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

In the Matter of	)	
	)	
CenturyLink's Alternative Petition for Interim	)	WC Docket No. 14-9
Waiver of Dominant Carrier Regulation and	)	
Computer Inquiry Tariffing Requirements	)	
Imposed on Enterprise Broadband Services	)	

CENTURYLINK'S REPLY COMMENTS IN SUPPORT OF ITS ALTERNATIVE PETITION FOR INTERIM WAIVER

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EXECUTIVE SUMMARY

The coalition of competitors ("Joint CLECs") opposing CenturyLink's Alternative Petition for Interim Waiver of dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to its enterprise broadband services provide no rational basis for denying such relief. Their attempts to divert the Commission's attention with erroneous and irrelevant legal and procedural arguments should be rejected. Instead, to the extent the Commission does not grant CenturyLink's pending Petition for Forbearance from the same requirements, the Commission should grant CenturyLink's alternative request for interim waiver.

The Joint CLECs fail to address the Administrative Procedure Act's command that similarly situated parties must be treated in a similar manner and the Commission's related regulatory parity goal, both of which strongly support grant of the Waiver Petition. The Joint CLECs mischaracterize CenturyLink's position by conflating the Waiver Petition and the Petition for Forbearance and then charge that CenturyLink has not made a sufficient competitive showing for forbearance relief in the Waiver Petition. CenturyLink's petitions, however, set forth different legal and factual analyses and must be reviewed under the different standards governing those two procedures. The "good cause" waiver standard does not require the type of competitive or market dominance analysis required for forbearance relief.

Continuing the theme of melding the two petitions, the Joint CLECs also assert the novel proposition that a party that seeks forbearance relief, or could seek forbearance relief, from a legal requirement may not seek similar relief under any other procedural vehicle, including a petition for waiver. There is no rule or other authority, however, for the proposition that a waiver cannot be used to secure alternative relief that might also have been sought through a

forbearance petition, and longstanding industry practice and Commission precedent rebut any such notion.

It also is well established that maintaining regulatory parity is a core public interest factor in assessing whether the good cause standard has been met, and can justify a waiver. The fact that the Commission may also consider additional factors in its waiver analysis does not detract from the central importance of regulatory parity in the Commission's assessment.

Moreover, the Joint CLECs compound their errors by misrepresenting the application of the good cause standard entirely. The Waiver Petition describes at length the public interest and other considerations -- in addition to regulatory parity -- that satisfy the good cause standard in this case. The vain attempts by the Joint CLECs to distinguish cases cited in the Waiver Petition in fact bolster CenturyLink's showing. The Joint CLECs also fail to provide any evidence that waiver relief would be harmful and ignore CenturyLink's showing that the current regime is harmful to consumers. As the Waiver Petition demonstrates, good cause thus exists for an interim waiver of dominant carrier regulation, which would merely place CenturyLink in the same position as the roughly 90 percent of the enterprise broadband industry that has been released from such rules and could not possibly cause any harm to consumers or competition.

Contrary to the assertions of the Joint CLECs, it also is clear that the Commission has authority to grant temporary relief from the Section 203 tariffing requirement here. Section 203(b)(2) of the Communications Act plainly authorizes the Commission to "modify" any tariffing requirement, and the Supreme Court has endorsed the Commission's authority to defer or waive that requirement "altogether," authority that has been used to defer a carrier's tariffing obligation for over two years.

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I. INTRODUCTION

CenturyLink responds to the oppositions filed by tw telecom, *et al.* ("Joint CLECs")[1] and Sprint Corp.[2] to its Alternative Petition for Interim Waiver.[3] The Waiver Petition seeks interim relief from the Commission's dominant carrier regulations and the *Computer Inquiry* tariffing requirement with respect to CenturyLink's packet-switched and optical transmission broadband services (together, "enterprise broadband services") that are still subject to those obligations. The Waiver Petition seeks relief in the alternative to CenturyLink's simultaneously filed Petition for Forbearance from the same requirements, but only until such time as the Commission

[1] Opposition of tw telecom, *et al.*, to CenturyLink's Waiver Petition, WC Dkt. No. 14-9 (Feb. 14, 2014) ("Joint CLEC Waiver Opp.").

[2] Opposition of Sprint Corp., WC Dkt. No. 14-9 (Feb. 13, 2014) ("Sprint Opp.").

[3] CenturyLink Alternative Petition for Interim Waiver, WC Dkt. No. 14-9 (Dec. 13, 2013) ("Waiver Petition"). Although Sprint Corp. opposes the Waiver Petition, it discusses only the Petition for Forbearance in its filing. *See* Sprint Opp. This Reply therefore addresses only the Joint CLECs' Opposition.

resolves the regulatory treatment of incumbent carrier enterprise broadband services on an industry-wide basis.[4]

Contrary to the oppositions, the Waiver Petition more than meets the Commission's legal standard for waiver and would advance the public interest. The strength of CenturyLink's showing is reflected in the lack of any opposition from two of the four parties that oppose the Petition for Forbearance.[5]

II. CONTRARY TO THE CLAIMS OF THE JOINT CLECS, THE WAIVER PRINCIPLE OF REGULATORY PARITY AND THE ADMINISTRATIVE PROCEDURE ACT STRONGLY SUPPORT WAIVER RELIEF HERE

The Waiver Petition demonstrates that, under the Administrative Procedure Act ("APA"), the Commission must "apply the same criteria to all [parties] petitioning for exemptions"[6] and that an agency may not "'treat like cases differently'"[7] or "'grant to one person the right to do that which it denies to another similarly situated.'"[8] The APA's requirement that an agency

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[4] *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 Docket No. 14-9 (filed Dec. 13, 2013) ("Petition for Forbearance").

