
THE EVOLUTION OF FEDERAL COMMUNICATIONS COMMISSION FORBEARANCE ORDERS: FROM OMAHA TO PHOENIX

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I. INTRODUCTION

The Telecommunications Act of 1996 (“Act”) grants the Federal Communications Commission (“FCC” or “Commission”) the power to decide whether to apply or to forbear from applying certain provisions of the Act to regulated entities.¹ Section 10, which outlines the Commission’s forbearance authority, does so in general terms.² The FCC, being an expert agency, may choose different modes of analysis to carry out its statutory mandate. This article explores the Commission’s marked shift in the analysis it uses to evaluate a request by an incumbent local exchange carrier (“ILEC”) for Section 10 forbearance from an unbundled network element (“UNE”) obligation.³

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¹ The Telecommunications Act of 1996 amended the Communications Act of 1934 to add Section 10, which outlines the criteria the Commission may use to forbear from applying any of its regulations to telecommunications carriers. Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128-29 (1996) (codified at 47 U.S.C. § 160 (2006)).

² *See id.*

³ *See* 47 U.S.C. § 251 (2006) (outlining the interconnection requirements of telecommunications carriers). UNE obligations were created to encourage competition in the telephone market, which is characterized by very high up-front costs to build the physical facilities of a network. The Act requires incumbent telecommunications carriers (*i.e.*, telephone companies) to make certain elements of their physical telephone network facilities available to their competitors. *Id.* § 251(c). This allows competitors to offer telephone service at a lower up-front cost, because they do not have to build all of the necessary infrastructure to reach customers. However, recognizing that competitors could

Two approaches are at issue: the *Omaha Forbearance Order* of 2005,⁴ and the *Phoenix Forbearance Order* of 2010.⁵ Both decisions arose from petitions by Qwest Corporation (“Qwest”) for forbearance from its interconnection obligations under Section 251 of the Act.⁶ Specifically, Qwest argued that competition for telecommunications services in the Omaha, Nebraska and Phoenix, Arizona market areas had increased sufficiently that it should no longer have to make certain elements of its telephone network available to its (non-incumbent) competitors.⁷ The *Omaha* approach utilized a comparative analysis that took into account the state of competition between the incumbent and competitive carriers, including factors such as the level of retail competition.⁸ The *Phoenix* approach, which is the FCC’s modern approach, utilizes fewer variables, concentrating on a market power analysis.⁹ The FCC argues that this is consistent with standard antitrust analysis.¹⁰ Critics are skeptical of the FCC’s characterization: one questions the rigor of its analysis,¹¹ and another believes that it creates a situation in which a grant of forbearance will be impossible.¹²

eventually become large enough to build their own facilities, Congress gave the FCC the power to deregulate competitive markets through Section 10 forbearance orders. *Id.* § 160. But, because Congress did not specifically state when deregulation is appropriate, it is up to the Commission to decide when markets are competitive enough to warrant deregulation. *Id.* As this article will demonstrate, the Commission has experienced growing pains as it discovers the best way to evaluate forbearance petitions.

⁴ *In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, 20 F.C.C.R. 19,415 (2005) [hereinafter *Omaha Forbearance Order* or *Omaha Order*].

⁵ *In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Memorandum Opinion and Order*, 25 F.C.C.R. 8622 (2010) [hereinafter *Phoenix Forbearance Order* or *Phoenix Order*].

⁶ 47 U.S.C. § 251.

⁷ *Omaha Forbearance Order*, *supra* note 4, ¶ 1; *Phoenix Forbearance Order*, *supra* note 5, ¶ 1.

⁸ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 17 n.52, 64-72; *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 21-27.

⁹ *Phoenix Forbearance Order*, *supra* note 5, ¶ 37. A market power approach encompasses definition of the product and geographic market for each service, actual market shares of the suppliers of the service, trends in market shares, elasticity of demand for the service, supply substitutability, and the potential for de novo entry. *See id.* ¶¶ 28, 42.

¹⁰ *Id.* ¶ 1. *See also* Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and Open Competitive Internet*, 63 FED. COMM. L.J. 91, 135 (2010) (noting that the analytical framework of the *Phoenix Forbearance Order* would be “well-suited for application in any FCC proceeding involving competition policy”).

¹¹ *See* Seth L. Cooper, *Forbearance Follies: What the FCC’s New Framework Portends for the “Third Way,”* PERSPECTIVES FROM FSF SCHOLARS, July 9, 2010, at 1, 2, available at <http://commcns.org/L8HR9K>.

¹² George S. Ford & Lawrence J. Spiwak, *The Impossible Dream: Forbearance After the Phoenix Order*, PHOENIX CENTER FOR ADVANCED LEGAL & ECON. PUB. POL’Y STUD., Dec. 16, 2010, at 1, 1, available at <http://commcns.org/KQVys8> (“the standard for forbearance

Regardless of its characterization, the new approach tends to raise an already high bar for granting forbearance requests implicating legacy services offered by ILECs over narrowband, circuit-switched facilities.¹³ Part 2 discusses the economic rationales for forbearance, identifies differences between forbearance and full economic deregulation, and explains the criteria for forbearance established in the Telecommunications Act. Part 3 provides an overview of the Commission's forbearance analysis. Part 4 describes the old approach for evaluating a forbearance request utilized in the *Omaha Order*. Part 5 explains the new approach for evaluating a request for forbearance utilized in the *Phoenix Order* and compares it to the old *Omaha* approach. Finally, Part 6 identifies three refinements that would enhance the rigor of the *Phoenix* approach for evaluating forbearance requests.

II. BACKGROUND ON FORBEARANCE AS A REGULATORY INSTRUMENT IN THE UNITED STATES

Overall, the Act's purpose was to promote competition and reduce regulation in telecommunications markets.¹⁴ In order to promote competition, ILECs are required to "unbundle" elements of the local network to facilitate the entry of local exchange telecommunications competitors.¹⁵ Later, once competition has increased in a specific local telecommunications market, the FCC is authorized by Congress to grant petitions from ILECs for relief from particular regulatory obligations, if the FCC is convinced that the request satisfies its criteria.¹⁶ Thus, a great deal of discretion belongs to the FCC in the forbearance decision-making process.

set in the *Phoenix Order* effectively renders, perhaps inadvertently, Section 10 of the Act moot by establishing a forbearance threshold—price equals marginal cost—that is impossible to satisfy in most (if not all) communications markets" (emphasis in original)).

