

**Before The
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W., Washington, D.C. 20554**

In the Matter of)	
)	
Wireline Competition Bureau Seeks Comment On)	WC Docket No. 14-9
Appropriate Market Analysis For CenturyLink)	
Enterprise Forbearance Petition)	

COMMENTS OF AT&T SERVICES, INC.

I. INTRODUCTION AND SUMMARY

AT&T Services, Inc., on behalf of itself and its affiliates (together, “AT&T”), submits the following Comments in response to the Public Notice (“*Notice*”)¹ concerning the petition filed by CenturyLink seeking forbearance from certain dominant carrier regulations and Computer Inquiry requirements for its non-TDM packet-switched and optical broadband transmission services (collectively, “enterprise broadband services”).² The *Notice* indicates that the Wireline Competition Bureau intends to evaluate CenturyLink’s forbearance petition using the “traditional

¹ Public Notice, *Wireline Competition Bureau Seeks Comment On Appropriate Market Analysis For CenturyLink Enterprise Forbearance Petition*, WC Docket No. 14-9 (rel. June 20, 2014) (“*Notice*”).

² See Petition of CenturyLink 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 14-9 (filed Dec. 13, 2013) (“*Petition*”).

market power framework” that the Commission employed in the *Qwest Phoenix Order*.³ The *Notice* thus request comment on the proposed use of this analysis in this proceeding.⁴

The Commission should reject the approach contemplated in the *Notice*. Indeed, the use of a “traditional market power framework” to resolve petitions for forbearance is fundamentally at odds with the requirements and purposes of Section 10. But even if that framework was appropriately used to resolve the *Qwest Phoenix Order*, it has no application here. The *Qwest Phoenix Order* concerned “legacy [TDM] facilities,” not the enterprise broadband services that are at issue in CenturyLink’s current request for forbearance. As the Commission recognized in the *Qwest Phoenix Order* itself, those enterprise broadband services require a “different analysis” that encompasses the broadband deployment goals that Congress established in Section 706 of the Act.⁵ Accordingly, the Commission should resolve CenturyLink’s pending Petition using the judicially approved analytical framework it already has employed to evaluate forbearance petitions involving enterprise broadband services.

II. DISCUSSION

A. The Commission Should Evaluate CenturyLink’s Petition Using Its Well-Established, Judicially Approved Framework For Analyzing Broadband Forbearance Requests.

In the *Qwest Phoenix Order*, the Commission applied a “traditional market power framework” to evaluate Qwest’s request for forbearance from various unbundling and dominant carrier requirements with respect to legacy TDM facilities and services. Citing supposed deficiencies in Qwest’s market-specific evidentiary showing, the Commission denied that

³ *Notice* at 2 (citing *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 (2010) (“*Qwest Phoenix Order*”).

⁴ *Notice* at 3.

⁵ *Qwest Phoenix Order*, ¶39. See 47 U.S.C. §1302.

petition.⁶ Now, and notwithstanding the fact that the issues in this case involve enterprise broadband services, the *Notice* indicates that the Wireline Competition Bureau intends to address CenturyLink’s current request for forbearance through the same “traditional market power framework” it applied in the *Qwest Phoenix Order*.

The Commission should reject that approach. As a predicate matter, insisting on a market power showing to obtain forbearance under Section 10 reflects a fundamental misapplication of that statute.⁷ The statute lays out a specific inquiry: it requires the Commission to forbear from enforcing any “statutory provision or regulation” if it determines that (1) enforcement “is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory,” 47 U.S.C. § 160(a)(1); (2) enforcement “is not necessary for the protection of consumers,” *id.* § 160(a)(2); and (3) non-enforcement “is consistent with the public interest,” *id.* § 160(a)(3).

Reading these provisions as forcing a petitioner to demonstrate a lack of market power in order to obtain forbearance goes far beyond what Section 10 requires.⁸ The question in forbearance proceedings is not whether the applicant is nondominant or has lost all market power. Rather, as the statute provides, the question is whether *the particular regulation at issue* remains necessary (if it ever was). Indeed, many kinds of regulations can outlive their usefulness, if not become affirmatively harmful, even if the applicant still has market power. In

⁶ *Qwest Phoenix Order*, ¶¶ 1-3.

⁷ AT&T previously has described in detail the legal and policy concerns associated with applying the traditional market power framework to forbearance proceedings. *See* Comments of AT&T Inc., *In the Matter of Wireline Competition Bureau Seeks Comment On Applying The Qwest Phoenix Forbearance Order Analytic Framework In Similar Proceedings*, WC Docket Nos. 06-172, 07-97 (Aug. 23, 2010), at 6-17.

⁸ *See EarthLink v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006) (“*Earthlink*”) (rejecting argument that forbearance can be justified only by “a traditional market analysis (including market share, demand and supply elasticity, and other factors)”).

many cases, it should be possible to show that the regulation at issue is no longer playing a meaningful role in maintaining just and reasonable rates without having to make the extensive and difficult type of showing that the Commission required CenturyLink to undertake in the *Qwest Phoenix Order*.

However, even if the *Qwest Phoenix Order* had been correctly decided on its own terms, the traditional market power framework that was applied in that case it should not be applied to CenturyLink's pending petition for forbearance for at least three independent reasons.

