

competitive analysis of enterprise broadband services as a group, rather than by individual services,<sup>59</sup> and that a national market analysis, rather than a geographic market-by-market analysis, must be conducted, 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.”<sup>60</sup> The courts have uniformly approved this approach in the broadband context because, “[g]iven the rapidly changing state of the overall broadband market and [the statute’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.”<sup>61</sup>

In contrast, in the *Phoenix Forbearance Order*, the Commission stated that it was “return[ing]” to a “traditional market power” analysis in addressing a forbearance request for standard TDM “legacy” services,<sup>62</sup> but it acknowledged that “a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition

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<sup>59</sup> See *AT&T Forbearance Order*, 22 FCC Rcd at 18719-20 ¶¶ 23-24; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19491-93 ¶¶ 22-23; *Qwest Forbearance Order*, 23 FCC Rcd at 12275-77 ¶¶ 26-27.

<sup>60</sup> See *AT&T Forbearance Order*, 22 FCC Rcd at 18716-18 ¶¶ 20-21; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489-91 ¶¶ 19-20; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-74 ¶¶ 23-24.

<sup>61</sup> *Ad Hoc Appeal*, 572 F.3d at 908 (citations and internal quotation marks omitted).

<sup>62</sup> *Phoenix Forbearance Order*, 25 FCC Rcd at 8642 ¶37, 8644 ¶ 39.

addressing legacy facilities.”<sup>63</sup> “For advanced services, . . . we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation.”<sup>64</sup>

The Commission had previously acknowledged that legacy TDM services and broadband services might be treated differently. It noted the absence of “similarities between the mass market switched access services market . . . and the enterprise packet-switched and optical services market . . . that would [otherwise] warrant use of a similar type of market analysis” and that its previous use of a ““traditional market power analysis”” “does not establish that the Commission is required to conduct” such an analysis “in every case in which the agency considers whether to forbear from dominant carrier regulation.”<sup>65</sup> Thus, where enterprise broadband services are involved, a “different analysis” from the “traditional” approach taken with regard to “legacy” services properly applies -- one that takes into account the rapidly evolving, unregulated nature of the broadband market.<sup>66</sup>

Even apart from the unique characteristics of the enterprise broadband market, Section 706 of the Telecommunications Act of 1996 (“1996 Act”), which requires the Commission to “encourage the deployment . . . of advanced telecommunications capability,”<sup>67</sup> mandates application of a forbearance analysis that encourages broadband investment to the same extent as the approach taken in the *Enterprise Broadband Forbearance Orders*. The Commission found in the *AT&T Forbearance Order* that Section 706 “require[s]” the Commission to “ensure that

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<sup>63</sup> *Id.* at 8644 ¶ 39.

<sup>64</sup> *Id.*

<sup>65</sup> Brief for the Federal Communications Commission at 34, *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, No. 07-1426 (D.C. Cir. filed Dec. 3, 2008) (“FCC Brief, *Ad Hoc*”).

<sup>66</sup> *Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

<sup>67</sup> 47 U.S.C. § 1302(a) (“Section 706”).

[its] broadband policies promote infrastructure investment,” because “regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest.”<sup>68</sup> The other *Enterprise Broadband Forbearance Orders* echoed the paramount importance of Section 706 in any forbearance analysis involving broadband services.<sup>69</sup>

As the Commission noted in its brief in the *Ad Hoc Appeal*, Congress specifically directed it to “utiliz[e] its section 10 ‘regulatory forbearance’ power” to promote broadband investment.<sup>70</sup> Thus, Section 706 mandates that Section 10 be applied in this case to “promote [broadband] infrastructure investment” and eliminate “regulation that constrains incentives to invest in and deploy” such infrastructure.<sup>71</sup>

The statutory mandate that forbearance be applied to remove regulation that deters broadband investment means that the competitive analysis used in the *Phoenix Forbearance Order* cannot be used here. In *Phoenix*, the Commission expressly acknowledged that forbearance requests involving broadband services must be reviewed pursuant to “the direction

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<sup>68</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49 (citation omitted).

<sup>69</sup> See *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19503 ¶ 46, 19504 ¶ 48; *Qwest Forbearance Order*, 23 FCC Rcd at 12287 ¶ 50, 12288 ¶ 52.

<sup>70</sup> The Commission stated that, in adopting the *Enterprise Broadband Forbearance Orders*, it “heeded Congress’s direction to ‘utiliz[e] its section 10 ‘regulatory forbearance’ power to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’” FCC Brief, *Ad Hoc*, at 1 (citing 1996 Act, Pub. L No. 104-104, 110 Stat. 56, § 706(a), 47 U.S.C. § 157 note).

