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February 18, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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*, WC Docket No. 14-9

Dear Ms. Dortch:

CenturyLink Inc., by its attorneys, hereby responds to claims made in a letter filed by Level 3 Communications, LLC, Integra Telecom, Inc., and Birch Communications, Inc. (the "Joint Commenters") on January 30, 2015.¹

The Joint Commenters Continue to Misunderstand the Relevant Product Market. The Joint Commenters continue to misconstrue the relevant precedent in this matter, asserting that CenturyLink has failed to disaggregate the enterprise broadband market and that the Commission must define distinct product markets using the "hypothetical monopolist" test set out in the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines.² As CenturyLink explained in its Petition, however, this is not the approach the Commission has taken when addressing the enterprise broadband marketplace.³ Instead, in *four* separate orders,⁴ the Commission has treated enterprise broadband services as falling into a single relevant product market.⁵

This approach continues to make sense: There is no stand-alone market for any of these services, but rather a wider market for higher-capacity services provided to enterprise customers through various technologies. Enterprise broadband services are largely interchangeable. The customer essentially purchases a particular amount of bandwidth for a certain price and chooses the capacities and features of available services that best fit its needs. Thus, for example, where

¹ Letter from Thomas Jones, Nirali Patel, and Matthew Jones, Counsel for Level 3, Integra, and Birch, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-9 (filed Jan. 30, 2015) ("January 30 Letter").

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Ethernet is not available, customers will generally substitute a SONET-based service.⁶ Consistent with this approach, the Commission’s enterprise broadband decisions have always treated these services as constituting a single product market.⁷

² *Id.* at 2.

³ *See, e.g.*, CenturyLink Petition for Forbearance at 16-26, WC Docket No. 14-9 (filed Dec. 13, 2013) (“CenturyLink Petition”).

⁴ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“AT&T Forbearance Order”), *aff’d sub nom. Ad Hoc Telecommc’ns. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (“ACS Dominance Forbearance Order”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (“Embarq-Frontier-Citizens Forbearance Order”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (“Qwest Forbearance Order”) (together, the *Enterprise Broadband Forbearance Orders*).

⁵ *See, e.g.*, *AT&T Forbearance Order*, 18713 ¶ 12 (“Based on our analysis of marketplace conditions for the services at issue here, we grant AT&T forbearance from the application of our dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control and certain Computer Inquiry requirements to broadband services with regard to (1) its existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) its existing non-TDM-based, optical transmission services. These services include Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services. This grant is restricted to services that AT&T currently offers and lists in its petitions, and excludes all TDM-based, DS1 and DS3 services.”).

⁶ Declaration of Julie Brown ¶ 9 (Dec. 4, 2013), appended as Attachment 7 to CenturyLink Petition (“Brown Declaration”).

⁷ The Commission also has aggregated high capacity services for competitive analysis in the context of merger review. In the *SBC/AT&T Order* and the *Verizon/MCI Order*, the Commission declined to analyze separate product markets for different capacities of special access services. It found that there were “comparable competitive alternatives for varying capacities of special access [services],” and that competing carriers’ “facilities can be ‘channelized’ to provide service at all capacity levels.” *See SBC Commc’ns Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, 20 FCC Rcd 18290, 18306 ¶ 27 n.90 (2005); *Verizon Commc’ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18449 ¶ 27 n.89 (2005).

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The Joint Commenters do not confront this well-settled precedent.⁸ Indeed, the five-page January 30 Letter barely acknowledges that the Commission has squarely addressed the market-definition question at issue here – in a sentence that castigates CenturyLink for “insisting” that four orders resolving the very question presented should govern the outcome in this matter.⁹ But the Joint Commenters present no basis, either in their January 30 letter or elsewhere, for a departure from the Commission’s well-worn approach. As CenturyLink has explained, the *Phoenix Order*, on which the Joint Commenters rely for support,¹⁰ is off-point. The *Phoenix Order* addressed competition in legacy special access services, not broadband services. As the *Phoenix Order* itself acknowledges, the standard applied to such petitions does not govern petitions regarding enterprise broadband services.¹¹ There is no reason to change course now, particularly when doing so would leave one enterprise broadband provider in a dramatically impaired condition *vis-à-vis* all of its competitors.

CenturyLink Lacks Bottleneck Control in the Product Market At Issue Here. The January 30 Letter next contends that CenturyLink’s data show that it “retains bottleneck control” over the services at issue here. This is nonsense. To “demonstrate” their point, the Joint Commenters employ a mathematical sleight-of-hand, comparing the number of commercial buildings into which CLECs have deployed *fiber* facilities against the number of physical addresses to which CenturyLink provides an extremely broad range of services, including many that *are not at issue in this matter*. The fact that CenturyLink provides TDM-based “DS1, DS3, ... or [UNE] loops” to a particular location¹² says nothing about competition in the enterprise broadband marketplace: Even if CenturyLink were the only provider offering these facilities to a particular location, this would be irrelevant, because CenturyLink *is not seeking any relief with respect to those offerings*. It seeks relief only with respect to enterprise broadband offerings, defined in its petition to include Ethernet, SONET, Video Transmission, Wave, Frame Relay, and ATM offerings.¹³

Moreover, the Joint CLECs further misstate CenturyLink’s market position by conflating “physical addresses” with “buildings.” CenturyLink’s response to the Commission’s data

⁸ tw telecom, Level 3, Integra, and Cbeyond likewise fail to grapple with this precedent in the letter they filed on August 20, 2014. See Letter from Thomas Jones and Nirali Patel, Counsel for tw telecom, Level 3, Integra, and Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-9 (filed Aug. 20, 2013) (“August 20 Letter”).