[5] *See* Opposition of COMPTEL, WC Dkt. No. 14-9 (Feb. 14, 2014), and The Reply and Opposition of the New Jersey Rate Counsel, WC Dkt. No. 14-9 (Feb. 26, 2014), which are silent on the Waiver Petition.

[6] *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985).

[7] *Id.* (quoting *United States* v. *Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984) (affirming lower court order allowing medical device to be marketed without FDA approval in light of its similarity, in all relevant respects, to a device previously approved by FDA)).

[8] *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev'd on other grounds*, 382 U.S. 46 (1965)). *See also Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (an agency "cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly").

apply the same "decisional criteria to similarly situated carriers"[9] echoes and reinforces the Commission's well-established policy that the requisite "good cause" for a waiver can be established by a showing that a grant would bring about regulatory "parity" with the regulatory scheme governing similarly situated entities.[10] The regulatory parity waiver policy is especially compelling, now that CenturyLink is the only major national provider of enterprise broadband services that is still subject to dominant carrier regulation, and much larger incumbents, as well as all of CenturyLink's other competitors, are free of such burdens.

A. Joint CLECs Conflate the Waiver Petition and the Petition for Forbearance

Joint CLECs respond that an agency may revise its approach on a given issue if it provides an adequate explanation, but they fail to connect that argument in any coherent manner with this waiver proceeding. They assert instead that the Commission is not required to "apply[] the same exact analysis and mak[e] the same exact findings as in the [*Enterprise Broadband Forbearance Orders*]" and that denial of the Waiver Petition would not be arbitrary if the Commission used a different competitive analysis than was applied in those orders and provided a reasoned explanation for the different approach.[11] Continuing in this vein, Joint CLECs argue that, in order to obtain waiver relief, "CenturyLink must show that . . . the level of competition in

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[9] *Airmark*, 758 F.2d at 692.

[10] *TerreStar Networks Inc.*, Order and Authorization, 25 FCC Rcd 228, 235-36 ¶¶ 22, 24 (IB 2010) ("*TerreStar Networks*") (describing *New ICO Satellite Services G.P.*, Order and Authorization, 24 FCC Rcd 171, 185 ¶ 40 (IB 2009) ("*New ICO*")).

[11] Joint CLEC Waiver Opp. at 12-13.

the relevant markets for packet-based special access services . . . justify deregulation in this case."[12] That is precisely what CenturyLink does *not* have to show to obtain waiver relief.

Contrary to Joint CLECs' mischaracterization, CenturyLink is not requesting that the Commission "apply[] the same exact" competitive and legal "analysis and mak[e] the same exact findings" in deciding the Waiver Petition that was used in the *Enterprise Broadband Forbearance Orders*.[13] Rather, it is requesting that, *pending* any industry-wide final determination of the proper regulatory treatment of incumbent enterprise broadband service providers based on such competitive considerations, the Commission find that "good cause" exists for an interim waiver of dominant carrier regulation of CenturyLink's enterprise broadband services. As explained in the Waiver Petition, no competitive or market dominance analysis or findings are necessary or appropriate in reviewing a waiver request, so the "same exact analysis" would be impossible.

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[12] *Id.* at 16-17.

[13] *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*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007), *aff'd sub nom. Ad Hoc Telecommc'ns. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended* (*47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007); *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*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (together, the "*Enterprise Broadband Forbearance Orders*").

For example, in the *Verizon Advanced Services Waiver*, the Commission expressly accepted Verizon's argument that "the relief . . . request[ed] here 'is . . . only interim in nature.'"[14] The Commission concluded that "our grant of a waiver . . . is not intended . . . to detract from a full and fair consideration of whether advanced services should receive broader 'non-dominant' regulatory treatment in the future."[15] The *Qwest Advanced Services Waiver* also noted that "the grant of the waiver to . . . Verizon . . . was interim in nature and did not prejudge broader issues related to the regulatory treatment of advanced services."[16] Thus, there is no need to resolve "arguments regarding the competitive nature of the . . . market in this [waiver] proceeding, as such a complex analysis is better suited to . . . [other] proceedings."[17] As in the *Advanced Services Waiver Orders*, the waiver sought by CenturyLink is "interim in nature,"[18] and thus, there is no need to resolve "arguments regarding the competitive nature of the . . . market. . . ."[19]

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[14] *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, 20 FCC Rcd 16840, 16848 ¶ 14 (2005) ("*Verizon Advanced Services Waiver*") (citation omitted).