<sup>71</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49. See also *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19504 ¶ 48; *Qwest Forbearance Order*, 23 FCC Rcd at 12288 ¶ 52.

of section 706” and its mandate to use forbearance to encourage broadband deployment, thus requiring a “different analysis” from the one applied to the legacy services in the case before it.<sup>72</sup>

Finally, the analytical approach taken in the *Phoenix Forbearance Order* is inapplicable in this case for yet another reason. In *Phoenix*, the Commission expressed dissatisfaction with the broader competitive analytical approach taken in prior forbearance proceedings addressing legacy services, particularly the *Qwest Omaha Forbearance Order*,<sup>73</sup> based primarily on the alleged failure of “predictive judgments” in that order regarding the development of competition.<sup>74</sup>

By contrast, there should be no question that all of the expectations in the *Enterprise Broadband Forbearance Orders* have been borne out -- e.g., “we anticipate that competitors will explore various [ILEC special access and other] options in seeking to provide enterprise broadband services;”<sup>75</sup> “detariffing of these services will facilitate innovative integrated service offerings;”<sup>76</sup> and “eliminating these requirements . . . we anticipate will increase even further the amount of competition in the marketplace.”<sup>77</sup> As detailed below, enterprise broadband

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<sup>72</sup> *Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

<sup>73</sup> *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005) (“*Qwest Omaha Forbearance Order*”), *aff’d*, *Qwest Corp. v. FCC*, 482 F.2d 471 (D.C. Cir. 2007).

<sup>74</sup> *Phoenix Forbearance Order*, 25 FCC Rcd at 8633-34 ¶ 24, 8639-43 ¶¶ 33-37. The *Qwest Omaha Forbearance Order*, however, did not characterize all three of those points as “predictive judgments.” Two of them were the types of judgments that are inherent in any forbearance analysis -- i.e., “we expect to see further investment and deployment” (see *Qwest Omaha Forbearance Order*, 20 FCC Rcd at 19451 ¶ 69), and “we believe that . . . facilities-based competition . . . minimizes the risk of duopoly and of coordinated behavior.” *Id.* at 19452 ¶ 71.

<sup>75</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18722 ¶ 26.

<sup>76</sup> *Id.* at 18725 ¶ 33.

<sup>77</sup> *Id.* at 18726 ¶ 35.

competition is more vigorous than ever, and competitors continue to use a variety of techniques, including purchasing ILEC TDM special access services (which would not be affected by the requested forbearance), to offer enterprise broadband services. The accuracy of the competitive predictions in the *Enterprise Broadband Forbearance Orders* strongly militates in favor of adherence to the Commission's successful approach in those orders.

**1. Product Market**

In the *Enterprise Broadband Forbearance Orders*, the Commission analyzed the state of competition for enterprise broadband services as a group. That continues to be the proper approach, given that there is not a 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. For example, where Ethernet is not available, customers will generally substitute a SONET-based service.<sup>78</sup>

In short, the evolving nature of enterprise broadband services makes it appropriate to evaluate these services "broadly."<sup>79</sup> The marketplace for these services is in a constant state of evolution as mature services are gradually replaced with new services that offer attractive features.<sup>80</sup> Growing demand and technological changes are causing legacy services, such as

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<sup>78</sup> Declaration of Julie Brown ¶ 9 (Dec. 4, 2013), appended as Attachment 7 ("Brown Declaration").

<sup>79</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

<sup>80</sup> Brown Declaration ¶ 10.

Frame Relay and ATM, to be supplanted by newer services, such as IP, Ethernet and Multi-Protocol Label Switching (“MPLS”)-based broadband services.<sup>81</sup> Thus, a provider’s market share for a particular service at a particular time has little bearing on the actual state of competition, given that providers can use other services to provide the same broadband transmission capabilities.

The Commission recognized these facts in the *Enterprise Broadband Forbearance Orders*, concluding that it should not give much weight to static market share information, given the “emerging and evolving nature” of the enterprise broadband market.<sup>82</sup> CenturyLink nevertheless provides, as further reconfirmation of its nondominance, estimated market shares and other data for providers of enterprise broadband services below, demonstrating that, for all of these services, CenturyLink is just one of numerous national providers, and still holds a modest fraction of the market for these services.

## 2. Geographic Markets

Consistent with applicable precedent, the Commission employed a national market analysis in the *Enterprise Broadband Forbearance Orders*. While each customer location can be considered a separate relevant geographic market, administrative convenience has led the Commission typically to aggregate customers facing similar competitive choices. In the

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<sup>81</sup> See Frost & Sullivan, *U.S. Data Transport Services Market Update, 2013: All Transport Roads Lead to Ethernet and MPLS*, at 6 (June 2013) (“*Frost U.S. Data Transport Update*”), appended as Attachment 8.

<sup>82</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19491-92 ¶ 22; *Qwest Forbearance Order*, 23 FCC Rcd at 12275-76 ¶ 26. See also *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16460-61 ¶ 39 (2007) (recognizing that market share calculations alone can “significantly overstate” a party’s market position, particularly considering “other market factors that may affect market power.”).

*Enterprise Broadband Forbearance Orders*, the Commission concluded that for packet-switched broadband and optical transmission services it is appropriate “to look more broadly at competitive trends without regard to specific geographic markets,” because the market for these broadband services is “emerging and changing.”<sup>83</sup> In further support, the Commission noted that “many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.”<sup>84</sup> The Commission therefore decided that it should analyze market conditions on a “national basis.”<sup>85</sup>

This decision accords with the way the Commission has consistently and repeatedly analyzed the evolving marketplace for broadband services. For example, in the *Cable Modem Order* and *Wireline Broadband Order*, the Commission relied on national market conditions in concluding that cable modem and DSL transmission services should be free of common carrier requirements, even though the availability of those broadband services varied widely across local geographic areas.<sup>86</sup> Similarly, the Commission considered competitive conditions at the national

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<sup>83</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

<sup>84</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19490-91 ¶ 20; *Qwest Forbearance Order*, 23 FCC Rcd at 12274 ¶ 24.