¹³ Using the old approach, the FCC had granted some form of forbearance relief in only three of thirteen geographic areas where it had received forbearance petitions. *Phoenix Forbearance Order*, *supra* note 5, ¶ 17.

¹⁴ *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provision of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 19,020, ¶ 1 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) [hereinafter *Triennial Review Order*]; *in re* Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 F.C.C.R. 2533, ¶ 1 (2004), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) [hereinafter *Triennial Review Remand Order*].

¹⁵ See *Triennial Review Order*, *supra* note 14, ¶ 55 (describing the principles of unbundling).

¹⁶ 47 U.S.C. § 160.

Forbearance relief is not an all-or-nothing determination—it may be narrowly tailored to address the specific market conditions existing in a given local telecommunications market.¹⁷ For instance, the FCC could grant forbearance to an ILEC for relief from a regulation to unbundle local loops for mass market residential customers in a specific geographic area within a city that are used for switched access exchange service. Yet, at the same time, it could continue to mandate local loop unbundling for other groups of customers in the same geographic area for the same service. Forbearance relief could be narrowly targeted to encompass a well-defined market in which effective competition has emerged.¹⁸

In contrast, a grant of deregulation without qualification could be overbroad. It would enable regulatory relief across different telecommunications markets, including different services (such as switched access exchange services, broadband Internet access services, special access services), different groups of customers (such as mass market residential customers, enterprise customers), and different geographic areas (such as at the level of a wire center,¹⁹ in an entire metropolitan statistical area, or nationwide).²⁰ Forbearance has the flexibility to be an intermediate step on the path to full deregulation as the degree of competition deepens and broadens in telecommunications markets in a metropolitan statistical area.

Two main reasons justify forbearance relief.²¹ First, the ultimate goal of the Act is a gradual shift from a highly-regulated market to a fully deregulated market where consumers are protected by high levels of competition.²² Once a telecommunications market can sustain effective competition, the Act assumes that the need for economic regulations disappears. Second, a regulatory framework and its corresponding regulations involve the use of scarce societal resources.²³ Conceptually, the FCC engages in a cost-benefit analysis to

¹⁷ *Id.* § 160(a) (enabling forbearance from “any regulation or any provision of this Act 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” (emphasis added)).

¹⁸ See *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 14-15 (explaining the constituent elements of a Commission forbearance determination).

¹⁹ A wire center is similar to the terms central office and switch. Typically, customers’ local loops terminate at a wire center owned by a telecommunications provider. Compare 47 C.F.R. § 51.5 (2011) (defining wire center), with 47 C.F.R. § 36 app. (2011) (defining “central office” and “loop”).

²⁰ See 47 U.S.C. § 160(a).

²¹ For an interesting discussion of similar rationales for regulatory forbearance and the meaning of regulatory forbearance, see Hudson N. Janisch & Bohdan S. Romaniuk, *The Quest for Regulatory Forbearance in Telecommunications*, 17 OTTAWA L. REV. 455 (1985).

²² See *Triennial Review Order*, *supra* note 14, ¶ 1.

²³ The Commission reviews its rules every three years in an attempt to ease regulatory burdens on regulated entities. See 47 U.S.C. § 257 (2006); *in re* Section 257 Triennial

evaluate the necessity of continuing with a specific regulation.²⁴ If the costs of a regulation (including, for example, the impact of a regulation on the incentive of the ILEC to invest in network upgrades) exceed the benefits (e.g., the effect on prices from facilitating intra-modal competition by an unbundling regulation), the FCC should decide to grant forbearance from the regulation. The cost-benefit framework the FCC utilizes in its *Phoenix Forbearance Order* analyses is qualitative, not quantitative, and appears to supplement the effective competition analysis.²⁵

Section 10 instructs the FCC to use three criteria, each of which must be satisfied to grant forbearance relief:

Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act 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.²⁶

Furthermore, in making its public interest determination in 10(a)(3), the FCC is instructed to evaluate whether forbearance will promote competitive market conditions, including whether forbearance will enhance competition among providers of telecommunications services.²⁷ If forbearance will promote competition, then forbearance is consistent with the public interest.

III. THE COMMISSION'S FORBEARANCE ANALYSIS

As local competition developed and the time arrived for Section 10 forbearance petitions for relief from unbundling rules, the FCC decision making process has evolved to its current state—the *Phoenix Order* approach—in which unbundling relief is now based on a stricter market power standard.²⁸ Before, the standards for mandating unbundling relief were broader

Report to Congress Identifying and Eliminating Market Entry Barriers, For Entrepreneurs and Other Small Businesses, *Report*, 26 F.C.C.R. 2909 (2011).

²⁴ See, e.g., *in re Matter of Standardizing Program Reporting Requirements for Broadcast Licensees, Notice of Inquiry*, 26 F.C.C.R. 16,525, ¶¶ 44-48 (2011) (discussing the Commission's intent to conduct a cost/benefit analysis with respect to certain broadcaster reporting regulations).

²⁵ See discussion, *infra* Part V.

²⁶ 47 U.S.C. § 160(a).

²⁷ See *id.* § 160; *Phoenix Forbearance Order*, *supra* note 5, ¶ 14.

²⁸ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 2, 41-45.

in nature and revolved around a vague “impairment” concept.²⁹ Now, the standard used to grant forbearance relief from the mandated unbundling has become much more targeted and structured.³⁰ In practice, the standard the FCC needed to meet to order a network element to be unbundled was lower than the standard an ILEC must meet, today, to be granted relief from the same unbundling rule.³¹

Since the Act, the scope of narrowband circuit-switched unbundling obligations for ILECs has been hotly contested at the FCC and in the courts.³² Repeated legal challenges to FCC efforts to implement unbundling rules created an environment of uncertainty for ILECs and competitors alike. Not until 2005, with implementation of the *Triennial Review Remand Order* (the FCC’s fourth try since 1996 to implement unbundling rules acceptable to the reviewing courts), were the narrowband unbundling rules finalized.³³

In theory, network unbundling rules and forbearance rules can be conceptualized as different sides of the same competitive coin. For many years, the local telecommunications network was viewed as a natural monopoly.³⁴ In the Act, in order to facilitate competition for the natural monopolist, Congress mandated unbundled access to ILEC network elements in the belief that competition would otherwise be economically infeasible.³⁵ Network element unbundling rules allow a telecommunications entrant to begin to construct its own facilities-based network by utilizing critical network elements controlled by the ILEC for which alternative suppliers were not available and self-provision was uneconomic.³⁶ Over time, it was expected that emerging local competitors would add to their own facilities and become full-blown facilities-based providers of local services.³⁷ When the FCC developed

²⁹ *Triennial Review Order*, *supra* note 14, ¶ 84.