[15] *Id.*

[16] *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, Order, 22 FCC Rcd 7482, 7484 ¶ 4 (WCB 2007) ("*Qwest Advanced Services Waiver*") (together with *Verizon Advanced Services Waiver*, the "*Advanced Services Waiver Orders*").

[17] *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16848 ¶ 14.

[18] *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7484 ¶ 4.

[19] *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16848 ¶ 14.

B. Joint CLECs Fail to Grasp the Importance of Regulatory Parity and Similar Treatment for Competitors to the Proper Application of the "Good Cause" Standard

Whether or not a different competitive analysis might be justifiable in response to CenturyLink's Petition for Forbearance (and CenturyLink has shown that no such revised approach could be justified), the Waiver Petition presents an entirely different set of issues not involving any market analysis. By misconstruing the nature of the interim relief sought in the Waiver Petition, Joint CLECs completely miss the point that, in determining whether good cause exists, the Commission has repeatedly taken into consideration how other similarly situated carriers are treated and the goal of regulatory parity. As demonstrated in the Waiver Petition, and discussed in Part III, *infra*, the requisite "good cause" for a waiver can be established by a showing that a grant would bring about regulatory "parity" with the regulatory scheme governing similarly situated entities.[20]

In *Terrestar Networks*, the International Bureau found that "good cause" was shown for a waiver of technical satellite rules partly because such relief "would comport with the Commission's established requirements for comparable terrestrial services."[21] The Bureau also noted that it had "waived the same rule" for another satellite provider because "waiver would put" the other provider's operations "at parity with" comparable terrestrial services.[22] Similarly,

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[20] *TerreStar Networks*, 25 FCC Rcd at 235-36 ¶¶ 22, 24.

[21] *Id.* at 235 ¶ 22.

[22] *Id.* at 235-36 ¶ 24 (describing *New ICO*, 24 FCC Rcd at 185 ¶ 40 (waiving technical satellite rules to permit base station operations consistent with the Commission's "requirements for comparable terrestrial services")). *See also Samsung Electronics America, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 12941, 12944 ¶ 5 (MB 2013) ("*Samsung*") (waiver of analog cable tuner requirements "will provide regulatory parity between" Samsung's digital cable tuner

when the Fox Networks Group sought a waiver of the "network representation" TV advertising rule in order to bring about "a level playing field" in the U.S. Spanish language broadcast television market, the Media Bureau granted the waiver "in recognition of the competitive imbalance that could result in the absence of a waiver."[23]

The Waiver Petition demonstrated that these cases include orders in which the Commission waived rules that had been lifted from other similarly situated parties under other procedural vehicles in order to bring about "parity" between the petitioner's services or products and the regulatory status of a "comparable" class of services or products.[24] Similar treatment, rather than the "same exact analysis," justified those waivers.[25] Accordingly, waiver relief is perfectly appropriate in order to bring about "parity" with "comparable"[26] entities that enjoy a more favorable regulatory status or that were granted similar relief by means other than previous waivers. Joint CLECs have not demonstrated why the APA requirement of similar treatment for similarly situated parties and the regulatory parity principle do not apply here as they have in these other cases.

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and cable-leased set-top boxes with which it competes); *TiVo, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 12181, 12185 ¶ 6 (MB 2013) (waiver of same rule will provide "regulatory parity").

[23] *Fox Networks Group, Inc. (MundoFox)*, Order, 27 FCC Rcd 5158, 5158 ¶ 2, 5160 ¶ 5 (MB 2012) ("*Fox*").

[24] *See TerreStar Networks*, 25 FCC Rcd at 235-36 ¶¶ 22, 24 (waiver for satellite services to "put" them "at parity with" terrestrial services); *Samsung*, 28 FCC Rcd at 12944 ¶ 5 (waiver for digital cable tuners to "provide regulatory parity between" them and cable-leased set-top boxes).

[25] Joint CLEC Waiver Opp. at 12.

[26] *See TerreStar Networks*, 25 FCC Rcd at 235-36 ¶¶ 22, 24.

Joint CLECs also argue that regulatory parity is not sufficient by itself to show good cause for waiver relief.[27] That there may have been additional factors in some of the orders discussed in the Waiver Petition does not detract from the central importance of regulatory parity as a waiver goal, as shown by the cases discussed above. CenturyLink also demonstrated factors other than regulatory parity justifying waiver relief in its discussion of good cause in the Waiver Petition, as discussed *infra*.[28]

Joint CLECs also contend that CenturyLink is somehow attempting to avoid the good cause requirement by requesting relief similar to the *Enterprise Broadband Forbearance Orders*.[29] They hypothesize a situation where waiver relief would harm the public interest even though another party received similar treatment and assert that no waiver would be granted in such a case.[30] Joint CLECs' approach thus is to frame regulatory parity and similar treatment principles as entirely separate from, and potentially conflicting with, the good cause waiver standard. In fact, as discussed above, regulatory parity and the goal of similar treatment for similarly situated parties are part and parcel of the good cause standard. The cases cited in the Waiver Petition found that "put[ting]" petitioners "at parity with" other providers of "comparable" services would establish especially "good cause" for waiver relief[31] and that such

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[27] *See* Joint CLEC Waiver Opp. at 14.

