

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

In the Matter of	)	
	)	
Petition of CenturyLink for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) from	)	WC Docket No. 12-60
Dominant Carrier and Certain <i>Computer</i>	)	
<i>Inquiry</i> Requirements on Enterprise	)	
Broadband Services	)	

**OPPOSITION OF SPRINT NEXTEL CORPORATION**

Sprint Nextel Corporation (“Sprint Nextel”) submits this Opposition in response to the *Public Notice* the Federal Communications Commission (“FCC” or “Commission”) issued on March 6, 2012, seeking comment on CenturyLink’s Petition for Forbearance from Dominant Carrier Regulation (“Petition”).<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

In its Petition, CenturyLink seeks forbearance from dominant carrier regulation of a wide variety of packet-based and optical services (collectively, the “non-TDM services”).<sup>2</sup> These non-

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<sup>1</sup> *Pleading Cycle Established for Comments on CenturyLink Petition for Forbearance from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60, Public Notice, DA 12-346 (rel. March 6, 2012) (“*Public Notice*”); *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60, Order, DA 12-451 (rel. March 22, 2012) (extending comment deadlines); *see also* Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain *Computer Inquiry* Requirements on Enterprise Broadband Services, WC Docket No. 12-60 (Feb. 23, 2012, as amended March 21, 2012) (“Petition”).

<sup>2</sup> *See* Petition, Attachment A (listing the services for which CenturyLink is seeking forbearance, including Ethernet Transport, Ethernet Virtual Private Line, Local Transport – Synchronous Optical Channel, Synchronous Optical Channel Service, Custom Connect, Frame Relay Access Service, ATM Cell Relay Access Service, Video Frame Services – Type II (270 Mbps), Ethernet Virtual Private Line, and 270 Mbps Digital Video Transport Service).

TDM services are critical both to enterprise customers as well as to competitive carriers that require access to those services as wholesale inputs in order to serve enterprise customers. As an incumbent local exchange carrier (“LEC”) that controls critical last-mile facilities in its service areas, CenturyLink enjoys a significant advantage over potential competitors seeking to serve customer locations within those areas.<sup>3</sup> CenturyLink has failed to demonstrate that it is no longer dominant in the provision of all of the non-TDM services for which it seeks relief. Indeed, CenturyLink has not even provided the Commission with the information it would need to determine whether CenturyLink remains dominant in the provision of those services. Consequently, the Commission must deny CenturyLink’s Petition.

## II. DISCUSSION

### A. CenturyLink Bears the Burden of Proof

CenturyLink bears the burden of proving it is entitled to the forbearance relief it seeks.<sup>4</sup> Specifically, CenturyLink must show that: (a) the dominant carrier regulations in question are not necessary to ensure that CenturyLink’s prices are just, reasonable and not unjustly or unreasonably discriminatory; (b) the regulations are not necessary to protect consumers of the subject services; and (c) forbearance from the regulations in question is consistent with the

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<sup>3</sup> See, e.g., *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, ¶ 5 (2010) (“*Qwest Phoenix Forbearance Order*”) (explaining that control of bottleneck facilities constitutes *prima facie* evidence of market power); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1, ¶¶ 54, 56, 58 (1980) (“*Competitive Carrier First Report and Order*”).

<sup>4</sup> See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543, ¶ 20 (2009) (“*Forbearance Procedural Order*”) (“the burden of proof is on forbearance petitioners at the outset and throughout the proceeding”).

public interest.<sup>5</sup> Further, CenturyLink’s Petition must present a *prima facie* case for forbearance that “take[s] into account relevant Commission precedent.”<sup>6</sup> CenturyLink has failed to meet this heavy burden. In fact, CenturyLink has virtually ignored the most relevant Commission precedents and, consequently, has not even attempted to show that granting its Petition would be consistent with those decisions.

**B. CenturyLink’s Petition Largely Ignores the Relevant Analytical Framework**

CenturyLink relies heavily on the FCC’s *Broadband Business Forbearance Orders* to support its contention that dominant carrier regulation of its non-TDM services is no longer necessary because those services are “highly competitive.”<sup>7</sup> Indeed, the Petition is based largely on the notion that CenturyLink should receive forbearance relief simply because the Commission granted other incumbent LECs similar relief in those prior orders.<sup>8</sup>

The *Broadband Business Forbearance Orders* that CenturyLink relies on, however, represent an anomaly in the Commission’s approach to analyzing market power issues. The “abbreviated” analysis used in those orders stands in sharp contrast to the more rigorous approach that the Commission employed in both prior and subsequent orders.<sup>9</sup> The Commission used that more traditional market power test in a long line of decisions, beginning with the

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<sup>5</sup> 47 U.S.C. § 160(a).