³⁰ See discussion, *infra* Part V.

³¹ See Table 2, *infra* Part V.

³² See *Triennial Review Order*, *supra* note 14, ¶¶ 6-19 (recounting the history of the Commission’s unbundling regime).

³³ See *id.* ¶¶ 7-19.

³⁴ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 F.C.C.R. 15,499, ¶ 11 (1996) [hereinafter *Local Competition Order*] (“The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly.”).

³⁵ See James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 118 (2003) (“the unifying theme of the 1996 Act’s local competition provisions was the presumption that new entrants into local telecommunications markets would be successful only with the cooperation of the incumbents”).

³⁶ See *Triennial Review Order*, *supra* note 14, ¶ 58 (defining network elements that must be made available to competitors).

³⁷ *Local Competition Order*, *supra* note 34, ¶ 12 (discussing potential paths of entry into the local market).

its unbundling policy, the determination as to what network elements must be unbundled was not based on a market power analysis.³⁸ Rather, the objective of the unbundling policy was to enable competition by mandating unbundled access to a network element when the entrant would be “impaired” without access to that network element.³⁹

IV. THE OMAHA APPROACH

In 2004, Qwest requested relief from narrowband network unbundling regulations and Title II dominant carrier regulations for the Omaha metropolitan statistical area (“MSA”) based on the assertion that Qwest faced intense intermodal competition from a cable company, Cox.⁴⁰ The FCC granted partial relief in response to Qwest’s petition. Specifically, Qwest was relieved from its section 251(c) unbundling obligations for nine of its twenty-four wire centers in the Omaha MSA, with respect to its unbundled loops and dedicated transport.⁴¹ Qwest was also relieved from certain dominant carrier regulations for its entire service area in the Omaha MSA, with respect to mass market exchange access services and mass market Internet access services.⁴²

In its decision, the Commission relied on a generalized analysis. It assumed the entry of just one facilities-based competitor,⁴³ recognized a safety net of regulatory protections (other than interconnection) that would remain in place,⁴⁴ and made several optimistic predictions on how local telecommunications competition would evolve.⁴⁵ Interestingly, when

³⁸ For a comparison of the different standards and objectives of the FCC’s unbundling policy and forbearance policy, see DENNIS L. WEISMAN & TIMOTHY J. TARDIFF, *PRINCIPLES OF COMPETITION AND REGULATION FOR THE DESIGN OF TELECOMMUNICATIONS POLICY* 37 (2009), *attached to in re* 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, *Reply Comments of Qwest Corporation*, WC Docket Nos. 06-172, 07-97 (filed Oct. 21, 2009), *available at* <http://commens.org/K7swuQ> (“Hence, the standard for mandatory unbundling under §251, which, at least in theory does not turn on market power considerations, differs from the standard for forbearance from mandatory unbundling under §10, which by Commission decree does turn on market power considerations.”).

³⁹ See *Triennial Review Order*, *supra* note 14, ¶ 84.

⁴⁰ *In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 04-223, at 1, 8 (filed June 21, 2004).

⁴¹ *Omaha Forbearance Order*, *supra* note 4, ¶ 59.

⁴² *Id.* ¶ 15.

⁴³ In other words, Cox. See *id.* ¶ 59; *Phoenix Forbearance Order*, *supra* note 5, ¶ 16.

⁴⁴ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 64, 90.

⁴⁵ *Id.* ¶¶ 64-72, 81-83.

conducting its analysis regarding relief from dominant carrier regulations, the *Omaha Forbearance Order* used an approach that was more consistent with a market power analysis.⁴⁶

The *Omaha* approach to evaluate whether to grant relief from unbundling obligations for network elements had the following components. First, the FCC analyzed the level of retail competition to the ILEC, using a wire center as the unit of analysis.⁴⁷ Through this variable, the FCC evaluated the competitive impact of granting unbundling relief on mass market consumers of retail services.⁴⁸ Second, the FCC analyzed the level of competition in wholesale markets for inputs into the production of retail telecommunications services.⁴⁹ Again, the focus was on assessing the competitive impact of granting unbundling relief on the purchasers/demanders of critical local network inputs.⁵⁰ Third, at the wire center level, the FCC examined the actual and planned use of competitive last-mile facilities to provide competitive telecommunications services similar to those offered by the incumbent.⁵¹

The Commission's general inquiry centered on the impact on competition at a specific wire center if access to unbundled, rate-regulated elements was no longer assured.⁵² If competition were capable of constraining the ILEC from exercising market power, then relief was granted, albeit accompanied by a set of competitive safeguards to ensure the continued development of a competitive market.⁵³

Overall, the FCC cited three key findings to justify its grant of regulatory relief from unbundling obligations in nine specific wire centers: (1) the very high level of facilities-based competition, including Cox's use of its own last-mile loops, for telecommunications services from a single cable provider;⁵⁴ (2)

⁴⁶ *Id.* ¶¶ 18, 50 n.129.

⁴⁷ *Id.* ¶ 50 n.129.

⁴⁸ *Id.* The use of a wire center as the unit of analysis makes economic sense for unbundling obligations for specific loops and transport that are physically related to a specific wire center. Moreover, competitive conditions appear to vary considerably across wire centers located in the same study area. See *Triennial Review Remand Order*, *supra* note 14, ¶ 80 (“[i]ndividual routes, even within the same larger geographic area, may have very different economic characteristics”). It appears that a cable competitor focuses attention, money, and facilities on only a subset of wire centers to provide traditional telecommunications services in a metropolitan statistical area.

⁴⁹ *Omaha Forbearance Order*, *supra* note 4, ¶ 65.

⁵⁰ *Id.* ¶¶ 67-72.

⁵¹ *Id.* ¶¶ 68-70 (examining Qwest and Cox's respective coverage in the wire centers where Qwest requested forbearance).

⁵² *Id.* ¶ 59 (granting Qwest's forbearance petition for certain wire centers, but not others).