<sup>85</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21 n.87; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19490 ¶ 20 n.79; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-74 ¶¶ 23-24 nn.86, 93. See also FCC Brief, *Ad Hoc*, at 23 (“a nationwide approach is particularly appropriate for broadband markets, such as [for enterprise broadband services], that are emerging and changing”).

<sup>86</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799-4800 ¶ 1, 4802 ¶ 6, 4802-04 ¶ 9, 4831 ¶ 56 (2002) (“*Cable Modem Order*”); *Appropriate Framework for*

level in deciding that ILECs should not be required under sections 251 and 271 to unbundle high-capacity broadband facilities for their competitors.<sup>87</sup> Each of these determinations was upheld on appeal.<sup>88</sup> A similar analysis has been used in reviewing merger applications.<sup>89</sup>

This approach also is consistent with CenturyLink's experience. Enterprise customers typically seek broadband services for nationwide or other large geographic areas. They frequently solicit bids through requests for proposal ("RFPs") for service to numerous locations throughout the country, in order to command better prices and minimize the expense of managing their telecommunications suppliers.<sup>90</sup> Of CenturyLink's 312 commercial agreements

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*Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880-81 ¶ 50, 14901-03 ¶¶ 91-94 (2005) ("*Wireline Broadband Order*").

<sup>87</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17128 ¶ 248, 17148 ¶ 286 (2003) ("*Triennial Review Order*"), *aff'd in relevant part and vacated in other respects*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *Petition for Forbearance of the Verizon Telephone Cos. Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21502 ¶ 12, 21504 ¶ 19 (2004).

<sup>88</sup> *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1001-02 (2005) (ultimately affirming *Cable Modem Order*); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) (upholding *Wireline Broadband Order*); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004) (affirming *Triennial Review Order's* elimination of unbundling requirements for OCn facilities); *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8-9 (D.C. Cir. 2006) (affirming forbearance from Section 271 unbundling requirements for high-capacity facilities).

<sup>89</sup> *See SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18325 ¶ 63 (2005) ("*SBC/AT&T Order*"); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18467 ¶ 63 (2005).

<sup>90</sup> Brown Declaration ¶¶ 2, 6.

for enterprise broadband services, more than half are with customers having a national presence.<sup>91</sup>

In recent years, for example, wireless providers have issued numerous RFPs of regional or national scope for Ethernet services used to provide backhaul services to their cell sites. In some cases, wireless providers have sought service for hundreds or even thousands of cell sites in a single transaction, with uniform rates, terms and conditions. To successfully bid for such business, CenturyLink typically must agree to serve all of the customer's locations dispersed throughout CenturyLink's ILEC footprint or even the entire country.<sup>92</sup> Similarly, two wholesale wireline customers recently approached CenturyLink to buy Ethernet services so they could respond to RFPs to serve an end user's business locations across the country.<sup>93</sup> One of CenturyLink's chief selling points is that it has a broad service territory that is not limited to metropolitan areas.<sup>94</sup> Other providers similarly market and provide their enterprise broadband services on a national, or even global, basis.<sup>95</sup>

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<sup>91</sup> *Id.* ¶ 6.

<sup>92</sup> Because so many enterprise broadband service arrangements are nationwide in scope, regulatory obstacles to nationwide uniformity in responding to RFPs are especially problematical for a carrier competing for these bids. *See infra*, Part III.B.2.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* ¶ 5.

<sup>95</sup> *See, e.g.*, AT&T Business, *Wide Area Ethernet*, <http://www.business.att.com/enterprise/Service/network-services/ethernet/wide-area-vpls/> ("Wide Area Ethernet service from AT&T offers a global reach to connect your locations and applications.") (last visited Nov. 15, 2013); Verizon Fact Sheet, *Private IP: Securely Connect and Communicate Around the World*, 1-2, [http://www.verizonenterprise.com/resources/factsheet/fs\\_private-ip-securely-connect-and-communicate-around-the-world\\_en\\_xg.pdf](http://www.verizonenterprise.com/resources/factsheet/fs_private-ip-securely-connect-and-communicate-around-the-world_en_xg.pdf) ("Our Private IP solution is available in more than 170 markets around the world.... We offer flexible access methods including 4G LTE and 3G EVDO broadband wireless, fiber, Ethernet, and DSL, where available.") (last visited Nov. 15, 2013); tw telecom, *Native LAN Service*, <http://www.twtelecom.com/telecom-solutions/voice->

Even if a carrier lacks facilities to provide services in a particular location or on a particular route, these high-end services provide sufficient revenue to justify the construction of facilities necessary to provide them. The Commission has found that “the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers’ own networks.”<sup>96</sup> Given these considerations, there is no reason to depart from the Commission’s sound approach in the *Enterprise Broadband Forbearance Orders* of analyzing market conditions on a national basis.

