

August 20, 2014

VIA ECFS

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services; CenturyLink's Alternative Petition for Interim Waiver of Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements Imposed on Enterprise Broadband Services, WC Dkt. No. 14-9*

Dear Ms. Dortch:

tw telecom inc., Level 3 Communications, LLC, Integra Telecom, Inc., and Cbeyond Communications, LLC (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this letter in response to CenturyLink's reply comments in support of its forbearance petition and its interim waiver petition in the above-referenced docket.¹ As discussed herein, nothing in those reply comments can save CenturyLink's fatally flawed petitions.

I. The Commission Should Deny CenturyLink's Forbearance Petition.

In their opposition, the Joint Commenters identified numerous deficiencies in CenturyLink's forbearance petition.² CenturyLink, however, has not responded to these arguments or otherwise cured the defects in its petition. Examples include the following:

¹ CenturyLink's Reply Comments in Support of its Petition for Forbearance, WC Dkt. No. 14-9 (filed Feb. 28, 2014) ("CenturyLink Forbearance Reply Comments"); CenturyLink's Reply Comments in Support of its Alternative Petition for Interim Waiver, WC Dkt. No. 14-9 (filed Feb. 28, 2014) ("CenturyLink Waiver Reply Comments").

² See Opposition of tw telecom, Level 3, Integra, EarthLink and Cbeyond to CenturyLink's Forbearance Petition, WC Dkt. No. 14-9, at 16-31 (filed Feb. 14, 2014) ("Joint Commenters' Forbearance Opposition").

- The Joint Commenters explained that the Wireline Competition Bureau’s data request in the CenturyLink 2012 forbearance petition proceeding provided an obvious blueprint for the type of information that CenturyLink needed to submit in this proceeding to satisfy the requirements of Section 10 of the Act. For example, following that blueprint, CenturyLink could have submitted a comparison of (1) the number of business customer locations to which it has connections capable of providing the packet-based special access services at issue in the legacy CenturyTel and Embarq territories; and (2) data from the telecommunications database firm GeoResults on the number of business customer locations to which competitors have deployed their own such connections.³ CenturyLink has not submitted this information or anything similar. Nor has it provided other evidence showing that it no longer retains control over the vast majority of such connections in the territories at issue.
- For the reasons explained in the Joint Commenters’ opposition, CenturyLink’s reliance on Vertical Systems Group’s rankings of Ethernet service providers in terms of retail port share is misplaced and misleading. That is, the rankings do not demonstrate that CenturyLink faces sufficient facilities-based competition in the retail and wholesale markets for Ethernet services at various capacity levels in the legacy CenturyTel and Embarq territories.⁴ CenturyLink still has not responded to this argument.
- CenturyLink continues to rely on competition from cable companies’ provision of best efforts business broadband Internet access services to justify forbearance from regulation of an entirely different category of services. As the Joint Commenters have explained, business customers do not generally view such services as viable substitutes for Ethernet and other packet-based special access services.⁵ CenturyLink continues to ignore this marketplace reality.
- The Joint Commenters pointed out that CenturyLink had not addressed the extent to which each of the “over 30 [service] providers” listed in its petition⁶ (1) are significant providers of packet-based special access services in the legacy CenturyTel and Embarq territories; (2) offer packet-based special access services at wholesale; or (3) provide packet-based special access services over their own facilities.⁷ And CenturyLink still has not done so.

³ See Joint Commenters’ Forbearance Opposition at 17.

⁴ See *id.* at 18-21.

⁵ See *id.* at 20.

⁶ CenturyLink Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services, WC Dkt. No. 14-9, at 28 (filed Dec. 13, 2013).

⁷ See Joint Commenters’ Forbearance Opposition at 19-21.

CenturyLink has failed to address the deficiencies in its forbearance showing because its petition really boils down to a request for the Commission to grant forbearance relief simply because relief was granted, either by default or order, to previous applicants. Instead of providing sufficient evidence to support its petition, CenturyLink hopes that the Commission will simply buy into its “regulatory parity” theory.⁸ That is not, however, what Section 10 requires. In order to meet the requirements of that statutory provision, CenturyLink bears the burden of affirmatively demonstrating that, *with regard to the specific services in the specific geographic areas for which it has sought forbearance*, (1) enforcement of dominant carrier regulation “is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with” CenturyLink’s packet-based special access services “are just and reasonable and not unjustly or unreasonably discriminatory;” (2) enforcement of dominant carrier regulation of CenturyLink’s packet-based special access services “is not necessary for the protection of consumers;” and (3) forbearance “is consistent with the public interest.”⁹ CenturyLink must demonstrate that it meets each prong of this standard in light of the market conditions under which it offers the services at issue. And CenturyLink must do so regardless of whether the Commission determined that forbearance might have been appropriate for different services offered by a different service provider in a different geographic area. CenturyLink has barely even attempted to make this showing.