[28] Waiver Petition at 13-26.

[29] Joint CLEC Waiver Opp. at 15-16.

[30] *Id.* at 16.

[31] *TerreStar Networks*, 25 FCC Rcd at 235-36 ¶¶ 22, 24.

relief would bring about "a level playing field" and thereby relieve "the competitive imbalance that could result in the absence of a waiver."[32]

Similar competitive considerations led to waivers in the *Advanced Services Waiver Orders*. In the *Verizon Advanced Services Waiver*, the Commission granted a waiver to allow Verizon to exercise pricing flexibility for its advanced packet switched broadband services in certain areas and thereby "respond to competition effectively."[33] The record in that proceeding showed that BellSouth and SBC also exercised pricing flexibility for their comparable advanced services.[34] The Commission found good cause for a waiver to permit Verizon to exercise pricing flexibility for its advanced services because such relief would "promote[] competition for advanced services, resulting in more choices and better prices for customers."[35] Thus, waiver relief was granted in order to allow Verizon to exercise the same pricing flexibility in its offering of advanced services that its competitors enjoyed and similar to that exercised by other ILECs -- in the case of SBC, *through forbearance relief*.[36]

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[32] *Fox*, 27 FCC Rcd at 5158 ¶ 2, 5160 ¶ 5.

[33] *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16842 ¶ 4.

[34] *Id.* at 16843 ¶ 7 & n.24.

[35] *Id.* at 16844-45 ¶¶ 8-9.

[36] Joint CLECs argue that SBC had not obtained similar flexibility through a prior forbearance grant. Joint CLEC Waiver Opp. at 14 n.60. The order states, however, that "Verizon . . . notes that SBC, which offers advanced services through its separate affiliate, *is . . . able to exercise pricing flexibility for comparable services*." *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16843 ¶ 7 (emphasis added). The footnote at the end of that sentence states: "Although SBC has not been granted pricing flexibility for its provision of similar services, *SBC was granted forbearance from our tariffing rules in connection with its provision of advanced services* through a separate affiliate" (citing *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000

Subsequently, in the *Qwest Advanced Services Waiver*, the Wireline Competition Bureau "grant[ed] Qwest the same relief that Verizon received in the *Verizon Advanced Services Waiver Order*"[37] and under the same competitive rationale, *i.e.*, "that the waiver granted here serves the public interest" by "[p]roviding Qwest the flexibility to offer contract tariffs tailored to the needs of individual customers," which "will enable it to respond more effectively to competition."[38] Responding "more effectively to competition" thus does double duty as a "public interest" factor establishing good cause[39] and as a means of implementing the regulatory parity goal of creating "a level playing field" and thereby relieving "the competitive imbalance" resulting from disparate regulatory burdens.[40]

C. There is no Basis for Joint CLECs' Novel Theory that Waiver Relief is Unavailable in These Circumstances

Joint CLECs also assert the novel proposition that when a party seeks relief under the Section 10 forbearance standard, it may not request similar relief under any other procedural vehicle, including a waiver petition. Thus, under their theory, where application of a regulation

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(2002)). *Id.* at 16843 ¶ 7 n.24 (emphasis added). Thus, SBC's prior forbearance grant did provide equivalent (if not greater) "pricing flexibility for comparable services."

The quibble that Joint CLECs raised is irrelevant to the point that SBC previously had secured essentially equivalent relief through forbearance. Because that forbearance relief covered only services provided through SBC's separate affiliate, SBC also requested the same pricing flexibility waiver relief sought by Verizon so that it could exercise pricing flexibility for such services offered on an unseparated basis. *See* SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules at 4, WC Dkt. No. 03-250 (filed Dec. 9, 2003).

[37] *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7484 ¶ 4.

[38] *Id.* at 7485 ¶ 7.

[39] *See id.*

[40] *Fox*, 27 FCC Rcd at 5158 ¶ 2, 5160 ¶ 5.

is no longer appropriate due to changed market circumstances, a party may not seek waiver of that regulation, or any other relief, as an alternative to forbearance relief.[41] Joint CLECs do not cite any authority for this newly-minted principle, nor could they, since there is no such rule. In fact, other parties have sought forbearance and, in the alternative, similar relief under other procedures, and the Commission has not suggested any procedural bar to such alternative pleading.[42]

For example, in the *Pricing Flexibility Suspension Order*, the Commission noted that parties could seek relief from the competitive showing required by its special access pricing flexibility rules *either through petitions for forbearance or waiver petitions*.[43] As examples of such waivers, the Commission cited the *Advanced Services Waiver Orders*, discussed above.[44] The *Advanced Services Waiver Orders* are especially illustrative of the flaws in Joint CLECs' new theory. There, the Commission recognized that competitors provide their own advanced

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[41] Joint CLEC Waiver Opp. at 7-11.

