.A. 1515) (noting that Qwest provided no Phoenix-specific data regarding VoIP usage).

operations of these providers in the Phoenix" market. Arizona Corporation Commission Reply Comments at 14 (J.A. 1152). Qwest (Br. 36) and its intervenors (Br. 19-20) simply ignore the lack of a sufficient – and reliable – evidentiary basis for including over-the-top VoIP service in the market power analysis. The Commission, accordingly, acted within its broad discretion in excluding such services from the relevant product market, *Order* ¶ 54 & n.163 (J.A. 1515). *See EarthLink*, 462 F.3d at 9.

B. The Commission Reasonably Determined That Qwest Had Not Established That a Qwest-Cox Duopoly Was Sufficient To Constrain Qwest's Exercise of Market Power.

Qwest and its supporting intervenors contend that, even if the relevant product market consists solely of residential wireline service, the Commission had to accept their economic theory that the "unique cost dynamics" of the industry made a Qwest-Cox duopoly sufficient to curb Qwest's market power and to ensure just and reasonable rates. Qwest Br. 51-53; BOC Intervenors Br. 20-25. Under Qwest's theory, if an incumbent LEC faces competition from a *single* substantial competitor, that bare fact is sufficient to excuse the incumbent from generally applicable laws that otherwise would regulate it. In particular, Qwest argues (Br. 51) that because the wireline telephone industry is characterized by high fixed costs and low marginal costs, each company has "unusually strong incentives to make price concessions."[55] This is so, Qwest asserts, because "a cable or telephone company [that] loses a customer" will "lose[] all revenues associated with that customer while saving almost no costs." *Id.* (emphasis omitted).

The Commission reasonably concluded, however, that it could not simply assume that duopoly was "necessarily sufficient" to constrain Qwest's market power enough to grant forbearance. *Order* ¶ 30 (J.A. 1502); *see also id.* ¶ 86 (J.A. 1532-33). The Commission noted that although some theoretical economic models indicate that duopoly may yield competitive results under some circumstances, "[e]conomists, courts, and the Commission have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing." *Order* ¶ 29 (J.A. 1501) (footnotes omitted).

For one thing, some models predict that, even when duopoly firms act "unilaterally," they do not lower prices or increase quantities to competitive levels. *Id.* ¶ 30 & n.89 (J.A. 1502) (citing economic literature). The Commission also pointed to a significant body of economic literature suggesting that duopoly may encourage "coordinated interaction" and thereby yield supracompetitive pricing.

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[55] Qwest make no effort to reconcile this claim with its earlier assertion that incumbent LECs that are subject to price regulation "may well" decline to respond to competition by reducing their prices. Br. 44 (citation omitted); *see also id.* at 43 (arguing that rate caps "severely limit Qwest's flexibility in responding to competition").

Id. ¶ 30 & n.90 (J.A. 1502) (citing scholarly opinion).[56] The Commission, moreover, cited an array of empirical studies from the wireless, cable and other industries concluding that duopolies yield supracompetitive prices. *Order* ¶ 31 & nn.92 & 94 (J.A. 1502-03). Not surprisingly, therefore, courts have recognized that "'supra-competitive pricing at monopolistic levels is a danger'" in duopoly markets. *Order* ¶ 29 n.84 (J.A. 1501) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001)). *See also Time Warner Entertainment Co. v. FCC*, 46 F.3d 151, 166-67 (D.C. Cir. 1995) (upholding as reasonable the FCC's assessment that cable television duopolies may lead to supracompetitive pricing).

Qwest's theoretical argument about high fixed and low marginal costs – divorced from any Phoenix-specific competitive showing – does not suggest otherwise. Qwest (Br. 52-53) dismisses as a "non sequitur" the Commission's observation that Qwest assumed without support that demand for its residential telecommunications services is highly elastic. *See Order* ¶ 86 n.258 (J.A. 1533). But antitrust literature confirms that any feature of the industry that leads firms "to expect a severe price war" if coordinated pricing breaks down, including low

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[56] Qwest suggests in passing (Br. 50 n.28) that the Commission's general concern about collusion in a duopoly environment is inconsistent with its decision to deny forbearance from dominant carrier access charge tariffing requirements, which, Qwest contends, facilitate collusion by publicly announcing rate changes in advance. As the Commission explained, however (*Order* ¶ 112 (J.A. 1543-44)), LECs have effective *monopolies* in connection with a long-distance carrier's access to LEC subscribers and, thus, their market power in that – different – context does not derive from any risk of collusion.

marginal cost relative to market prices, may undermine vigorous competition.[57] Moreover, even absent coordinated pricing, a duopoly would not perform competitively when product differentiation limits the extent to which buyers view each service as a close substitute for the other. *See Order* ¶ 86 n.257 (J.A. 1533); *see also id.* ¶ 30 n.89 (J.A. 1502).