First, the *Qwest Phoenix Order* concerned legacy TDM-based services, not the high-capacity broadband packet-switched and optical services at issue here, which in turn implicate the broadband deployment goals articulated in section 706 of the Act. Indeed, in that *Order*, the Commission did “not find any persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.”⁹ Thus, the Commission chose to use its “traditional market power framework.”¹⁰

By contrast, where, as here, the deployment of broadband services is directly implicated, section 706 “explicitly directs the FCC to utilize forbearance to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans and provides the Commission flexibility to balance the future benefits against short term impact.”¹¹ Because of this statutory requirement, the Commission recognized the need for “a different analysis” when deciding a broadband forbearance petition rather than a “petition addressing

⁹ *Qwest Phoenix Order*, ¶ 39.

¹⁰ *Id.*, ¶ 37.

¹¹ *Id.*, ¶ 39 (quoting *Earthlink*, 462 F.3d at 8-9 (internal quotations and alterations omitted)).

legacy facilities, such as Qwest’s petition”¹² In short, the traditional market power framework is simply the *wrong* framework for broadband services.

Second, the *correct* analytical framework for broadband services already exists. Indeed, the Commission has articulated, applied, and received judicial approval of its analytical framework for evaluating forbearance petitions related to enterprise broadband services – a framework that does not employ a traditional market power analysis.¹³ For example, in the *Enterprise Broadband Order*, the Commission analyzed competitive conditions “without regard to specific, identified geographic markets,” because “relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account

¹² *Id.*, ¶ 39.

¹³ See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to its Broadband Services, et al.*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180 ¶ 22 (2007) (*Enterprise Broadband Order*), *aff’d*, *Ad Hoc Telecoms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (“*Ad Hoc*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, *Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007), *aff’d Ad Hoc supra*; *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended (47 U.S.C. § 160(c)), For Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); see also *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21504-13 ¶¶ 19-36 (2004), *aff’d*, *EarthLink*, 462 F.3d 1 (D.C. Cir. 2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 91 (2005) (*Wireline Broadband Order*), *aff’d*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

for all of the forces that influence the future market development.”¹⁴ And the courts have uniformly approved that form of market analysis in the section 706 context because:

Given the rapidly changing state of the overall broadband market and § 706’s direction that the FCC may look to and attempt to shape possible future developments in regulating broadband, . . . the law does not compel a particular mode of market analysis or level of geographic rigor when the agency forbears from imposing certain requirements on broadband providers.¹⁵

There is no reason – and the *Notice* offers none – for departing from this judicially approved framework in evaluating CenturyLink’s Petition. CenturyLink is seeking the *same* relief granted to AT&T, ACS of Anchorage, Embarq, Frontier and Qwest for the *same* categories of non-TDM packet switched and optical broadband transmission services offered by those carriers. The only difference here is that the enterprise broadband market has become even *more* competitive since the Commission granted forbearance to AT&T seven years ago, when it found that dominant carrier regulation was no longer warranted because there “are a myriad of providers prepared to make competitive offers to enterprise customers,” including “the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against AT&T.”¹⁶ Under these circumstances, abandoning the Commission’s well-established and judicially-approved framework to apply a different – and plainly inapposite – standard to CenturyLink’s Petition could only be described as arbitrary and capricious.¹⁷

Third, in adopting the *National Broadband Plan*, the Commission repeatedly recognized

¹⁴ *Enterprise Broadband Order*, ¶ 20.

¹⁵ *Ad Hoc*, 572 F.3d at 908 (internal quotation marks omitted). *See also EarthLink*, 462 F.3d at 8; *Time Warner Telecom*, 507 F.3d at 221.

¹⁶ *Enterprise Broadband Order*, ¶ 22.

¹⁷ *See* 5 U.S.C. §706(2)(A) (“a reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

that regulatory uncertainty poses a significant impediment to broadband investment.¹⁸ When service providers are unable to discern which rules apply to broadband services – or when the Commission fundamentally changes those rules in mid-course – providers’ incentives and abilities to invest in broadband are diminished. Thus, consistent with section 706’s directive to remove barriers to infrastructure investment, the Commission committed in the *National Broadband Plan* to provide greater certainty regarding a variety of different regulations affecting broadband services.¹⁹

But moving forward with the approach contemplated in the *Notice* would have exactly the opposite effect. Rather than providing greater certainty in the regulatory framework applicable to broadband services, the approach proposed in the *Notice* would abruptly abandon years of judicially approved Commission precedent and apply a different standard that likely would have the effect of maintaining outmoded regulations on CenturyLink’s enterprise broadband services. Doing so likely would send an investment-chilling message to the entire broadband industry, while calling into question the Commission’s commitment to fulfilling Congress’ goal of ubiquitous broadband deployment articulated in section 706.

The Commission should not continue down this road. Instead, the Commission should promote broadband deployment as Congress intended by eliminating unnecessary regulations through “regulatory forbearance” and other measures that “remove barriers to infrastructure investment.”²⁰

¹⁸ *Connecting America: The National Broadband Plan*, FCC, at 110, 141-42 (March 14, 2010).

¹⁹ *Id.*

²⁰ 47 U.S.C. § 1302.

III. CONCLUSION

For the foregoing reasons, the Commission should not apply the analytical framework used in the *Qwest Phoenix Order*, but instead should use the framework it previously has employed for resolving petitions for forbearance involving enterprise broadband services.

Respectfully Submitted,

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