

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

In the Matter of	)	
	)	
In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas <sup>1</sup>	)	WC Docket No. 06-172
	)	
	)	
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)	WC Docket No. 07-97
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**JOINT COMMENTS OF THE  
NEW JERSEY DIVISION OF RATE COUNSEL  
AND THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

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<sup>1</sup> / These comments were originally requested in the Qwest Corporation “4 MSA” docket. See Public Notice DA 10-1115 (June 22, 2010). The Qwest 4 MSA Petition was subsequently withdrawn, and that proceeding has been terminated. Public Notice DA 10-1561 (August 20, 2010).

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## SUMMARY

State Advocates commend the FCC for establishing an economically sound, data-based, and rigorous analytical framework, which relies on traditional market power analysis, for reviewing the merits of carriers' petitions for forbearance from unbundling requirements. Furthermore, in response to the questions posed in the FCC's Public Notice, State Advocates recommend that the framework that the FCC applied in the *Qwest Phoenix Forbearance Order* be applied to the pending remands of the Verizon 6 MSA Petition and the Qwest 4 MSA Petition<sup>2</sup> as well as to any future petitions for forbearance.

The FCC also invites industry and other interested parties to update evidence in the pending remand proceedings. Petitioners in those proceedings bear the burden of demonstrating that effective competition exists in properly defined geographic and product markets, and, therefore, State Advocates anticipate that Verizon or Qwest may submit additional information with their initial comments to seek to depict effective competition. State Advocates are prepared to analyze any data that industry may submit in response to the FCC's Public Notice, applying the analytical framework that the FCC established in the *Qwest Phoenix Forbearance Order*. If such information is voluminous, then State Advocates urge the Commission to extend the time frame for reply comments so that interested parties have sufficient time for careful analysis of such information.

State Advocates commend the FCC for its well-reasoned order that, among other things, affords proper weight to actual and potential competition, recognizes the impact

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<sup>2</sup> / As noted on the cover page to these comments, the Qwest 4 MSA proceeding has been terminated.

of carriers' upstream markets on the development of competition in downstream markets,  
and defines geographic and product markets based on well-accepted economic theory.

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

In the Matter of )  
 )  
In the Matter of Petitions of the Verizon ) WC Docket No. 06-172  
Telephone Companies for Forbearance )  
Pursuant to 47 U.S.C. §160(c) in the Boston, )  
New York, Philadelphia, Pittsburgh, )  
Providence and Virginia Beach Metropolitan )  
Statistical Areas )

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**I. INTRODUCTION**

On June 22, 2010, the Federal Communications Commission (“FCC” or “Commission”) released its order denying the petition of Qwest Corporation (“Qwest”) for forbearance from providing unbundled network elements (“UNEs”) in the Phoenix Metropolitan Statistical Area.<sup>3</sup> The Commission also issued a Public Notice seeking “comment on the application of the analytical framework used in the *Qwest Phoenix Forbearance Order* to other, similar requests for regulatory relief, including the pending remands of the *Verizon 6 MSA Forbearance Order* (WC Docket No. 06-172) and the

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<sup>3</sup> / *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 (rel. June 22, 2010) (“Qwest Phoenix Forbearance Order”).

*Qwest 4 MSA Forbearance Order* (WC Docket No. 07-97).”<sup>4</sup> The New Jersey Division of Rate Counsel (“Rate Counsel”) and the National Association of State Utility Consumer Advocates (“NASUCA”) (collectively, “State Advocates”) hereby submit these comments to support the Commission’s application of a data-based and rigorous analytic framework to its assessment of all forbearance petitions, especially those involving UNE unbundling, and to support the FCC’s rejection, on remand, of two separate requests for forbearance (the Verizon 6 MSA Petition and the Qwest 4 MSA Petition).

## **II. INTEREST OF NASUCA AND THE RATE COUNSEL IN THIS PROCEEDING.**

NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

Rate Counsel, a member of NASUCA, is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential,

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<sup>4</sup> / Public Notice, “Wireline Competition Bureau Seeks Comment on Applying the *Qwest Phoenix Forbearance Order* Analytic Framework in Similar Proceedings,” WC Docket Nos. 06-172, 07-97, DA 10-1115, June 22, 2010 (“Public Notice”). As noted above, the 07-97 proceeding has been terminated.

business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings.