<sup>6</sup> *Forbearance Procedural Order* ¶ 17; *see also id.* ¶ 21 (clarifying that the “burden of proof” includes both the burden of production and the burden of persuasion, including the obligation to state a *prima facie* case).

<sup>7</sup> Petition at 3, 5 n.9 (citing orders collectively referenced herein as the *Broadband Business Forbearance Orders*).

<sup>8</sup> *See, e.g.*, Petition at 13 (asking the Commission to treat the Petition as a “me-too” petition).

<sup>9</sup> *See Qwest Phoenix Forbearance Order* ¶ 41.

*Competitive Carrier* proceedings and, more recently, in the *Qwest Phoenix Forbearance Order*.<sup>10</sup>

Thus, in evaluating the merits of CenturyLink’s Petition, the Commission should apply the traditional market power test it used in the *Qwest Phoenix Forbearance Order* and “many prior proceedings.”<sup>11</sup> As the Commission has explained, that analytical approach provides a proven, reliable, framework for analyzing whether a grant of forbearance from dominant carrier regulation is justified pursuant to Section 10.<sup>12</sup> Such an approach is “not only data-driven, economically sound, and predictable, but also reflects a forward-looking approach to competition.”<sup>13</sup>

**C. CenturyLink Has Failed to Provide the Information Necessary to Demonstrate that It Is Entitled to the Requested Relief Under Section 10**

A traditional market power analysis requires the Commission, as an initial step, to identify the relevant product and geographic markets. As explained below, CenturyLink has

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<sup>10</sup> See *id.* ¶ 37 (“return[ing] to a traditional market power framework, which the Commission established in the *Competitive Carrier* proceedings and developed further in subsequent decisions”); *id.* ¶ 5 n.7 (citing the various orders that, collectively, comprised the *Competitive Carrier* proceeding); see also, e.g., *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007).

<sup>11</sup> *Qwest Phoenix Forbearance Order* ¶ 1; *id.* ¶ 37 (noting that the approach used in the *Qwest Phoenix Forbearance Order* is “comparable to the analysis used by the DoJ, FTC and telecom regulators in other countries . . . to determine the extent of competition in a market”).

<sup>12</sup> See *id.* ¶ 37; see also *Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings*, Public Notice, 25 FCC Rcd 8013, DA 10-1115 at 1 (2010) (“*Analytic Framework PN*”) (explaining that the FCC’s traditional market power analysis is “well-designed to protect consumers, promote competition, and stimulate innovation”).

<sup>13</sup> *Qwest Phoenix Forbearance Order* ¶ 3; see also *id.* ¶ 21 (finding it “appropriate to return to a competitive analysis that more carefully defines the relevant product and geographic markets and examines whether there are any carriers in those markets that, individually or jointly, possess significant market power”).

attempted to justify its request for relief based on an overly inclusive product market and excessively large geographic market. CenturyLink, therefore, has failed to show that its Petition satisfies the statutory requirements of Section 10 for granting the requested forbearance relief.

1. Relevant Product Market

Consistent with the *Qwest Phoenix Forbearance Order*, the FCC must “separately evaluate competition for distinct services . . . differentiating among the various retail services purchased by [different types of retail customers] . . . and the various wholesale services purchased by other carriers.”<sup>14</sup> CenturyLink ignores this precedent and instead asks the Commission to treat all of the non-TDM services for which it seeks relief as part of a single relevant product market that CenturyLink claims includes a broad range of “higher-capacity services provided to enterprise customers through various technologies.”<sup>15</sup>

In fact, as CenturyLink’s own product descriptions and tariffs show, the prices, transmission capacity, and other characteristics of the services for which it seeks relief in this proceeding vary widely.<sup>16</sup> According to CenturyLink’s erroneous definition of the relevant

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<sup>14</sup> *Id.* ¶ 1.

<sup>15</sup> Petition at 14-15; *see also id.* at 20 (analyzing competition in the “marketplace for enterprise broadband services.”).

