

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

In the Matter of)
)
CenturyLink's Petition for Forbearance Pursuant) WC Dkt. No. 14-9
to 47 U.S.C. § 160(c) from Dominant Carrier)
Regulation and Computer Inquiry Tariffing)
Requirements on Enterprise Broadband Services)

**OPPOSITION OF
TW TELECOM, LEVEL 3, INTEGRA, EARTHLINK AND CBEYOND TO
CENTURYLINK'S FORBEARANCE PETITION**

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Pursuant to the *Public Notice* in the above-captioned docket,¹ tw telecom inc. (“tw telecom”), Level 3 Communications, LLC (“Level 3”), Integra Telecom, Inc. (“Integra”), EarthLink, Inc. (“EarthLink”), and Cbeyond Communications, LLC (“Cbeyond”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit this opposition to CenturyLink’s petition for forbearance from dominant carrier regulation of the legacy CenturyTel and legacy Embarq packet-based special access services listed in Attachment 1 to its petition.²

I. INTRODUCTION AND SUMMARY.

This is the second time in the past two years that CenturyLink has sought forbearance from dominant carrier regulation of the packet-based special access services offered by legacy

¹ *Pleading Cycle Established for Comments on CenturyLink Petitions for Forbearance from or Interim Waiver of Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, Public Notice, DA 14-36 (rel. Jan. 14, 2014) (“*Public Notice*”).

² See CenturyLink Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services, WC Dkt. No. 14-9 (filed Dec. 13, 2013) (“CenturyLink Forbearance Petition”); see also *id.*, Attachment 1.

CenturyTel and legacy Embarq. In its previous petition, CenturyLink did not come close to bearing its burden of proof. The Commission should have promptly denied the petition, but it did not do that. Instead—more than 12 months into the proceeding—the Wireline Competition Bureau (“Bureau”) requested that CenturyLink submit additional information “[i]n order for the Commission to complete its review of the petition” and assess the competitiveness of the relevant markets.³ Apparently recognizing that any such assessment would result in denial of the petition, CenturyLink withdrew it rather than respond to the Bureau’s data request. In other words, CenturyLink followed, and the Commission acquiesced in, the incumbents’ well-established ““Heads, I win; Tails, I withdraw””⁴ approach to forbearance proceedings. Less than a year later, CenturyLink is back again. The instant petition is much like the previous one, and CenturyLink once again hopes that it can persuade the Commission to grant forbearance without examining the level of competition in the relevant markets. Of course, if this gambit fails, CenturyLink will likely seek to withdraw again.

The Commission must put a stop to this wasteful gamesmanship. It should promptly evaluate the level of facilities-based competition that CenturyLink faces in the relevant markets, and it should do so using the traditional market power framework. As discussed in Part II.A, that analytical framework yields far more reliable conclusions as to the competitiveness of the relevant markets than the result-oriented, predictive approach utilized in the *Broadband*

³ Letter from Julie A. Veach, Chief, Wireline Competition Bureau, FCC, to Craig J. Brown, Associate General Counsel, CenturyLink, Inc., 28 FCC Rcd. 2090, at 1 (2013) (“*March 2013 Information Request*”).

⁴ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶ 36 (2009) (“*Forbearance Procedures Order*”).

Forbearance Orders.⁵ The conclusions yielded by the market power framework will enable the Commission to make informed judgments as to whether the criteria for forbearance set forth in Section 10 of the Communications Act⁶ have been met. As also explained in Part II.A, the Commission unquestionably has the discretion to apply this more reliable approach to the instant petition.

Under the traditional market power framework—or indeed any sensible framework—CenturyLink has failed to meet its burden of proof. CenturyLink has not shown that dominant carrier regulation of its packet-based special access services (1) is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions; (2) is no longer necessary to protect consumers; and (3) is no longer in the public interest. In particular, as discussed in Part II.B, CenturyLink has failed to show that it is now, or will be anytime in the foreseeable future, subject to sufficient facilities-based competition in the provision of packet-based special access services in the legacy CenturyTel and legacy Embarq regions to justify forbearance. Nor does CenturyLink’s proffered “evidence” of falling prices, lost revenue, and umbrella pricing, or its baseless predictions of increased broadband investment, demonstrate that forbearance is warranted. Accordingly, the Commission must deny the petition.

⁵ *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.*, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007) (“*AT&T Forbearance Order*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 19478 (2007) (“*Embarq & Frontier Forbearance Order*”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260 (2008) (“*Qwest Forbearance Order*”) (collectively, the “*Broadband Forbearance Orders*”).

⁶ 47 U.S.C. § 160(a).

Finally, the Commission should not permit CenturyLink to withdraw the instant petition as a means of avoiding an unfavorable precedent. As the Commission explained in the *Forbearance Procedures Order*, “[f]ull-fledged participation in the notice and comment process generated by forbearance petitions puts an enormous burden on stakeholders’ resources,” and “[m]ounting repeated defenses again multiple forbearance petitions . . . wastes competitors’ resources if those proceedings do not result in greater regulatory clarity.”⁷ Given the substantial resources that the agency and CenturyLink’s (much smaller) competitors must allocate toward these proceedings, the decision of “whether the Commission decides the issues raised in [the] forbearance petition should not be left solely to [CenturyLink’s] discretion.”⁸ Accordingly, the Commission should promptly release a final order denying the petition and explaining the basis for that denial.

II. ARGUMENT.

A. The Commission Can And Should Use The Traditional Market Power Framework To Evaluate CenturyLink’s Petition.

1. The Commission Unquestionably Has The Authority To Replace The Approach It Used In The Broadband Forbearance Orders With The More Reliable Traditional Market Power Framework.

In a series of wrongly-decided and harmful orders beginning in 2003⁹ and continuing with the so-called “deemed grant” of forbearance to Verizon in 2006¹⁰ and the *Broadband*

⁷ *Forbearance Procedures Order* ¶ 36.

⁸ *Id.*

⁹ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 (2003) (“*Triennial Review Order*”).

Forbearance Orders in 2007 and 2008,¹¹ the Commission eliminated regulation of wholesale packet-based last-mile facilities in most of the country. In making these changes, the Commission declined to follow its traditional market power analytical framework. Instead, the Commission relied largely on unfounded predictions that wholesale regulation of these facilities would be unnecessary going forward. Those predictions have proven to be unfounded.¹² The result is inappropriate deregulation of the very packet-based last mile facilities that will soon be the only means available of providing broadband to business customers.¹³

In the instant proceeding, the Commission can begin the process of ensuring appropriate wholesale regulation of packet-based special access services by applying the traditional market

¹⁰ See *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services is Granted by Operation of Law*, WC Dkt. No. 04-440, News Release (Mar. 20, 2006).