[42] *See, e.g.*, *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*, 27 FCC Rcd 11532, 11532 ¶ 1 (2012) ("*CLEC/Cable Forbearance Order*") (petition for declaratory ruling and conditional petition for forbearance in the alternative); *Iowa Telecom Petition for Interim Waiver of the Commissions Universal Serv. High-Cost Loop Support Mechanism*, Order, 25 FCC Rcd 5573 (WCB 2010); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007). Of course, Commission Rule 1.53 requires that forbearance be requested in a separate pleading from any other relief. 47 C.F.R. § 1.53. CenturyLink accordingly filed separate petitions in the alternative.

[43] *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557, 10604 ¶ 84 (2012) ("*Pricing Flexibility Suspension Order*").

[44] *Id.* at 10604 ¶ 84 n.264 (citing *Advanced Services Waiver Orders*).

services[45] and granted a waiver to Verizon in order to "promote[] competition for advanced services, resulting in more choices and better prices for customers."[46] Qwest was granted similar waiver relief under the same competitive rationale, *i.e.*, "that the waiver granted here serves the public interest" by "[p]roviding Qwest the flexibility to offer contract tariffs tailored to the needs of individual customers," which "will enable it to respond more effectively to competition" and thereby "promote competition in the market for advanced services and result in more choices and better prices for customers."[47] Those are precisely the types of competitive concerns that the Commission stated in the *Pricing Flexibility Suspension Order* could be the basis for either forbearance or waiver relief but that Joint CLECs insist are forbidden in the waiver context.[48]

In the *CLEC/Cable Forbearance Order*, the Commission denied a petition for declaratory ruling on the merits, but granted a forbearance petition seeking the same relief because, *inter alia*, such relief "will likely speed the entry of [additional providers] . . . into the market for telecommunications services provided to business customers and will foster increased facilities-

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[45] *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16846 ¶ 11.

[46] *Id.* at 16845 ¶ 9.

[47] *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7485 ¶ 7.

[48] Joint CLECs, at 14 n.60, quibble that Verizon was not seeking relief from a rule that had been rendered unnecessary by increased competition, but, rather, relief from the circumstances that had caused its advanced services to be kept out of price cap regulation and thus ineligible for pricing flexibility. This is a distinction without a difference. Verizon sought a waiver in order to "respond to competition effectively" by "offer[ing] individually negotiated contracts for these advanced services and to adjust prices . . . for different customer and market segments." *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16842 ¶ 4. The Commission granted relief to "promote[] competition for advanced services, resulting in more choices and better prices for customers," *id.* at 16845 ¶ 9, and, in the case of Qwest, to "enable it to respond more effectively to competition" and thereby "promote competition in the market for advanced services." *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7485 ¶ 7. Those considerations are directly analogous to CenturyLink's rationale for the relief requested in the Waiver Petition.

based competition for these services."[49] There was no suggestion in that order that declaratory relief would have been an inappropriate means of bringing about "increased . . . competition." The Commission also forbore from enforcement of the equal access "scripting" requirement as to the Bell Operating Companies ("BOCs") because, *inter alia*, "market conditions have changed substantially, greatly reducing the benefits of the" requirement, continuation of which "is likely to distort competition," and waived the same rule as to their ILEC affiliates so that they could operate under a "uniform regulatory framework."[50]

Joint CLECs' procedural "rule" also fails because it depends on their underlying mistake, namely their characterization of the Waiver Petition as seeking a ruling based entirely on "increased competition."[51] As explained above, although the issue of a "competitive imbalance" between petitioner and other market participants is central to the regulatory parity waiver goal,[52] waiver relief requires no competitive or market findings, a point studiously overlooked by Joint CLECs.

Joint CLECs attempt to use the *Puerto Rico Waiver Order* in support of their procedural theory, but, that case effectively rebuts any claimed procedural bar to waiver relief in these circumstances.[53] There, the Puerto Rico Telephone Company, Inc. ("PRT") requested a waiver

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[49] *CLEC/Cable Forbearance Order*, 27 FCC Rcd at 11544 ¶ 27.

[50] *Section 272(f)(1) Sunset of the BOC Separate Affiliate & Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16499 ¶ 120, 16501 ¶ 123, 16502 ¶ 126 (2007).

[51] Joint CLEC Waiver Opp. at 8.

[52] *See Fox*, 27 FCC Rcd at 5160 ¶ 5.

[53] *Petition of Puerto Rico Tel. Co., Inc. and Puerto Rico Tel. Larga Distancia, Inc. for Waiver of Section 64.1903 of the Commission's Rules*, Memorandum Opinion and Order, 25 FCC Rcd

of the structural separation requirements, claiming that they "are not necessary because it faces extensive local and long distance competition. PRT also claim[ed] that compliance with those requirements imposes unnecessary costs that compound the challenges PRT faces . . . ."[54] PRT also requested that, in the event that the Bureau waives the structural separation requirements, the Bureau also waive application of dominant carrier regulation of its unseparated in-region long distance services on an interim basis because "it lacks market power."[55] Without addressing the merits of this market power argument, the Bureau determined that a temporary deferral of dominant carrier regulation was appropriate while the Commission considered whether competitive considerations required the lifting of such requirements.[56]

Thus, an interim waiver of dominant carrier regulation is perfectly appropriate pending consideration of the market power and other competitive issues that must be resolved in determining whether dominant carrier regulation is applicable. Those are the types of issues raised in the Waiver Petition that Joint CLECs maintain can never support an interim waiver.[57]

17704 (WCB 2010) ("*Puerto Rico Waiver Order*"), *modified*, 27 FCC Rcd 2495 (WCB 2012), *modified*, 28 FCC Rcd 1072 (WCB 2013).