**B. Application of the Appropriate Competitive Analysis Compels a Finding That the Section 10 Criteria are Satisfied**

**1. Dominant Carrier Regulation is Not Necessary for These Services to be Provided on a Just, Reasonable and Nondiscriminatory Basis**

Section 10(a)(1) requires a determination of whether dominant carrier regulation of the enterprise broadband services in question is necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with [those] . . . telecommunications service[s] are just and reasonable and not unjustly or unreasonably discriminatory.”<sup>97</sup> Several years ago, the Commission concluded in the *Enterprise Broadband Forbearance Orders* that the marketplace for packet-switched broadband and optical transmission services appeared to be

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[solutions/business-ethernet-services/](#) (“Extended Native LAN (ENLAN) expands your metro Business Ethernet connectivity across the country.”) (select “native LAN” tab) (last visited Nov. 15, 2013).

<sup>96</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23 (citing *Triennial Review Order*, 18 FCC Rcd at 17063 ¶ 129); *Qwest Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

<sup>97</sup> 47 U.S.C. § 160(a)(1).

“highly competitive.”<sup>98</sup> It further noted that “[t]here are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC’s service territory. These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against [the petitioners].”<sup>99</sup>

Accordingly, given these considerations, the Commission concluded that “it is appropriate to forbear from dominant carrier regulation as it applies to these services.”<sup>100</sup> In particular, “mandating that [petitioner], but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.”<sup>101</sup>

Given the even more intense competition for these services today, and CenturyLink’s market position with respect to these services, dominant carrier regulation is especially unnecessary and counterproductive. As the Commission found, “‘so long as competitive choices remain’ for retail enterprise services, large enterprise ‘customers should seek out best-priced

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<sup>98</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23, 18725 ¶ 33. See also *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

<sup>99</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18718-19 ¶ 22. See also *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19491 ¶ 21; *Qwest Forbearance Order*, 23 FCC Rcd at 12274-75 ¶ 25.

<sup>100</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18715 ¶ 17; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19488 ¶ 16; *Qwest Forbearance Order*, 23 FCC Rcd at 12271-72 ¶ 20.

<sup>101</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18715 ¶ 17; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19488 ¶ 16; *Qwest Forbearance Order*, 23 FCC Rcd at 12271-72 ¶ 20.

alternatives,' limiting the ability of a provider 'to raise and maintain prices above competitive levels.'<sup>102</sup>

a) **The Market is More Competitive Today Than When the Enterprise Broadband Forbearance Orders Were Issued**

In the intervening years since the *Enterprise Broadband Forbearance Orders*, the enterprise broadband services market has become even more competitive. Indeed, over 30 providers offer enterprise broadband services nationally or to large areas of the country.<sup>103</sup> For example, every major cable provider now competes aggressively for enterprise customers.<sup>104</sup> Attachment 9 illustrates the numerous national and regional providers of enterprise services operating throughout the country today.

Enterprise broadband services also frequently bring in sufficient revenues to justify self-deployment. In the *Enterprise Broadband Forbearance Orders*, the Commission found that "competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services in [Embarq's and Frontier's] incumbent LEC service areas."<sup>105</sup> The

<sup>102</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18720-21 ¶ 25 (citations omitted); *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19493-94 ¶ 24 (citations omitted); *Qwest Forbearance Order*, 23 FCC Rcd at 12277 ¶ 28 (citations omitted).

<sup>103</sup> See Attachment 9. See also *Frost Wholesale Carrier Ethernet Analysis* at 33 (noting existence of more than 25 providers of wholesale carrier Ethernet services).

<sup>104</sup> See, e.g., Time Warner Cable Business Class, *Solutions for Medium and Enterprise Business*, <http://www.timewarnercable.com/en/business-home/solutions/medium-and-enterprise-business.html> (last visited Nov. 15, 2013); Charter Business, *Enterprise: Charter Business® Data Networking*, <http://www.charterbusiness.com/data-networking.aspx?type=large> (last visited Nov. 15, 2013); Comcast Business, *Ethernet*, <http://business.comcast.com/smb/services/ethernet> (last visited Nov. 15, 2013).

<sup>105</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18720-21 ¶ 25; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19493-94 ¶ 24, 19496-97 ¶ 31; *Qwest Forbearance Order*, 23 FCC Rcd at 12277 ¶ 28. See also *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2634 ¶ 183 (2005) (subsequent history omitted) (recognizing that there is

Commission further found that “OCn-level facilities produce revenue levels that can justify the high cost of loop construction.”<sup>106</sup> “[L]arge enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.”<sup>107</sup>

These competitive providers have other options as well. Where they choose not to deploy their own fiber facilities, potential providers also can rely on CenturyLink’s special access services and Unbundled Network Elements (“UNEs”) to provide enterprise broadband services. In the *Enterprise Broadband Forbearance Orders*, the Commission considered and rejected Time Warner Telecom’s contention that wholesale TDM-based loops, *i.e.*, DS1 and DS3 special access circuits, cannot in many instances be used as an input to provide packetized broadband services such as Ethernet.<sup>108</sup> That finding was specifically upheld by the D.C. Circuit on appeal.<sup>109</sup>

Likewise, CLECs can use, and are using, UNE loops to provide DSL-based Ethernet services at an even lower cost than TDM-based special access services. Through use of “pair

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“substantial deployment of competitive fiber loops at the OCn capacity” and that “competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them.”).

