

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

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

REPLY COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these reply comments in response to comments filed pursuant to the Commission’s Public Notice (DA 14-845) (hereinafter referred to as “Public Notice”) seeking comment on its proposed analytical framework for evaluating CenturyLink’s Petition for Forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to CenturyLink’s packet-switched and optical transmission services (together, “enterprise broadband services”). As stated in the initial round of comments, COMPTTEL supports the Commission’s proposal to use the traditional market power test it adopted in the *Qwest Phoenix Order*¹ for purposes of evaluating the packet-based special access market. The Commission should disregard the tired contentions made by CenturyLink and AT&T for not adopting this proposal. As discussed below, their arguments are merely a rehash of prior claims that hold no merit.

First, contrary to CenturyLink’s repeated claims, the Commission’s prior grants of forbearance with regard to enterprise broadband services do not – nor does the market analysis

¹ *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, WC Docket No. 09-135, FCC 10-113 (2010) (“*Qwest Phoenix Order*”).

(or lack thereof) used in granting those petitions – preclude the Commission from embarking on a more sound policy and market analysis for granting future grants of forbearance from dominant carrier regulations.² The Commission recognized its ability to revisit its decisions in its *Broadband Forbearance Orders*.³ Moreover, the D.C. Circuit explicitly affirmed that the Commission’s grant of forbearance to the ILECs with regard to the enterprise broadband services “is not chiseled in marble...the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area.”⁴ Indeed, the Commission did exactly this in deciding, in the *Qwest Phoenix Order*, that there is a better analytical framework than the one the Commission employed for that same type of forbearance petition (grant of forbearance from Section 251 unbundling obligations) in the

² The Commission should also apply a rigorous market power analysis to AT&T, legacy Embarq, Frontier, legacy Qwest, and Verizon enterprise broadband services and reverse its prior grants of forbearance.

³ *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.*, Memorandum Opinion and Order, WC Docket No. 06-125, FCC 07-180, 22 FCC Rcd. 18705, ¶ 28, n. 120 (2007) (“*AT&T Forbearance Order*”); *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, et al.*, Memorandum Opinion and Order, WC Docket No. 06-147, FCC 07-184, 22 FCC Red. 19478, ¶ 27, n. 113 (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, WC Docket No. 06-125, FCC 08-168, 23 FCC Rcd. 12260, ¶ 31, n. 127 (2008) (collectively, the “*Broadband Forbearance Orders*”). See also, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, FCC 07-13, 22 FCC Rcd. 5207, ¶ 55 (2007). The Commission has also recognized its ability to revisit the Verizon deemed granted forbearance. *AT&T Forbearance Order* at ¶ 50.

⁴ *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (2009).

Qwest Omaha Order.⁵ The Commission did not let its flawed analysis in the *Qwest Omaha Order* preclude it from reaching the correct decision in subsequent orders.

The Commission has a statutory duty to ensure that the rates for the enterprise broadband services at issue in the petition are just and reasonable and non-discriminatory.⁶ Recognizing that the previous market analysis (again, or lack thereof) is not suitable, the Commission should not continue to operate under the flawed standard. Rather, the Commission is obligated to take action and apply the appropriate standard not only to this petition, but in reviewing previous grants of forbearance as well. This market is too critical for the Commission to ignore the need for a rigorous market analysis to determine if preserving the grants of forbearance from dominant carrier regulations is appropriate. There is no question that Ethernet, in particular, is becoming an increasingly important technology forming the PSTN of the future.⁷ As Commissioner Pai identified, a core principle when transitioning to new emerging technologies is that “the FCC

⁵ *Qwest Phoenix Order* at ¶¶ 21 and 24.

⁶ 47 U.S.C §§201 and 202.