<sup>16</sup> *See, e.g., id.* at Attachment A, “Services for Which CenturyLink Is Seeking Forbearance.” *Compare, e.g.,* CenturyLink Product Fact Sheets: “CenturyLink Private Line Synchronous Service Transport,” *available at:* <<http://www.centurylink.com/business/asset/product-info/private-line-synchronous-service-transport-po070105.pdf>>; “CenturyLink Metro Ethernet,” *available at:* <<http://www.centurylink.com/business/asset/product-info/metro-optical-ethernet-po070070.pdf>>; “CenturyLink Frame Relay Service,” *available at:* <<http://www.qwest.com/networx/downloads/productOverviews/FrameRelay.pdf>>; “CenturyLink Asynchronous Transfer Mode Service,” *available at:* <[http://www.qwest.com/networx/downloads/productOverviews/AsynchronousTransferMode\\_ATM.pdf](http://www.qwest.com/networx/downloads/productOverviews/AsynchronousTransferMode_ATM.pdf)>. *See also, e.g.,* CenturyLink General Exchange Tariff Process for Wholesale Customers, *available at:* <<http://www.centurylink.com/wholesale/industrysolution/get.html>> (viewed Apr. 13, 2012).

product market, enterprise customers (as well as, presumably, carrier customers) would regard a service with a transmission rate far below 1 Gbps (the equivalent of an OC-12) and a service with a transmission rate of almost 2.5 Gbps (the equivalent of an OC-48) as effective substitutes for one another. That claim is belied by the declaration submitted by CenturyLink’s own Director of Wholesale Pricing, Marketing and Training, however, which stresses that customers are attentive to the capabilities and features of different non-TDM services when making purchasing decisions.<sup>17</sup>

In addition, CenturyLink has ignored Commission precedent focusing on facilities-based competition in analyzing market power in the wholesale market.<sup>18</sup> As a result, in discussing wholesale competition, CenturyLink has failed to distinguish between facilities-based competition and “competition” from resellers or other providers that do not rely on their own facilities. Thus, CenturyLink has not provided the Commission with the data it needs to make an informed decision regarding the level of competition in the relevant wholesale product market(s).

In short, CenturyLink has proposed an overly inclusive definition of the product market the Commission should use in evaluating the Petition without offering any plausible justification.<sup>19</sup> Absent a credible definition of the relevant product market, the Commission

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<sup>17</sup> See Petition at Attachment B, Declaration of Emily Binder, ¶¶ 9-10 (noting that customers compare the capacities and features of different services before selecting one that best fits their needs, distinguishing between dedicated and non-dedicated services and noting the importance of features such as network reliability and survivability).

<sup>18</sup> See, e.g. *Qwest Phoenix Forbearance Order* ¶¶ 69-71, 76-78 (focusing on facilities-based competition in evaluating competition for wholesale loops and transport services).

<sup>19</sup> At a minimum, CenturyLink should have explained how the numerous services for which it seeks forbearance – including dedicated and switched services at capacities ranging from 10 Mbps to 10 Gbps – are effective substitutes not only for each other, but for other products in the “wider market for higher-capacity services.” Petition at 14.

cannot perform the analysis required to satisfy section 10. Consequently, on this basis alone, the Commission must deny the Petition.

## 2. Geographic Market

CenturyLink also has defined the relevant geographic market far too expansively, arguing for a “national market analysis.”<sup>20</sup> Contrary to CenturyLink’s proposed approach, the FCC has concluded in prior forbearance proceedings that in the telecommunications industry, “each customer location constitutes a separate relevant geographic market.”<sup>21</sup> For reasons of administrative convenience, the Commission has aggregated groups of similarly situated customers into larger geographic markets. But the aggregation must be rational – the customers within the designated geographic area must face similar competitive choices.<sup>22</sup>

CenturyLink has not shown, and could not show, that customers in its proposed “national market” face similar choices.<sup>23</sup> For example, CenturyLink’s attempt to group all customer locations into a single, national, geographic market ignores the fact that the competitive choices for non-TDM services available to customers in densely populated metropolitan areas typically are very different from the choices that are available to customers in rural areas.<sup>24</sup> Further, the

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<sup>20</sup> Petition at 16; *see also, e.g., id.* at 24-25 (discussing CenturyLink’s share of the national market for Ethernet services).

<sup>21</sup> *Qwest Phoenix Forbearance Order* ¶ 64.

