

**REDACTED—FOR PUBLIC INSPECTION**

January 30, 2015

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**Re: *CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services; CenturyLink's Alternative Petition for Interim Waiver of Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements Imposed on Enterprise Broadband Services, WC Dkt. No. 14-9***

Dear Ms. Dortch:

On behalf of Level 3 Communications, LLC, Integra Telecom, Inc., and Birch Communications, Inc., please find enclosed the redacted version of an *ex parte* letter for filing in the above referenced proceeding. The letter contains information that CenturyLink has designated as highly confidential under the *Second Protective Order*.<sup>1</sup>

Pursuant to the procedures outlined in the *Second Protective Order*,<sup>2</sup> the original highly confidential version is being delivered to the Secretary's Office, and two copies of the highly confidential version are being delivered to Matt Warner of the Competition Policy Division of the Wireline Competition Bureau. In addition, one copy of the highly confidential version is being served on CenturyLink.

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<sup>1</sup> *In the Matter of CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, Second Protective Order, 29 FCC Rcd. 2200 (2014) ("*Second Protective Order*"); see also Letter from Julie A. Veach, Chief, Wireline Competition Bureau, to Craig J. Brown, Senior Associate General Counsel, CenturyLink, 29 FCC Rcd. 11117 (2014) (amending Appendix A of the *Second Protective Order*).

<sup>2</sup> See *Second Protective Order* ¶ 12.

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Please do not hesitate to contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

*/s/ Thomas Jones*

*Counsel for Level 3, Integra, and Birch*

Enclosure

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***EX PARTE***

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445 12th Street, SW, Room TW-A325  
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**Re: *CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services; CenturyLink's Alternative Petition for Interim Waiver of Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements Imposed on Enterprise Broadband Services, WC Dkt. No. 14-9***

Dear Ms. Dortch:

Level 3 Communications, LLC, Integra Telecom, Inc., and Birch Communications, Inc. (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit this letter regarding the data recently provided by CenturyLink in support of its forbearance petition in the above-referenced proceeding. As the Joint Commenters have previously explained, for numerous reasons, CenturyLink’s petition fails to demonstrate that forbearance should be granted from dominant carrier regulation of the Ethernet and other packet-based special access services at issue in the legacy CenturyTel and Embarq territories.<sup>1</sup> As discussed herein, the data submitted by CenturyLink in response to the Wireline Competition Bureau’s September 12, 2014 information request does nothing to help CenturyLink meet its burden of proof. In fact, the data confirms that the petition should be denied.

*First*, CenturyLink fails to show that sufficient competition exists in the relevant product markets, as required under the *Phoenix Order*,<sup>2</sup> because it does not even bother to define those

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<sup>1</sup> See generally Opposition of tw telecom, Level 3, Integra, EarthLink and Cbeyond to CenturyLink’s Forbearance Petition, WC Dkt. No. 14-9 (filed Feb. 14, 2014); Letter from Thomas Jones and Nirali Patel, Counsel for tw telecom inc., Level 3 Communications, LLC, Integra Telecom, Inc., and Cbeyond Communications, LLC, WC Dkt. No. 14-9 (filed Aug. 20, 2014).

<sup>2</sup> *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 FCC Rcd. 8622, ¶¶ 41-42 (2010) (“*Phoenix Order*”).

markets. In its information request, the Bureau instructed CenturyLink to “[i]dentify the product market into which each of the Listed Services falls” and support its response with an “explanation and documentary evidence.”<sup>3</sup> Instead of identifying the relevant product markets, CenturyLink insists that “enterprise and broadband services, such as the Listed Services” should be analyzed “as a group” pursuant to the earlier *Enterprise Broadband Forbearance Orders*.<sup>4</sup> To justify its response, CenturyLink provides “recent examples” demonstrating that “it is not uncommon for customers to consider more than one of the Listed Services to meet their needs.”<sup>5</sup> But that is not how the Commission defines product markets. Rather, the appropriate methodology is to apply the hypothetical monopolist test set forth in the Department of Justice-Federal Trade Commission *Horizontal Merger Guidelines*.<sup>6</sup> Under that test, a relevant product market is the smallest group of products for which a hypothetical monopoly provider would be able to profitably impose a “small but significant and non-transitory” increase in price.<sup>7</sup> If the pricing data needed for this test is unavailable, the DOJ and FTC examine information that approximates the test in its quantitative form, such as (1) “how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions”; (2) “information from buyers, including surveys, concerning how they would respond to price changes”; (3) “sellers’ business decisions or business documents indicating sellers’ informed beliefs concerning how customers would substitute among products in response to relative changes in price”; and (4) “objective information about product characteristics and the costs of delays of switching products, especially switching from products in the candidate market to products outside the candidate market.”<sup>8</sup> Similarly, the FCC has previously relied on comparisons of prices charged for different services, comparisons of the technical characteristics of services, and the extent of customer churn between services to define relevant product markets for purposes of its competition analysis.<sup>9</sup> CenturyLink does not provide any of this information or even attempt to define the relevant product markets.

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<sup>3</sup> Letter from Julie A. Veach, Chief, Wireline Competition Bureau, FCC, to Craig J. Brown, Senior Associate General Counsel, CenturyLink, DA 14-1324, Attachment 1, “Information, Data, and Document Request,” Question 4 (issued Sept. 12, 2014) (“Information Request”).