<sup>106</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31; *Qwest Forbearance Order*, 23 FCC Rcd at 12280 ¶ 35; *Triennial Review Order*, 18 FCC Rcd at 17169 ¶ 316.

<sup>107</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31; *Qwest Forbearance Order*, 23 FCC Rcd at 12280 ¶ 35. Indeed, the Commission found nearly a decade ago that requesting carriers are not impaired without access to OCn or SONET interoffice transport at TELRIC rates. *Triennial Review Order*, 18 FCC Rcd at 17168 ¶ 315, 17221 ¶ 389.

<sup>108</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18721-22 ¶ 26; *Qwest Forbearance Order*, 23 FCC Rcd at 12277-78 ¶ 29.

<sup>109</sup> *Ad Hoc Appeal*, 572 F.3d at 910.

bonding,” CLECs can provide broadband speeds and performance that are comparable to those of CenturyLink’s enterprise broadband services – at a fraction of the cost of deploying fiber. Over the past several years, CLECs have successfully launched and marketed “Ethernet-over-copper” services in numerous areas served by CenturyLink -- including some “Tier 2” and “Tier 3” cities.<sup>110</sup>

Because these services rely on unbundled copper loops purchased at TELRIC rates, the CLECs’ cost structure typically is much lower than for fiber-based ILEC broadband services, which frequently require the extension of fiber optic cable to customer locations.<sup>111</sup> As the Commission has stated, “the elimination of dominant carrier regulation of the ILECs’ Ethernet inputs cannot harm the competitive provision of Ethernet service that does not use the ILECs’ Ethernet inputs.”<sup>112</sup> Accordingly, the enterprise broadband market has become even more competitive than it was when the *Enterprise Broadband Forbearance Orders* were released, not only in the proliferation of competing providers, but also in competitors’ use of ILEC low-cost facilities. Attachment 11 provides more detail on CLECs’ use of copper loops to provide broadband services.

Where the rationale for a prior forbearance grant has become stronger over time, the Commission has recognized that other similarly situated parties should be granted similar relief. In the recent *USTelecom Forbearance Order*, the Commission addressed a request to forbear from continued application of the equal access “scripting” requirement to all ILECs still subject

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<sup>110</sup> See Declaration of Kevin Downs ¶¶ 2-3 (Nov. 26, 2013), appended as Attachment 10 (“Downs Declaration”).

<sup>111</sup> *Id.* ¶¶ 2, 5.

<sup>112</sup> FCC Brief, *Ad Hoc*, at 25. The availability of CenturyLink UNE loops would not be affected by the grant of this petition.

to the rule.<sup>113</sup> The Commission had forbore from application of this rule to the Bell Operating Companies in 2007 because the stand-alone long distance carrier industry segment was becoming a fringe market, as the competition that the scripting rule was designed to protect gave way to competition between service bundles that included long distance calling.<sup>114</sup> The Commission decided to extend forbearance from the scripting rule to all other ILECs partly because “[t]hese trends appear to have continued in the intervening years,” and there is therefore minimal public interest in requiring ILECs to comply with the rule.<sup>115</sup> Similarly, the enterprise broadband competitive “trends” detailed in the *Enterprise Broadband Forbearance Orders* “have continued in the intervening years” and compel forbearance for a carrier that was always far less “dominant” than forbore AT&T or Verizon.

**b) CenturyLink Is Not a “Dominant” Provider of Enterprise Broadband Services**

CenturyLink is nowhere close to being a dominant provider of enterprise broadband services. According to Vertical Systems Group, CenturyLink had only an 8.8 percent share of U.S. Broadband Data service revenues in 2012.<sup>116</sup> This put CenturyLink far behind market leaders AT&T and Verizon, and less than four percent ahead of Sprint, with other providers

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<sup>113</sup> This rule required that an ILEC inform new local service customers of their options for presubscribed long distance services from other carriers. *See USTelecom Forbearance Order*, 28 FCC Rcd at 7634-35 ¶¶ 11-12.

<sup>114</sup> *Id.* at 7636 ¶ 13.

<sup>115</sup> *Id.* at 7636-37 ¶ 14.

<sup>116</sup> Vertical Systems Group, *Business Broadband Data Services Share Analysis* at 3 (Oct. 2013) (“*VSG Business Broadband Share Analysis*”), appended as Attachment 12. “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.*

accounting for nearly 29 percent of total revenues for these services.<sup>117</sup> Even excluding long-haul revenues, CenturyLink had only a 9.3 percent share of U.S. Broadband Data Service revenues.<sup>118</sup>

CenturyLink holds a similarly modest position with regard to Ethernet, one of today's most highly sought enterprise broadband services. 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.<sup>119</sup> CenturyLink garnered less than 8 percent of all revenues for the U.S. Retail Metro Business Ethernet services market -- hardly the mark of a dominant provider.<sup>120</sup> While eight service providers (including Time Warner Cable, Level 3, Cox and XO) hold four percent or more of billable Ethernet port installations,<sup>121</sup> more than thirty others deliver Ethernet services in the U.S., a significant increase from the number of Ethernet service providers referenced in the 2012 Forbearance Petition.<sup>122</sup> Attachment 11 provides more detail on the Ethernet market and other enterprise broadband providers.