Qwest also contends that, in questioning Qwest's assumption about the elasticity of demand between mass market services offered by telephone and cable companies, the Commission improperly departed from its statement in the *Qwest Omaha Order* that "residential customers are highly demand-elastic." Br. 53 (citing *Qwest Omaha Order* ¶ 33 (J.A. 32)). However, the quoted statement from *Qwest Omaha* is inapposite in this context, because it was based upon findings in the 1995 *AT&T Domestic Nondominance Order*, which dealt with stand-alone long distance services, not the distinct market for local wireline access services at issue here. *See Order* ¶ 53 n.159 (J.A. 1515) (finding that "[s]tand-alone long distance service" is not at issue in this proceeding). In the *Order* on review, moreover, the Commission found that the *Qwest Omaha Order*'s analytical approach was flawed, and explained in detail why it declined to perpetuate that approach. *See Order* ¶¶ 23-40 (J.A. 1498-1510).

At bottom, the Commission did not abuse its discretion in concluding that Qwest had not established that its duopoly with Cox provided sufficient

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[57] Andrew I. Gavil, William E. Kovacic and Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 243 (2d ed. 2008).

competition to exempt Qwest from regulation that otherwise applies to all incumbent LECs.[58] That economic judgment is entitled to deference. *Cablevision*, 597 F.3d at 1314; *EarthLink*, 462 F.3d at 9.

C. Qwest's Remaining Claims Lack Merit.

Qwest finally challenges as arbitrary the Commission's reliance on actual experience in Omaha, following issuance of the *Qwest Omaha Order*, as one reason for reconsidering its analytical approach to forbearance petitions. Br. 54-57. But Qwest errs in contending (Br. 55) that the Commission's conclusions about these developments dealt only with the enterprise market (*i.e.*, the business market) and thus were "irrelevant" to its analysis of the mass market – the focus of Qwest's judicial challenge in this case. In the *Order*, the Commission made clear that the experience in Omaha showed that forbearance had harmed – rather than helped – competition in that market overall: "the record indicates that McLeodUSA" – then the only Omaha competitor "of significant size" other than Cox – "has removed most of its employees from the Omaha marketplace, has

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[58] The BOC Intervenors (but not Qwest) argue that the Commission's ruling was unreasonable because a duopoly is unlikely to lead to supracompetitive pricing where competition involves different technologies and allegedly heterogeneous products. BOC Intervenors Br. 22-23. This claim is not properly before the Court because intervenors may not enlarge the issues presented by petitioners. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 18 (D.C. Cir. 2002). The claim lacks merit in any event. As the Commission explained, product heterogeneity may increase the likelihood of pricing above competitive levels under some models of non-cooperative duopoly behavior. *See Order* ¶ 30 n.89 (J.A. 1502). Economic texts also suggest that product diversity does not rule out possible collusion. *See* Massimo Motta, *Competition Policy: Theory and Practice* 146 (2004).

limited its operations primarily to serving its existing customer base, and has ceased sales of *residential* and nearly all business services in Omaha." *Order* ¶ 34 (J.A. 1505) (emphasis added).

Qwest also asserts that the Commission uncritically accepted McLeodUSA's claim that its withdrawal from the Omaha market was due to the Commission's grant of forbearance in the *Qwest Omaha Order*. Qwest Br. 56 (citing Qwest Reply Comments at 48-49 (J.A. 893-94)). McLeod (later acquired by PAETEC) refuted Qwest's theories about the reasons for the withdrawal, *see* Letter, dated December 11, 2009, from Andrew Lipman to FCC Secretary, at 2-5 (J.A. 1002-05); *Order* ¶ 34 n.107 (J.A. 1505), and the Commission was entitled to rely on its evidence. *See Zoltanski v. FAA*, 372 F.3d 1195, 1200 (10th Cir. 2004) (Court "may not displace the agency's choice between two fairly conflicting views.") (quotation marks and citation omitted). Moreover, evidence before the Commission confirmed that the negative impact of the *Omaha* order on McLeod was not an isolated occurrence. *See Order* ¶ 34 & n.111 (J.A. 1505-06) (citing evidence that another prospective competitor had been contemplating entry into the Omaha market but abandoned its plans to do so following issuance of the order). It was entirely reasonable for the Commission to take account of evidence regarding the Omaha experience in comprehensively revisiting its approach to forbearance.

Finally, Qwest asserts that it is arbitrary and contrary to the statute to impose asymmetrical regulation constraining Qwest, but not Cox, under the duopoly conditions in Phoenix. Qwest Br. 49-50, 53-54. As the Commission stressed, however, that claim is largely a challenge to the wisdom of the underlying statutory scheme that requires incumbent LECs to assist competitive entry, not to the Commission's application of the Act's prerequisites for forbearance. Congress imposed network element unbundling obligations only on incumbent LECs, *see* 47 U.S.C. § 251(c) (imposing the duty to provide unbundled access on "each incumbent local exchange carrier"), and it is undisputed that Cox is not such a carrier, *see id.* § 251(h) (defining "incumbent local exchange carrier"). Given the uncontested fact that Qwest remains the dominant provider of wholesale services in Phoenix, as well as "the lack of evidence of sufficient actual or potential [retail] competition" in that market, the Commission rationally concluded that "the potential competitive harms associated with forbearance outweigh any theoretical benefits arising from regulatory parity." *Order* ¶ 107 (J.A. 1541). Qwest presents no basis on which to set aside that judgment.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

STATEMENT REGARDING ORAL ARGUMENT

We believe that oral argument will assist the Court in resolving the issues in this case.