<sup>4</sup> Letter from Craig J. Brown, Senior Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 14-9, Attachment, “CenturyLink’s October 14, 2014 Response to Information, Data and Document Request,” at 4 (filed Oct. 14, 2014) (“CenturyLink Oct. 14th Response”).

<sup>5</sup> *Id.*

<sup>6</sup> See U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 4.1.1 (Aug. 19, 2010) (“*Horizontal Merger Guidelines*”); see also *Phoenix Order* n.141.

<sup>7</sup> *Id.*

<sup>8</sup> *Horizontal Merger Guidelines* § 4.1.3.

<sup>9</sup> See, e.g., *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 193 (2005).

*Second*, the data CenturyLink has submitted actually shows that it retains bottleneck control over the last-mile connections needed to provide packet-based special access services to businesses in the legacy CenturyTel and Embarq territories. Specifically, CenturyLink indicates that it “provides any of the following defined services (on either a retail or wholesale basis): DS1, DS3, OCx, Ethernet, [ATM], Frame Relay, Centrex, [PBX], Key, or [UNE] loops”<sup>10</sup> to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]<sup>11</sup> commercial buildings in the exchanges covered by CenturyLink’s petition.<sup>12</sup> CenturyLink also indicates that the number of commercial buildings in these exchanges in which “GeoResults’ National Competitive Infrastructure Database has identified one or more competitors as having placed fiber-enabled equipment”<sup>13</sup> is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].<sup>14</sup> In other words, competitors have deployed fiber to only approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the commercial buildings in these exchanges to which CenturyLink has an in-service connection. Stated differently, CenturyLink has the only connection to approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of the commercial buildings it currently serves in the geographic areas for which it seeks forbearance. In light of this fact, it is unclear how the Commission could find that CenturyLink is nondominant in the provision of packet-based special access services, which can be delivered over those connections. CenturyLink undoubtedly has the ability to leverage this control over last-mile connections to lock up the market for Ethernet and other packet-based special access services.<sup>15</sup>

*Third*, CenturyLink’s response to the Bureau’s request for information on Requests for Proposal (“RFPs”) also fails to support a finding of forbearance. Rather than providing information responsive to the Bureau’s request, CenturyLink provides a data dump of its Salesforce.com records

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<sup>10</sup> Letter from Craig J. Brown, Senior Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 14-9, at 2 (filed Nov. 5, 2014) (“CenturyLink Nov. 5th Response”).

<sup>11</sup> *See id.*, Attachment 11.B.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> Letter from Craig J. Brown, Senior Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 14-9, at 3 (filed Oct. 31, 2014) (“CenturyLink Oct. 31st Response”).

<sup>14</sup> *Id.*, Attachment C (listing “GeoResults Non-CenturyLink Lit Buildings”).

<sup>15</sup> *See, e.g.*, CenturyLink Operating Companies, Tariff F.C.C. No. 9, § 7.4.16(A)-(B) (effective Mar. 1, 2011) (requiring wholesale customers “to commit 100% of their existing and future special access services ordered from [CenturyLink] on a national basis for a five year commitment period” in order to obtain discounts on and circuit portability for DS1 and DS3 special access services, and allowing customers to reduce their commitment levels when they begin purchasing Ethernet or SONET from CenturyLink but not from competitors).



facilities-based competition in the relevant markets, it is unlikely that the wholesale customer had any wholesale options other than CenturyLink.

In addition, another [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]<sup>22</sup> Again, this does not necessarily mean that the prospective wholesale customer purchased the packet-based special access service at issue from a wholesale supplier other than CenturyLink. Rather, the wholesale customer could be continuing to purchase CenturyLink’s DSn services or the wholesale customer’s prospective end user customer could be continuing to purchase Dsn services directly from CenturyLink. In sum, contrary to CenturyLink’s suggestions, its responses to Questions 12 and 13 fail to demonstrate that it faces sufficient competition in the retail or wholesale markets for the services for which it seeks forbearance or that it faces “difficulties in responding effectively to RFPs . . . issued by wholesale customers” due to “asymmetric regulation” of those services.<sup>23</sup>

For these reasons, as well as those discussed in the Joint Commenters’ previous filings in this proceeding,<sup>24</sup> the Commission should deny CenturyLink’s forbearance petition.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones  
Nirali Patel  
Matthew Jones

*Counsel for Level 3, Integra, and Birch*

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<sup>22</sup> *See id.*

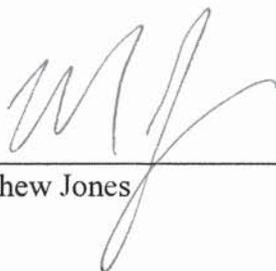
<sup>23</sup> Letter from Craig J. Brown, Senior Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 14-9, at 3 (filed Jan. 21, 2015).

<sup>24</sup> *See supra* note 1.

## CERTIFICATE OF SERVICE

I, Matthew Jones, hereby certify that on this 30th day of January, 2015, I caused to be served via FedEx a true and correct copy of the highly confidential version of the foregoing *ex parte* letter on the following individual:

Craig J. Brown  
Senior Associate General Counsel  
CenturyLink  
Suite 250  
1099 New York Avenue, N.W.  
Washington, DC 20001



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Matthew Jones