

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

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

CENTURYLINK’S MARKET ANALYSIS REPLY COMMENTS

CenturyLink provides these Reply Comments relating to the Public Notice (“PN”)¹ proposing to employ a segmented market analysis to evaluate CenturyLink’s Petition for Forbearance from dominant carrier and *Computer Inquiry* tariffing requirements imposed on certain of its enterprise broadband services (“Petition”).² While AT&T, like CenturyLink, supports an appropriate nationwide market analysis,³ several commenters advocate for a more granular geographic market analysis focused on specific market power.⁴ These commenters, however, simply ignore two critical points that render that approach inappropriate here.

First, as CenturyLink demonstrated in its Petition and Initial Comments responding to the PN,⁵ and not refuted by any party, CenturyLink’s enterprise broadband services remain subject to vestigial regulatory mandates that do not apply to its similarly situated competitors and larger

¹ FCC Public Notice, *Wireline Competition Bureau Seeks Comment on Appropriate Market Analysis for CenturyLink Enterprise Forbearance Petition*, WC Dkt. No. 14-9, DA 14-845 (June 20, 2014) (“PN”).

² CenturyLink Petition for Forbearance, WC Dkt. No. 14-9 (Dec. 13, 2013) (“Petition”).

³ Comments of AT&T Services, Inc., WC Dkt. No. 14-9 (July 7, 2014).

⁴ Comments of Sprint Corporation, WC Dkt. No. 14-9 (July 7, 2014); Comments of Comptel, WC Dkt. No. 14-9 (July 7, 2014); Comments of tw telecom, Level 3, Integra and CBeyond (collectively, the “Joint Commenters”), WC Dkt. No. 14-9 (July 7, 2014).

⁵ CenturyLink’s Market Analysis Comments, WC Dkt. No. 14-9 (July 7, 2014) (“Initial Comments”).

incumbent rivals. This creates an obvious inequity and regulatory disparity that is inconsistent with Commission policy and cannot stand under the Administrative Procedure Act (“APA”) and case authority summarized in CenturyLink’s Petition.⁶ That, by itself, is a sufficient and overriding basis to grant the Petition.

Second, a segmented geographic market power analysis would be inconsistent with longstanding Commission precedent regarding the analysis of broadband markets. In granting forbearance relief to other incumbents in the *Enterprise Broadband Forbearance Orders*,⁷ the Commission repeatedly found that competition in the dynamic, rapidly expanding enterprise broadband service market at issue should be analyzed on a nationwide basis.⁸ Moreover, as CenturyLink demonstrated in its Initial Comments, the Commission has for more than a decade analyzed competition in broadband markets on a nationwide basis in other proceedings as well.⁹

⁶ See Petition at 10-14; *see also* Initial Comments at 3-5.

⁷ *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) (“*AT&T Forbearance Order*”), *aff’d sub nom. Ad Hoc Telecomm’ns. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (“*Ad Hoc Appeal*”); *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*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 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-Citizens 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*”) (together, the *Enterprise Broadband Forbearance Orders*).

⁸ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18715-18 ¶¶ 18-21.

⁹ See Initial Comments at 5- 8.

Commenters' appeals to the *Qwest Phoenix Forbearance Order*¹⁰ are inapposite: That decision involved TDM-based offerings, *not* broadband services, and indeed expressly recognizes that “a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities.”¹¹

I. THE COMMISSION MUST APPLY THE SAME STANDARD TO EVALUATE CENTURYLINK’S PETITION AS IT HAS USED TO EVALUATE PRIOR ENTERPRISE BROADBAND FORBEARANCE PETITIONS

Despite some commenters' assertions, the Commission did *not* evaluate prior broadband forbearance petitions utilizing such “traditional market power” metrics; instead, it recognized that for broadband services (as opposed to TDM offerings), it is appropriate “to look more broadly at competitive trends without regard to specific geographic markets,” because the market for these broadband services is “emerging and changing.”¹² Having evaluated prior enterprise broadband petitions under this nationwide framework, the Commission must do so here as well. To do otherwise would be to impermissibly discriminate against CenturyLink and simply ignore the mandates of the APA.¹³

The commenters advocating that the commission utilize a “traditional” market power test have no answer for this. Indeed, they acknowledge that they are asking the Commission to treat CenturyLink differently than other incumbent carriers.¹⁴ This the Commission may not do. As

¹⁰ *Petition of Qwest Corp. 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) (“*Qwest Phoenix Forbearance Order*”), *aff’d sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

¹¹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

¹² *AT&T Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

¹³ Petition at 10-14; *see also* Initial Comments at 3-5 (discussing relevant case law).

¹⁴ The Joint Commenters acknowledge, as they must, that “it is true that the Commission, under the leadership of a different Chairman, failed to apply the market power standard in the

CenturyLink has explained, an agency may not ““treat like cases differently,””¹⁵ and must “apply the same criteria” and “provide a consistent approach” “to all [parties] petitioning for exemptions” from a generally applicable requirement.¹⁶ It is well-established that no deference is owed to an agency that “reached diametrically opposite conclusions on the basis of virtually [identical] situations,” and that, “despite its broad discretion,” an agency “cannot ... arbitrarily treat similar situations dissimilarly”¹⁷ The Commission is not writing on a blank slate. It has established an approach for addressing the precise issues raised here, has applied that framework to numerous other parties, and, as such, is bound to apply it to CenturyLink as well.