⁵³ *Id.* ¶ 62 (discussing other provisions of section 251 and 271 on which carriers would still be able to rely despite the Commission's grant of forbearance relief).

⁵⁴ *Id.* ¶ 59.

the lack of regulatory and operational entry barriers to the market;⁵⁵ and (3) the predictive judgment that Qwest would be a stronger competitor if it were constrained by no more regulation than its competitors (*i.e.*, regulatory parity).⁵⁶

With respect to the first finding, the grant of narrowband unbundling relief was dependent on Cox's ability to offer voice service (*i.e.*, "covers"⁵⁷) for at least 75 percent of the end-user locations served by a wire center.⁵⁸ The FCC believed that this high level of competitor coverage reflected an economic commitment, in the form of significant sunk investments, to being a long-lasting competitor for Qwest's customers.⁵⁹ In contrast, if Cox had been primarily dependent on access to Qwest's UNEs to provide competition for retail telecommunications services for end users served by Qwest's wire center, the case for granting unbundling relief would have been considerably weaker because Cox would not have been sufficiently independent from, and therefore competitive with, Qwest.⁶⁰

With respect to the third finding, the FCC found that Qwest was the only significant provider of inputs in the wholesale market.⁶¹ Nevertheless, the FCC made a critical predictive judgment that Cox's presence created natural, economic incentives for Qwest to offer unbundled network wholesale inputs at commercially negotiated rates to retail, intramodal competitors in order to retain utilization of its network facilities.⁶² In short, natural, economic incentives to develop wholesale markets replaced the necessity of involuntary, legal obligations. However, apparently not totally confident of its predictive judgment, the FCC conditions Qwest's unbundling relief on it still being subject to section 271 obligations to provide unbundled wholesale narrowband elements albeit with a more favorable pricing standard for an ILEC.⁶³ The

⁵⁵ This article does not discuss this second finding because it has little bearing on the shift from the *Omaha Order's* generalized analysis based on predictive judgments versus the *Phoenix Order's* stricter analysis.

⁵⁶ *Omaha Forbearance Order*, *supra* note 4, ¶ 78.

⁵⁷ "[A]n intermodal competitor 'covers' a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings." *Id.* ¶ 60 n.156.

⁵⁸ *Phoenix Forbearance Order*, *supra* note 5, ¶ 16.

⁵⁹ *Id.*

⁶⁰ It should be noted that other forms of intermodal competition (*i.e.*, wireless, Voice over Internet Protocol) were not considered good substitutes for wireline telephone service given the lack of data supporting such a conclusion. See *Omaha Forbearance Order*, *supra* note 4, ¶ 72.

⁶¹ *Id.* ¶ 67.

⁶² See *id.* ¶ 81.

⁶³ *Id.* ¶ 90. The section 271 pricing standard, very general and thus subject to varying interpretations, requires that prices for unbundled elements are just, reasonable, and non-

FCC stated:

We note that in granting Qwest forbearance from its obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3), consistent with the language of the Act, we determined that the application of *section 251(c)(3)* with its TELRIC pricing standard was not necessary in certain wire centers to ensure that the standards of section 10(a) are satisfied. We did *not* determine that Qwest's provision of wholesale access to loops and transport was no longer necessary to ensure that the standards of section 10(a) are satisfied.⁶⁴

It appears that the distinction reflected a general dissatisfaction with the measured improvements in competition in narrowband markets resulting from the previous regulatory scheme. A key part of the unbundling scheme was utilization of a pricing methodology (*i.e.*, TELRIC or forward looking incremental cost) that the FCC itself created in implementing the Telecommunications Act of 1996.⁶⁵ The FCC acknowledged the importance of preserving access to narrowband unbundled network elements as a competitive safeguard for local competition, but at a pricing standard that does not allegedly discourage competitors from constructing their own narrowband facilities.⁶⁶

In addition, Qwest remained subject to other section 251(c) obligations, including interconnection, good faith negotiation, and, important to spur retail competition, resale arrangements, with its mandated retail minus avoided cost pricing standard.⁶⁷ Thus, the only significant unbundling relief granted in the presence of a facilities-based intermodal competitor was with respect to the pricing standard that an ILEC used when required to offer unbundled narrowband loops and transport to competitors.⁶⁸ In the FCC's view, safeguards continued to preserve the options for fledgling intramodal competitors to enter local exchange markets by leasing narrowband elements and/or reselling the incumbent's retail service as first steps to becoming facilities-based competitors. Over the long run, its economic analysis reflects not just a hope, but an expectation, that the market structure of local telecommunications markets will transition from a monopoly to a duopoly, and eventually to a fully competitive market.

To summarize, there were three key reasons for why forbearance from UNE obligations was granted using the *Omaha* approach in nine wire centers: (1) the presence of a single facilities-based competitor,⁶⁹ (2) remaining regulatory

discriminatory. 47 U.S.C. § 271(c)(2)(B)(iii).

⁶⁴ See *Omaha Forbearance Order*, *supra* note 4, ¶ 105 (emphasis in original).

⁶⁵ *Local Competition Order*, *supra* note 34, ¶¶ 672-703.

⁶⁶ See *Omaha Forbearance Order*, *supra* note 4, ¶ 105 (emphasis in original).

⁶⁷ *Id.* ¶ 57.

⁶⁸ *Id.* ¶ 57.

⁶⁹ *Id.* ¶ 59.

safeguards,⁷⁰ and (3) predictive judgments regarding the powerful economic and market incentives governing the operation of wholesale markets.⁷¹ The FCC fully expected that the Omaha market would transition from a duopoly market structure to a more competitive market structure encompassing additional facilities-based and intramodal providers. However, its expectations have not been fully realized.