The arguments CenturyLink does make have no merit. *First*, CenturyLink argues that the Joint Commenters and other opponents have failed to demonstrate that harm has resulted from similar grants of forbearance.¹⁰ In so doing, CenturyLink attempts to shift the burden of proof in this proceeding onto its opponents. But it is *CenturyLink*—not the Joint Commenters or other parties—that must demonstrate that forbearance will not result in harm to consumers and is in the public interest.¹¹ Moreover, CenturyLink criticizes opponents’ reliance on COMPTTEL’s Ethernet pricing study to show that forbearance would be harmful on the basis that the study uses guidebook rates rather than the unpublished rates charged by incumbent LECs.¹² But CenturyLink fails to submit the “rates actually charged”¹³ by legacy Qwest for packet-based special access services before and after it received

⁸ See CenturyLink Forbearance Reply Comments at 8 (arguing that regulatory parity is “part and parcel of the competitive public interest goals of Section 10”); see also CenturyLink Waiver Reply Comments at 8 (arguing that “regulatory parity and the goal of similar treatment for similarly situated parties are part and parcel of the good cause standard” for waivers).

⁹ 47 U.S.C. § 160(a).

¹⁰ See CenturyLink Forbearance Reply Comments at 4-5.

¹¹ See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶ 20 (2009) (holding that “the burden of proof is on forbearance petitioners at the outset and throughout the proceeding”).

¹² See CenturyLink Forbearance Reply Comments at 5, 15 & n.44.

¹³ *Id.* at 5.

forbearance for those services. The logical inference to be drawn from CenturyLink's failure to provide such evidence is that the evidence would have supported a denial of forbearance.

Second, CenturyLink asserts that the Joint Commenters misunderstand the impact of Ethernet-over-copper competition in this proceeding.¹⁴ According to CenturyLink, "copper loops are perfectly suitable for competitive enterprise broadband services" and the Joint Commenters "offer no examples" of the "inadequacy of copper loops for their own broadband services."¹⁵ But the Commission need look no further than CenturyLink's own statements last year in the copper retirement reform proceeding to see why CenturyLink is wrong. There, CenturyLink expressly recognized the limitations of providing Ethernet over copper and urged the Commission to adopt policies that would encourage carriers to deploy fiber:

Changes to the copper retirement rules could . . . undermin[e] incentives for ILECs and CLECs to deploy fiber facilities . . . [M]any CLECs have competed very effectively using Ethernet-over-copper technologies to provide broadband speeds of up to 50 Mbps or even higher. *Nevertheless, there are limits on what can be provided over copper plant* (though those limits are continually increasing). *A fiber loop will always be able to support faster speeds than a copper loop. For the highest speeds (e.g., 1 Gbps or higher) – which are increasingly requested – fiber currently may be the only option.*¹⁶

As the Joint Commenters have also explained, these technical limitations are one of several constraints on competitors' ability to provide Ethernet over copper.¹⁷

Third, CenturyLink contends that the Joint Commenters are "confus[ed]" about the effect of deregulation on investment and it insists that granting forbearance here will lead to increased broadband investment.¹⁸ To support its claim, CenturyLink states that because legacy Qwest's capital investment remained flat while its access lines declined between 2007 (the year before it received forbearance) and 2013, "its investment per access line actually increased" significantly during the post-forbearance period.¹⁹ But dividing Qwest's total capital investment by its residential and business voice access line total each year tells the Commission absolutely nothing about the effect of the *Qwest Broadband Forbearance Order* on Qwest's investment in the network facilities used to provide the

¹⁴ *See id.* at 16, 31.

¹⁵ *Id.* at 31.

¹⁶ Comments of CenturyLink, GN Dkt. No. 12-353, at 12 (filed Mar. 5, 2013) (emphasis added).

¹⁷ *See* Comments of EarthLink, Integra, and tw telecom, GN Dkt. No. 12-353, at 2-3 (filed Mar. 5, 2013).

¹⁸ CenturyLink Forbearance Reply Comments at 23-25.

