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

In the Matter of	)	
	)	
CenturyLink's 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

COMMENTS OF TW TELECOM, LEVEL 3, INTEGRA, AND CBEYOND

tw telecom inc. ("tw telecom"), Level 3 Communications, LLC ("Level 3"), Integra Telecom, Inc. ("Integra"), and Cbeyond Communications, LLC ("Cbeyond") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these comments in response to the Wireline Competition Bureau's ("Bureau's") June 20, 2014 *Public Notice* in the above-captioned docket.[1]

I. INTRODUCTION.

In the *Phoenix Forbearance Order*,[2] the Commission applied a market power standard to CenturyLink's petition for forbearance from economic regulations governing last-mile connections that use legacy TDM technology. That market power standard has been the touchstone for competition policy for many decades. In the instant proceeding, however, CenturyLink has argued that the FCC should abandon the market power standard. CenturyLink's sole basis for this claim is that, in this proceeding, it seeks forbearance from economic regulations governing last-mile connections that use packet-based and optical network

[1] *Wireline Competition Bureau Seeks Comment on Appropriate Market Analysis for CenturyLink Enterprise Forbearance Petition*, Public Notice, DA 14-845 (rel. June 20, 2014) ("*Public Notice*").

[2] *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 (2010) ("*Phoenix Forbearance Order*").

technology.[3] But the market power standard is technology-neutral – it is the most reliable means of determining whether economic regulation is needed regardless of whether the facilities and services at issue utilize TDM-based technology, packet-based technology, or some other technology. As the Bureau has proposed in the *Public Notice*, the Commission should therefore apply the market power standard to the instant petition for forbearance.

Moreover, there can be no dispute that the FCC has the authority to apply the market power standard to the instant petition. As the Bureau correctly observes in the *Public Notice*, Section 10 of the Act "'imposes no particular mode of market analysis or level of geographic rigor.'"[4] Thus, while it is true that the Commission, under the leadership of a different Chairman, failed to apply the market power standard in the *Broadband Forbearance Orders*, the agency is free to return to applying that standard here.[5] Nor does the Commission's observation in the *Phoenix Forbearance Order* that "a different analysis may apply when the Commission addresses advanced services, like broadband services" indicate that a different analysis *should* or *will* apply.[6] As the Joint Commenters explained in their opposition, the market power standard is the most appropriate framework for assessing competition in the relevant markets for Ethernet and other packet-based special access services, and reliance on that framework will advance the policy goals set forth in Section 706 of the 1996 Act.[7]

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[3] *See* CenturyLink's Reply Comments in Support of Its Petition for Forbearance, WC Dkt. No. 14-9, at 11-12 (filed Feb. 28, 2014).

[4] *Public Notice* at 2 (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006)).

[5] *See* Opposition of tw telecom, Level 3, Integra, EarthLink and Cbeyond to CenturyLink's Forbearance Petition, WC Dkt. No. 14-9, at 4-11 (filed Feb. 14, 2014) ("tw telecom *et al.* Opposition to CenturyLink Forbearance Petition") (explaining that the Commission unquestionably has the authority to replace the approach it used in the *Broadband Forbearance Orders* with the more reliable traditional market power standard).

[6] *See Public Notice* n.7 (quoting *Phoenix Forbearance Order* ¶ 39).

[7] tw telecom *et al.* Opposition to CenturyLink Forbearance Petition at 11-15.

Application of the market power standard is fatal to CenturyLink's petition. Under Section 1.54(b) of the Commission's rules, a petition for forbearance must include, among other things, detailed facts that make a *prima facie* case that each prong of Section 10 of the Act is met.[8] CenturyLink has refused to offer any facts or analysis as to why it might lack market power or be otherwise eligible for forbearance in any relevant product or geographic market. The petition must therefore be dismissed as procedurally defective. In all events, correct application of the market power standard requires that the Commission deny the petition unless CenturyLink faces competition from multiple, facilities-based actual competitors in a relevant market. There is no basis for concluding that this is the case here.