¹¹ See generally *AT&T Forbearance Order; Embarq & Frontier Forbearance Order; Qwest Forbearance Order*.

¹² See, e.g., Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 46-47 (filed May 31, 2013) (discussing evidence showing that incumbent LECs' prices for packet-based special access services are well in excess of competitive levels); Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 57-58 (filed Nov. 2, 2012) ("*Ad Hoc et al. Petition to Reverse Forbearance*") (discussing harms resulting from the *Broadband Forbearance Orders*).

¹³ See, e.g., Letter from Robert W. Quinn, Jr., Senior Vice President Federal Regulatory and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5, at 2 (filed Jan. 21, 2014) (proposing trials in which incumbent LECs would discontinue TDM-based services); Letter from Robert C. Barber, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 13-299, at 1 (filed Dec. 18, 2013) ("*AT&T December 18, 2013 Ex Parte Letter*") (discussing "the 2020 deadline AT&T has established for completing the migration of all customers from TDM-based services").

power framework to CenturyLink’s petition.¹⁴ In so doing, the Commission should reject CenturyLink’s assertion that it would be arbitrary and capricious for the Commission to depart from its approach in the *Broadband Forbearance Orders*¹⁵ and “‘appl[y] different decisional criteria to similarly situated carriers.’”¹⁶ Under the arbitrary and capricious standard of review, an agency has the discretion to change its policies as long as it displays awareness that it is changing its position, ensures that the new policy is permissible under the statute, and shows that there are good reasons for the new policy.¹⁷ As discussed below, the Commission can easily meet this standard. Moreover, the fact that the approach used in the *Broadband Forbearance Orders* was affirmed on appeal¹⁸ in no way changes the analysis. The D.C. Circuit held that the Commission’s forbearance decisions in those *Orders* were “not chiseled in marble” and that “the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area.”¹⁹ And, precisely because

¹⁴ While the Joint Commenters strongly oppose the instant forbearance petition, denial of the petition is just the first step toward establishing appropriate competition policies for packet-based special access services. The Commission should take the additional steps outlined in the Joint Commenters’ filings in the special access rulemaking proceeding to stop CenturyLink and other incumbent LECs from engaging in exclusionary conduct and to establish price regulation as appropriate in relevant product and geographic markets. *See generally* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25 (filed Feb. 11, 2013) (“tw telecom *et al.* Special Access Comments”); Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25 (filed Mar. 12, 2013).

¹⁵ *See* CenturyLink Forbearance Petition at 10-14.

¹⁶ *Id.* at 10 (internal citation omitted).

¹⁷ *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Qwest Corp. v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012) (“Generally, . . . no heightened level of scrutiny attends a policy change.”).

¹⁸ CenturyLink Forbearance Petition at 17.

¹⁹ *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

Section 10 ““does not compel a particular mode of market analysis,””²⁰ the Commission has the discretion to conduct a market power analysis here provided it offers a reasoned explanation for abandoning its prior approach.²¹

The Commission can explain that it is departing from the approach used in the *Broadband Forbearance Orders* because that approach is inherently less reliable than a market power analysis. Indeed, in the *Broadband Forbearance Orders* the Commission acknowledged that its “analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis,”²² but it departed from the traditional market power analysis in a number of important respects. *First*, the Commission failed to define the relevant product and geographic markets.²³ In particular, the Commission ignored the wholesale market for packet-based special access services and improperly analyzed the retail market for all packet-based broadband services rather than the specific subset of services for which the incumbent LECs had requested forbearance (*i.e.*, packet-based special access services).²⁴ It also considered broad

²⁰ CenturyLink Forbearance Petition at 17 (quoting *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 908).

²¹ See *Qwest Corp.*, 689 F.3d at 1230-31 (“In sum, the Commission offered an extensive discussion of its reasons for abandoning the two-part test in the *Omaha Order* and for adopting the market-power approach—an approach with some basis in the Commission’s precedent and, in the Commission’s view, better in keeping with the underlying purposes of section 10. The Commission, therefore, was conscious of the change it was making, believed it to be better, explained why it was necessary, and offered a sound basis for repudiating its prior decisions.”).

²² See, *e.g.*, *AT&T Forbearance Order* n.80.

²³ See, *e.g.*, *id.* ¶ 20.

²⁴ See, *e.g.*, Brief of Private Petitioners, *Ad Hoc Telecomms. Users Comm. v. FCC*, No. 07-1426, at 6 (D.C. Cir. July 15, 2008) (explaining that the record contained data “purporting to show the existence of competition for downstream, interexchange, packetized services,” not the special access services at issue); *id.* at 12 (explaining that the “FCC granted forbearance with respect to special access products that are necessarily provided in local geographic markets, yet the FCC considered only competitive data relating to the national market for end-to-end products”).

national “competitive trends without regard to specific geographic markets.”²⁵ *Second*, the Commission did not rely on “detailed market share information”²⁶ and instead took into account competition from providers (*e.g.*, “systems integrators, equipment vendors, and value-added resellers”) that do not rely on their own facilities to provide packet-based special access services.²⁷ *Third*, the Commission relied on vague and unsupported predictive judgments about the development of competition in the provision of retail packet-based special access services in the future—including the possibility that competitors would deploy their own broadband facilities²⁸—even though the Commission had consistently found that the barriers to competitive deployment of last-mile facilities are impossible to overcome in most situations.²⁹ *Fourth*, the Commission failed to examine other “clearly identifiable market features,”³⁰ such as the level of demand elasticity and the cost structure, size, and resources of the petitioners.

Instead of relying on the longstanding elements of the traditional market power framework, the Commission considered factors that have no relevance to the level of competition for packet-based special access services. For example, the Commission relied on the sophistication of enterprise customers to counteract the incumbent LECs’ exercise of market

²⁵ *See, e.g., AT&T Forbearance Order* ¶ 20; *see also id.* ¶ 19 (finding “insufficient information to precisely define the market boundaries” for the services for which AT&T sought forbearance).

²⁶ *See, e.g., id.* ¶ 23.

²⁷ *See, e.g., id.* ¶ 22.

²⁸ *See, e.g., id.* n.86.

²⁹ *See Ad Hoc et al. Petition to Reverse Forbearance* at 46-49.

³⁰ *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 5 (1995) (“*AT&T Non-Dominance Order*”).

power,³¹ despite the fact that, in the absence of a viable alternative, there is nothing that even the most sophisticated buyer can do to offset the incumbents' market power. In addition, the Commission relied on “[its] enforcement authority” under Sections 201, 202, and 208 of the Act,³² even though the Commission has never deemed such authority to be sufficient, by itself, to protect consumers and competition against the exercise of incumbent LEC market power and there was no evidence to support such a finding.³³

Unlike the approach used in the *Broadband Forbearance Orders*, a “market analysis” based on the *DOJ-FTC Horizontal Merger Guidelines*³⁴—an analysis also known as the “traditional market power framework”—is a more reliable approach for determining whether forbearance from dominant carrier regulation of packet-based special access services is justified under Section 10. The traditional market power framework is based on “well-accepted” principles of economics that have been developed in antitrust law to assess the competitiveness

³¹ See, e.g., *AT&T Forbearance Order* ¶ 24.