The above-captioned proceedings are germane to NASUCA's and Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.<sup>5</sup> Consumers and their representatives have a stake in the FCC's deliberations regarding the existence and status of competition in relevant telecommunications markets. State Advocates have been active participants in several proceedings initiated by the Commission to review specific carrier requests for forbearance as well as the Commission's proceeding regarding procedural rules to govern forbearance proceedings.<sup>6</sup> State Advocates welcome the opportunity to respond to the Commission's

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<sup>5</sup> / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

<sup>6</sup> / Most recently (on April 29, 2010), State Advocates filed comments in response to the FCC's request for comments on the analytic framework that the FCC should apply in its examination of the request for forbearance sought by Qwest from certain regulatory obligations within the Phoenix, Arizona Metropolitan Statistical Area ("MSA") pursuant to 47 U.S.C. § 160 and more generally in its examination of requests for forbearance submitted by incumbent local exchange carriers ("ILECs"). FCC Public Notice DA 10-647, "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," April 15, 2010. Also, see, e.g., In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas; Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket Nos. 06-172; 07-97, Comments of the National Association of State Utility Consumer Advocates on Remand (September 21, 2009) ("State Advocates Remand Comments"); Reply Comments of the National Association of State Utility Consumer Advocates on Remand (October 21, 2009) ("State Advocates Remand Reply Comments"); In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket 06-172 ("06-172"), Comments of the National Association of State Utility Consumer Advocates, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Virginia Office of Attorney General, the Maryland Office of People's Counsel, the New Jersey Division of Rate Counsel, the New Hampshire Office of Consumer Advocate and the Connecticut Office of Consumer Counsel (March 5, 2007) ("State Advocates Comments"); Reply Comments of the National Association of State Utility Consumer Advocates, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Virginia Office of Attorney General, the Maryland Office of People's Counsel, the New Jersey Division of Rate

Public Notice and support the Commission’s well-executed efforts, reflected in the recent *Qwest Phoenix Forbearance Order*, to apply an economically sound and comprehensive analytic framework to the assessment of evidence regarding the development of competition in relevant geographic and product markets. The design and application of a well-reasoned analytical framework to specific evidence about particular geographic and product markets ensures that consumers may benefit from the development of effective competition and be protected from incumbent local exchange carriers’ market power.

Forbearance petitions have the potential to affect consumers in many ways. The Commission’s current rules, include, among others, rules that ensure access to public data regarding telecommunications infrastructure, service quality and the financial condition of telecommunications carriers; rules that govern network unbundling obligations to ensure that competition develops; and rules to ensure non-discriminatory and just and reasonable rates. Forbearance petitions have covered a broad spectrum of Commission rules, including:

- Cost assignment rules;
- Reporting requirements;
- Dominant carrier regulations (federal tariff filings; price cap regulations; discontinuance);
- Computer III and ONA requirements;
- Title II and *Computer Inquiry* Rules (broadband); and
- Loop and transport unbundling requirements, as in these proceedings.

As State Advocates discuss in these comments, the FCC’s analysis of market power, included in the *Qwest Phoenix Forbearance Order*, properly relies on “a more

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Counsel, the New Hampshire Office of Consumer Advocate, and the Connecticut Office of Consumer Counsel (April 18, 2007) (“State Advocates Reply Comments”).

comprehensive analytical framework” that is described as a “traditional market power framework.”<sup>7</sup>

### III. STATUS OF FORBEARANCE PROCEDURES AND PETITIONS

#### A. *Congressional Standards and FCC’s Procedures for Forbearance Petition Review*

The standards established by Congress by which the Commission must evaluate forbearance petitions are high, indicating that Congress did not intend for the Commission to “rubber stamp” such requests. Section 10 of the Act includes a three-part test that governs whether the Commission shall forbear from applying any regulation or provision of the 1996 Act. The section states that:

[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or a 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.<sup>8</sup>

As the Commission has explained,

The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied. Thus, the Commission “could properly deny a petition for forbearance if it finds that

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<sup>7</sup> / *Qwest Phoenix Forbearance Order*, at para. 37.

<sup>8</sup> / 47 U.S.C. § 160(a) (emphasis added).

any one of the three prongs is unsatisfied.”<sup>9</sup>

Further, the Commission must also follow the requirement of Section 10(b) that in making a determination of whether forbearance is in the public interest, 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.”<sup>10</sup>

A year ago, the FCC provided specific guidance regarding its review of forbearance petitions. After seeking and receiving comments from diverse entities, on June 26, 2009 the Commission adopted the *Forbearance Procedures Order*, which set forth rules for considering forbearance petitions under Section 10 of the Communications Act of 1934, as amended.<sup>11</sup> The new rules include a “complete as filed” requirement “consistent with the principle that whenever a petitioner files a petition for forbearance, the petitioner bears the burden of proof with respect to establishing that the statutory criteria for forbearance are met.”<sup>12</sup> Petitioners may not withdraw or “significantly

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<sup>9</sup> / *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21294 (2007) (*Verizon 6 MSA Forbearance Order*), at para. 20, quoting *Cellular Telecommunications & Internet Assoc. v. Federal Communications Commission*, 330 F.3d 502, 509 (D.C. Cir. 2003), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009),. See also *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125, para. 12 (2007).

<sup>10</sup> / 47 U.S.C. §160(b).