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 4.

<sup>119</sup> 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; *Frost Wholesale Carrier Ethernet Analysis* at 33.

<sup>120</sup> *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.

<sup>121</sup> VSG Mid-Year 2013 Ethernet Leaderboard.

<sup>122</sup> See 2012 Forbearance Petition at 26.

The ongoing, nationwide rush to upgrade backhaul services for wireless cell sites vividly illustrates the intense competition that characterizes the marketplace for enterprise broadband services, and CenturyLink's lack of dominance in that marketplace. Over the past few years, the telecommunications industry has witnessed an exponential increase in the backhaul needs for wireless networks, due to the rapid transition from narrowband, voice-centric services to bandwidth-hungry data applications, such as streaming video.<sup>123</sup> As a result, wireless providers have increasingly turned to the use of broadband enterprise services, such as Ethernet, to meet the demand for increased bandwidth.<sup>124</sup> Indeed, "wireless providers are almost desperate to replace their T1 circuits at the cell towers with high-capacity fiber based Ethernet."<sup>125</sup>

Wireless providers are therefore in the midst of upgrading the backhaul capacity for the vast majority of their cell sites, and "[o]ver the near term these same wireless carriers will migrate to LTE and demand even higher bandwidth connections to accommodate increased mobile video, mobile apps, and mobile commerce."<sup>126</sup> In addition to these upgrades to existing "macro" cell sites, wireless providers are also beginning to deploy both "micro" and "pico" small

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<sup>123</sup> This "large-scale 'mass migration' of wireless backhaul . . . from TDM to Ethernet" is a significant contributing factor to the rapid growth of Ethernet services. *Insight Ethernet Report* at 8.

<sup>124</sup> *Frost U.S. Data Transport Update* at 19 (noting that Ethernet has become the "de facto choice, where available, for mobile traffic backhaul from cell towers, to support the explosive traffic growth on 3G and 4G networks."). According to Atlantic-ACM, for example, wireless carriers' spending on "OCx and above" (including Ethernet) grew from one-third to two-thirds of their overall spending on local transport between 2008 and 2011. Atlantic-ACM, *Wireless Backhaul: Sustaining Ethernet Growth in the Coming Years*, at 10 (2012), <http://www.atlantic-acm.com/images/stories/whitepapers/aacmbackhaul2012.pdf>.

<sup>125</sup> Frost & Sullivan, *Mid-Band Ethernet Services: Next New Thing in Business Last-Mile Connectivity* at 9 (Jan. 2012), appended as Attachment 15.

<sup>126</sup> *Insight Ethernet Report* at 8.

cells, which will use a mix of fiber deployment and non-line-of-sight wireless-based solutions.<sup>127</sup> Already, wireless providers have issued RFPs to provide high-capacity backhaul services to a large percentage of these cell sites. CenturyLink has faced substantial competition in responding to these RFPs from CLECs, cable companies and fiber wholesalers.<sup>128</sup> Cable multiple system operators (“MSOs”) have been identified as “major players” in the mobile backhaul sector.<sup>129</sup>

Consistent with Commission precedent, there are two main reasons the broadband backhaul marketplace has become so competitive. First, cell sites with high traffic volumes produce sufficient demand to justify the deployment of Ethernet or another high-capacity service, thereby attracting multiple bids.<sup>130</sup> Second, when a wireless provider transitions from narrowband to broadband backhaul facilities, CenturyLink generally enjoys no advantage over its competitors in deploying fiber to that provider’s cell sites, even if it already provides backhaul to those cell sites by means of legacy copper facilities. To replace copper with fiber,

<sup>127</sup> Sean Buckley, *Wireless Backhaul to be a \$9B market by 2016, says Dell’Oro*, Fierce Telecom (Aug. 15, 2012), available at <http://www.fiercetelecom.com/story/wireless-backhaul-be-9b-market-2016-says-delloro/2012-08-15>. A micro cell is larger than a pico cell in both physical size and coverage area. See Definition of Microcell, Phone Scoop, <http://www.phonescoop.com/glossary/term.php?gid=250> (last visited Nov. 15, 2013).

<sup>128</sup> Brown Declaration ¶ 12.

<sup>129</sup> Carl Weinschenk, *Mobile Backhaul: A Changing and Growing Opportunity*, Broadband Technology Report (Aug. 7, 2013), available at <http://btreport.net/2013/08/mobile-backhaul-a-changing-and-growing-opportunity/> (quoting Steve Hratko, Director of Carrier Marketing for Ruckus Wireless).

<sup>130</sup> See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32 (finding that “there is substantial deployment of competitive fiber loops at OCn capacity[,] . . . that competitive carriers are often able to economically deploy these facilities to large enterprise customers [and] that OCn-level facilities produce revenue levels that can justify the high cost of loop construction”), *aff’d*, *Ad Hoc Appeal*, 572 F.3d at 910-11. In 2010, a Commission staff paper reported that “mobile data demand is expected to grow between 25 and 50 times current levels within 5 years.” FCC Staff Technical Paper, *Mobile Broadband: the Benefits of Additional Spectrum* at 5 (Oct. 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-302324A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf).

