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***Appropriate Regulatory Framework
for Review of CenturyLink's
Enterprise Broadband Forbearance
Petition***

Sept. 11, 2012

CenturyLink's Petition



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- Today, FCC regulation of CenturyLink's enterprise broadband services varies sharply, depending on the legacy ILEC.
 - Qwest has forbearance for *all* current enterprise broadband services.
 - Embarq has forbearance for *some* current services.
 - CenturyTel has forbearance for *no* current services.
- This lack of uniform regulatory treatment frustrates customers and artificially handicaps CenturyLink in the enterprise broadband market.

CenturyLink's Petition



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- CenturyLink seeks forbearance from dominant carrier regulation and *Computer Inquiry* tariffing requirements for its enterprise broadband services still subject to those requirements.
 - Forbearance would extend to CenturyLink the same regulatory treatment that applies to every other major provider of enterprise broadband services, including market leaders AT&T, Verizon, and tw telecom.

Furthering §706 Goals



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- Forbearance will enable CenturyLink to meet customer demands for simple, individually-tailored arrangements.
 - Such arrangements will expedite CenturyLink’s delivery of enterprise broadband services – including fiber backhaul services necessary to provide broadband services to wireless consumers.
- Forbearance will improve competition.
 - It will allow CenturyLink to compete more effectively in meeting customers’ needs.
 - It will create further downward pricing pressure on enterprise broadband services.
 - It will prevent its tariff from creating a pricing umbrella for competitors.
- Removing this regulatory handicap may advance deployment through more efficient network investment.

Appropriate Analytical Framework



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- The Commission has a well-established, judicially-approved analytical framework for reviewing CenturyLink’s petition.
 - The Commission has consistently applied a streamlined analytical framework – “informed by its traditional market power framework” – to evaluate forbearance petitions related to enterprise broadband services.
- That framework was used to review comparable petitions of AT&T, ACS, Embarq, Frontier, Qwest.

Reasons for Applying a Streamlined Analysis



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- The Commission explained its reasons for viewing enterprise broadband services from the perspective of the “larger trends that are shaping the marketplace” and not insisting on “detailed market share information for particular enterprise broadband services.”
 - An evolving marketplace makes static market share information unreliable.
 - Section 706 of the 1996 Act directs the Commission to promote the availability of advanced services.
 - Enterprise customers are sophisticated purchasers of these services, seeking best-priced alternatives from multiple national providers with national market presences.
 - Many enterprise customers have national, multi-location operations.
 - DS-1 and DS-3 special access services, UNEs, and Title II regulation of enterprise broadband services will remain in place.
 - “Myriad providers” are prepared to make competitive offers to enterprise customers.

Similar Approach in Other Contexts



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- The Commission has employed a similar streamlined approach in other types of proceedings considering the appropriate regulation of broadband services:
 - *Cable Modem Order*
 - *Triennial Review Order*
 - *MDU Reconsideration Order*
 - *FTTC Reconsideration Order*
 - *Section 271 Broadband Forbearance Order*
 - *Wireline Broadband Order*
- Each of these actions was guided by § 706’s directive to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.
- The Commission found the emerging market for broadband services “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve.”

Uniform Court Approval



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- Courts have uniformly approved this form of market analysis with advanced services.
- *Ad Hoc* (upholding *Enterprise Broadband Forbearance Orders*):
 - The FCC reasonably concluded that eliminating the “extra layer of dominant-carrier pricing regulation” on enterprise broadband -- “while leaving in place basic Title II common-carrier regulation -- will better promote competition and the public interest.”
 - The FCC reasonably acted on a nationwide basis, 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.”

Uniform Court Approval



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- *EarthLink* (affirming *Section 271 Broadband Forbearance Order*):
 - A “painstaking analysis of market conditions” in “particular geographic markets and for specific telecommunications services” was not necessary before forbearing from § 271 unbundling requirements on broadband network elements.
 - Given the FCC’s view of the broadband market “as still emerging and developing, it reasonably eschewed a more elaborate snapshot of the current market” in deciding whether to forbear.
- *Time Warner Telecom* (upholding *Wireline Broadband Order*):
 - The FCC adequately “justified its decision to refrain from a traditional market analysis and to rely instead on larger trends and predictions concerning the future of the broadband services market.”