<sup>11</sup> / *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56, released June 29, 2009 (“Forbearance Procedures Order”). Most of the new rules became effective on September 8, 2009 (the new rule 1.54, “Petitions for forbearance must be complete as filed,” which required approval of the Office of Management and Budget, took effect later). Public Notice, “Notice of Effective Date of New Forbearance Rules,” WC Docket No. 07-267, DA 09-1852, August 24, 2009.

<sup>12</sup> / *Id.*, at para. 1. See, also, *id.*, at para. 20 for the FCC’s reasoning that the Petitioner bears the burden of proof. The FCC states that the burden of proof includes both “burden of production” and “burden of persuasion.” *Id.*, at para. 21.

narrow” a petition after the tenth day following reply comments without FCC authorization.<sup>13</sup> The FCC describes its new procedures as ensuring that forbearance petitions are “addressed in a timely, equitable and predictable manner” and that review will be “frontloaded, actively managed, transparent, and fair.”<sup>14</sup> The Report and Order also sets out standards regarding initial FCC Bureau review and summary denial and procedures for public notice.<sup>15</sup> The FCC declined to amend its rules with respect to proprietary data and declined to adopt a rule with respect to state commission requests for data.<sup>16</sup>

***B. Verizon 6 MSA and Qwest 4 MSA Forbearance Orders***

On September 6, 2006, the Verizon Telephone Companies (“Verizon”) filed six separate petitions with the FCC seeking forbearance from a multitude of FCC regulations and other current obligations.<sup>17</sup> The six petitions pertained individually to the Philadelphia, Pittsburgh, Boston, Providence, New York City and Virginia Beach Metropolitan Statistical Service Areas (“MSAs”). State Advocates and other individual member advocate offices submitted comments and reply comments opposing Verizon’s

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<sup>13</sup> / *Id.*, at para. 21.

<sup>14</sup> / *Id.*, at para. 1.

<sup>15</sup> / *Id.*, at paras. 28-29.

<sup>16</sup> / *Id.*, at para. 39.

<sup>17</sup> / The six Petitions Verizon filed had substantially the same structure and discuss substantially the same issues. Rather than citing each of the six Petitions, these comments will principally cite Verizon’s Petition for forbearance in the Philadelphia MSA (“Verizon Philadelphia Petition”), with the understanding that Verizon took the same position in the other five Petitions. *See generally* Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Boston Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Providence Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York City Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon New York City Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006).

petitions for forbearance,<sup>18</sup> and subsequently several NASUCA members met with the Commission to discuss further their concerns with Verizon's petitions.<sup>19</sup> Also, on November 30, 2007, NASUCA and several member agencies submitted an *ex parte* letter to the FCC, opposing the petition and providing additional recommendations for the proper analytic framework for analyzing Verizon's petitions for forbearance.

On appeal, the *Verizon 6 MSA Forbearance Order* was remanded by the D.C. Circuit Court of Appeals in *Verizon v. FCC*, which faulted the Commission for failing to explain why it had departed from its previous practice of considering potential competition in its analysis. Specifically, the Court stated that the FCC had:

changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace. **The flaw is not in this change, but rather in the FCC's failure to explain it.** In the *Order*, the FCC without explanation applied these newly dispositive factors as if that had always been its method of competitiveness analysis.<sup>20</sup>

The Court further found that it was "arbitrary and capricious" to apply a market share test that "considered only actual, and not potential, competition in the marketplace," departing from prior decisions without explanation.<sup>21</sup> The Court generally rejected

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<sup>18</sup> / See footnote 6, *supra*.

<sup>19</sup> / See Ex parte letter from Joel Cheskis, Assistant Consumer Advocate, Pennsylvania Office of Consumer Advocate to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, November 7, 2007 ("NASUCA Nov 7 2007 Ex Parte") and Ex parte letter from Joel Cheskis, Assistant Consumer Advocate, Pennsylvania Office of Consumer Advocate to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, November 13, 2007 ("NASUCA Nov 30 2007 Ex Parte").

<sup>20</sup> / *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) ("*Verizon v. FCC*") (citations omitted, emphasis added).

<sup>21</sup> / FCC Public Notice, "Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order," August 20, 2009, citing *Verizon v. FCC*, at 18.

Verizon's other arguments. The Court remanded the case to the Commission "on the limited ground of the FCC's unexplained departure from its precedent."

Similarly, the FCC had rejected a petition by Qwest for forbearance in four MSAs.<sup>22</sup> On August 5, 2009, the D.C. Circuit Court remanded the *Qwest 4 MSA Forbearance Order* at the request of the FCC.<sup>23</sup> As noted above, the Qwest 4 MSA proceeding has been terminated.