³² See, e.g., *id.* ¶¶ 35-36.

³³ See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 62 (2005) (holding that “the Act’s general provisions designed to guard against anticompetitive behavior are [not] sufficient to protect competitive carriers from potential abuses of special access pricing on a timely basis”). In fact, it is very difficult to succeed in a Section 208 complaint proceeding challenging incumbent LEC special access rates, terms, and conditions because, among other things, in the case of untariffed special access services (such as Ethernet services), “the complainant lacks any information about the rates and terms offered to other special access purchasers.” See Reply of Petitioners in Support of Petition for Writ of Mandamus, *In re COMPTel*, No. 11-1262, at 13-15 (D.C. Cir. Oct. 19, 2011).

³⁴ See generally U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Aug. 19, 2010) (“*DOJ-FTC Horizontal Merger Guidelines*” or “*Merger Guidelines*”).

of the relevant markets.³⁵ As the Commission explained in the *Phoenix Order*, this framework uses “economically sound standards for defining product [and geographic] markets.”³⁶ And as the Commission held in the *Pricing Flexibility Suspension Order*, a market power analysis “identif[ies] significant current and potential market participants, and consider[s] their impact when assessing the level of competition in a market,”³⁷ “allows for specific, economically rigorous, and factually specific inquiries regarding potential competition,”³⁸ and “ensure[s] that appropriate regulatory relief is granted in those markets where competitive conditions justify it.”³⁹ In addition, the framework “was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions”—which is “the precise inquiry specified in section 10(a)(1).”⁴⁰

There is another important reason for the Commission to abandon its approach in the *Broadband Forbearance Orders* in this proceeding. As mentioned, the Commission held that granting forbearance would not harm competitors seeking to provide Ethernet and other packet-

³⁵ *AT&T Non-Dominance Order* ¶ 38; see also Brief for Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 19 (10th Cir. Jan. 10, 2011).

³⁶ *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, n.169 (2010) (“*Phoenix Order*”).

³⁷ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd. 10557, ¶ 91 (2012) (“*Pricing Flexibility Suspension Order*”).

³⁸ *Id.* ¶ 100.

³⁹ *Id.* ¶ 95.

⁴⁰ *Phoenix Order* ¶ 37; see also *Pricing Flexibility Suspension Order* ¶ 87.

based services to business customers in part because those competitors would still have access to TDM-based DS1 and DS3 special access inputs subject to price regulation.⁴¹ But the Commission’s Technology Advisory Council has recommended that the agency ultimately allow incumbent LECs to cease offering DS_n services⁴² (and AT&T has unilaterally determined that this should occur by 2020).⁴³ If the FCC were to adopt this recommendation, TDM-based special access inputs would no longer be offered by incumbent LECs. Accordingly, unlike in the *Broadband Forbearance Orders*, the Commission cannot rely on the continued availability of TDM-based special access services as a rationale for granting forbearance here.

2. *The Traditional Market Power Framework Is Appropriate For Assessing Competition In Dynamic Markets.*

CenturyLink is also wrong when it asserts that the Commission cannot use a market power framework to evaluate its forbearance petition because “static market share information” can understate competition in “evolving” or dynamic markets.⁴⁴ The Commission already rejected the same argument in the *Pricing Flexibility Suspension Order*.⁴⁵ There, the Commission held that a market analysis based on the *Merger Guidelines* is precisely the right

⁴¹ See, e.g., *AT&T Forbearance Order* ¶ 25. Of course, incumbent LECs are not subject to any price cap regulation of their TDM-based DS1 and DS3 special access services in “Phase II” areas. See *Pricing Flexibility Suspension Order* ¶ 23 (explaining Phase II relief).

⁴² See FCC Technology Advisory Council, Status of Recommendations, at 11 (June 29, 2011), available at <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

⁴³ See AT&T December 18, 2013 *Ex Parte* Letter, at 1.

⁴⁴ See CenturyLink Forbearance Petition at 22 & n.82.

⁴⁵ *Pricing Flexibility Suspension Order* ¶ 92 (“AT&T and Verizon both assert that the Commission should not rely on market share as the basis for concluding that a given market lacks competition, because market share is a static measure that can understate the impact of competitive alternatives in dynamic markets.”).

approach to analyzing competition in dynamic markets.⁴⁶ This is because the market analysis includes a “forward-looking” and “multi-faceted assessment of competition that considers a variety of factors” (e.g., potential competition) in addition to consideration of market share.⁴⁷ Additionally, “this type of fact-specific analysis is in line with current approaches to competition policy”⁴⁸ and will “provide analytical precision” in determining whether a given market is competitive.⁴⁹

Moreover, while changing market conditions (e.g., changes in technology) may cause existing market shares to understate or overstate competition, this does not mean that the Commission should ignore market share data entirely or refrain from conducting a market analysis altogether. Rather, consistent with the *Merger Guidelines*, the Commission should “consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data.”⁵⁰ Otherwise, under CenturyLink’s logic, the *Merger Guidelines* could *never* be applied to markets that are characterized by change. Of course, this has not been established practice. In 2011, for example, the Department of Justice and the FCC Staff relied on the *Merger Guidelines* to analyze competition in the fast-changing market for mobile wireless voice and broadband services.⁵¹

⁴⁶ See *id.* ¶¶ 87-101 (describing the “market analysis” and its benefits).

⁴⁷ See *id.* ¶¶ 92, 101.

⁴⁸ *Id.* ¶ 92.

⁴⁹ See *id.* ¶¶ 91-92.

⁵⁰ *Merger Guidelines* § 5.2.

⁵¹ See generally Staff Analysis and Findings, WT Dkt. No. 11-65 (rel. Nov. 29, 2011); see also Amended Complaint, *United States v. AT&T Inc.*, Civil Action No. 11-01560 (D.D.C. Sept. 16, 2011).

Thus, nothing precludes the Commission from conducting a “forward-looking” assessment of market shares in a dynamic market. In fact, as the Joint Commenters have explained in the special access rulemaking proceeding, the Commission can conduct such a forward-looking analysis by examining the location and ownership of facilities that *can* be readily used or upgraded to provide the relevant service even if such facilities are not *currently* being used to provide that service.⁵² For example, an incumbent LEC such as CenturyLink can provide Ethernet and other packet-based services to essentially any commercial building and along any point-to-point transport route reached by its network. Thus, for purposes of the market share analysis in this proceeding, CenturyLink should be treated as serving all locations served by its network. This approach to assessing market shares and market concentration will enable the Commission to assess the position of a firm with respect to a service, such as Ethernet service, that is being gradually deployed over its network facilities.