II. COMPETITION IN THE ENTERPRISE BROADBAND MARKET HAS BEEN, AND SHOULD CONTINUE TO BE, ANALYZED ON A NATIONAL BASIS

The commenters objecting to the continued use of nationwide standard to evaluate broadband forbearance petitions attempt to marginalize the Commission’s use of this nationwide standard in all of the *Enterprise Broadband Forbearance Orders* by characterizing those orders as “flawed” aberrations from what they see as the “traditional” analytical framework.¹⁸ These commenters argue for a “return”¹⁹ to the granular analysis exemplified by the *Qwest Phoenix*

Enterprise Broadband Forbearance Orders . . .” Joint Comments at 2. Similarly, Comptel contends that CenturyLink is asking the Commission to “adopt the flawed analysis that led to grants of previous similar forbearance petitions.” Comptel Comments at 2.

¹⁵ *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984)).

¹⁶ *Id.* at 691, 695; *see also 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)) (an agency is not permitted to ““grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday””).

¹⁷ *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978). *See also id.* at 870 (NLRB reached “essentially a different decision on essentially the same facts”).

¹⁸ Sprint Comments at 2. *See also* Joint Comments at 2; Comptel Comments at 2.

¹⁹ *Id.*

Forbearance Order. They fail to acknowledge that it is they who seek a radical departure from Commission precedent – namely, more than ten years of precedent evaluating broadband competition on a nationwide basis.

As CenturyLink demonstrated in its Initial Comments, the use of a nationwide analytical framework to evaluate broadband competition issues has deep roots. The *Enterprise Broadband Forbearance Orders* themselves relied on numerous prior Commission decisions analyzing the evolving marketplace for broadband services on a national basis, including the *Wireline Broadband Order*²⁰ and the *Section 271 Broadband Forbearance Order*,²¹ as discussed in the Petition.²² In fact, as early as 2003, in the *Triennial Review Order*, the Commission recognized that the “competitive environment” for high-capacity broadband services²³ enabled it to “adopt a national approach” in relieving ILECs of unbundling obligations under Section 251.²⁴ Even the *Qwest Phoenix Forbearance Order* observed that broadband services are different than traditional TDM-based services.²⁵ Sprint and Comptel, however, don’t even acknowledge that critical distinction, suggesting that the *Qwest Phoenix Forbearance Order* relating to TDM-

²⁰ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880-81 ¶ 50, 14901-03 ¶¶ 91-94 (2005) (“*Wireline Broadband Order*”), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

²¹ *Petition for Forbearance of the Verizon Telephone Cos. Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21502 ¶ 12, 21504 ¶ 19 (2004) (“*Section 271 Broadband Forbearance Order*”), *aff’d sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (“*EarthLink*”).

²² See Petition at 23-24.

²³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17152 ¶ 292 (2003) (“*Triennial Review Order*”), *aff’d in relevant part and vacated in other respects, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA*”), *cert. denied*, 543 U.S. 925 (2004).

²⁴ *Id.* at 17148 ¶ 286.

²⁵ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

based services reconfirms the appropriateness of a granular market specific analysis for *all* services. It does not. That order continued to recognize, consistent with numerous prior Commission decisions, that broadband services are different.

As the Commission has correctly observed, in evaluating broadband services it is necessary “to look more broadly at competitive trends *without* regard to specific geographic markets.”²⁶ This is so because the market for broadband services is constantly “emerging and changing.”²⁷ Indeed, enterprise broadband competition has only increased since the Commission made this pronouncement.²⁸ For this reason the Commission has correctly determined that it should analyze broadband market conditions on a “national basis.”²⁹

Section 706 of the Telecommunications Act of 1996³⁰ further reinforces that broadband services are different, and expressly directs the Commission to use forbearance to “encourage the deployment” of broadband services.³¹ Indeed, in the *Section 271 Broadband Forbearance Order* the Commission analyzed competition on a nationwide basis, and the D.C. Circuit Court of Appeals expressly affirmed this approach in upholding that decision.³²

²⁶ *AT&T Forbearance Order*, 22 FCC Rcd at 18715-17 ¶ 20.

²⁷ *Id.*

²⁸ *See* Petition at 14-16, 28-39.

²⁹ *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 29, n. 87. *See also* Brief for the Federal Communications Commission at 23, *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, No. 07-1426 (D.C. Cir. Filed Dec. 3, 2008) (“a nationwide approach is particularly appropriate for broadband markets, such as [for enterprise broadband services], that are emerging and changing”).

³⁰ 47 U.S.C. § 1302.

³¹ Section 706 of the Telecommunications Act of 1996 requires the Commission to “encourage the deployment . . . of advanced telecommunications capability . . . by utilizing” such measures as “regulatory forbearance.” 47 U.S.C. § 1302(a).

³² *Earthlink*, 359 F.3d at 9.

III. CONCLUSION

Because the Commission employed a nationwide geographic analysis in granting forbearance for all of the other major national ILEC providers of enterprise broadband service, the APA and the Commission's regulatory parity policy require the same approach for all of CenturyLink's customers. Moreover, in numerous other proceedings the Commission employed a nationwide analysis to assess broadband competition, an approach reinforced by the mandate of Section 706. The more granular market power analysis used to evaluate legacy services has never been applied in the context of broadband forbearance requests, and there is no basis for changing course here.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

Craig J. Brown
1099 New York Avenue, NW
Suite 250
Washington, D.C. 20001
303-992-2503
craig.j.brown@centurylink.com

By: /s/ Bryan N. Tramont
Bryan N. Tramont
Russell P. Hanser
Philip J. Roselli
2300 N Street, NW
Suite 700
Washington, D.C. 20037
202-783-4141

Its Attorneys

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