The FCC sought comment in response to the remands of the *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order* in response to the guidance provided by the D.C. Circuit in *Verizon v. FCC*. Those comments and reply comments were due September 21, 2009 and October 6, 2009, respectively.<sup>24</sup> In its *Qwest Phoenix Forbearance Order*, the FCC amply and adequately addresses the concerns raised by the Court, and explains fully and reasonably its departure from prior decisions.<sup>25</sup>

#### **IV. ISSUES RAISED BY PUBLIC NOTICE**

##### ***A. Analytic Framework for Reviewing UNE Forbearance Petitions***

###### *1. Overview*

The FCC seeks comment on applying the analytical framework that it used in the *Qwest Phoenix Forbearance Order* to other similar requests for relief from unbundling

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<sup>22</sup> / *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11730, para. 1 (2008) (*Qwest 4 MSA Forbearance Order*), motion for voluntary remand granted, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir., Aug. 5, 2009).

<sup>23</sup> / FCC Public Notice, "Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order," August 20, 2009. The FCC had requested that the Court remand the decision on July 17, 2009.

<sup>24</sup> / *Id.*

<sup>25</sup> / See, e.g., *Qwest Phoenix Forbearance Order*, at paras. 23-40.

requirements, including the pending remands of the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Orders*.<sup>26</sup>

In the *Qwest Phoenix Forbearance Order*, the Commission concluded that there is a more appropriate framework for considering forbearance petitions than that utilized in its *Qwest Omaha Forbearance Order* “[w]ith the benefit of hindsight and upon further consideration.”<sup>27</sup> Regarding the *Qwest Omaha Forbearance Order*, the FCC stated: “Although requests for forbearance from different statutory requirements or rules might correctly focus on competition for different products and services, the order [did] not adequately explain why it is appropriate to use fundamentally different analytical methodologies to evaluate competition for purposes of unbundling relief versus relief from dominant carrier regulation.”<sup>28</sup> The FCC described the *Qwest Omaha Forbearance Order* as essentially a two-part test: first, whether the petitioner’s share of the retail mass market had dropped below a certain level and second, whether an alternative (the cable company’s) network reached a certain percentage of end user locations in a wire center.<sup>29</sup> The FCC concluded in the *Qwest Phoenix Forbearance Order* that neither part of the test fully analyzes the absence or presence of market power.<sup>30</sup>

State Advocates concur with the FCC’s analysis that the first part of the test failed to examine whether the petitioner could control price and to assess other relevant markets beyond the mass market retail voice market. Furthermore, State Advocates strongly

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<sup>26</sup> / Public Notice, at 2.

<sup>27</sup> / *Qwest Phoenix Forbearance Order*, at para. 24, referring to *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (*Qwest Omaha Forbearance Order*).

<sup>28</sup> / *Qwest Phoenix Forbearance Order*, at para. 25.

<sup>29</sup> / *Id.*, at para. 27.

<sup>30</sup> / *Id.*, at para. 28.

support the FCC’s conclusion that the second part of the test (whether the cable company served end-users in a wire center) “inappropriately assumed that duopoly always constitutes effective competition and is necessarily sufficient to to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers.”<sup>31</sup> State Advocates also concur with the FCC’s finding that the predictive judgments (*i.e.*, the prior reliance on “potential competition”) that it made in the *Qwest Omaha Forbearance Order* to counter concern regarding duopolistic competition have simply not been borne out.<sup>32</sup>

State Advocates fully support the FCC’s application of the well-reasoned and economically sound analytical framework that the FCC sets forth in the *Qwest Phoenix Forbearance Order* to the pending remands as well as to future forbearance petitions. State Advocates further concur that the analytical approach is superior to the one that the FCC applied in the *Qwest Omaha Forbearance Order*, which, among other things, relied excessively on predictive judgments.<sup>33</sup>

State Advocates will not in these comments identify all the many aspects of the FCC’s framework with which they agree. But they identify, for example, the following aspects, which, in State Advocates’ view, comport with sound economic theory, and that also enable the Commission to address future, continuing dynamic changes in the industry while protecting consumers from carriers’ market power:

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<sup>31</sup> / *Id.*, at para. 29. See, also, *id.*, at para. 30 stating: “We thus find that the move from monopoly to duopoly is not alone necessarily sufficient to justify forbearance in proceedings such as this one.”

<sup>32</sup> / *Id.*, at paras. 33-34.

<sup>33</sup> / *Id.*, at paras. 24, 34-36.