3. *Reliance On The Traditional Market Power Framework Will Advance The Policy Goals Set Forth In Section 706.*

Application of the traditional market power framework to the instant forbearance request is fully consistent with the policy goals set forth in Section 706 of the 1996 Act.⁵³ Indeed, it is the optimal means of advancing the objectives of Section 706 in the instant context.

CenturyLink seizes upon the Commission’s observation in the *Phoenix Order* that “a different analysis” than the traditional market power framework “*may* apply when the Commission addresses [forbearance petitions involving] advanced services, like broadband

⁵² See *tw telecom et al. Special Access Comments* at 65-66.

⁵³ 47 U.S.C. § 1302(a).

services.”⁵⁴ Contrary to CenturyLink’s assertion, this statement does not indicate that a different analysis should or will apply.

In fact, the Commission subsequently held in the *Pricing Flexibility Suspension Order* that a market analysis is appropriate to assess competition in the provision of special access circuits (including Ethernet circuits), which are “a particularly important input” for carriers “to provide affordable broadband service.”⁵⁵ The Commission held that “a comprehensive market analysis” that considers factors such as market share, barriers to entry, and demand elasticity “will foster broadband deployment” by “ensur[ing] that appropriate regulatory relief is granted in those markets where competitive conditions justify it.”⁵⁶

Moreover, this conclusion comports with the terms of Section 10. Under Section 10(a)(1)-(2) of the Act, the Commission must determine if enforcement of a particular statutory provision or Commission rule is necessary to ensure that rates, terms, and conditions are just, reasonable, and not unjustly or unreasonably discriminatory and necessary to protect consumers.⁵⁷ It is entirely logical and legally permissible for the Commission to undertake the analysis under Section 10(a)(1)-(2) by assessing whether competition in the relevant markets for packet-based special access services is sufficient to meet the statutory criteria. Section 10(a)(3)⁵⁸ in turn requires that the Commission determine whether forbearance is in the public interest. In making that determination, it would be logical for the Commission to determine whether

⁵⁴ See CenturyLink Forbearance Petition at 18 (citing *Phoenix Order* ¶ 39 (emphasis added)).

⁵⁵ *Pricing Flexibility Suspension Order* ¶ 94 & n.293.

⁵⁶ *Id.* ¶¶ 93-95 (emphasis added).

⁵⁷ 47 U.S.C. § 160(a)(1)-(2).

⁵⁸ *Id.* § 160(a)(3).

forbearance would, among other things, promote the policy of broadband deployment set forth in Section 706. That is exactly what the FCC did in the *Phoenix Order*. There, the Commission applied the traditional market power framework and considered, in its Section 10(a)(3) analysis, whether the requested forbearance would “advance the goals of Section 706.”⁵⁹ The Commission can do the same here.

Finally, notwithstanding CenturyLink’s suggestions to the contrary, deregulation via forbearance is neither automatically warranted under Section 706 nor the only approach to encouraging broadband deployment set forth in that provision. To begin with, Section 706 states that the Commission should only utilize forbearance as a means of promoting broadband deployment if doing so is “consistent with the public interest, convenience, and necessity.”⁶⁰ Moreover, Section 706 expressly provides that the FCC can also use “price cap regulation . . . or other regulating methods” to advance the goals of that provision.⁶¹ As the D.C. Circuit recently found, the Commission has broad discretion to choose the optimal means of promoting broadband deployment under Section 706 so long as those methods are consistent with the Act.⁶² Such methods would clearly include continued dominant carrier regulation of incumbent LECs’ packet-based special access services.

⁵⁹ See *Phoenix Order* ¶ 39; see also *id.* ¶ 106 (finding that the requested forbearance would not advance broadband deployment in part because of evidence that “wireline UNEs encourage the provision of broadband service”); *id.* ¶ 108 (finding that “UNE obligations have led some competitive carriers to invest in equipment and technologies to provide innovative broadband and video services over legacy copper loops”).

⁶⁰ 47 U.S.C. § 1302(a).

⁶¹ *Id.*

⁶² See generally *Verizon v. FCC*, No. 11-1355, 2014 WL 113946 (D.C. Cir. Jan. 14, 2014).

B. Under The Traditional Market Power Framework, Or Any Other Reasonable Standard, CenturyLink Has Failed To Meet Its Burden Of Proof.

The Commission has held that the petitioner in a forbearance proceeding bears the burden of proof “at the outset and throughout the proceeding.”⁶³ This burden includes “providing convincing analysis and evidence” to support the petition.⁶⁴ As discussed herein, there is no question that CenturyLink has failed to meet this burden.

1. CenturyLink Has Failed To Demonstrate That There Is Sufficient Competition In the Relevant Markets To Justify Forbearance.

CenturyLink concedes that its previous (2012) petition seeking the same forbearance relief could have been “more complete,”⁶⁵ but the instant petition relies largely on the same factual support as the previous one. In March 2013, in the eleventh hour of the 2012 petition proceeding, the Bureau issued a data request to CenturyLink seeking information necessary “to complete [the Commission’s] review of the petition.”⁶⁶ The Bureau sought, among other things,

- basic information about each of the services for which CenturyLink sought forbearance (*e.g.*, “information about the service’s characteristics, such as its bandwidth or bandwidth range, whether it is circuit-switched (TDM) or packet-switched,” whether the service is sold at retail or wholesale, and the pricing structure of the service, including whether it was offered with a term- or volume-based commitment);
- basic information about the geographic areas (*i.e.*, the zip codes and counties in the legacy CenturyTel and legacy Embarq territories) in which CenturyLink sought forbearance;

⁶³ *Forbearance Procedures Order* ¶ 20; *see also id.* ¶¶ 21-23.

⁶⁴ *Id.* ¶ 20.

⁶⁵ CenturyLink Forbearance Petition at 3.

⁶⁶ *March 2013 Information Request* at 1 (“In order for the Commission to complete its review of the petition, we require additional information from CenturyLink.”).