¹⁹ *See id.*, Attachment C, Declaration of Mark Gast, ¶ 3.

packet-based special access services for which it received forbearance. Nor would it be surprising for Qwest's investment in broadband infrastructure to have risen in recent years given that CenturyLink and Qwest agreed in 2011 to make "substantial investments" to increase broadband availability in the Qwest territory as a condition of FCC approval of their merger.²⁰ It is thus CenturyLink that has utterly "failed to demonstrate any causal link between" the grant of forbearance to Qwest and its subsequent network investment.²¹

II. The Commission Should Deny CenturyLink's Interim Waiver Petition.

CenturyLink's efforts to defend its interim waiver petition fare no better. CenturyLink begins by constructing and attacking a strawman argument. In particular, CenturyLink states that the Joint Commenters "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."²² The Joint Commenters said no such thing. In fact, they expressly recognized in their opposition that "the Commission has the authority to address some of the relief that CenturyLink seeks here (e.g., relief from price cap regulations) via a waiver."²³ The relevant question is whether a waiver, as opposed to forbearance, is the *appropriate* procedural vehicle for granting relief from these regulations. As discussed below, CenturyLink's own waiver petition demonstrates that it is not.

When the regulation from which an applicant seeks a waiver is dominant carrier regulation, it is unclear how the Commission can find that "special circumstances warrant a deviation from the general rule" or "explain why deviation better serves the public interest"²⁴ without even considering whether the applicant is non-dominant. And that question is more appropriately addressed in a forbearance proceeding than in a waiver proceeding. CenturyLink's solution to this problem is for the Commission to grant a waiver simply because other parties have already obtained relief from dominant carrier regulation of packet-based special access services. As CenturyLink concedes, however, those parties obtained such relief via *forbearance*.²⁵

²⁰ See *Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd. 4194, Appendix C (2011).

²¹ CenturyLink Forbearance Reply Comments at 24-25.

²² CenturyLink Waiver Reply Comments at 10.

²³ Opposition of tw telecom, Level 3, Integra, EarthLink and Cbeyond to CenturyLink's Waiver Petition, WC Dkt. No. 14-9, at 7 (filed Feb. 14, 2014) ("Joint Commenters' Waiver Opposition").

²⁴ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁵ See CenturyLink Alternative Petition for Interim Waiver, WC Dkt. No. 14-9, at 6 (filed Dec. 13, 2013) (seeking waiver relief from the same requirements addressed in the *Broadband Forbearance Orders*).

CenturyLink is well aware that it would be inappropriate for the Commission to grant a waiver from dominant carrier regulation without considering whether the underlying predicate that made application of those rules necessary (*i.e.*, the incumbent's market power) still exists. This is why, while accusing the Joint Commenters of improperly conflating the standard for waiver and the standard for forbearance, CenturyLink repeatedly refers in its waiver petition to purported evidence of nondominance in its simultaneously filed forbearance petition.²⁶ Ironically, CenturyLink also relies on two instances in which the FCC granted *forbearance* (in the *CLEC/Cable Forbearance Order* and the *BOC Section 272 Sunset Order*) to support its claim that a *waiver*, as opposed to forbearance, is appropriate in this case.²⁷

Nor does any of the other precedent cited by CenturyLink support its claims that (1) a waiver is appropriate here, and (2) “no competitive or market dominance analysis or findings are . . . appropriate” when reviewing its waiver request.²⁸ *First*, in the *Verizon Advances Services Waiver Order*, the FCC granted Verizon Phase I pricing flexibility for its packet-based advanced services.²⁹ The Commission did so because Verizon had already qualified for Phase I or II pricing flexibility for

²⁶ See, e.g., *id.* at 24 (“The simultaneously filed Petition for Forbearance provides additional detail demonstrating the increased vigor of competition in today’s enterprise broadband market.”); *id.* (citing to its forbearance petition for the claims that “CenturyLink still accounts for less than ten percent of the national enterprise broadband market” and that “[g]iven the intense competition for these services today, and CenturyLink’s relatively small market position, dominant carrier regulation is especially unnecessary and counterproductive”); *id.* at 26 (“The simultaneously filed Petition for Forbearance provides additional detail regarding competitors’ use of ILEC TDM-based facilities to provide their enterprise broadband services.”); see also *id.* at 21 (“The simultaneously filed Petition for Forbearance provides further data on the known losses arising from the competitive imbalance caused by CenturyLink’s disproportionate regulatory burdens.”).

²⁷ See CenturyLink Waiver Reply Comments at 12-13 (referencing the Commission’s grant of forbearance from Section 652 of the Act in *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd. 11532 (2012) (“*CLEC/Cable Forbearance Order*”) and citing the Commission’s grant of forbearance from the equal access scripting requirement in *Section 272(f)(1) Sunset of the BOC Separate Affiliate & Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd. 16440 (2007) (“*BOC Section 272 Sunset Order*”).

²⁸ CenturyLink Waiver Reply Comments at 4.