- The FCC used a traditional market power analysis, differentiates among various retail services and wholesale services, and assesses competition within localized geographic areas.<sup>34</sup>
- The FCC “returned to a competitive analysis that more carefully defines the relevant product and geographic markets.”<sup>35</sup>
- The FCC recognized that in analyzing the Omaha market, it “inappropriately assumed that a duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable and nondiscriminatory rates and practices and to protect consumers.”<sup>36</sup>
- The FCC properly determined that services offered to mass market services include separate product markets, including local voice, bundled local and long distance voice, broadband Internet access service, and bundled voice and broadband Internet access service.<sup>37</sup>
- The FCC concluded that it appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service”<sup>38</sup> and that “mobile wireless-only customers should be included in calculating residential voice market shares only upon a showing that residential mobile wireless service constrains the price of residential wireline service.”<sup>39</sup>

State Advocates support the FCC’s decision in the *Qwest Phoenix Forbearance Order* to use the more comprehensive antitrust-based analysis that will “ensure that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.”<sup>40</sup> State Advocates concur with the FCC that its analysis “is well-designed to protect consumers, promote competition, and stimulate innovation by thoroughly analyzing competitive developments.”<sup>41</sup> State Advocates have consistently recommended that the FCC conduct a traditional market power analysis, and commend the FCC for establishing a framework that provides better protection against

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<sup>34</sup> / *Id.*, at paras. 1, 37-38.

<sup>35</sup> / *Id.*, at para. 21.

<sup>36</sup> / *Id.*, at para. 29. See generally *id.*, at paras. 29-32.

<sup>37</sup> / *Id.*, at para.53.

<sup>38</sup> / *Id.*, at para.59.

<sup>39</sup> / *Id.*, at para.61, citation omitted.

<sup>40</sup> / *Id.*, at para.40.

<sup>41</sup> / *Id.*, at para. 3.

the market power of incumbent carriers, while also providing sufficient flexibility to recognize and encourage competition in changing telecommunications markets.

2. *Petitioners should bear the burden of updating the record with additional data.*

Petitioners bear the burden of proof to demonstrate that they have met all the standards for forbearance and to delineate specifically the rules from which they seek forbearance. For example, in 06-172, State Advocates stated:

The regulations from which Verizon seeks forbearance are identified only in a footnote in Verizon's Petitions, and are not mentioned again anywhere in the Petitions or the accompanying Declarations, which focus on issues relating to competition. However, these regulations have a substantial impact on consumers' daily use of their telecommunications services. Verizon fails to differentiate its forbearance requests from Qwest's, when in fact they are very different. In so doing, Verizon evades its burden to present a prima facie case justifying forbearance for each regulation in each exchange, and attempts to place the burden on the Commission and other commenting parties to discern the impact forbearance from these regulations would have on consumers in these distinct markets.<sup>42</sup>

As noted by State Advocates, "The tests required in sections 160(a) and 160(b) are conjunctive. [The ILEC] must pass *each* test for *each* regulation in *each* relevant geographic market for which the Company requested forbearance."<sup>43</sup>

The FCC "encourage[s] the petitioners in the remand proceedings, and other interested persons, to update the record in each of those proceedings with additional data and other evidence."<sup>44</sup> State Advocates urge the Commission to require the petitioners, should they decide to update the records, to provide detailed, wire center-specific data and product-specific data in electronic formats that enable other parties to conduct

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<sup>42</sup> / 06-172, State Advocates Comments at 16-17.

<sup>43</sup> / *Id.*, at 8 (emphasis in original).

<sup>44</sup> / Public Notice, at 2.

independent analyses of the evidence.<sup>45</sup> Data must be sufficiently granular to enable analysis of relevant product markets within relevant geographic markets. These data should be made available in a timely manner to interested parties subject to any necessary protective agreements. If, instead, petitioners rely on general characterizations of market conditions, the FCC should reject such data as deficient.

3. *Granting forbearance petitions prematurely poses substantial risks of harm to consumers.*

State Advocates urge the Commission to resist the likely onslaught of industry pleas for expeditious review and approval of forbearance petitions. The burden is not on the Commission to attempt to “find” competition where it does not yet exist, but rather is on petitioners to comprehensively demonstrate the presence of effective competition in well-defined geographic and product markets. The analytic framework that the Commission adopted in the *Qwest Phoenix Forbearance Order*, should be applied to pending and future petitions, and should not prioritize a hasty review. Rather, the framework should recognize that consumers, who lack the resources and lobbying capabilities of industry, bear the brunt of unnecessarily and improperly rushed deliberations regarding forbearance petitions. Once granted, forbearance is unlikely to be

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<sup>45</sup> / For example, in a pending proceeding before the Massachusetts Department of Telecommunications and Cable, Verizon Massachusetts provided Competitive Profiles, which provide, among other data, estimated market shares (both residential and total) of its competitors in each wire center in Massachusetts. The Competitive Profiles for the years 2004 through 2009 were provided on a proprietary basis in response to discovery requests of the Massachusetts Office of the Attorney General. Verizon Massachusetts files the Competitive Profiles each year as part of its compliance with the requirements of its alternative regulation plan (D.T.E. 01-31). See *In re Verizon Service Quality in Western Massachusetts*, D.T.C. 09-1, Pre-Filed Rebuttal Testimony of Susan M. Baldwin on behalf of the Office of the Attorney General, February 24, 2010, at 63, citing Verizon MA response proprietary response AG-VZ 3-76 and AG-VZ 9-15. See, also, Massachusetts Department of Telecommunications and Cable Competition Status Report, February 12, 2010, available at [http://www.mass.gov/Eoca/docs/dtc/compreport/CompetitionReport\\_Combined.pdf](http://www.mass.gov/Eoca/docs/dtc/compreport/CompetitionReport_Combined.pdf).

revoked, and therefore alters the landscape permanently, affecting current and future consumers' options in telecommunications markets.