[54] *Id.* at 17710 ¶ 11.

[55] *Id.* at 17713 ¶ 18.

[56] *Id.* at 17713-14 ¶ 20.

[57] Joint CLECs, at 9, appear to believe that it is significant that the temporary deferral was granted to allow PRT to provide the necessary nondominance showing, while CenturyLink has already made its forbearance showing in the Petition for Forbearance and thus should need no deferral or waiver. This argument reflects Joint CLECs' underlying conflation of the two proceedings. The Waiver Petition seeks interim relief pending the resolution of the appropriate status of enterprise broadband services on an industry-wide basis, which is being considered in other proceedings. The Commission has granted interim waiver relief pending resolution of other proceedings in a variety of circumstances, a point not challenged by Joint CLECs. *See* Waiver Petition at 27-33.

In a last desperate sally on this point, Joint CLECs argue that PRT's dominance status was ultimately addressed in a forbearance order, but, as they concede, no forbearance relief was actually granted. Instead, the Commission determined that ILEC long distance services had previously been classified as nondominant, thereby mooting the issue.[58] The *Puerto Rico Waiver Order* thus effectively rebuts Joint CLECs' asserted procedural bar to interim waiver relief.

III. EVEN ASIDE FROM APA AND REGULATORY PARITY CONCERNS, JOINT CLECS MISREPRESENT THE GOOD CAUSE STANDARD

Under the "good cause" standard, a waiver may be granted where strict compliance would, under the particular circumstances presented, be inconsistent with the public interest.[59] In reviewing a waiver request, the Commission "may take into account considerations of hardship, equity or more effective implementation of overall policy."[60] Waiver thus is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would serve the public interest better than would strict adherence.[61]

Not only have Joint CLECs misrepresented the importance of regulatory parity in assessing a waiver request under the good cause standard, as discussed above, but they also misunderstand how the good cause standard should be applied here. They incorrectly argue that

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[58] Joint CLEC Waiver Opp. at 11 (citing *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7695-7700 ¶¶ 154-62 (2013) (also discussed in the Waiver Petition at 32 n.127).

[59] *Northeast Cellular Tel. Co. L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

[60] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[61] *Northeast Cellular*, 897 F.2d at 1166. *See also Puerto Rico Waiver Order*, 25 FCC Rcd at 17710 ¶ 12 n.47.

CenturyLink made no attempt at establishing good cause, other than by relying on the APA's similar treatment principles and regulatory parity.[62] The Waiver Petition, however, describes at length the public interest and other considerations -- in addition to regulatory parity -- that CenturyLink satisfies in meeting the good cause standard. In particular, the requested waiver would enable CenturyLink to respond more effectively to competition, which was the identical rationale for waiver relief in the *Advanced Services Waiver Orders*.[63] As CenturyLink explains, under dominant carrier regulation, it lacks "the flexibility to offer contract[s] . . . tailored to the needs of individual customers" that the Commission identified as a "public interest" benefit of waiver relief in the *Advanced Services Waiver Orders*.[64] Meanwhile, its unregulated competitors have had a head start of years to enjoy their advantages.

Joint CLECs inadvertently make CenturyLink's point even more clearly, in attempting to distinguish cases cited in the Waiver Petition. For example, Joint CLECs argue that, unlike the showing in the Waiver Petition, cases such as *Samsung* "identified the special circumstances that warranted deviation from the general rule" and "specific and unique public interest benefits that would result from the waiver," and showed that "granting a waiver would not undermine the purpose of the rule."[65]

In particular, according to Joint CLECs, "Samsung explained that compliance with the Commission's . . . rule 'would substantially increase the production costs and retail price of'" the

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[62] Joint CLEC Waiver Opp. at 12.

[63] *See* Waiver Petition at 17-26.

[64] *See, e.g.*, *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7485 ¶ 7.

[65] Joint CLEC Waiver Opp. at 14.

product at issue "to the point that Samsung 'cannot offer the device at a market-appropriate price point,'" and "Samsung 'demonstrated specific and distinct benefits to support its waiver request,' including selling its device at a lower cost to consumers. . . ."[66] Joint CLECs add that "the Media Bureau found that granting Samsung a waiver of the . . . rule would 'increase choices for consumers in the retail marketplace' . . . and would not undermine the rule's purpose. . . ."[67]

CenturyLink presents almost the identical demonstration in the Waiver Petition, which states that:

> CenturyLink . . . lacks "the flexibility to offer contract[s] . . . tailored to the needs of individual customers" . . . .
>
> The "one size fits all" tariff offerings that CenturyLink is required to file . . . depriv[e] customers of a full range of choices and rates. . . .
>
> . . . .
>
> Continuing inefficient, outdated dominant carrier regulation of one corner of one company in an increasingly dynamic marketplace . . . needlessly adds costs, hampers competition and frustrates customers' desired serving arrangements, thereby slowing the deployment of broadband services. . . .
>
> . . . Thus, dominant carrier regulation results in *all* enterprise broadband customers paying higher rates than they would have paid if CenturyLink were regulated as a nondominant carrier for all of its enterprise broadband services.[68]

Joint CLECs have not shown how these concerns, such as the inability to offer customers the service arrangements they desire at competitive prices, depriving "customers of a full range of

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[66] *Id.* at 14-15 (quoting *Samsung*, 28 FCC Rcd at 12943 ¶ 4, 12944 ¶ 5).