Respectfully submitted,

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL

KATHERINE B. FORREST
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
/S/ NANCY C. GARRISON
NANCY C. GARRISON

ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

/S/ LAURENCE N. BOURNE
LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

March 18, 2011

IN THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

QWEST CORPORATION PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	))))))))))	NO. 10-9543

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 13897 words.

/s/ Laurence N. Bourne
Laurence N. Bourne
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

March 18, 2011

CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING REQUIREMENTS

I, Laurence N. Bourne, hereby certify that any necessary privacy redactions have been made. I further certify that I have scanned the file for viruses with Symantic End Point Protection Version 11.0.4014.26, last updated January 10, 2011. According to that program, the file is free of viruses.

/s/ Laurence N. Bourne

Laurence N. Bourne

March 18, 2011

<u>STATUTORY APPENDIX</u>

47 U.S.C. § 160
47 U.S.C. § 251(c)(3)
47 U.S.C. § 251(d)(2)
47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility
Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed
In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that

determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance
Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation
Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance
A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 251(c)(3)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

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© Additional obligations of incumbent local exchange carriers
In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

* * * * * *

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

* * * * * *

47 U.S.C. § 251(d)(2)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

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(d) Implementation

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(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

* * * * * *

47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

* * * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Qwest Corporation, Petitioner

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on March 18, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Craig J. Brown Robert B. McKenna Harisha J. Bastiampillai Qwest Corporation 1801 California Street, 10th Floor Denver, CO 80202 *Counsel for: Petitioner*	Jonathan E. Nuechterlein Heather M. Zachary Elvis Stumbergs WilmerHale 1875 Pennsylvania Avenue, N.W. Washington, D.C. 20006 *Counsel for: Petitioner*
Mary C. Albert COMPTEL 900 17 Street, N.W., Suite 400 Washington, D.C. 20006 *Counsel for: COMPTEL*	David C. Bergmann Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, OH 43215-3485 *Counsel for: NASUCA*

Russel M. Blau Bingham McCutchen LLP 2020 K Street, N.W. Washington, D.C. 20006 *Counsel for: Covad Communications Company, et al.*	David P. Murray Thomas Jones Nirali Patel Willkie Farr & Gallagher LLP 1875 K Street, N.W. Washington, D.C. 20006 *Counsel for Cbeyond, Inc. et al.*
Samuel L. Feder Jenner & Block 1099 New York Avenue, N.W. Suite 900 Washington, D.C. 20001 *Counsel for: Cavalier Telephone LLC*	Edward H. Shakin Rashann R. Duvall Verizon 1320 North Courthouse Road Ninth Floor Arlington, VA 22201 *Counsel for: Verizon*
Genevieve Morelli Kelley Drye & Warren LLP Washington Harbour 3050 K Street, N.W. Suite 400 Washington, D.C. 20007 *Counsel for: XO Communications, LLC*	Scott H. Angstreich Jeffrey Matthew Harris Kellogg Huber Hansen 1615 M Street, N.W. Suite 400 Washington, D.C. 20036 *Counsel for: Verizon*
John Bergmayer Harold Feld Public Knowledge 1818 N Street, N.W. Suite 410 Washington, D.C. 20036 *Counsel for: Public Knowledge*	Nancy C. Garrison Catherine G. O'Sullivan U.S. Department of Justice Antitrust Division 950 Pennsylvania Avenue, N.W. Room 3224 Washington, D.C. 20530 *Counsel for: USA*

Peter D. Keisler C. Frederick Beckner, III Brendan James McMurrer Sidley Austin LLP 1501 K Street, N.W. Washington, D.C. 20005 *Counsel for: AT&T Inc.*	Andrew M. Brown Colleen Boothby Levine, Blaszak, Block and Boothby, LLP 2001 L Street, N.W. Suite 900 Washington, D.C. 20036 *Counsel for: Ad Hoc Telecommunications Users Committee*
Marueen A. Scott Arizona Corporation Commission 1200 W. Washington Phoenix, AZ 85007 *Counsel for: Arizona Corporation Commission*	Christopher J. Wright Timothy J. Simeone Joseph C. Cavender Wiltshire & Grannis LLP 1200 18th Street, N.W. Washington, D.C. 20036 *Counsel for: Sprint Nextel Corporation*

/s/ Laurence N. Bourne