First, the FCC is now considering a petition from McLeodUSA for reconsideration of the *Omaha Forbearance Order*.⁷² Events transpiring since the 2005 order suggest that the FCC's predicted trend of increasing competition in Omaha has failed to materialize. For instance, McLeodUSA, the only other significant local competitor in Omaha other than Cox when the order was issued, has since cancelled plans to expand its role as a telecommunications competitor in Omaha and, in fact, has retrenched its Omaha operations.⁷³ Integra, another potential competitor, had considered entering the Omaha market but after the *Omaha* order cancelled those plans.⁷⁴ Actual economic decisions by potential competitors have spoken louder than FCC theoretical predictions regarding the likely emergence of local competition.⁷⁵

Second, the Commission predicted that local market entrants would continue to rely on other wholesale access rights available through section 271 and section 251(c) since these regulatory requirements remain in place.⁷⁶ The problem with this path is that the pricing standard associated with these options is not conducive to entry. The UNE pricing standard was cost-based⁷⁷—wholesale access through sections 271 and 251(c) might not be cost-based.⁷⁸ Wholesale elements purchased from an ILEC using a non-cost-based pricing standard is likely to place entrants at a severe disadvantage when pricing their retail services to mass market consumers.⁷⁹ This is a form of exclusionary behavior practiced by a monopoly provider of an input when it also operates in

⁷⁰ *Id.* ¶¶ 57, 90.

⁷¹ *Id.* ¶¶ 64-72, 81-83.

⁷² *In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Petition for Modification of McLeodUSA Telecommunications Services, Inc.*, WC Docket No. 04-223 (filed July 23, 2007). Details about events that have transpired since the Omaha order are chronicled in the *Phoenix Forbearance Order*. *Phoenix Forbearance Order*, *supra* note 5, ¶ 34.

⁷³ *Phoenix Forbearance Order*, *supra* note 5, ¶ 34.

⁷⁴ *Id.*

⁷⁵ *Id.* (“these subsequent developments have cast doubt on the accuracy of the Commission’s first prediction made in the *Qwest Omaha Forbearance Order*”).

⁷⁶ *Id.* ¶ 35.

⁷⁷ *Local Competition Order*, *supra* note 34, ¶¶ 672-703.

⁷⁸ *Phoenix Forbearance Order*, *supra* note 5, ¶ 35 n.115.

⁷⁹ *See Triennial Review Remand Order*, *supra* note 14, ¶¶ 46-48.

output markets in retail competition with its wholesale customers.⁸⁰

Third, the *Omaha* approach predicted that the market success with respect to mass market customers of the incumbent cable operator in entering the local telecommunications market would inspire additional facilities-based entry and help to mitigate any concern that a duopoly market structure would persist.⁸¹ But the Commission failed to appreciate the significant advantages a cable operator possessed compared to other potential entrants.⁸² Incumbent cable operators were positioned uniquely in local markets, for they already had in place a facilities-based network that provided multi-channel video programming to mass market customers. Because of technological advancements, cable operators were able to upgrade, at a relatively low marginal cost, their existing networks to provide local telecommunications services and broadband services to mass market customers.⁸³ Such an unusual path of entry is not available to any other firm. Moreover, despite the low marginal cost of upgrades, cable operators remain unmotivated to augment their telecommunications networks to reach a majority of business/enterprise customers within a geographic market and, thus, increase the level of retail competition for the enterprise segment of the local market.⁸⁴

V. THE PHOENIX APPROACH

The *Omaha* analytical approach was not well received.⁸⁵ This compelled the FCC to develop a new approach for making forbearance decisions.⁸⁶ In the *Phoenix Order*, the FCC used a rigorous market power approach and granted no relief from regulations.⁸⁷ When the FCC looked back on the actual development (or, more accurately, lack of development) of narrowband local voice competition in the Omaha market, it concluded that its previous

⁸⁰ *Id.*

⁸¹ *Phoenix Forbearance Order*, *supra* note 5, ¶ 36.

⁸² *See id.* ¶ 36 (discussing the ability of cable operators to make incremental upgrades to their networks).

⁸³ *See id.* ¶ 84 (“In short, cable operators may have faced comparatively lower barriers to entering telecommunications services markets because they owned existing cable networks that could be upgraded at a feasible incremental cost, but this does not imply that entry barriers for other competitive LECs have eased.”).

⁸⁴ *See id.* ¶ 36.

⁸⁵ *See, e.g., Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 303-05 (D.C. Cir. 2009) (discussing the FCC’s departure from precedent); *in re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, *Additional Comments of PAETEC, Covad, TDS Metrocom and U.S. Telepacifc*, WC Docket No. 09-135, at 4 (filed Apr. 29, 2010) (describing the Commission’s analysis in the *Omaha Forbearance Order* as “the failed Omaha experiment”).

⁸⁶ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 23-37.

⁸⁷ *Id.* ¶¶ 2, 41-45.

approach for analyzing forbearance petitions was flawed in several respects.⁸⁸ Table 1 provides background information comparing several metrics for the cities involved in the case study comparison. Table 2 compares the *Omaha* approach to the *Phoenix* approach with respect to ten issues.

Table 1: Background Information on Omaha and Phoenix Metropolitan Statistical Area

| | OMAHA | PHOENIX |
|---|---------------------------------|-----------------------------|
| State(s) | Nebraska and Iowa ⁸⁹ | Arizona ⁹⁰ |
| Population (2010) | 408,952 | 1,445,632 |
| City Market Ranking | 42nd | 6th |
| Dominant Telecommunications Carriers | Qwest and Cox ⁹¹ | Qwest and Cox ⁹² |
| Number of Wire Centers in Qwest's Service Territory | 24 ⁹³ | 64 ⁹⁴ |

Table 2: Comparison of Omaha Approach to Phoenix Approach for Ten Issues

| ISSUE | OMAHA ORDER | PHOENIX ORDER |
|---|--|--|
| 1. Methodology to conduct forbearance analysis | Depends on relief sought ⁹⁵ | Rigorous market power analysis ⁹⁶ |
| 2. Is duopoly sufficient for effective competition? | Yes ⁹⁷ | No, not in most cases ⁹⁸ |

⁸⁸ *Id.* ¶¶ 23-37.

⁸⁹ *Omaha Forbearance Order*, *supra* note 4, ¶ 2 n.3.

⁹⁰ *Phoenix Forbearance Order*, *supra* note 5, ¶ 1.

⁹¹ See discussion, *supra* note 40.

⁹² *Phoenix Forbearance Order*, *supra* note 5, ¶ 42 n.143.

⁹³ *Omaha Forbearance Order*, *supra* note 4, ¶ 2 n.3.

⁹⁴ *Phoenix Forbearance Order*, *supra* note 5, ¶ 22 n.67.

⁹⁵ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 13-14 & 14 n.46.

⁹⁶ *Phoenix Forbearance Order*, *supra* note 5, ¶ 41.