II. DISCUSSION.

In the *Public Notice*, the Bureau seeks comment on its proposal to define the relevant markets for packet-based special access services for which CenturyLink seeks forbearance by differentiating "among various customer classes (*e.g.*, small and medium businesses, as opposed to large enterprise customers; customers with localized or low-volume needs versus those with needs for nationwide contracts)."[9] In making this proposal, the Bureau correctly recognizes that the level of competition for Ethernet and other packet-based special access services is unlikely to be uniform across all customer classes, or across the entire country as CenturyLink suggests.[10] In order to accurately assess competition, the Bureau should follow the methodology of the *DOJ-FTC Horizontal Merger Guidelines*[11] and (1) define the relevant product markets based on demand substitution by customers; and (2) define the relevant product markets separately from

[8] *See* 47 C.F.R. § 1.54(b).

[9] *Public Notice* at 3.

[10] *See id.* at 1-3.

[11] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4 (Aug. 19, 2010) ("*DOJ-FTC Horizontal Merger Guidelines*" or "*Merger Guidelines*").

the relevant geographic markets at issue. The Commission should then determine whether CenturyLink has proven that it lacks market power in any of the relevant product and geographic markets. The Commission should deny the forbearance request for any relevant market in which CenturyLink fails to make this showing.

A. The Commission Should Define Relevant Product Markets By Following The *Merger Guidelines*.

In order to define the relevant product markets consistent with the *Merger Guidelines*, the Commission should identify the products that qualify as substitutes for those encompassed by the forbearance petition.[12] As the Joint Commenters and others have explained, in order to simplify this task, the Commission should consider defining product markets based on the capacity of the business-class dedicated services at issue.[13] This is an approach that the Commission has used in the past.[14] It is generally sound because business customers are unlikely to view services that deliver significantly different capacities to be substitutes for each other. For example, customers

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[12] *See, e.g.*, *id.* ("Market definition focuses solely on demand substitution factors, *i.e.*, on customers' ability and willingness to substitute away from one product to another in response to a price increase . . . ."); *Phoenix Forbearance Order* ¶ 56 (explaining that "two services should be in the same relevant market only if the prospect of buyer substitution to [product B] constrains the price of [product A]"); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area et al.*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756, ¶ 5 (1997) ("*LEC Classification Order*").

[13] *See, e.g.*, Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom inc., WC Dkt. No. 05-25, at 58 (filed Feb. 11, 2013); 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 35 (filed Nov. 2, 2012); *see also* tw telecom *et al.* Opposition to CenturyLink Forbearance Petition at 19.

[14] *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, ¶ 166 (2005) (conducting a capacity-specific analysis of competitive deployment of high-capacity loops); *id.* ¶¶ 170-171 (analyzing competitive deployment of DS3 loops separately from competitive deployment of DS1 loops).

are unlikely to view a lower-capacity, dedicated, business-class service (*e.g.*, 5 Mbps symmetrical capacity) as a substitute for the same type of dedicated, business-class service that delivers much higher capacity (*e.g.*, 50 Mbps symmetrical capacity). Moreover, this approach is likely to be more reliable than defining the relevant markets at issue based on the type or size of the customer, as proposed in the *Public Notice*, because small and medium-sized business customers may sometimes require higher capacity services at certain locations and large enterprise customers may sometimes require lower capacity services at certain locations.[15]

Furthermore, in defining the appropriate capacity tiers for its market analysis, the Commission should be guided by the bandwidths at which business customers demand and service providers offer dedicated, symmetrical services. Capacity tiers that are established without regard to the specific capacities demanded and offered in the marketplace could well distort the analysis and yield unreliable results.[16]

Finally, the Commission should examine competition in the retail market for the services at issue separately from the wholesale market for those services. The Commission has consistently differentiated between the retail and wholesale markets in past proceedings,

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[15] *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, ¶ 210 (2003) (subsequent history omitted); *see also id.* n.623 (recognizing that "although each loop type and capacity level may be used predominantly to provide service to a particular customer group, that same loop also may be used to provide service across a range of customer categories").