[67] *Id.* at 15 (quoting *Samsung*, 28 FCC Rcd at 12945 ¶ 6).

[68] Waiver Petition at 17-20 (internal citations omitted).

choice and rates," and "needlessly add[ing] costs," differ in any significant way from the public interest considerations that were found to satisfy the good cause standard in *Samsung* and other cases.

Joint CLECs argue that the Waiver Petition fails to demonstrate that granting a waiver would not undermine the purpose of dominant carrier regulation by harming the public interest, but, other than reference to unspecified harms supposedly resulting from the *Enterprise Broadband Forbearance Orders*, they do not suggest why waiver relief would be harmful. This argument is another attempt by Joint CLECs to place the burden on CenturyLink, in this proceeding, of making a competitive showing equivalent to a forbearance petition. As discussed above, a waiver applicant is not required to make a competitive showing sufficient to support forbearance or, for that matter, nondominance.

CenturyLink has made the showing necessary for a waiver in these circumstances. For example, in the *Verizon Advanced Services Order*, the Commission rejected opposition arguments that competitive advanced service providers depend on Verizon's special access facilities to reach end users, noting that "[t]his proceeding does not give Verizon any additional authority to change prices for these facilities."[69] 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."[70] Similarly, CenturyLink does not seek any waiver relief regarding its special access services.

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[69] *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16846 ¶ 11.

[70] Brief for the FCC at 25, *Ad Hoc Telecommunications Users Committee v. FCC*, No. 07-1426 (D.C. Cir. filed Dec. 3, 2008).

Even in the absence of a competitive analysis meeting the requirements for forbearance, which is not required here, it is clear that an interim waiver of dominant carrier regulation for the last major national provider of enterprise broadband services still subject to those rules could not possibly cause any harm to consumers or competition. With roughly 90 percent of the industry free of dominant carrier regulation, the only significant impact of such regulation is to hobble the remaining ten percent, which harms the public interest in competition.

As CenturyLink demonstrates in the Waiver Petition, the burdens of dominant carrier regulation on its enterprise broadband services are not merely burdens on CenturyLink, but also losses to consumers.[71] That is why, in the *Advanced Services Waiver Orders*, "[p]roviding . . . the flexibility to offer contract tariffs tailored to the needs of individual customers [that] will enable [an ILEC] to respond more effectively to competition" was held to serve the "public interest" -- not just the carrier's interest -- thereby satisfying the good cause requirement for waiver relief.[72] In these circumstances, as in the *Advanced Services Waiver Orders*, "the waiver will promote competition in the market for advanced services and result in more choices and better prices for customers."[73] As the Bureau concluded in *Samsung*, "Given this evidence, it is clear that the benefits that will result from waiver establish that deviation from the general rule will serve the public interest better than strict adherence to it."[74]

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[71] Waiver Petition at 20-21.

[72] *See Qwest Advanced Services Waiver*, 22 FCC Rcd at 7485 ¶ 7.

[73] *See id.*

[74] *Samsung*, 28 FCC Rcd at 12945 ¶ 6 (citing *Northeast Cellular*, 897 F.2d at 1166).

IV. THE COMMISSION HAS AUTHORITY TO GRANT AN INTERIM WAIVER OF CENTURYLINK'S TARIFFING OBLIGATIONS

The Waiver Petition demonstrates that, because the waiver sought here is for interim relief pending the outcome of other proceedings, the Commission has the authority to include an interim waiver of the tariffing requirements of Section 203(a) of the Act for CenturyLink's enterprise broadband services. "[S]ubstantial deference by courts is accorded to an agency when the issue concerns interim relief."[75] CenturyLink also demonstrates that the Commission has authority under Section 203(b)(2) of the Communications Act of 1934 ("the Act") to waive tariffing requirements on an interim basis.[76] Indeed, the Supreme Court has stated that the Commission "can defer filing or perhaps even waive [the tariff-filing requirement] altogether in limited circumstances,"[77] and this authority was the basis for a "temporar[y] waive[r]" of tariffing requirements in the *Puerto Rico Waiver Order*.[78]

Joint CLECs respond that the Supreme Court language quoted in the Waiver Petition is "ambivalent" "mere dicta," that the Commission has no authority to waive a statutory obligation and that, in any event, the *Puerto Rico Waiver Order* is distinguishable.[79] Contrary to Joint CLECs' characterization, the Supreme Court's reading was hardly a stretch. Section 203(b)(2) of the Act states that:

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[75] *MCI Telecommc'ns. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984) ("*MCI Telecomms.*").

