

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

REPLY COMMENTS OF AT&T INC.

JACK S. ZINMAN
GARY L. PHILLIPS
PEGGY GARBER

Attorneys For:
AT&T INC.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3053 – phone
(202) 457-3074 – facsimile

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I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies (collectively, AT&T) respectfully submit the following reply comments in response to CenturyLink’s Petition seeking forbearance from certain dominant carrier regulations and *Computer Inquiry* requirements for its non-TDM packet-switched and optical broadband transmission services (collectively, enterprise broadband services).¹

The handful of commenters opposing CenturyLink’s Petition raise two basic claims: (1) the market for enterprise broadband services is not sufficiently competitive to warrant forbearance under section 10 of the Act; and (2) in evaluating whether to grant forbearance for these non-TDM broadband services, the Commission should apply the “traditional market power framework” that it used to evaluate Qwest’s legacy TDM services in the *Phoenix Forbearance Order*.² They are wrong on both counts.

First, as the Commission has previously found, the enterprise broadband market is teeming with a “myriad of providers” offering a variety of competitive broadband transmission services to enterprise customers.³ Second, the *Phoenix Forbearance Order* concerned “legacy [TDM] facilities” and not the enterprise broadband services at issue here, which call for a “different analysis” that factors in the broadband deployment goals that Congress set forth in

¹ 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) (Petition).

² Sprint Comments; TW Telecom Comments; Joint Comments of NASUCA and N.J. Division of Rate Counsel. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 (2010) (*Phoenix Forbearance Order*), appeal pending sub nom. *Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. filed July 30, 2010).

³ See *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, et al.*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180 ¶ 22 (2007) (*Enterprise Broadband Order*), *aff’d*, *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

section 706 of the Act.⁴ Accordingly, the Commission should reject the opposing commenters' arguments.

II. DISCUSSION

A. The Market for Enterprise Broadband Services is Robustly Competitive.

As CenturyLink, AT&T and others have demonstrated to the Commission at length, the market for enterprise broadband services is extremely competitive – even more so than it was in 2007 when the Commission granted forbearance relief to AT&T for the same services at issue here.⁵ At that time, the Commission concluded dominant carrier regulation was no longer warranted because there “are a myriad of providers prepared to make competitive offers to enterprise customers,” including “the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against AT&T.”⁶

Over the last five years that competition has only intensified. As AT&T explained in a recent filing, the explosive growth of wireless data services – and the resulting stampede of wireless carriers seeking to upgrade their backhaul links to high-capacity Ethernet services – has dramatically increased the already extensive competition among the many providers of these enterprise broadband services.⁷ Indeed, even some CLECs are now willing to acknowledge this competitive reality. According to Level 3, for example, the wireless backhaul market is “a very competitive space. . . . [W]e’ve actually seen the competition really, really increase over the past

⁴ *Phoenix Forbearance Order* ¶ 39. See 47 U.S.C. § 1302.

⁵ See, e.g., Petition at 20-28, Attachments C-L; Letter from David Lawson, Counsel for AT&T, to Marlene Dortch, FCC, WC Docket No 05-25 (March 28, 2012) (AT&T March 28, 2012 Letter); Supplemental Comments of AT&T, WC Docket No. 05-25 (August 8, 2007); Verizon Comments, WT Docket No. 11-186, at 99-107 (Dec. 5, 2011).

⁶ *Enterprise Broadband Order* ¶ 22.

⁷ AT&T March 28, 2012 Letter.

12 months, pretty dramatically. . . . [T]he MSOs seem to have really gotten into that space in earnest, [and] CLECs are becoming really competitive.”⁸ And for its part, Sprint has announced that in connection with upgrading backhaul links at tens of thousands of its cell sites, it “will end up with ‘25 to 30 significant backhaul providers’ that will likely be a mix of incumbent LECs, cable MSOs and alternative carriers, all of whom will be expected to deliver Ethernet predominantly over fiber for Sprint's new multi-mode network.”⁹

Rather than restate our prior filings here, however, we respectfully refer the Commission to those filings, which amply demonstrate that robust competition in the enterprise broadband market makes dominant carrier regulation both unnecessary and counterproductive.¹⁰

B. The Commission Should Not Abandon Its Well-Established, Judicially Approved Framework for Analyzing Broadband Forbearance Requests.

The commenters opposing CenturyLink’s Petition urge the Commission to evaluate the Petition using the “traditional market power framework” that it employed in the *Phoenix Forbearance Order*. In that *Order*, the Commission denied Qwest’s request for forbearance from various unbundling and dominant carrier requirements with respect to legacy facilities and

⁸ Amanda Tierney, Vice President-Wholesale Market Management for Level 3, Interview with Lightreading.com (Oct. 7, 2011) available at http://www.lightreading.com/video.asp?doc_id=213138&f_src=lrdailynewsletter.

⁹ Carol Wilson, Light Reading, *Sprint to Reveal Backhaul Contract Winners Friday* (Oct. 5, 2011), available at: http://www.lightreading.com/document.asp?doc_id=213050. Sprint also noted that it “could still build its own backhaul facilities, where the alternatives presented don’t meet its requirements, including in less populated markets,” “[b]ut to date . . . [it was] pleased with the way the industry has stepped up.” *Id.* See also TW Telecom Reports First Quarter 2012 Results, TW Telecom Press Release (May 1, 2012) (TW Telecom “plans to rollout a new Ethernet solution in the second half of 2012, that offers *ubiquitous national Ethernet coverage* from a single connection point to buildings and data centers across its national footprint for infrastructure customers, including carriers, data centers and other technology companies.”) (emphasis added).