⁹ January 30 Letter at 2.

¹⁰ See January 30 Letter at 1 (citing *Petition of Qwest Corp. 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 (2010) (“*Phoenix Order*”), *aff’d sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012)).

¹¹ *Phoenix Order*, 25 FCC Rcd at 8644 ¶ 39. See also CenturyLink Petition at 17-21.

¹² *Id.* at 3 (alteration in original).

¹³ See CenturyLink Petition at Attachment 1.

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request indicated that it provided one or more of the specified services to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] physical addresses. A commercial building, however, often includes *multiple* physical addresses (i.e., “locations”). For example, a strip mall with five commercial establishments may have five physical addresses even though a single fiber or copper cable can serve all five locations. Thus, the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *locations* to which CenturyLink provides the specified services would likely account for far fewer *buildings*. Even if it were proper to compare the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *buildings* with CLEC fiber facilities against the number of *locations* to which CenturyLink provides the wide range of services identified (which, as explained above, it is not), the CenturyLink number would be well below [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Indeed, according to GeoResults, CenturyLink has fiber equipment into only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] lit buildings of the more than 400,000 commercial buildings in the area at issue [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

Just as the Joint Commenters have massively overestimated the number of buildings in which CenturyLink has placed the facilities relevant here, so too they have *underestimated* the number of buildings with competitive facilities capable of offering enterprise broadband services. For example, the January 30 Letter ignores cable providers’ hybrid fiber-coax connections into commercial buildings. Those connections facilitate meaningful competition in the provision of enterprise broadband services – competition that is growing stronger as cable providers expand their business-grade offerings.¹⁴ Moreover, the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] GeoResults figure for buildings with CLEC facilities is a conservative estimate itself. It omits, for example, buildings with CLEC fiber equipment that has not been “lit” and buildings that are connected via fiber to *other* buildings that are on the public network. In short, the buildings at issue are far, far more likely to house competitive facilities than the January 30 Letter suggests.

What ultimately *does* matter here is whether there is competition for the provision of enterprise offerings in the nationwide marketplace for such offerings. And, as CenturyLink has demonstrated, there clearly is. Vertical Systems Group found that CenturyLink had only an 8.8

¹⁴ The August 20 Letter claims that “business customers do not generally view [cable] services as viable substitutes for Ethernet and other packet-based special access services.” August 20 Letter at 2. Apparently, business consumers themselves have not been apprised of their views on this matter: Cable companies already have one-quarter of the Ethernet service marketplace nationally, and that share will likely grow to approximately one-third in the next few years. Bloomberg/BNA estimates that, by 2017, cable companies will control more than 40 percent of US small business Ethernet services and one-third of the wireless backhaul marketplace. See Bloomberg BNA, *Cable Commercial Services Business Forecast 2012* at 3 (2012).

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percent share of U.S. Broadband Data service revenues in 2012.¹⁵ CenturyLink was the fourth largest provider of U.S. business Ethernet services as of mid-year 2013, following AT&T, Verizon, and CLEC tw telecom,¹⁶ and collected less than 8 percent of all revenues for the U.S. Retail Metro Business Ethernet services market.¹⁷ While eight service providers (including Time Warner Cable, Level 3, Cox and XO) hold four percent or more of billable Ethernet port installations, more than thirty others deliver Ethernet services in the U.S.¹⁸ Any claim that CenturyLink is dominant in this marketplace is patently absurd.

The Record Contains Undisputed Evidence That CenturyLink Loses Bids to Competitors in the Product Market at Issue Here. The Joint Commenters conclude by arguing that the Salesforce.com information provided by CenturyLink does not demonstrate the specific degree to which CenturyLink loses sales opportunities to its competitors.¹⁹ CenturyLink agrees that this information is of limited value, and indicated as much to the Commission’s staff.²⁰ It provided that information because it was required to do so. Nevertheless, the only evidence on the record with respect to this issue demonstrates that CenturyLink does, in fact, lose a

¹⁵ Vertical Systems Group, *Business Broadband Data Services Share Analysis* at 3 (Oct. 2013) (“VSG Business Broadband Share Analysis”), appended as Attachment 12 to the CenturyLink Petition. “Business broadband data services” includes Private Line services above DS3 capacity, Frame Relay, ATM, Dedicated IP VPN, and Business Ethernet services. CenturyLink’s estimated revenue share includes the revenues of legacy Qwest, Embarq, CenturyTel and Savvis. Other providers include AT&T, EarthLink Business, Frontier, Level 3, Sprint, tw telecom, Windstream, and cable MSOs. *Id.*