⁹⁷ The Commission rejected the notion that its decision in the *Omaha Order* would result in a duopoly, despite that Qwest and Cox were the only major competitors in the Omaha MSA, because it believed that its predictive judgments that competition would flourish would be borne out. *Omaha Forbearance Order*, *supra* note 4, ¶ 71. Nonetheless, the Commission appears to have recognized that the Qwest/Cox duopoly was the foundation for later competition. *Id.*

⁹⁸ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 29-32.

| | | |
|---|-------------------------------|--|
| 3. Likelihood that the ILEC, after forbearance relief, would continue to lease wholesale facilities at competitive rates and terms to competitors | Key prediction ⁹⁹ | No ¹⁰⁰ |
| 4. Likelihood of emergence of additional wireline facilities-based competitors besides incumbent cable operator | Optimistic ¹⁰¹ | Little realistic prospect ¹⁰² |
| 5. How important are regulatory provisions (such as section 271 requirements and section 251(c)(4) resale) besides mandatory UNE in facilitating local competition? | Very important ¹⁰³ | Unimportant ¹⁰⁴ |
| 6. Are VOIP and wireline telephones close substitutes? | No ¹⁰⁵ | No ¹⁰⁶ |
| 7. Are mobile wireless services and wireline services close substitutes? | No ¹⁰⁷ | No ¹⁰⁸ |
| 8. Impact of mandatory UNE obligations on ILEC investment incentives for legacy network | Detrimental ¹⁰⁹ | Neutral ¹¹⁰ |
| 9. Importance of the goal of regulatory parity | High ¹¹¹ | Low ¹¹² |

⁹⁹ *Omaha Forbearance Order*, *supra* note 4, ¶ 79.

¹⁰⁰ *Phoenix Forbearance Order*, *supra* note 5, ¶ 34.

¹⁰¹ *Omaha Forbearance Order*, *supra* note 4, ¶ 71.

¹⁰² *Phoenix Forbearance Order*, *supra* note 5, ¶ 36.

¹⁰³ See *Omaha Forbearance Order*, *supra* note 4, ¶¶ 57, 92 (discussing the scope of forbearance).

¹⁰⁴ *Phoenix Forbearance Order*, *supra* note 5, ¶ 35.

¹⁰⁵ *Omaha Forbearance Order*, *supra* note 4, ¶ 72.

¹⁰⁶ *Phoenix Forbearance Order*, *supra* note 5, ¶ 54.

¹⁰⁷ *Omaha Forbearance Order*, *supra* note 4, ¶ 72.

¹⁰⁸ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 55-61.

¹⁰⁹ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 76, 78 (discussing that forbearance from section 251(c)(3) obligations will remove regulatory burdens and thus increase regulatory parity).

¹¹⁰ *Phoenix Forbearance Order*, *supra* note 5, ¶ 108.

¹¹¹ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 76, 78 (“we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms”).

¹¹² *Phoenix Forbearance Order*, *supra* note 5, ¶ 107.

| | | |
|--|---------------------|--------------------|
| 10. Anticipated costs of regulatory intervention | High ¹¹³ | Low ¹¹⁴ |
|--|---------------------|--------------------|

There are significant policy differences over eight of the ten issues. Perhaps the most profound change in analytical approach implicates the question of whether the presence of a single facilities-based competitor to the ILEC is sufficient for the FCC to conclude that a market is effectively competitive and, thus, merits UNE forbearance. The *Omaha Forbearance Order* accepted duopoly as a sufficient condition to grant forbearance from UNE obligations.¹¹⁵ The *Phoenix* approach answers this question in the negative for the overwhelmingly majority of cases, including for the Phoenix market.¹¹⁶ It highlights theoretical and empirical concerns that a duopoly market structure will result in low prices, high output, high quality, and innovation.

A. Predictive Judgments

In the *Omaha* approach, the FCC made critical predictive judgments (issues 3, 4, and 5 in Table 2) that countered concerns about the continuation of a duopoly market structure.¹¹⁷ The FCC expected entry of facilities-based and intramodal suppliers to supplement the incumbent cable provider in the Omaha market.¹¹⁸ In particular, the FCC anticipated three paths for the new entry. First, the FCC expected that the ILEC would voluntarily continue to make wholesale elements available to competitors at competitive terms and conditions.¹¹⁹ The idea was that the ILEC, with its low marginal cost, high fixed cost, cost structure when providing service, would want to encourage use of its narrowband network even if it lost a retail voice customer to a rival.¹²⁰

¹¹³ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 76-77 (“we conclude that the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits”).

¹¹⁴ *Phoenix Forbearance Order*, *supra* note 5, ¶ 109.

¹¹⁵ In referring to the focus on the presence of a single facilities-based competitor under the *Omaha* approach, the FCC concluded, “This focus 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.” *Id.* ¶ 29.

¹¹⁶ *Id.* ¶¶ 29-32. The FCC argues that, at times, it has granted forbearance in the presence of a duopoly market structure (e.g., the market for Internet broadband access) but only where the likelihood of potential competition was high).

¹¹⁷ See Table 2, *supra* Part V.

¹¹⁸ *Omaha Forbearance Order*, *supra* note 4, ¶ 71.

¹¹⁹ *Id.* ¶ 81.

¹²⁰ See *id.* The failed prediction was supported by a body of research developed by scholars in telecommunications. See, e.g., Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 457 (1999) (“ILECs have a strong incentive to sell unbundled

Qwest lent weight to that theory, arguing that to behave otherwise would be economically irrational.¹²¹ In stark contrast, the FCC now argues that an ILEC will instead exploit its monopoly position and its ability for vertical foreclosure in wholesale markets.¹²² This new realization is supported by real-world events in the Omaha market after unbundling relief was granted.¹²³

One can use the *Phoenix* approach to envision positive circumstances characterizing a local voice market in which the FCC could conclude that a duopoly market is sufficient for effective competition and, thus, grant UNE relief for the ILEC. For instance, a wireline duopoly is sufficient if any—or, better yet, a combination—of the following economic factors were in place:

1. If the ILEC voluntarily provides wholesale loops and transport at competitive prices and terms to retail voice rivals in the local market,
2. If the incumbent cable operator continued to expand its telecommunications network to serve additional mass market and business customers and this investment inspired new facilities-based entry by others such as a wireline electricity provider,¹²⁴
3. Wireless telecommunications service provided by independent wireless providers with extensive wireless networks in a local market are considered by mass market customers to be a good substitute for wireline telecommunications service, or
4. Over-the-top Voice over Internet Protocol (“VoIP”) service, such as that offered by Vonage, utilizing a broadband Internet connection, is considered to be a good substitute for wireline telecommunications service.¹²⁵

B. Public Interest Considerations

The *Phoenix* approach placed different subjective weight on other factors considered in the forbearance analysis, such as those reflected in issues 8, 9, and 10 in Table 2, that addressed public interest aspects of unbundling policy.¹²⁶ In the *Omaha* approach, there was a heavy focus on the costs to society from continuing with a mandatory unbundling policy when some

elements to competitors at market-determined prices”).