- information, by county, on each competitive provider offering services similar to the services for which CenturyLink sought forbearance in the legacy CenturyTel and legacy Embarq territories, including whether the provider was a facilities-based competitor; and
- information on the total number of commercial buildings and cell sites within the relevant geographic areas to which CenturyLink provided a connection that it owned or leased under an IRU.⁶⁷

Thus, since the *March 2013 Information Request*, CenturyLink has been on notice as to the types of information needed to support its forbearance request. Yet nine months later, CenturyLink filed the instant petition, which contains *none* of that information. In the instant petition, CenturyLink could have submitted, among other things, a comparison of (1) the number of business customer locations to which it has connections capable of providing the packet-based special access services at issue in the legacy CenturyTel and legacy Embarq territories; and (2) data from the telecommunications database firm GeoResults on the number of business customer locations to which competitors have deployed their own such connections. The only inference that can be drawn from CenturyLink’s failure to provide such evidence is that the evidence would have supported a denial of forbearance.

It is also worth pointing out that if CenturyLink believed that the data necessary to meet its burden of proof lies in the hands of third parties (*e.g.*, competitive LECs and cable operators), it should have made that clear in its petition.⁶⁸ Indeed, the Commission has held that the “complete-as-filed” requirement does not preclude a petitioner from seeking additional data from

⁶⁷ *See id.*, Attachment, at 4-7.

⁶⁸ It should be noted, however, that non-disclosure agreements often prevent third parties from disclosing the rates, terms, and conditions on which incumbent LECs offer Ethernet and other unregulated packet-based special access services. This reality underscores the wisdom of requiring the party requesting forbearance to bear the burden of proving that rates, terms, and conditions will remain just and reasonable and not unjustly or unreasonably discriminatory in the absence of dominant carrier regulation.

third parties.⁶⁹ At the time of filing, the Commission “merely require[s] forbearance petitioners to identify the nature of the third-party information they need, the parties they believe possess it, and how the information relates to the petition.”⁷⁰ CenturyLink failed to take these steps when it filed the instant petition.

Furthermore, the little evidence that CenturyLink *has* provided fails to demonstrate that there is sufficient competition in the relevant markets to justify forbearance—under a traditional market power framework or any other reasonable forbearance standard. The reasons for this are discussed in turn.

a. Competition In The Relevant Geographic Markets

CenturyLink’s petition does not show that sufficient competition exists in the relevant geographic markets to warrant forbearance. Most, if not all, of the market share information CenturyLink provides is nationwide data.⁷¹ For example, CenturyLink states that it “was the fourth largest provider of U.S. business Ethernet services as of mid-year 2013,” according to Vertical Systems Group,⁷² and that it lags “far behind market leaders AT&T and Verizon” in Vertical Systems Group’s “Business Broadband Data Services Share Analysis.”⁷³ But this information has no bearing on whether CenturyLink faces enough competition *in the legacy CenturyTel and legacy Embarq territories* to warrant relief from dominant carrier regulation of its packet-based special access services in those territories.

⁶⁹ See *Forbearance Procedures Order* ¶ 15.

⁷⁰ *Id.*; see also *id.* ¶ 17.

⁷¹ See CenturyLink Forbearance Petition at 28, 31-32; see also *id.*, Attachments 9, 11-12.

⁷² See *id.* at 32.

⁷³ See *id.* at 31; see also *id.*, Attachment 12.

CenturyLink also relies on evidence of purported competition in geographic markets other than those for which it seeks forbearance. For instance, CenturyLink proffers that Integra provides Ethernet-over-copper services in *legacy Qwest* markets such as “Phoenix, Minneapolis, Seattle, Denver[,] and Portland.”⁷⁴ This fact is entirely irrelevant to the Commission’s forbearance analysis here. Similarly, CenturyLink points to competition from “over 30 providers,”⁷⁵ including Edison Carrier Solutions, Frontier, Masergy, and NTT America, but CenturyLink has not shown that these carriers are significant providers of packet-based special access services in the legacy CenturyTel and legacy Embarq territories.⁷⁶

b. Competition In The Relevant Product Markets

None of the evidence provided by CenturyLink shows that there is sufficient competition in the relevant product markets to warrant forbearance from dominant carrier regulation of its packet-based special access services. For example, CenturyLink relies heavily on Vertical Systems Group’s rankings of the top Ethernet service providers in the U.S. (based on retail port share) to support its claim that it is a non-dominant provider of Ethernet services.⁷⁷ But those rankings do not differentiate between the level of competition in the provision of Ethernet services at different capacity levels (*e.g.*, they do not differentiate between the level of competition in the provision of 10 Mbps services and 1 Gbps services).⁷⁸ And contrary to

⁷⁴ *Id.*, Attachment 10, Declaration of Kevin Downs ¶ 6.

⁷⁵ *Id.* at 28.

⁷⁶ *See id.*, Attachment 9.

⁷⁷ *See id.* at 32.

⁷⁸ *See* Vertical Systems Group, “Mid-Year 2013 U.S. Carrier Ethernet Leaderboard” (Aug. 20, 2013), available at <http://www.verticalsystems.com/vsglb/mid-year-2013-u-s-carrier-ethernet-leaderboard/> (“Vertical Systems Group Ethernet Rankings”).

CenturyLink’s suggestions, the Commission cannot accurately “analyze[] the state of competition for [all] enterprise broadband services,” or even all Ethernet services, “as a group.”⁷⁹ This is because, among other things, it is implausible to assume that business customers view lower bandwidth (*e.g.*, 10 Mbps) services as substitutes for higher bandwidth (*e.g.*, 1 Gbps) services.

Similarly, CenturyLink repeatedly points to competition from the “online offerings” of unnamed “cable players” in its petition.⁸⁰ Those services—*i.e.*, “online services providing 100 Mbps download and 20 Mbps upload speeds for \$199.95 per month”⁸¹—are almost certainly “best efforts” broadband Internet access services that business customers do not view as viable substitutes for Ethernet and other packet-based special access services.⁸²

Moreover, CenturyLink does not provide evidence of sufficient competition in the *wholesale market* for packet-based special access services.⁸³ For instance, CenturyLink implies that it competes with “over 30 providers [of] enterprise broadband services,”⁸⁴ but it never

⁷⁹ See CenturyLink Forbearance Petition at 21; *see also id.* (“Enterprise broadband services are largely interchangeable.”).

⁸⁰ *See id.*, Attachment 10, Declaration of Kevin Downs ¶ 8; *see also id.*, Attachment 11, at 10.

⁸¹ *See id.*

⁸² *See, e.g.*, *tw telecom et al. Special Access Comments* at 50-57 (explaining that the available evidence overwhelmingly demonstrates that “best efforts” broadband Internet access services are not in the same product market as dedicated special access services).

⁸³ Although CenturyLink states that Frost and Sullivan has identified it as the fourth largest provider of retail Ethernet services and the fourth largest provider of wholesale Ethernet services in U.S. (*see* CenturyLink Forbearance Petition n.119), that statement says nothing about whether CenturyLink faces sufficient facilities-based competition in the provision of different Ethernet services (*e.g.*, low-capacity, mid-capacity, and high-capacity services) at retail and at wholesale in the legacy CenturyTel and legacy Embarq footprint.