²⁹ See generally *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, 20 FCC Rcd. 16840 (2005) (“*Verizon Advanced Services Waiver Order*”).

other special access services *by satisfying triggers that were proxies for competition*.³⁰ At the same time, the Commission expressly declined to address Verizon's dominance status in the provision of the services at issue.³¹ The Commission reasoned that unlike a request for pricing flexibility, which "'is narrower in reach'" and can be assessed using administratively simple triggers, a request for non-dominant treatment requires a "comprehensive" "'analysis of market conditions.'"³² Thus, the *Verizon Advanced Services Waiver Order* actually supports consideration of CenturyLink's request for relief from dominant carrier regulation using a comprehensive market analysis. The Commission conducted such an analysis in the *Phoenix Forbearance Order*,³³ and as the Joint Commenters and other parties have explained, it should do the same in this docket.³⁴

Second, in the *Puerto Rico Waiver Order*³⁵ cited in CenturyLink's waiver petition, the Wireline Competition Bureau granted a temporary waiver of dominant carrier regulation *in order to give the applicant more time to submit evidence demonstrating that it is nondominant*.³⁶ Moreover, CenturyLink readily admits that the facts of that case "are completely different" from this one,³⁷ and that the Commission subsequently decided to address Puerto Rico Telephone's ("PRT's") dominance status in the USTelecom *forbearance* proceeding.³⁸ Contrary to CenturyLink's claims,³⁹ the fact that

³⁰ *Id.* ¶ 1. In 2012, the Commission found that these triggers "have not worked as intended." *See 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).

³¹ *Verizon Advanced Services Waiver Order* ¶ 14.

³² *Id.* (internal citations omitted).

³³ *See generally 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*").

³⁴ *See, e.g.*, Joint Commenters' Forbearance Opposition at 4-15; Comments of Sprint Corporation, WC Dkt. No. 14-9, at 2-3 (filed July 7, 2014); Comments of COMPTTEL, WC Dkt. No. 14-9, at 1-9 (filed July 7, 2014); Reply Comments of the Alarm Industry Communications Committee, WC Dkt. No. 14-9, at 2-3 (filed July 14, 2014).

³⁵ *Petition of Puerto Rico Telephone Company, Inc. and Puerto Rico Telephone Larga Distancia, Inc. for Waiver of Section 64.1903 of the Commission's Rules*, Memorandum Opinion and Order, 25 FCC Rcd. 17704 (WCB 2010) ("*Puerto Rico Waiver Order*").

³⁶ *See* Joint Commenters' Waiver Opposition at 9 (quoting *Puerto Rico Waiver Order* ¶¶ 19-20).

³⁷ CenturyLink Waiver Reply Comments at 22.

³⁸ *Id.* at 15.

the Commission ultimately determined in that forbearance proceeding that the issue of PRT's dominance status was moot is irrelevant here. That fact does not change the Wireline Competition Bureau's finding that it was "prudent to evaluate" PRT's request for relief in the USTelecom forbearance proceeding because that proceeding "raise[d] issues and require[d] analysis similar to those at issue for PRT."⁴⁰

Finally, in support of its request for waiver from dominant carrier tariffing regulations, CenturyLink relies on the Supreme Court's statement in *MCI v. AT&T*, that "the Commission can modify the form, contents, and location of required [tariff] filings, and can defer filing or perhaps even waive [the tariff filing requirement] altogether in limited circumstances."⁴¹ As the Joint Commenters have discussed, however, this statement is mere *dicta*.⁴² Furthermore, the statement must be understood in light of the statutory language at issue. Section 203(b)(2) of the Act only provides that the "Commission may, . . . *modify* any requirement made by or under the authority of this section."⁴³ And as the Court held in *MCI v. AT&T*, "modify" as commonly understood and as used in the statute merely means "to change moderately or in a minor fashion."⁴⁴ It does not mean to eliminate or get rid of something, which is what CenturyLink seeks in its interim waiver request here.

III. Conclusion.

For all of these reasons, the Commission should deny CenturyLink's petitions.

Respectfully submitted,

/s/ Thomas Jones

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³⁹ *Id.*

⁴⁰ *Petition of Puerto Rico Telephone Company, Inc. and Puerto Rico Telephone Larga Distancia, Inc. for Waiver of Section 64.1903 of the Commission's Rules*, Order, 27 FCC Rcd. 2495, ¶ 4 (WCB 2012).

⁴¹ *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994) ("*MCI v. AT&T*").

⁴² See Joint Commenters' Waiver Opposition at 4-5.

⁴³ 47 U.S.C. § 203(b)(2) (emphasis added).

⁴⁴ See *MCI v. AT&T*, 512 U.S. at 225-228.

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