[76] 47 U.S.C. § 203(b)(2).

[77] *MCI Telecommc'ns. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) ("*MCI v. AT&T*").

[78] *See Puerto Rico Waiver Order*, 25 FCC Rcd at 17714-15 ¶ 22 & n.76.

[79] Joint CLEC Waiver Opp. at 3-6.

> The Commission may, in its discretion and for good cause shown, *modify any requirement made by or under the authority of this section* either in particular instances or by general order applicable to special circumstances or conditions . . . .[80]

There is no limitation on the type of modification permitted by this provision.[81]

In *MCI v. AT&T*, the Court held that this provision did not authorize the complete "elimination" of the tariffing obligation for a large portion of the long distance market,[82] but could defer or waive it in limited circumstances.[83] The interim waiver sought by CenturyLink is certainly well within the Section 203(b)(2) authority to modify "any [tariffing] requirement" "in particular instances"[84] and is narrower than the Court's assent to "waive it altogether in limited circumstances."[85] Joint CLECs' conclusion that relief from the tariffing requirement is available only through forbearance is therefore wildly incorrect.

Joint CLECs apparently then abandon their "no authority" position by arguing that the 15-month deferral of the tariffing requirement (which they mistakenly characterize as a three-month deferral), granted in the *Puerto Rico Waiver Order*[86] is irrelevant because PRT's waiver

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[80] 47 U.S.C. § 203(b)(2) (emphasis added).

[81] Joint CLECs' authorities regarding the Commission's lack of authority to waive absolute statutory commands thus are beside the point here.

[82] *MCI v. AT&T*, 512 U.S. at 231.

[83] *Id.* at 234.

[84] 47 U.S.C. § 203(b)(2).

[85] *MCI v. AT&T*, 512 U.S. at 234.

[86] The interim waiver of dominant carrier regulation and simultaneous temporary deferral of the tariffing requirement in the *Puerto Rico Waiver Order* was for 90 days in order to allow PRT to file further evidence in support of its claim of nondominance within that period and, assuming PRT met that deadline, "the deferral will continue for one additional year or until the

showing was much stronger than CenturyLink's showing and the deferral was for a "defined period of time."[87] Significantly, Joint CLECs do not argue that those distinctions affect the Commission's statutory authority to defer or waive tariffing. They stress the unspecified time period that CenturyLink's waiver might continue, but the tariff deferral permitted by the *Puerto Rico Waiver Order* ultimately lasted almost two and a half years, which hardly seems as "defined" as Joint CLECs suggest.[88] The period of time ultimately covered by the interim waiver that CenturyLink seeks, if granted, will be determined by the ultimate industry-wide resolution of the treatment of enterprise broadband services, which is as much under the Commission's control as the ultimate resolution of dominance issues that terminated the "temporary" tariffing deferral granted to PRT.

As for the strength of PRT's waiver showing, CenturyLink's showing more than meets the good cause standard for waiver relief under the *Advanced Services Waiver Orders* and other cases discussed above. Attempting to compare it to PRT's showing of challenges posed by the high poverty rate in its service area is pointless because, although the governing legal principles are identical, the two factual situations are completely different.

Joint CLECs also argue that the *CompTel* case recognizing the Commission's broad authority to order interim measures is distinguishable because of the conflicting statutory goals at

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Commission addresses PRT's supplemental submission, whichever occurs earlier." 25 FCC Rcd at 17714 ¶21.

[87] Joint CLEC Opp. at 5-6.

[88] *See* Waiver Petition at 36 n.146.

issue in that case.[89] They assert that, in this case, there is no Congressional intent supporting a temporary waiver of Section 203.[90] As discussed above, the modification authority in Section 203(b)(2) supports a temporary waiver, so there is no conflict. *CompTel* thus provides more leeway than is actually needed for the interim tariffing waiver that CenturyLink seeks. In any event, Joint CLECs say nothing about the multiple other court and Commission cases discussed in the Waiver Petition that confirm the "substantial deference" accorded to agency "interim relief" measures.[91]

V. CONCLUSION

In the event that the Commission does not grant CenturyLink's Petition for Forbearance, the Commission, in the alternative, should grant an interim waiver of its dominant carrier regulations and the *Computer Inquiry* tariffing requirement with regard to CenturyLink's enterprise broadband services for the reasons stated above and in the Waiver Petition. Such relief should be granted only until the Commission's ultimate determination as to the regulatory treatment of those services on an industry-wide basis.

The requested relief would enable CenturyLink to respond more effectively to competition, thereby removing the current regulatory imbalance in that highly competitive market and placing CenturyLink in the same in the same position as the 90 percent of the enterprise broadband industry not subject to dominant carrier regulation pending such

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[89] Joint CLEC Opp. at 6 (citing *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997) ("*CompTel*")).

[90] *Id.*

[91] Waiver Petition at 33-34.

determination. The resulting regulatory parity and public interest benefits more than satisfy the "good cause" requirement for waiver relief as well as the APA's requirement that similarly situated parties be treated alike.

Respectfully submitted,

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