⁸⁴ *Id.* at 28.

addresses the extent to which each of these providers offers packet-based special access services at wholesale.

c. Facilities-Based Competition

Most of the “evidence” CenturyLink relies upon is not evidence of facilities-based competition. For example, CenturyLink fails to discuss the extent to which each of the 30+ service providers listed in Attachment 9 to its petition provide packet-based special access services over their own facilities.⁸⁵ In addition, the Vertical Systems Group Rankings upon which CenturyLink relies do not differentiate between Ethernet ports associated with services that competitive LECs provide over their own facilities and Ethernet ports associated with services provided over last-mile facilities leased from incumbent LECs, such as CenturyLink.⁸⁶ It would defy logic to relieve an incumbent LEC of pricing and other dominant carrier regulation of its packet-based special access inputs based on competition from service providers that rely on those very same inputs to deliver packet-based special access services to their own end-user customers.

d. Potential Competition

CenturyLink overstates the potential for competitive entry in the relevant markets for packet-based special access services. It is well established that competitors continue to face substantial economic and operational barriers to constructing their own fiber facilities.⁸⁷

⁸⁵ See *id.*, Attachment 9.

⁸⁶ See generally Vertical Systems Group Rankings.

⁸⁷ See, e.g., *Phoenix Order* ¶ 84 (“[T]he Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile facilities. . . . We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”); see also *id.* ¶ 90 (making similar finding).

CenturyLink contends, however, that it “possesses no meaningful” first-mover or cost advantage over competitors when “deploying fiber to a customer location, even if [CenturyLink] has copper facilities there.”⁸⁸ CenturyLink is wrong for a number of reasons.

First, CenturyLink already has customers at the commercial buildings served by its copper facilities.⁸⁹ This existing customer base is a significant first-mover advantage because it offers CenturyLink a ready source of revenue to recover the large sunk costs associated with deploying new fiber loop facilities. Competitive carriers almost always lack this source of revenue.

Second, incumbent LECs’ fiber transport networks give them significant advantages over their competitors when deploying fiber to commercial buildings. As the Commission and the DOJ have recognized, one of the most important factors in constructing facilities to end-user locations is the distance of the building from the carrier’s transport network.⁹⁰ Given the ubiquity of incumbent LECs’ transport networks, they have a clear cost advantage over competitive LECs in constructing fiber laterals in response to customer demand.⁹¹

⁸⁸ CenturyLink Forbearance Petition at 35-36.

⁸⁹ See *Triennial Review Order* ¶ 276 (finding that where “an incumbent LEC constructs fiber transmission facilities parallel to or in replacement of its existing copper plant, . . . incumbent LECs still enjoy an established customer base”).

⁹⁰ 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, ¶ 154 (2005); Declaration of W. Robert Majure, *United States v. SBC Commc’ns, Inc.*, No. 1:05cv02102, ¶ 14 (D.D.C. Aug. 9, 2006) (explaining that “the cost of building a lateral” is based “primarily [on] the distance of the building from the provider’s network”).

⁹¹ See also Reply Comments of Zayo Group, LLC, WT Dkt. No. 11-65, at 10 (filed June 20, 2011) (“Zayo June 20, 2011 Reply Comments”) (citing “longer mileage to build” as one of “numerous obstacles” that alternative providers—and not incumbent LEC providers—face when deploying fiber to cell sites).

Third, incumbent LECs enjoy substantial economies of scale and scope—and resulting cost advantages—in the provision and use of facilities that competitors do not. This is evident from CenturyLink’s own comments in the special access rulemaking. As CenturyLink explained there, it effectively uses the fiber its deploys to cell sites to subsidize its residential services: “CenturyLink sometimes uses the fiber facilities it builds to a wireless cell site to reduce the cost of upgrading its network plant in a nearby residential neighborhood, in order to justify the cost of enhancing the company’s broadband services in that neighborhood.”⁹²

Fourth, the largest incumbent LECs, including CenturyLink, have used their exclusionary special access purchase arrangements to create “artificial and inefficient barriers” for competitors seeking to deploy their own facilities.⁹³ As Level 3 and others have explained, these special access purchase arrangements erect a barrier to competitive facilities deployment by locking up customer demand:⁹⁴

A competitor such as Level 3 might offer better rates, terms, and conditions on new facilities that it would construct to a [retail business] customer’s location(s). But if that customer is compelled by a [term- or volume-based commitment] plan to maintain a baseline number of circuits with the price-cap LEC, the customer will be reluctant to leave the price cap LEC’s service and suffer shortfall penalties for doing so even where that customer is no longer under any term obligation with respect to individual services on the relevant routes and could otherwise “re-bid” the services. In that event, the competitive facilities to the relevant premises might never be deployed (even if a rational “build-buy” analysis would otherwise

⁹² Opposition of CenturyLink, WC Dkt. No. 05-25, at 34 (filed Apr. 16, 2013).

⁹³ See Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, n.47 (filed Feb. 22, 2012).

⁹⁴ See, e.g., *id.*; see also Zayo June 20, 2011 Reply Comments at 10 (“Zayo and other alternative access providers encounter numerous obstacles in constructing fiber to cell sites that are not encountered by ILECs, including . . . take-or-pay contracts with the ILECs that prevent potential customers from changing carrier[s] Various smaller wireless providers have communicated to Zayo that they could not sign new backhaul service orders and/or needed to delay Ethernet rollout due to being locked into take-or-pay volume commitment deals with ILECs.”).

justify them) because the customer faces a substantial disincentive to depart the price-cap LEC's service. Similarly, if a wholesale carrier customer is a party to such a [term- or volume-based commitment plan] with the price-cap LEC, the carrier customer might feel compelled to buy services from the price cap LEC to avoid a potential shortfall rather than building to a new location.

As further evidence of potential competition, CenturyLink contends that “[w]here they choose not to deploy their fiber facilities, potential providers . . . can rely on CenturyLink’s special access services and Unbundled Network Elements (‘UNEs’)” to provide packet-based special access services.⁹⁵ But this argument is flawed in several respects. To begin with, it is well-established that where downstream retail competition relies upon wholesale inputs from incumbent LECs, the incumbents have the incentive and ability to raise retail rivals’ costs by denying, delaying and degrading those inputs.⁹⁶

In addition, as *tw* telecom and numerous other competitors have explained, TDM-based DS1 and DS3 services are not viable inputs for higher capacity Ethernet services. In particular, reliance on TDM-based inputs to provide such services results in higher costs, less flexibility to adjust capacity to meet the customer’s needs, and increased potential points for failure as compared to reliance on wholesale finished Ethernet loops.⁹⁷ These limitations eliminate many

⁹⁵ CenturyLink Forbearance Petition at 29.