¹⁶ See Press Release, Vertical Systems Group, Vertical Systems Group: Mid-Year 2013 U.S. Carrier Ethernet Leaderboard (Aug. 20, 2013) (“VSG Mid-Year 2013 Ethernet Leaderboard”), available at <http://www.verticalsystems.com/vsglb/mid-year-2013-u-s-carrier-ethernet-leaderboard/>. Similarly, Frost & Sullivan has identified CenturyLink as the fourth largest provider of retail and wholesale Ethernet services. See Frost & Sullivan, *Analysis of the U.S. Retail Carrier Ethernet Services Market, 2012* at 40 (Nov. 2012), appended as Attachment 13 to the CenturyLink Petition; Frost & Sullivan, *Analysis of the Wholesale Carrier Ethernet Services Market, 2012: Mobile Backhaul and Retail Market Trends Fuel Revenue Growth*, at 33 (Dec. 2012) (finding that there are “over 25” providers of wholesale carrier Ethernet services), appended as Attachment 5 to the CenturyLink Petition.

¹⁷ VSG *Business Broadband Share Analysis* at 5. Similarly, CenturyLink held only a 9.2 share of the U.S. MPLS/IP VPN services market in 2011. See Frost & Sullivan, *Analysis of the MPLS/IP VPN Services Market: Convergence, Cloud Services, and Distributed Connectivity Continue to Drive Adoption*, at 50 (May 2012), appended as Attachment 14 to the CenturyLink Petition.

¹⁸ VSG Mid-Year 2013 Ethernet Leaderboard.

¹⁹ January 30 Letter at 3-5.

²⁰ See Letter from Craig J. Brown, Senior Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-9, at 2-3 (filed Jan. 21, 2015).

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significant number of contracts as a result of the price regulation to which it – virtually alone among enterprise broadband providers – is subject.²¹

In a Declaration attached to CenturyLink’s petition for forbearance, Julie Brown, Director of Wholesale Pricing, Marketing and Training in CenturyLink’s Wholesale Markets Group, testified that, given the lack of region-wide forbearance, “CenturyLink is often unable to meet customers’ strong desire for simple, customized business arrangements that provide uniform rates, terms and conditions across CenturyLink’s service footprint,” and that the company’s “inability to offer simple, customized arrangements, free of time-consuming tariffing and other requirements, across its entire service area has sometimes excluded it from consideration for such contracts.”²² In the three years leading up to the Petition, “CenturyLink ha[d] lost at least [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] RFPs issued by wireless providers, covering approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] cell sites in areas served by legacy Embarq and CenturyTel, and costing approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] in potential revenue for CenturyLink.”²³ Moreover, notwithstanding the Joint Commenters’ speculation to the contrary, “[e]ach of these losses was to a competitor authorized to negotiate customized service arrangements, with the uniform rates, terms and conditions demanded by wireless providers.”²⁴

CenturyLink experienced similar losses in the wholesale marketplace:

Such losses are more difficult to quantify because wireline carrier customers, for example, do not typically issue RFPs for Ethernet and other enterprise broadband services. Instead, these carriers generally maintain a pricing tool that follows the rates available to that carrier from the various providers of enterprise broadband services in each given area. The prices listed for CenturyLink depend on whether its enterprise broadband services in that area are still subject to dominant carrier regulation. If they are, the

²¹ In the August 20 letter, several CLECs dismiss what they call CenturyLink’s “‘regulatory parity’ theory.” August 20 Letter at 3. They have not, however, responded to the extensive caselaw CenturyLink has provided to demonstrate that it must be subject to the same standards that have been applied to other providers seeking identical relief. *See* CenturyLink Petition at 10-14. They also have not explained how keeping CenturyLink’s enterprise broadband services under dominant regulation is necessary to ensure just and nondiscriminatory rates and to protect consumers in that market, or could possibly do so, given that 90% of the industry is not subject to such rules.

²² Brown Declaration ¶ 4.

²³ *Id.* ¶ 22.

²⁴ *Id.* *See also* Declaration of Julie Brown, appended as Attachment B to CenturyLink’s Reply Comments in Support of its Petition for Forbearance, WC Docket No. 14-9 (filed Feb. 28, 2014) (detailing loss of wireless backhaul contracts).

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pricing tool would list legacy Embarq or CenturyTel standard tariffed prices, which generally would exceed those individually negotiated by other providers.²⁵

Ms. Brown further explains why CenturyLink cannot compete against other providers given its current lack of industry-wide forbearance.²⁶

Thus, the only evidence on the record shows that CenturyLink does in fact lose contracts on account of its inability to price enterprise broadband services flexibly. When this happens, the real losers are consumers, because they (or their retail providers) will be charged rates by the vendor selected that are higher than those that CenturyLink would have been willing to charge if it had been permitted to do so. This result disserves consumers and undercuts the competitive marketplace.

Sincerely,

/s/ Russell P. Hanser
Russell P. Hanser

²⁵ Brown Declaration ¶ 23.

²⁶ *See id.* ¶¶ 23-30.