<sup>22</sup> *Id.*

<sup>23</sup> In the *Qwest Phoenix Forbearance* proceeding, for example, the Commission’s analysis focused largely on the Phoenix MSA in which Qwest sought forbearance relief. *Qwest Phoenix Forbearance Order* ¶¶ 64-91.

<sup>24</sup> *See* FCC, “Connecting America: The National Broadband Plan,” at 20 (rel. March 16, 2010), *available at*: <<http://download.broadband.gov/plan/national-broadband-plan.pdf>> (“National Broadband Plan”) (explaining that the availability and price of broadband circuits “vary greatly across different geographies”); *see also, e.g., Qwest Phoenix Forbearance Order*

Commission in the past has consistently used smaller geographic areas, such as the area served by a single wire center, to assess competitive conditions for a wide variety of services.<sup>25</sup>

Moreover, CenturyLink itself has urged the Commission to use the wire center as the relevant geographic market in assessing the competitiveness of the marketplace for residential broadband services. In that context, CenturyLink asserted that population density and other factors can cause competitive conditions to vary from wire center to wire center.<sup>26</sup> Precisely the

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¶ 1 (explaining that the Commission considered “how competition varies within localized areas in the Phoenix market”).

<sup>25</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 (2005) (“[W]e find that the area served by a wire center is the appropriate geographic market. . . . [A]n MSA-wide approach . . . would require . . . lumping together areas in which the prospects for competitive entry are widely disparate.”); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation to Time Warner Cable Inc., et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 64 (2006) (“the Commission has concluded that the relevant geographic market for MVPD services is local because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service”); *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc., for Consent to Transfer Control of Licenses and Authorizations and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580, ¶ 20 (2006) (noting that “[i]n recent mobile telephony transactions, the Commission applied the ‘hypothetical monopolist test’ and found that the relevant geographic markets are local”); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶¶ 72-73 (1999) (rejecting proposals to define the geographic scope of pricing flexibility on the basis of states or study areas).

<sup>26</sup> See, e.g., Letter from Jeffrey Lanning, CenturyLink, to Marlene Dortch, FCC, WC Docket No. 05-337, Attachment at 4, 6 (Dec. 15, 2009); Comments of CenturyLink, WC Docket No. 10-90, at 11-15 (April 18, 2011) (criticizing the practice of determining competitive conditions for broadband services across broad geographic areas and arguing that there are areas where it is “not economically feasible . . . to deploy a broadband network, given the revenues that can reasonably be expected from services provided over that network”). Although CenturyLink’s prior arguments focused on broadband services offered to residential customers, it has not even attempted to explain why the same principles do not apply to enterprise customers.

same factors likewise require the Commission to use a similarly localized geographic market definition in assessing the competitiveness of the non-TDM services that are the subject of CenturyLink's Petition. CenturyLink, however, has not submitted such an analysis in support of its request. Moreover, CenturyLink has failed to explain adequately why the Commission should depart from the granular analyses it has used in the past and employ a national geographic market in evaluating CenturyLink's Petition.<sup>27</sup>

In sum, because CenturyLink's Petition is based on improperly defined product and geographic markets, it fails to present a credible *prima facie* case to support the requested forbearance relief.<sup>28</sup> Accordingly, the Commission must deny CenturyLink's Petition.

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Indeed, the same geographic disparities exist with regard to enterprise services: costs and revenues – and thus competitive conditions – vary widely in different geographic markets. *See* National Broadband Plan at 20 (explaining that broadband availability varies greatly in different areas and noting that “many businesses and anchor institutions face challenges acquiring the [broadband] connectivity to support their needs”).

<sup>27</sup> CenturyLink relies heavily on the *Broadband Business Forbearance Orders* to support its use of a national geographic market. As explained above, however, those orders represent a departure from the more analytically rigorous approach the Commission has used in numerous other proceedings. *See* Section II.B, *supra*; *see also supra* at note 25 (listing a wide range of proceedings in which the Commission employed a more granular geographic market definition).

<sup>28</sup> *See* 47 C.F.R. § 1.54(b); *Forbearance Procedural Order* ¶ 21 (requiring the petitioner to “state a complete *prima facie* case in the petition”).

### III. CONCLUSION

For the reasons stated above, the Commission must deny CenturyLink's Petition.

Respectfully submitted,

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Dated: April 20, 2012

**Certificate of Service**

I hereby certify that on this 20th day of April, 2012, I caused a true and correct copy of the foregoing Opposition of Sprint Nextel Corporation to be mailed by electronic mail to:

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