⁹⁶ See e.g., *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 176 (2000) (“Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs’ retail markets. . . . Incumbent LECs’ ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.”).

⁹⁷ See Letter from Thomas Jones and Jonathan Lechter, Counsel for *tw* telecom, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-47, 09-51 & 09-137, at 9-10 (filed Dec. 22, 2009) (“*tw telecom Dec. 22, 2009 Letter*”); see also Letter from Joshua M. Bobeck, Counsel for Alpheus Communications, L.P., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125, at 3-5 (filed Oct. 9, 2007); Letter from Thomas Jones, Counsel for Time Warner Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125, at 3-4 (filed Aug. 24, 2007); Letter from Aryeh

of the inherent cost advantages of Ethernet technology.⁹⁸

Furthermore, CenturyLink ignores the limitations of relying on unbundled conditioned copper loops as an input for Ethernet services. For instance, incumbent LECs—including CenturyLink—have been retiring copper loops.⁹⁹ Even where copper has not been retired, it is often unsuitable for the provision of Ethernet-over-copper services. This is the case, for

Friedman, BT Americas, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-440, 05-25, 06-109, 06-125 & 06-147, at 1-2 (filed Oct. 5, 2007); Letter from Brad E. Mutschelknaus *et al.*, Counsel for NuVox Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-440, 06-125 & 06-147, at 7 (filed Sept. 19, 2007); Letter from Laura H. Carter, Vice President, Government Affairs, Federal Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-25, 06-109, 06-125 & 06-147, at 7-8 (filed Aug. 30, 2007); Opposition of Time Warner Telecom, Inc. *et al.*, WC Dkt. Nos., 06-125 & 06-147, at 16-20 (filed Aug. 17, 2006).

⁹⁸ See Abdul Kasim, DELIVERING CARRIER ETHERNET: EXTENDING THE ETHERNET BEYOND THE LAN, at 95 (2008) (“One big advantage of carrier Ethernet services is the economics for both the Service Providers and enterprise end users. However, as these services are currently being delivered over numerous underlying technologies . . . the economics may be less attractive (as opposed to delivering native Ethernet.)”); *id.* at 214-15 (“In particular, leased line services run at slower TI or OC-3 speeds and require costly intermediate protocol [translations] . . . It is well known that these multilayered set-ups suffer from huge bandwidth inefficiency and are very costly from an operational perspective. More importantly, they have failed to keep pace with today’s gigabit-level Ethernet port speeds.”); Lee L. Selwyn, Economics & Technology, Inc., *The Non-Duplicability of Wholesale Ethernet Services: Promoting Competition in the Face of the Incumbents’ Dominance over Last-Mile Facilities*, at 19 (Mar. 2009), available at <http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix3.pdf> (“[I]f the [ILEC] is only required to offer its TDM-based services . . . the competitor seeking to provide Ethernet services over this facility is confronted with the costly and inefficient task of re-provisioning the service -- cobbling the bandwidth together from ‘slices’ that are mis-sized for the required use and purchasing additional, costly electronic equipment.”).

⁹⁹ See, e.g., CenturyLink Network Disclosure Announcement No. 12-004, “Copper Retirements in Florida, Illinois, Missouri, North Carolina, Pennsylvania, and Wisconsin” (posted May 14, 2012), available at http://www.centurylink.com/wholesale/downloads/2012/120508/12_004_Century_Link_Copper_Retirements_in_FL_IL_MO_NC_PA_and_WI.doc; CenturyLink Network Disclosure Announcement No. 12-003, “Copper Retirements in Arkansas, Illinois, and Pennsylvania” (posted Mar. 20, 2012), available at http://www.centurylink.com/wholesale/downloads/2012/120314/12_003_Century_Link_Copper_Retirements_in_AR_IL_PA.doc.

example, where the copper pair between the central office and the end-user location is too long.¹⁰⁰ And Ethernet-over-copper services often cannot provide as much bandwidth as Ethernet services delivered over fiber facilities.

Finally, CenturyLink's argument that competitive LECs can rely on TDM-based inputs to provide packet-based special access services is entirely disingenuous given that the Commission is considering proposals from incumbent LECs to discontinue TDM-based services.¹⁰¹

e. Falling Prices

CenturyLink asserts that forbearance is warranted here because “the average rates for CenturyLink services covered by the [*Qwest* and *Embarq*] *Broadband Forbearance Orders* have declined” by a certain percentage since those *Orders* were granted.¹⁰² Putting aside the fact that CenturyLink does not provide any detailed pricing data to support this statement, falling prices are not necessarily evidence that a market is competitive.¹⁰³ It is well established that, “[p]rices can change for a large number of reasons, *only one* of which is a change in competitive conditions.”¹⁰⁴ When marginal costs decrease, for example, “even monopolists will pass [a

¹⁰⁰ See, e.g., Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Dkt. No. 09-223, at 18-19 (filed Nov. 16, 2009).

¹⁰¹ See generally *Technology Transitions*, Order, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-5 (rel. Jan. 31, 2014).

¹⁰² CenturyLink Forbearance Petition, Attachment 7, Declaration of Julie Brown ¶ 32.

¹⁰³ See Declaration of Dr. Stanley M. Besen ¶ 3, attached as Attachment B to Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed July 9, 2009).

¹⁰⁴ *Id.* ¶ 8 (emphasis added).

portion] of their cost savings on to consumers (not out of good will but in order to maximiz[e profits]).”¹⁰⁵

f. Lost Revenue

In its petition, CenturyLink submits the amount of potential revenue it has supposedly lost as a result of losing wireless carriers’ requests for proposals (“RFPs”) for packet-based special access services during the past three years.¹⁰⁶ CenturyLink provides no documentation or any other basis for verifying or reviewing this claim. Moreover, purported lost revenue, by itself, does not come close to showing that there is enough competition to grant forbearance for all of the packet-based special access services for which CenturyLink seeks forbearance throughout the legacy CenturyTel and legacy Embarq territories. For instance, it is not clear whether the services requested in those RFPs were higher capacity packet-based services that were likely to be subject to more competition than lower capacity packet-based services. Nor does that figure say anything about the level of competition in the provision of packet-based special access services to wireline carrier customers and retail business customers in commercial buildings throughout the legacy CenturyTel and legacy Embarq territories.

g. Price Umbrella

CenturyLink states that forbearance should be granted because its tariffed rates create a pricing umbrella and “customers [are] los[ing] out” on the “price competition that would otherwise occur.”¹⁰⁷ But nothing precludes CenturyLink from lowering the height of this price umbrella by reducing its tariffed rates. Moreover, CenturyLink’s admission that its rates create a

¹⁰⁵ See *id.* n.7 (internal citation omitted).