¹²¹ Letter from Cronan O’Connell, Qwest, to Marlene H. Dortch, Secretary, FCC, attach. at 2-3 (July 25, 2005), available at <http://commlaw.org/JJgovo>.

¹²² *Phoenix Forbearance Order*, *supra* note 5, ¶ 33.

¹²³ *Id.* ¶ 34.

¹²⁴ Factors 1 and 2 did not materialize as the Commission predicted in the *Omaha Order*. See *id.* ¶ 33.

¹²⁵ More weight should be given to Factors 3 and 4 in future forbearance proceedings. See *id.* ¶¶ 54-61 (discussing a lack of evidence to establish that VoIP providers or mobile wireless service providers could provide effective competition for wireline service).

¹²⁶ See Table 2, *supra* Part V.

facilities-based competition was observed in a local telecommunications market.¹²⁷ These costs included how an unbundling policy reduced the incentive of the ILEC to invest in new facilities and to innovate, the costs of managing shared resources, and the unfairness of one facilities-based competitor (the ILEC) subject to regulatory obligations while another facilities-based competitor (the incumbent cable operator) was free of such obligations.¹²⁸

In the *Phoenix* approach, more attention is paid to the widespread benefits to society from an unbundling policy and the costs of such a policy are downplayed or dismissed. For instance, it discusses the benefits of an unbundling policy in promoting competition for services other than traditional voice services.¹²⁹ A competitor can use an unbundled local loop leased from the ILEC to provide, in addition to voice services, broadband and video services and, thus, enhance competition in these related markets.¹³⁰ The FCC argued that investment incentives would be unaffected by continuation of a requirement to unbundle legacy facilities.¹³¹ These investments by the ILEC are sunk costs, and future investments would be targeted to construct fiber facilities which are, in general, free of regulatory obligations.¹³² In short, the public interest benefits of an unbundling policy exceed the costs of such a policy, at least until substantial (more than two competitors) facilities-based competition in local telecommunications markets could take hold.

Regardless of the approach, a forbearance decision is a decision that involves uncertainty. In hindsight, it appears that the FCC prematurely granted relief from unbundling obligations in the *Omaha Forbearance Order*. At the same time, it relied on predictive judgments that enabled the FCC to justify removing regulations and rely on market forces to protect consumer welfare. These turned out to be unsubstantiated. In the *Phoenix Forbearance Order*, the FCC changed its approach to forbearance and created a new market power standard (with no reliance on predictive judgments) that is more likely to err on the side of denying relief from regulations when, in fact, relief may be justified. To some extent, the *Phoenix* approach may be attributable to the new Obama Administration and its widely publicized view of the need for more stringent antitrust enforcement than existed in the previous Bush Administration.¹³³ The new approach is more likely to retain regulations when

¹²⁷ *Omaha Forbearance Order*, *supra* note 4, ¶¶ 75-83 (analyzing Qwest's forbearance petition under section 10(a)(3)'s public interest standard).

¹²⁸ *See id.* ¶¶ 76-78.

¹²⁹ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 102-103, 106.

¹³⁰ *Id.* ¶ 106.

¹³¹ *Id.* ¶ 108.

¹³² *Id.*

¹³³ *See* Stephen Labaton, *Administration Plans to Strengthen Antitrust Rules*, N.Y. TIMES,

they are no longer needed than to relax regulations and bet on the invisible forces of the market to protect consumer welfare. A significant aspect of the *Phoenix* approach is a reduction in the likelihood of premature forbearance.

VI. REFINEMENTS TO THE *PHOENIX* APPROACH

First, the *Phoenix* approach needs to include disinterested empirical studies examining the economic relationships between wireline telecommunications services and mobile wireless services. If an independent agency with economic expertise such as the FCC conducted a rigorous statistical analyses, the empirical results would be viewed with more credibility compared to the standard practice today, where the FCC relies on interested and sponsored parties.¹³⁴

There has been and continues to be rapid growth of mobile wireless voice and data services.¹³⁵ Is mobile wireless service a complement to or a substitute for wireline services? It is reported that almost 25 percent (a percentage that has doubled in three years) of all households in the United States rely exclusively on wireless phones whereas about 60 percent (a percentage that has stayed relatively constant over the last three years) subscribe to both a mobile wireless and wireline service.¹³⁶ Economically, it is imperative to know if mobile wireless service acts as a constraint on the price of wireline service. If the answer is yes, then the presence of a mobile wireless supplier should be included in the market power analysis of a geographic market such as Phoenix.¹³⁷

The Commission's approach should grapple with a confounding factor: what if the wireline ILEC is also a mobile wireless supplier, like AT&T and Verizon? In that case, the competitive influence of the wireless supplier in constraining the price of wireline service should be discounted to some degree, because the "competition" is merely different units within the same

May 11, 2009, <http://commcons.org/KXWiOp>.

¹³⁴ See, e.g., *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 71-72 (relying on evidence "in the record" to make its competitive determination).

¹³⁵ *In re* 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, *Fifteenth Report*, 26 F.C.C.R. 9664, ¶ 2 (2011).

¹³⁶ *Phoenix Forbearance Order*, *supra* note 5, ¶ 55 n.164.

¹³⁷ Furthermore, the data appears to show that an asymmetric substitution effect is occurring between wireline and wireless services. If there is a small but significant increase in price of wireless service, it is unlikely that a significant number of consumers will switch to wireline service (because of the value of mobility), but if there is a small but significant increase in wireline phone service, it is likely that a significant number of consumers will switch to wireless service.

business.¹³⁸ It is now time to more fully include wireless service into the market power analysis when examining forbearance from regulation of legacy wireline service.