¹⁰ See AT&T March 28, 2012 Letter; Declaration of Parley Casto, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (June 10, 2011); Supplemental Comments of AT&T, WC Docket No. 05-25 (August 8, 2007); Supplemental Reply Comments of AT&T, WC Docket No. 05-25 (Aug. 15, 2007).

services, citing supposed deficiencies in Qwest’s market-specific evidentiary showing.¹¹ But even if the *Phoenix Forbearance Order* had been correctly decided on its own terms, which AT&T disputes,¹² it should not be applied here for at least three independent reasons.

First, the *Phoenix Forbearance Order* concerned legacy TDM-based services, not the high-capacity broadband packet-switched and optical services at issue here, which implicate the broadband deployment goals articulated in section 706 of the Act. Indeed, in that *Order*, the Commission did “not find any persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.”¹³ Thus, the Commission chose to use its “traditional market power framework.”¹⁴

By contrast, where, as here, broadband deployment is implicated, section 706 “explicitly directs the FCC to utilize forbearance to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans and provides the Commission flexibility to balance the future benefits against short term impact.”¹⁵ Because of this statutory requirement, the Commission recognized the need for “a different analysis” when deciding a broadband forbearance petition rather than a “petition addressing legacy facilities, such as Qwest’s petition”¹⁶ In short, the traditional market power framework is simply the *wrong* framework for broadband services.

¹¹ See *Phoenix Forbearance Order* ¶¶ 1-3.

¹² AT&T has intervened in support of Qwest in the pending Tenth Circuit appeal of the *Phoenix Forbearance Order*.

¹³ *Phoenix Forbearance Order* ¶ 39.

¹⁴ *Phoenix Forbearance Order* ¶ 37.

¹⁵ *Phoenix Forbearance Order* ¶ 39 (quoting *Earthlink v. FCC*, 462 F.3d 1, 8-9 (D.C. Cir. 2006)) (internal quotations and alterations omitted).

¹⁶ *Phoenix Forbearance Order* ¶ 39.

Second, the *right* analytical framework for broadband services already exists. Indeed, the Commission has articulated, applied, and received judicial approval of its analytical framework for evaluating forbearance petitions related to enterprise broadband services.¹⁷ For example, in the *Enterprise Broadband Order*, the Commission analyzed competitive conditions “without regard to specific, identified geographic markets,” because “relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development.”¹⁸ And the courts have uniformly approved that form of market analysis in the section 706 context because:

Given the rapidly changing state of the overall broadband market and § 706’s direction that the FCC may look to and attempt to shape possible future developments in regulating broadband, . . . the law does not compel a particular mode of market analysis or level of geographic rigor when the agency forbears from imposing certain requirements on broadband providers.¹⁹

The opposing commenters offer no reason to depart from this judicially approved framework, save for their own self-interest in seeking to place what they perceive to be a higher hurdle in front of CenturyLink. But CenturyLink is seeking the *same* relief granted to AT&T,

¹⁷ See *Enterprise Broadband Order*; *Ad Hoc v. FCC*, *supra*; *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 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), *aff’d Ad Hoc supra*; *Petition of ACS 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); *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); see also *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21504-13 ¶¶ 19-36 (2004), *aff’d*, *EarthLink*, 462 F.3d 1 (D.C. Cir. 2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 91 (2005) (*Wireline Broadband Order*), *aff’d*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

¹⁸ *Enterprise Broadband Order* ¶ 20.

¹⁹ *Ad Hoc*, 572 F.3d at 908 (internal quotation marks omitted). See also *EarthLink*, 462 F.3d at 8; *Time Warner Telecom*, 507 F.3d at 221.

ACS of Anchorage, Embarq, Frontier and Qwest for the *same* categories of non-TDM packet-switched and optical broadband transmission services offered by those carriers.²⁰ The only difference here is that the enterprise broadband market has become even *more* competitive since the Commission granted that relief. It would thus be entirely arbitrary and capricious for the Commission to abandon its existing, judicially approved analytical framework for broadband forbearance petitions simply because the opposing commenters like their odds better under a different approach.²¹

Third, in adopting the *National Broadband Plan*, the Commission repeatedly recognized that regulatory uncertainty poses a significant impediment to broadband investment.²² When service providers are unable to discern which rules apply to broadband services – or when the Commission fundamentally changes those rules in mid-course – providers’ incentives and abilities to invest in broadband are diminished. Thus, consistent with section 706’s directive to remove barriers to infrastructure investment, the Commission committed in the *National Broadband Plan* to provide greater certainty regarding a variety of different regulations affecting broadband services.²³

By contrast, the opposing commenters are asking the Commission to do just the opposite here – abruptly overturn years of judicially approved Commission precedent and apply a different standard with the goal of maintaining outmoded regulations on CenturyLink’s enterprise broadband services. But doing so would send an investment-chilling message to the

²⁰ Petition at 8-10.

²¹ See 5 U.S.C. § 706 (2)(A) (“a reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law).

²² *Connecting America: The National Broadband Plan*, FCC, at 110, 141-42, 206 (March 14, 2010).

²³ *Id.*

entire broadband industry, while calling into question the Commission’s commitment to fulfilling the Congressional goal of ubiquitous broadband deployment articulated in section 706. Instead, the Commission should continue to promote broadband deployment as Congress intended by eliminating unnecessary regulations through “regulatory forbearance” and other measures that “remove barriers to infrastructure investment.”²⁴

III. CONCLUSION

For all of the foregoing reasons, the Commission should reject the arguments of the commenters opposing CenturyLink’s Petition.

Respectfully Submitted,

By: /s/ Jack S. Zinman

Jack S. Zinman
Gary L. Phillips
Peggy Garber

Attorneys for
AT&T Inc.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3053 – phone
(202) 457-3074 – facsimile

²⁴ 47 U.S.C. § 1302.