4. *The FCC has appropriately afforded little weight to speculations about future consumer demand and industry supply.*

The FCC's analytic framework, set forth in the *Qwest Phoenix Forbearance Order*, properly establishes criteria that should ensure that the FCC rejects outright industry speculations about the future. Predictions about the future are not compatible with a data-driven, rigorous analytic framework; they can be wrong! Instead, the Commission is correct in its reliance on actual market statistics.<sup>46</sup>

5. *The Commission should encourage state commission input as an integral element of its analytic framework.*

As acknowledged in both the Section 271 of the 1996 Act and Triennial Review Remand proceedings, state commissions have unique insight regarding the status of local competition and other regulatory issues that the Commission does not have. As stated by NASUCA in the *Verizon Six MSA* proceeding:

Although the delegation to states that the Commission set forth in its original *Triennial Review Order* regarding impairment was vacated, the methodology that the Commission originally established to guide states' fact-finding continues to be valid and indeed would provide a rational and sound basis for the Commission to assess the merits of ILECs' petitions for forbearance regarding unbundling obligations. Furthermore, as *USTA II* recognized, state regulators' fact-finding experiences can inform Commission policy.<sup>47</sup>

States and the Commission have traditionally worked collaboratively on matters of interstate and intrastate regulation and oversight of telecommunications services and infrastructure as well as on promoting competition in telecommunications markets. The

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<sup>46</sup> / See, e.g., *Qwest Phoenix Forbearance Order*, at paras. 24-40.

<sup>47</sup> / NASUCA Nov 30 2007 Ex Parte, at 3, citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (the FCC's decision-making process may be aided by state commission "fact gathering" as well as "advice").

Commission should continue to support that collaborative approach with respect to issues of forbearance. Many of the forbearance petitions deal directly with states' access to information and their ability to carry out regulatory responsibilities.

6. *ILECs continue to possess market power in relevant markets.*

The FCC properly found that Verizon and Qwest possess market power in the 6-MSA and 4-MSA areas for which the two carriers sought forbearance. Indeed, the D.C. Circuit did not find that the FCC's conclusions or calculations were in error, but rather faulted the FCC for failing to explain its departure from its earlier analytic framework. As the FCC found in the *Qwest Phoenix Forbearance Order*, ILECs continue to exert control over bottleneck local facilities. Regulatory accountability continues to be necessary to protect consumers and competitors from incumbent local carriers' anticompetitive behavior.

Ultimately, it is not the responsibility of the Commission, but rather is the responsibility of forbearance petitioners to demonstrate that the standards of Section 10 are met. In his statement accompanying the *Verizon Six MSA Order*, Commissioner Adelstein observed that the types of data utilized to analyze competitive conditions needs improvement:

There will always be imperfections in the data available to outside parties, but I would have preferred that the Commission take a finer look at specific geographic and product markets in this Order. In a welcome break from many recent Commission Orders, this Order does not place unwavering reliance on "predictive judgments" about our hopes for the development of competition but, instead, takes a closer look at the facts on the ground. In order to restore integrity to the forbearance process, the Commission simply must require petitioners to come forward with credible evidence regarding competitive conditions for the products and markets at issue.<sup>48</sup>

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<sup>48</sup> / *Verizon Six MSA Order*, Statement of Commissioner Jonathan S. Adelstein, Concurring.

The FCC’s Qwest Phoenix Forbearance Order “restore[s] integrity to the forbearance process.”

7. *The FCC appropriately found that wireless service does not yet constrain the price of wireline service.*

The FCC has appropriately recognized that statistics regarding the proportion of households subscribing to wireless service or the number of households that subscribe only to wireless service (rather than any wireline service) are not a sufficient indicator of whether an ILEC possesses market power. First, the framework must properly define the relevant product market. To do so, the FCC must determine whether potential substitution of wireless service for wireline service constrains the price of wireline service.<sup>49</sup>

The FCC stated in the *Qwest Phoenix Forbearance Order*: “Consistent with the more comprehensive analytic approach we use here, we conclude that mobile wireless-only customers should be included in calculating residential voice market shares only upon a showing that residential mobile wireless service constrains the price of residential wireline service.”<sup>50</sup> State Advocates concur with the FCC’s analysis that estimates of wireless-only households

cannot alone establish whether mobile wireless services should be included in the same relevant product market as residential wireline voice service. Knowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price-constraining effect on wireline access services. Moreover, while we acknowledge that the number of customers that rely solely on mobile wireless service has been growing steadily, we find that other reasons may explain the growth in the number of wireless-only customers, besides an increasing cross-elasticity of demand between mobile wireless and wireline services. For example, nationwide statistics

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<sup>49</sup> / *Qwest Phoenix Forbearance Order*, at para. 56 (footnote omitted).