CenturyLink must do what any competitive provider must do: it must hire work crews to lay new conduit and fiber. The result is that CenturyLink and its rivals face essentially the same costs to deploy broadband backhaul solutions to cell sites, and each provider competes on a level playing field in this regard.<sup>131</sup>

This is generally true any time a customer is transitioning to a fiber-based enterprise broadband service.<sup>132</sup> CenturyLink has no significant first-mover advantages in deploying fiber to a customer location, even if it has copper facilities there. According to a recent report, 64 percent of U.S. commercial buildings still are not connected by fiber facilities.<sup>133</sup> When CenturyLink deploys fiber to a commercial building, it must obtain access rights from the building owner, just like a CLEC, because it needs space and power in the building for its fiber-terminating devices.<sup>134</sup> In addition, just like a CLEC, CenturyLink typically must install (or have the building owner install) fiber inside wiring from the terminating device to the end user customer.<sup>135</sup> Thus, CenturyLink must, at a minimum, negotiate various types of permission from

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<sup>131</sup> See *Triennial Review Order*, 18 FCC Rcd at 17144 ¶ 276 (noting that CLECs and ILECs “largely face the same obstacles in deploying overbuild FTTH loops [such as] obtain[ing] materials, hir[ing] the necessary labor force, and construct[ing] the fiber transmission facilities[, and] that the revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops”).

<sup>132</sup> As noted, CLECs that deploy copper-based Ethernet services will enjoy an even lower cost structure to provide enterprise broadband services.

<sup>133</sup> Vertical Systems Group, *U.S. Business Fiber Gap Steadily Closing*, Fierce Telecom (Mar. 12, 2013), available at <http://www.fiercetelecom.com/press-releases/vertical-systems-group-us-business-fiber-gap-steadily-closing>.

<sup>134</sup> Fiber-based terminating equipment requires electrical power to operate.

<sup>135</sup> The presence of any existing copper inside wire in the building is of no use in providing these services.

the building owner, and in many instances must also compensate the building owner for this access.<sup>136</sup>

CenturyLink must also obtain access to, and any necessary permits for, conduit from the property line to the building to deploy its fiber, even if it is using the conduit for copper facilities. Such conduit frequently is owned and controlled by the building owner, so again CenturyLink has no advantage with respect to this aspect of deploying fiber facilities. To the extent conduit or right of way is owned by CenturyLink, as an ILEC, competitors can obtain access to that conduit at regulated rates, terms and conditions.<sup>137</sup> Finally, just like a CLEC, CenturyLink must obtain any necessary permits for deploying its facilities in municipal rights of way. Thus, particularly for the services in question, CenturyLink possesses no meaningful advantage over competitors based on the existence of their legacy copper network.<sup>138</sup>

Taken together, these facts demonstrate CenturyLink's far-from-dominant position in the provision of enterprise broadband services. Dominant carrier regulation of CenturyLink's enterprise broadband services is therefore unwarranted -- especially given that all other significant national providers of these services are regulated as nondominant in their provision of these services.

Given the intensified competition for these services, and CenturyLink's market position with respect to these services, the *Enterprise Broadband Forbearance Orders* compel a finding

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<sup>136</sup> See Brown Declaration ¶ 11. CenturyLink's existing agreements and easements with building owners for copper-based facilities typically are not sufficient to give it the additional access rights needed to deploy and provide fiber-based services in a building.

<sup>137</sup> See 47 U.S.C. § 224.

<sup>138</sup> See Brown Declaration ¶ 11.

that dominant carrier regulation is both unnecessary and counterproductive.<sup>139</sup> The Commission has also found that continued application of its dominant carrier discontinuance rules to an ILEC's enterprise broadband services in these circumstances "is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as [the ILEC] is subject to the same treatment as nondominant carriers in relation to these services."<sup>140</sup> That same conclusion applies here.

**c) Purchasers of Enterprise Broadband Services Exert Significant Bargaining Power**

The *Enterprise Broadband Forbearance Orders* pointed to the sophistication of enterprise customers as another factor further reducing any need for dominant carrier regulation. The Commission has consistently recognized that enterprise customers "demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge."<sup>141</sup> Moreover, these customers "are likely to make informed choices based on expert advice about service offerings and prices . . . [and] are likely to be aware of the choices available to them."<sup>142</sup> Not surprisingly, "the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities

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<sup>139</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18715 ¶ 17, 18720-21 ¶ 25; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19488 ¶ 16, 19493-94 ¶ 24; *Qwest Forbearance Order*, 23 FCC Rcd at 12271-72 ¶ 20, 12277 ¶ 28.

<sup>140</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

<sup>141</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24.