Inapplicability of Phoenix Framework



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- Nothing in the *Phoenix Forbearance Order* altered the analytical framework applied in the *Enterprise Broadband Forbearance Orders*.
- The analytical framework established in the *Phoenix Forbearance Order* applies only to requests for forbearance from unbundling requirements on legacy telecommunications facilities and services.
- The FCC explicitly acknowledged in the *Phoenix Forbearance Order* that a different analytical framework may well apply to broadband services.

Inapplicability of Phoenix Framework



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- None of the concerns underlying the *Phoenix Forbearance Order* applies here:
 - Whether it was appropriate to use “fundamentally different analytical methodologies to evaluate competition for purposes of unbundling relief versus relief from dominant carrier regulation.”
 - Whether an ILEC’s retail market share for telephone subscribers and geographic reach of the incumbent cable company’s network were appropriate triggers for eliminating unbundling obligations.
 - Whether a perceived duopoly constitutes effective competition sufficient to justify the elimination of unbundling requirements.
 - Whether the FCC’s predictive judgments in the *Omaha Forbearance Order* have been borne out by subsequent developments.

Inapplicability of Phoenix Framework



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- On the contrary, CenturyLink's petition relies on the predictive judgments in the *Enterprise Broadband Forbearance Orders*, all of which have been fully borne out:
 - Demand for enterprise broadband services has grown dramatically, exemplified by surging bandwidth needs for mobile backhaul services
 - Competition for enterprise broadband services has accelerated, resulting in a long list of non-ILEC providers
 - The market for these services continues to evolve rapidly, with customers migrating to Ethernet and other services.
 - Forbearance has resulted in falling prices for enterprise broadband services.
 - Legacy Embarq and Qwest have used the forbearance authority granted in the *Enterprise Broadband Forbearance Orders* to enter into approximately 270 commercial agreements with commercial customers.

Legal Constraints



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- It would be arbitrary and capricious to apply the *Phoenix* framework to CenturyLink’s petition.
- The Commission has given no notice of an intent to depart from the streamlined analysis it has consistently applied for enterprise broadband forbearance petitions, as well as other requests relating to regulation of advanced services.
- The Commission based the relief granted in the *Enterprise Broadband Forbearance Orders* on a number of key findings, which it has not altered or even addressed.
- The “unique factual circumstances” noted by the 10th Circuit as justifying “goalpost-moving” in the *Phoenix Forbearance Order* are not present here.

Additional Reasons for a Streamlined Analysis



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- Applying the *Phoenix* framework to CenturyLink's petition would upend the FCC's consistent, decade-long deregulatory approach to advanced services.
- The Commission has consistently recognized a granular market analysis is neither necessary nor appropriate in every context.
- The Commission found compelling reasons in the *Enterprise Broadband Forbearance Orders*, to apply a streamlined analysis.

Additional Reasons for a Streamlined Analysis



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- There are even more compelling reasons to apply a streamlined analysis to CenturyLink's petition
 - Competition has only accelerated since 2007.
 - No theoretical analysis is necessary to predict the impact of granting CenturyLink's petition.
 - CenturyLink is not the market or product leader.
 - It would be inequitable to apply a completely different analytical approach to CenturyLink's petition than the FCC applied to other providers of the same services.
 - Partial forbearance through an unnecessary granular analysis would continue to deny enterprise customers the simple, uniform arrangements that have become standard in the industry since the *Enterprise Broadband Orders*.

Additional Reasons for a Streamlined Analysis



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- With CenturyLink's petition, such competitive analysis is plainly unnecessary.
 - The Commission recognized in the *Phoenix Order* that carriers may seek forbearance “based on factors other than, or in addition to, claimed competition, so long as the section 10 criteria are satisfied.”
 - As CenturyLink showed in its petition, and as the FCC found in the *Enterprise Broadband Forbearance Orders*, burdens imposed by dominant carrier regulation of enterprise broadband services vastly outweigh any benefit of that regulation.
 - Competition and customers are harmed by continuing dominant carrier regulation of CenturyLink enterprise broadband services, and both would ultimately benefit from forbearance.
 - Beyond the difficulties meeting customer needs, inconsistent and uneven regulation of CenturyLink's enterprise broadband services needlessly increases the liabilities of outdated dominant carrier regulation.
 - In the enterprise broadband market, customers are sophisticated purchasers well aware of their many competitive options.