¹⁰⁶ CenturyLink Forbearance Petition at 47.

¹⁰⁷ *Id.* at 40.

pricing umbrella shows that there is insufficient price-constraining competition to ensure just and reasonable rates post-forbearance. For example, the Commission has found that “the risk of umbrella pricing is high when only one wholesale competitor enters the market in competition with the incumbent LEC, but is substantially reduced when two or more competitors provide wholesale [service] in competition with the market leader, the incumbent LEC.”¹⁰⁸ Thus, continued dominant carrier tariffing and price cap regulation—*not* forbearance—is necessary here.

2. CenturyLink Has Failed To Demonstrate That Forbearance Will Increase Broadband Investment.

CenturyLink provides no support for its claim that forbearance will result in increased investment in broadband facilities.¹⁰⁹ Nor could it. There is no empirical evidence to support the theory that deregulation by the FCC yields increased investment by incumbent LECs or competitive LECs.¹¹⁰ In fact, one study has found that deregulation of incumbent LEC last-mile facilities between 2002 and 2007 resulted in *less* investment by both incumbent LECs and competitive LECs during that period than between 1996 and 2001.¹¹¹ There is no reason to

¹⁰⁸ *Triennial Review Order* n.1275.

¹⁰⁹ See CenturyLink Forbearance Petition at 49-52.

¹¹⁰ As tw telecom has explained elsewhere, even AT&T’s recently announced “Project VIP” investment represents little, if any, increase in overall annual wireline capital expenditures by AT&T. See Comments of Cbeyond, EarthLink, Integra, Level 3 and tw telecom, GN Dkt. No. 12-353, at 29-30 (filed Jan. 28, 2013).

¹¹¹ See Susan M. Gately *et al.*, Economics & Technology, Inc., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, at 1-3, 6-11 (Feb. 2010), available at http://www.publicknowledge.org/pdf/eti_wholesale_study_20100211.pdf. The authors of the study note that “[e]ven if macro-level trends in the economy might have resulted in overall reductions to capital investment levels (for example, after the ‘tech bubble’ burst in 2000-2001)[,] the elimination of regulation of wholesale services exacerbated the general economic

believe that this trend has reversed itself. For instance, after AT&T received the forbearance relief that CenturyLink seeks here, its annual wireline capital expenditures decreased by approximately 23 percent during the next three years (*i.e.*, from 2008 to 2011).¹¹² And wireline capital investment by incumbent LECs, competitive LECs, and cable companies combined declined by approximately 18 percent during the same period.¹¹³

The Commission's findings in the *Pricing Flexibility Suspension Order* also show that granting regulatory relief in a market characterized by a dominant firm does not yield increased investment. There, the FCC found that its predictions in 1999 that regulatory relief "will induce competitive entry"¹¹⁴ sufficient to constrain the incumbent from exercising its market power had not come true.¹¹⁵ In particular, the Commission found relatively little facilities deployment by competitors in areas where incumbent LECs had been granted pricing flexibility.¹¹⁶

trend and while investment throughout the rest of the economy rebounded after a year or two[,] investment by ILECs and CLECs did not." *Id.* at 12-13.

¹¹² See AT&T, "Complete 2008 Annual Report," at 41, available at http://www.att.com/Common/about_us/annual_report/pdfs/2008ATT_FullReport.pdf; AT&T, "Complete 2011 Annual Report," at 48, available at http://www.att.com/Common/about_us/files/pdf/ar2011_annual_report.pdf.

¹¹³ See Susan M. Gately *et al.*, S.M. Gately Consulting LLC, *The Benefits of a Competitive Business Broadband Market*, at 16 (Table 4-1) (Apr. 2013), available at <http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf> ("*The Benefits of a Competitive Business Broadband Market*").

¹¹⁴ *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*, Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 144 (1999).

¹¹⁵ See *e.g.*, *Pricing Flexibility Suspension Order* ¶ 1 (finding that the Commission's pricing flexibility rules had "not work[ed] as predicted").

¹¹⁶ See *id.* ¶¶ 68-69.

Moreover, while CenturyLink insists that “all of the expectations in the [*Broadband Forbearance Orders*] have been borne out,”¹¹⁷ tw telecom’s own experience demonstrates that the relief granted in those *Orders* has hindered, not spurred, broadband deployment. As tw telecom has explained in other proceedings, incumbent LECs’ failure to offer wholesale Ethernet loops at reasonable rates prevents competitors from deploying fiber loop facilities as aggressively as they would otherwise.¹¹⁸ More specifically, because a multi-location business customer will typically require its service provider to offer Ethernet services at most or all of the customer’s locations, tw telecom cannot even justify fiber deployment to a customer’s high-demand locations unless it can obtain access to reasonably priced wholesale Ethernet loops to serve that customers’ lower-demand locations.¹¹⁹ For example, even if tw telecom can efficiently self-deploy loop facilities to two locations of a multi-location business that require high-capacity Ethernet connections (*e.g.*, 1 Gbps), tw telecom will not win the customer’s business unless it can obtain reasonably priced off-net facilities to serve the customers’ other four locations which require relatively low-capacity Ethernet connections (*e.g.*, 10 Mbps).

Thus, it is not forbearance but dominant carrier price cap and tariffing regulation that will facilitate increased broadband deployment.¹²⁰ In fact, one study has found that updating policies

¹¹⁷ CenturyLink Forbearance Petition at 20.

¹¹⁸ See Letter from Jonathan Lechter, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51, 09-47 & 09-137, at 7 (filed Dec. 22, 2009).

¹¹⁹ See *id.*

¹²⁰ As Judge Silberman noted in his separate opinion in *Verizon*, rate regulation could be used to incent increased infrastructure investment by a dominant provider. That is, by regulating its prices, the Commission would encourage the dominant provider to maximize profits by deploying more facilities to reach new customers instead of continuing to impose supracompetitive prices on its existing customers. See *Verizon*, 2014 WL 113946, at *31 (Silberman, J., concurring in part and dissenting in part) (“[I]f a particular broadband provider were a monopolist, then by regulating its prices, the Commission might encourage it to expand

that promote competition in a packet-based environment, including re-imposing dominant carrier regulation of incumbent LEC packet-based special access services where it has been eliminated, would *increase* investment in U.S. telecommunications networks by roughly \$184 billion over five years.¹²¹

III. CONCLUSION.

For the foregoing reasons, the Commission should promptly release a final agency order denying CenturyLink's forbearance petition consistent with the analysis provided herein.

Respectfully submitted,

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supply to increase profits, rather than artificially restrict supply so as to charge supracompetitive rates. Such a regulation would not increase competition, but it would at least potentially remove a barrier to investment.”).

¹²¹ See *The Benefits of a Competitive Business Broadband Market* at ii, 21.