[16] The Commission must also ensure that the services included in the capacity tiers deliver similar quality of service ("QoS"). This is an important distinction for packet-based networks, in which switches prioritize the transmission of bits based on information contained in the header record of the packet. Accordingly, it is likely that capacity tiers will need to incorporate distinctions between and among differing levels of QoS, such as Non-Critical, Interactive, and Real-Time.

including the *Phoenix Forbearance Order* proceeding.[17] Doing so is important because, as the FCC recognized in the National Broadband Plan, well-functioning wholesale markets are critical to promoting retail competition.[18]

B. The Commission Should Define Relevant Geographic Markets By Following the *Merger Guidelines*.

After defining the relevant product markets, the Commission should define the relevant geographic markets. CenturyLink is requesting forbearance from dominant carrier regulation of the Ethernet and other packet-based special access services it provides in the legacy CenturyTel and Embarq territories.[19] It follows that the relevant question before the Commission is whether CenturyLink retains market power over these services *within the legacy CenturyTel and Embarq territories*.

In analyzing this issue, the Commission should again follow the methodology established in the *Merger Guidelines*. Under that methodology as well as longstanding Commission precedent, the relevant geographic market for transmission services such as packet-based special

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[17] *See, e.g.*, *Phoenix Forbearance Order* ¶ 46 ("To evaluate Qwest's claims that competition is sufficient to justify forbearance under section 10 . . ., our analytical framework calls for us to define both wholesale and retail product markets."); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶¶ 24-87 (2007) ("*AT&T-BellSouth Merger Order*") (analyzing competitive effects of the proposed merger on wholesale special access services separately from the downstream retail services for which such wholesale services are inputs).

[18] *See* FCC, *Connecting America: The National Broadband Plan*, at 47 (rel. Mar. 16, 2010) ("National Broadband Plan") ("Because of the economies of scale, scope and density that characterize telecommunications networks, well functioning wholesale markets can help foster retail competition, as it is not economically or practically feasible for competitors to build facilities in all geographic areas. Therefore, the nation's regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.").

[19] CenturyLink Petition for Forbearance, WC Dkt. No. 14-9, Attachment 1 (filed Dec. 13, 2013).

access services is the individual building in which the customer is located.[20] For administrative convenience, however, the Commission could aggregate customer locations within the legacy CenturyTel and Embarq territories that are subject to similar levels of competition into larger geographic areas.[21]

A proper analysis of relevant product markets would require that CenturyLink provide data on, among other things, the number of customer locations to which it has connections capable of providing the services at issue in those territories. The agency could then assess the extent to which CenturyLink faces competition from service providers that have deployed their own facilities capable of providing the services at issue in the legacy CenturyTel and Embarq territories. The Commission would likely conclude that there is little or no competition in any relevant geographic area within those territories, in which case there would be little need to differentiate among relevant geographic areas in the analysis. If, however, the Commission were to seek to differentiate among different point-to-point connections it could, as suggested, aggregate similarly-situated locations into larger groupings (*e.g.*, those buildings where at least a specified number of competitors have deployed fiber) and then analyze the relevant aggregated groups separately.

C. CenturyLink Has Failed To Offer Any Evidence That It Lacks Market Power In Any Properly-Defined Relevant Market.

The application of the proper methodology for defining relevant markets is fatal to CenturyLink's petition. *First*, under Section 1.54(b) of the Commission's rules, a petition for

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[20] *See, e.g.*, *Phoenix Forbearance Order* ¶ 64 ("Consistent with Commission precedent, we reaffirm that each customer location constitutes a separate relevant geographic market, given that a customer is unlikely to move in response to a small, but significant and nontransitory increase in the price of the service."); *AT&T-Bell-South Merger Order* ¶ 28; *LEC Classification Order* ¶ 5.