<sup>142</sup> *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23.

where possible, and to carry the traffic of these customers over the suppliers' own networks."<sup>143</sup>

Enterprise customers use this availability of alternative providers to obtain more favorable arrangements for themselves. They routinely solicit competitive bids using RFPs, followed by intense negotiations over every material term and condition of service.<sup>144</sup>

These findings are all consistent with CenturyLink's experience in marketing and providing enterprise broadband services. The purchasers of CenturyLink's enterprise broadband services, many of which are carriers, share certain common characteristics: they are knowledgeable about telecommunications services; they are aware of the alternatives available to them, both in terms of alternative services and alternative providers, including over their own facilities; and they are adept at using those alternatives to obtain more favorable rates, terms and conditions in their negotiations with CenturyLink.<sup>145</sup>

In one situation, a customer issued an RFP and received bids for thousands of locations from numerous providers. The customer then compiled a spreadsheet reflecting the lowest bid for each location, and shared the spreadsheet with each competing bidder, offering its business if the bidder could beat that lowest price.<sup>146</sup> Similarly, another customer recently issued RFPs covering its wholesale purchases of enterprise broadband services across its entire network. After receiving responses to those RFPs, the customer picked the lowest bid that it had received in at least one location and reissued the RFPs with the guidance that respondents had to meet or

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<sup>143</sup> *Qwest Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

<sup>144</sup> *SBC/AT&T Order*, 20 FCC Rcd at 18332 ¶ 74 & n.226.

<sup>145</sup> *Brown Declaration* ¶¶ 2, 12-14.

<sup>146</sup> *Id.* ¶ 14.

beat that price in *every* location in order to be considered.<sup>147</sup> Such customers are willing to engage in searching negotiations, with multiple providers if necessary, to meet their particular business needs.<sup>148</sup>

**d) The Burdens Imposed by Dominant Carrier Regulation Exceed Any Potential Benefits**

The Commission has long noted the inefficiency of tariffing, particularly in a competitive market.<sup>149</sup> Dominant carrier regulation “is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an ILEC’s] control of any bottleneck access facilities that [the ILEC’s] competitors must access in order to provide competing services.”<sup>150</sup> Conversely, “the contribution of tariffing requirements, and the

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* ¶ 15.

<sup>149</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20744 ¶ 23 (1996) (“*IXC Forbearance Order*”); *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5213 ¶ 9 (2007) (“*Qwest Section 272 Sunset Forbearance Order*”). *AT&T Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33 (“[T]he Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals’ new offerings, and impose other unnecessary costs.”); *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

<sup>150</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18727-28 ¶ 39 (citation omitted); *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19500 ¶ 38 (citing *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16354 ¶ 111); *Qwest Forbearance Order*, 23 FCC Rcd at 12283 ¶ 42 (citation omitted); *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5234 ¶ 53).

accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is *negligible*.”<sup>151</sup>

Dominant carrier regulation prevents a carrier from “responding efficiently and in a timely manner to market-based pricing promotions, including volume and term discounts, or special arrangements offered by competitors.”<sup>152</sup> “[T]ariffing and cost support requirements limit [a carrier’s] ability to negotiate service arrangements tailored to specific customer needs and to respond to new service offers from unregulated competitors because it must . . . provide advance notice of any tariff price changes.”<sup>153</sup> In CenturyLink’s experience, advance notice of its tariff changes allows competitors to counter innovative product and service offerings even before they are made available to the public. Customers lose out, because they do not get the benefit of unrestrained price competition that would otherwise occur. In general, competitors typically set their “list” price at a certain amount, such as 10 percent, below CenturyLink’s tariffed rate.<sup>154</sup>

This is the case even with respect to contract-based tariffs authorized under the Commission’s pricing flexibility rules. While these arrangements enable CenturyLink to tailor services through individually negotiated arrangements, the Commission’s rules still require these

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<sup>151</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18723-24 ¶ 30 (emphasis added); *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19496 ¶ 29 (emphasis added); *Qwest Forbearance Order*, 23 FCC Rcd at 12279-80 ¶ 33 (emphasis added).

<sup>152</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18730-31 ¶ 46; *Qwest Forbearance Order*, 23 FCC Rcd at 12286-87 ¶ 49.

<sup>153</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Forbearance Order*, 23 FCC Rcd at 12279 ¶ 32.

<sup>154</sup> Brown Declaration ¶ 29.

contract-based tariffs to be filed with specified information “that is available publicly to any party, including competitors.”<sup>155</sup>

The Commission has repeatedly recognized the benefits of eliminating tariff obligations for enterprise broadband services. Detariffing these services “will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers’ ability to obtain service arrangements that are specifically tailored to their individualized needs.”<sup>156</sup> Eliminating these tariff obligations will also make CenturyLink a more effective competitor for these services, which in turn will increase even further competition in the marketplace.<sup>157</sup>

**2. Dominant Carrier Regulation of These Enterprise Broadband Services is Not Necessary to Protect Consumers**

Section 10(a)(2) requires a determination of whether “enforcement” of dominant carrier regulation of the enterprise broadband services in question is “necessary for the protection of consumers.”<sup>158</sup> Dominant carrier regulation is not necessary for the protection of the sophisticated “consumers” of enterprise broadband services. As discussed above, these regulations actually hinder, instead of protect, consumers’ interests, because they make it more difficult for enterprise service customers, and, ultimately, end user consumers, to secure the

<sup>155</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18725-26 ¶ 34; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19497-98 ¶ 33; *Qwest Forbearance Order*, 23 FCC Rcd at 12281 ¶ 37.

<sup>156</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

<sup>157</sup> *See AT&T Forbearance Order*, 22 FCC Rcd at 18726 ¶ 35; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19498 ¶ 34; *Qwest Forbearance Order*, 23 FCC Rcd at 12282 ¶ 38.

<sup>158</sup> 47 U.S.C. § 160(a)(2).