<sup>50</sup> / *Id.*, at para. 61 (footnote omitted).

published by the CDC suggest that the choice to rely exclusively upon mobile wireless services could be driven more by differences in consumers' age, household structure, and underlying preferences than by relative price differentials. Furthermore, just as some customers may rely solely on mobile wireless service regardless of the price of wireline service, several classes of customers appear unlikely to drop wireline service in response to a significant price increase, including those who: (a) value the reliability and safety of wireline service; (b) value a single point of contact for multiple household members; (c) live in a household with poor wireless coverage; (d) operate a business out of their home and believe that wireline service offers better reliability and sound quality; or (e) desire a service that is more economically purchased when bundled with a local service (e.g., wireline broadband Internet service, or a video service). Indeed, because the record reflects that the majority of residential customers continue to subscribe to both mobile wireless and wireline services, it appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.<sup>51</sup>

State Advocates anticipate that incumbents will provide updated information regarding quantities of “cord-cutters” (“access substitution”) and will discuss the growth in total wireless usage (“usage substitution”), as purported evidence of competition. State Advocates do not deny consumers' increasing dependence on and use of wireless telephones. State Advocates concur with the Commission that most consumers view wireless as a supplement to rather than substitute for wireline service, and that there is no evidence that wireless service constrains the price of wireline service. The vast majority of households continue to rely on the public switched telephone network for ordinary usage, as well as access to emergency and other services. Until this strong and undeniable consumer preference for retaining a wireline connection for communication diminishes substantially, the FCC should conclude simply that the United States may be in a transition to a wireless-dominated society, but is still many years from such a state.

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<sup>51</sup> / *Id.*, at para. 59 (footnotes omitted).

The FCC has appropriately focused on whether wireline carriers currently retain market power.

Assessment of wireless-only data must focus on whether such substitution is in response to an increase in price for wireline voice service. As the FCC correctly recognizes, “[t]he fundamental question in a traditional product market definition exercise is whether mobile wireless access service constrains the price of wireline access service.”<sup>52</sup> Typically, it does not. It would be analytically imprudent to rely on the presence of wireless suppliers as evidence of price constraining competition.<sup>53</sup>

Also, in many instances a local exchange carrier is “competing” with its wireless affiliate. For these reasons, and others discussed in more detail in previous State Advocate filings, State Advocates concur with the FCC’s conclusions in the *Qwest Phoenix Forbearance Order* regarding the minimal weight that should currently be afforded wireless service in assessing the status of competition in relevant markets.

8. *The fact that some consumers subscribe to bundled offerings does not provide market discipline for those who rely on unbundled basic local exchange service.*

State Advocates anticipate that incumbents may submit data and arguments about growing demand for cable service in an effort to conjure up an appearance of effective

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<sup>52</sup> / *Qwest Phoenix Forbearance Order*, at para. 56.

<sup>53</sup> / On May 20, 2010, the FCC released its 14<sup>th</sup> Annual Report on Mobile Wireless Competition in which it failed to find that there was effective competition in the wireless telecommunications market for the first time since a finding of effective competition in its 8<sup>th</sup> Annual Report in 2003. The Report cited increasing competition and calculated large EBITDA margins. See, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66 (Terminated), *Fourteenth Report*, rel. May 20, 2010, at paras. 3 and 6 (citations omitted). Of course, from the perspective of forbearance proceedings regarding wireline regulation, concentration in the wireless market is not relevant if wireless telecommunications services are not in the same product market. However, should the FCC find that wireless telecommunications services are in the same relevant product market for the purpose of forbearance proceeding, the FCC should consider the effect concentration in the wireless market has on its forbearance analysis.

local competition. The FCC’s analytic framework, however, properly recognizes that triple play bundles, whether double-, triple- or quadruple-play, do not represent an economic substitute for basic local exchange service. State Advocates concur with the FCC for various reasons, including the fact that bundled rates are typically higher than are those for basic local service, and also because bundled offerings may not be available in all relevant geographic markets. Furthermore, bundled offerings may be available from only two providers, which, typically does not yield effective competition. As the FCC explains in the *Qwest Phoenix Forbearance Order*, there is no evidence that the duopolies that now exist in telecommunications markets provide effective competition.<sup>54</sup> State Advocates concur with the FCC’s findings in the *Qwest Phoenix Forbearance Order* that bundles of local and long distance service and bundles of voice and broadband services, for example, fall into different product markets than basic local exchange service.<sup>55</sup>