The Commission should also apply the *Phoenix* market power approach to broadband/advanced services.¹³⁹ First, the Commission wishes to promote investment in fiber facilities with higher broadband speeds and capabilities to advance the goals identified in Section 706 of the Act, which may be advanced using a market power approach.¹⁴⁰ Second, the FCC characterizes broadband markets as rapidly evolving and subject to emerging competition.¹⁴¹ The growth of nascent markets counsels against regulating them, especially when the FCC has experienced difficulty finding appropriate authority to regulate those markets.¹⁴² Third, the ILECs were often second entrants into provision of broadband services following the entry of incumbent cable operators.¹⁴³ There is no history of market dominance that regulations could curtail. Nonetheless, it seems appropriate to conduct first a rigorous market power analysis for broadband services and then, second, to incorporate into the analysis Section 706 considerations.¹⁴⁴ In theory, the goals of Section 706 could override the

¹³⁸ One way to calculate the market share of an ILEC that is both a wireline and wireless provider to the same market is to use the sum of its wireline and wireless sales.

¹³⁹ The Commission did not do so in the *Phoenix Order*. See *Phoenix Forbearance Order*, *supra* note 5, ¶ 39.

¹⁴⁰ See CONNECTING AMERICA: A NATIONAL BROADBAND PLAN, FCC, 9-11 (2009), <http://comcomns.org/sCCj9m> (outlining the FCC's goals for broadband in general terms). Note, however, that an analysis under Section 706 criteria, which are vaguely defined, may not be compatible with a market power approach, leading to inconsistent recommendations.

¹⁴¹ *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853, ¶ 50 (Aug. 5, 2005).

¹⁴² See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (vacating the FCC's exercise of ancillary authority over Comcast with respect to its network management practices).

¹⁴³ As noted above, cable operators could more easily upgrade their facilities to provide broadband service. See discussion, *supra* note 83.

¹⁴⁴ This position is consistent with the argument advanced by Selwyn and Golding that “although the FCC suggests a somewhat different approach may be called for in broadband proceedings, the rationalizations that have been put forward for treating broadband differently from other types of access should not be elevated over the compelling competitive concerns expressed by the FCC in the [*Phoenix Forbearance Order*] ruling.” Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet*

market power analysis.

The Commission should tackle implementation difficulties when administering a decision to relax an ILEC's UNE obligation based on the presence of effective competition for the legacy voice mass market service, but where effective competition is lacking for other services such as broadband. This issue appeared to be totally ignored by the FCC in the *Omaha* approach. The *Phoenix* approach recognized the issue but it did not develop a concrete plan for administration.¹⁴⁵

Relaxing an UNE obligation can affect multiple services.¹⁴⁶ An ILEC petitions for relief from, say, unbundling local loops in a specific wire center in a metropolitan statistical area. The relief is based on the argument that competition exists for the legacy voice service. However, a rigorous market power analysis must examine competition for each service that can be provisioned with the unbundled element.¹⁴⁷ A conservative approach would suggest that relief cannot be granted until effective competition is in place for each service associated with the specific network element. However, this might result in unacceptable delays.

This issue implicates a related issue involving the marketing of bundled services to customers. Local telecommunications providers offer a variety of choices for customers: local voice service, long distance voice service, broadband Internet access, and multi-channel video programming services.¹⁴⁸ Services are offered individually and in combinations with significant discounts when purchasing a bundle of services versus purchasing the same set of services individually.¹⁴⁹ Competitors that lease an unbundled element such as a local loop can use that element to provide a variety of services for a customer similar to the ILEC.¹⁵⁰ The FCC should take into account in its forbearance analysis that competitors may be able to offer a multiplicity of services from a single unbundled element.

Access: A Policy Framework for Net Neutrality and Open Competitive Internet, 63 FED. COMM. L.J. 91, 135 (2010).

¹⁴⁵ *Phoenix Forbearance Order*, *supra* note 5, ¶ 44.

¹⁴⁶ *Id.* ¶¶ 102-103, 106.

¹⁴⁷ The *Phoenix Order*, although it acknowledged the potential effect of a forbearance decision related only to legacy services on advanced services, did not conduct separate analyses for all the services that could be supported by unbundled facilities. *See id.* ¶¶ 39-40, 102, 106 (providing no separate market analysis for broadband services).

¹⁴⁸ *See, e.g., Browse for Top Bundles*, COX, <http://commcns.org/N3o4wW> (last visited May 13, 2012).

¹⁴⁹ *Id.*

¹⁵⁰ *Phoenix Forbearance Order*, *supra* note 5, ¶¶ 102-103, 106.

VII. CONCLUSION

The FCC was right to change the approach it uses to evaluate forbearance relief from legacy regulations for ILECs. The *Omaha* approach was too loose and lacked a rigorous analytical framework.¹⁵¹ The result of the *Omaha* approach is the possibility of inconsistent decision making in the presence of a similar set of facts. This apparently was the case when the FCC utilized a variation on the approach it used in *Omaha* in 2005 when it evaluated Verizon's petition for relief for six metropolitan statistical areas in 2007.¹⁵² The United States Court of Appeals for the District of Columbia Circuit concluded that the FCC not only departed from FCC forbearance precedent but failed to explain the reasoning behind the departure.¹⁵³ Such a result was possible given the lack of economic rigor in the FCC decision making process. In response, the FCC now utilizes a more highly structured approach in its forbearance analyses. The likelihood of inconsistent decision making is now considerably reduced. While there is still room for improvement in the FCC's application of a market power analysis to forbearance requests (such as including the importance of wireline versus wireless substitution), the analytical base that has been built is considerably stronger.

¹⁵¹ For a similar appraisal, see Rob Frieden, *Telecommunications Policy: Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. TELECOMMS. & HIGH TECH. L. 277, 291-92 (2010).

¹⁵² *In re* 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, *Memorandum Opinion and Order*, 22 F.C.C.R. 21,293 (Dec. 4, 2007).

¹⁵³ See *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 296 (D.C. Cir. 2009). Specifically, the Court found that the FCC applied an unjustified per se market share test in the six metropolitan areas when deciding whether to grant UNE relief. *Id.* at 302-03. The market share test considered only actual competition while, in contrast, in previous forbearance orders (such as *Omaha* where relief was partially granted) the FCC considered both actual competition and potential competition in the marketplace. *Id.*