[21] *See, e.g.*, *Phoenix Forbearance Order* ¶ 64; *AT&T-BellSouth Merger Order* ¶ 31; *LEC Classification Order* ¶ 5.

forbearance "must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance."[22] As the Bureau recognizes in the *Public Notice*, CenturyLink's petition for forbearance is predicated on its assertion that there is no need to conduct a detailed market power analysis for the services encompassed by the petition. CenturyLink's petition therefore includes no analysis of relevant product and geographic markets, and it includes no proffer of "facts" and no "arguments" showing that forbearance is warranted in any properly-defined relevant market. Accordingly, application of the analytical framework proposed in the *Public Notice* and described further herein requires that the Commission deny the petition for failure to meet the requirements of Section 1.54(b).

Second, even if the Commission proceeds with consideration of the petition on the merits, it must deny CenturyLink's forbearance request if, as is almost certainly the case, CenturyLink continues to fail to provide information showing that it faces sufficient competition in any relevant market.[23]

In assessing whether CenturyLink retains market power, only competitors that have deployed their own facilities should be considered. It would make no sense to relieve CenturyLink 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. Competition from service providers that lease CenturyLink's local transmission facilities should be deemed irrelevant to

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[22] *See* 47 C.F.R. § 1.54(b).

[23] Last year, the Commission denied USTelecom's request for nationwide forbearance from all narrowband *Computer Inquiry* requirements based on the same logic. *See 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, ¶¶ 22-24 (2013).

the analysis also because CenturyLink can exploit its position as a wholesale provider to limit downstream competitors' effectiveness in the retail market.[24] There are many obvious and subtle ways in which it could do so. For example, it could refuse to offer packet-based local transmission facilities to wholesale customers at reasonable prices in the future. It could also raise rivals' costs by degrading service quality in any number of ways (*e.g.*, by degrading or delaying provisioning, repair, maintenance, wholesale billing, or other wholesale functionalities).

Furthermore, in light of the extremely high entry barriers associated with the markets at issue,[25] only competitors that have actually deployed facilities to a particular location should be considered. The Commission has too often relied on predictions that competition would develop in the future, only to learn that no such competition has in fact developed.[26] Thus, the Commission should reject claims that forbearance should be granted in areas where there is

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[24] The Commission has repeatedly recognized that a firm with substantial and persisting market power over upstream inputs has a powerful incentive to deny, delay, degrade and overprice those inputs when demanded by competitors. *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); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 190 (1999).

[25] *See, e.g.*, *Phoenix Forbearance Order* ¶¶ 84, 90.

[26] *See, e.g.*, *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, ¶ 22 (2012) (finding that the special access pricing flexibility triggers that the Commission used as proxies for actual competition "have not worked as expected"); *Phoenix Forbearance Order* ¶ 24 (finding that "there does not appear to be a basis for relying on the predictive judgments" regarding competition that the Commission employed in assessing Qwest's petition for forbearance in the Omaha Metropolitan Statistical Area and that "application of that approach in other similar situations may result in granting relief from existing obligations before competition has developed sufficiently to protect against the exercise of market power by incumbent LECs").

insufficient competition from actual, facilities-based competitors to constrain CenturyLink's exercise of market power. Nor, as the Commission held in the *Phoenix Forbearance Order*, is the presence of a single facilities-based competitor sufficient.[27] Indeed, the optimal approach would be for the Commission to deny forbearance in a relevant market unless there are at least three facilities-based service providers competing with CenturyLink in the relevant market. Under this or any other reasonable test for the level of competition needed to render a relevant market competitive, the instant petition fails and must be rejected.

III. CONCLUSION.

For the foregoing reasons, the Bureau should proceed with its proposal to utilize the market power standard in this proceeding and it should define the relevant markets at issue as discussed herein. Application of that standard requires that the Commission deny CenturyLink's forbearance petition.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Nirali Patel
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000

Counsel for tw telecom, Level 3, Integra, and Cbeyond

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[27] *See Phoenix Forbearance Order* ¶¶ 29-31 (finding that duopoly markets are unlikely to yield competitive outcomes and are likely to harm consumer welfare (*e.g.*, through supracompetitive prices)).