9. *Where petitioners lack market power for some but not all of the relevant products under consideration in a forbearance petition, the FCC should direct petitioners to resubmit narrower petitions, consistent with such findings.*

The FCC seeks “comment on the policy and administrability questions posed” when “the evidence in a particular forbearance proceeding may indicate that the petitioner lacks market power for some but not all of the relevant products under consideration.”<sup>56</sup> The FCC further seeks comment “on the best ways accurately and effectively to tailor regulatory relief to the particular services in a particular market that

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<sup>54</sup> / *Qwest Phoenix Forbearance Order*, at para. 82.

<sup>55</sup> / *Id.*, at para. 53.

<sup>56</sup> / Public Notice, at 2, citing *Qwest Phoenix Forbearance Order*, at para. 44.

are subject to competition and meet the section 10 criteria.”<sup>57</sup> State Advocates recommend that in such instances, the FCC reject the petition as filed and direct the petitioner to file a revised and narrower petition, consistent with the FCC’s findings, for review on an expedited basis. The requirement for refiling of petitions will deter the filing of excessively broad petitions at the outset.

***B. Evidence Regarding the State of Competition***

*1. Overview*

In its Public Notice, the FCC recognizes that, because “the state of competition may vary from area to area and from market to market,” the result of applying the market power analysis that it uses in the *Qwest Forbearance Order* may vary depending on “differing evidence regarding the state of competition.”<sup>58</sup> State Advocates concur that in order to determine the merits of any individual carrier’s petition for forbearance, the FCC’s analytic framework must be applied to the evidence regarding specific, relevant geographic and product markets. As stated above, carriers bear the burden of providing evidence at a sufficiently detailed level so as to support their petitions for forbearance.

*2. State Advocates intend to examine any updated evidence that petitioners in the remand proceeding and other interested parties submit.*

The FCC “encourage[s] the petitioners in the remand proceedings, and other interested parties, to update the record in each of those proceedings with additional data and other evidence that would show whether forbearance is warranted under this analytic

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<sup>57</sup> / *Id.*, at 2, citing *Qwest Phoenix Forbearance Order*, at para. 44.

<sup>58</sup> / *Id.*, at 2.

framework.”<sup>59</sup> Again, Petitioners bear the burden of providing relevant evidence and, furthermore, industry (petitioners and competitors) possesses relevant detailed market-specific data (which are not readily accessible to consumers). Therefore, State Advocates’ focus will be on the analysis of data and information that other parties, especially Petitioners, submit with their initial comments.<sup>60</sup> The volume of data that parties submit, and the lag in time between the request for, and the access to, information that industry may consider to be confidential are unknown. Therefore, State Advocates urge the Commission, after it receives the initial comments, to ensure that the one-month time period between the filing of initial comments and the date for filing reply comments allows adequate time for rigorous review of the evidence submitted by interested parties.

If Qwest had not withdrawn its petition, State Advocates would have urged the Commission to consider carefully the impact, if any, of the pending CenturyLink-Qwest transaction<sup>61</sup> on the market power that the new post-transaction entity would possess in the markets encompassed by the Qwest 4 MSA petition. This will be relevant if CenturyLink refiles for the non-Phoenix MSAs.

## V. CONCLUSION

State Advocates welcome the opportunity to comment on the proper analytical framework for the FCC’s review of forbearance petitions and may, depending on others’ initial comments, apply the FCC’s analytical framework to updated industry-provided

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<sup>59</sup> / *Id.*, at 2.

<sup>60</sup> / As noted above, Qwest has withdrawn its petition.

<sup>61</sup> / On May 10, 2010, CenturyTel, Inc. d/b/a CenturyLink (“CenturyLink”) and Qwest Communications International Inc. (“Qwest”) submitted an application to the FCC for consent to transfer of control. Qwest Communications International Inc., Transferor, and CenturyTel, Inc. d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended (filed May 10, 2010). On May 20, 2010, the transferee’s company name changed to CenturyLink, Inc. *Id.*, at 38, n. 63.

evidence regarding specific product and geographic markets. State Advocates support the FCC’s analytically rigorous and data-based decisions regarding the Verizon 6 MSA Petition and the Qwest 4 MSA Petition, support the market power framework set forth in the *Qwest Phoenix Forbearance Order*, and are confident that a more complete explanation by the FCC of the analytical approach it is applying in its forbearance deliberations will address the Court’s concerns. State Advocates further support the FCC’s objective “to ensure complete records so that forbearance can be granted in cases where the petitioner has demonstrated that sufficient competition exists to meet the statutory criteria.”<sup>62</sup>

Respectfully submitted,

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<sup>62</sup> / Public Notice, at 3.

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