⁷ This does not mean, however, that DS1 and DS3 special access services are irrelevant. DS1s and DS3s are still key inputs for business broadband services and will remain key inputs for some time – especially if BOCs continue to charge far more for equivalent capacity in an IP format. See, e.g., *Special Access for Price Cap Local Exchange Carriers*, Report and Order, WC Docket No. 05-25, RM-10593, FCC 12-92, ¶ 2 (2012) (“Four of the largest incumbent LECs recently reported that their combined 2010 revenues from sales of DS1s and DS3s exceeded \$12 billion.”).

must be able to combat discrete market failures and anticompetitive harms.”⁸ Market power concerns remain even though technologies are evolving.⁹

Second, there is no merit to AT&T’s broad claim that the Commission should not conduct a market power test when considering any request for forbearance, even when the request is forbearance from dominant carrier regulations. While not all forbearance petitions pertain to dominant carriers and the pricing of their services, ones that do (such as this one) require a market power analysis prior to granting forbearance to ensure that such regulations (1) are no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions; (2) are no longer necessary to protect consumers; and (3) are in the public interest.¹⁰ As the Commission has found, the traditional market power analysis adopted in the *Qwest Phoenix Order* is designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.¹¹ The Commission concluded that this “market power analysis is the precise inquiry specified in

⁸ Opening Remarks of Commission Ajit Pai, Technology Transition Policy Task Force Workshop, March 18, 2013, available at <http://www.fcc.gov/document/technology-transitions-policy-task-force-workshop-opening-statement>

⁹ Nor does the Commission’s duty to promote competition and protect consumers disappear simply because a market is changing. See Prepared Remarks of then FCC Chairman Julius Genachowski, Technology Transitions Policy Task Force Workshop, March 18, 2013, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319574A1.pdf (“While technological advances can change markets, they don’t change the FCC’s mission.”).

¹⁰ 47 U.S.C. ¶ 160.

¹¹ *Qwest Phoenix Order* at ¶ 37.

section 10(a)(1), and informs [its] assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates.”¹²

Finally, the Commission should not give any credence to AT&T’s specious assertion that Section 706 of the Act dictates that the Commission forbear from enterprise broadband services regulation. Contrary to AT&T’s claims, Section 706 recognizes that the Commission may encourage deployment of advanced telecommunications capabilities in a variety of ways, namely: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹³ Congress gave the Commission discretion in determining which of these tools are best able to encourage further deployments in particular circumstances.

In the context of broadband enterprise services, Commission policies ensuring reasonably priced access to wholesale inputs is necessary to advance the core goals of Section 706: promoting competition and spurring broadband investment. More often than not, ILEC connections offer the only economically viable means for competitors to connect to business customer locations.¹⁴ Importantly, these ILEC connections use physical infrastructure dating back to the monopoly era – including conduits and poles, as well as transmission links – and thus are a continuing advantage of that privileged market position. Today, this infrastructure is used

¹² *Id.*

¹³ 47 U.S.C. § 706 (emphasis added).

¹⁴ See 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 41-46 (filed Nov. 2, 2012) (“Petition to Reverse Forbearance”).

(and shared) by both IP and TDM services. Moreover, ILECs can spread their costs across all/most locations on any given route, because their customer base includes both their retail customers and their competitors (purchasing wholesale services for last-mile access).¹⁵ There is no rational basis for abandoning competition policies when the ILECs will continue to possess substantial market power as they move into the IP era.

Critically, Commission policies ensuring wholesale access to last-mile facilities at just and reasonable rates has made it possible for CLECs to formulate a viable economic case for investing large sums in other network facilities. As the Commission has concluded, regulations ensuring competitive access protect and promote a “virtuous cycle” of investment and development, because competition spurs network innovations, which drive end-user demand for more advanced broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.¹⁶ In fact, the Commission cited evidence of this virtuous cycle in the recent *Technologies Transition Order and Further NPRM*. Specifically, it recognized that between 1996 and 2001 – the time period after the telephone network was open to competition and *before* the Commission started granting ILECs relief from their wholesale obligations – the industry experienced “a torrent of new investment deployed over 200,000 miles

¹⁵ The ILECs have reinforced this dominant position with contracts leveraging their locational monopolies across entire markets and thereby impeding competitors’ deployments to individual buildings. The Commission has not yet addressed these services anticompetitive terms with regard to TDM-based special access services, even as the ILECS have extended these terms and their anticompetitive consequences to IP-based products.

¹⁶ *Preserving the Open Internet, et al*, Report and Order, GN Docket No. 09-191, *et al*, FCC 10-201, ¶14 (2001).

of trenches and approximately 18 million miles of fiber – enough fiber to circle the equator 750 times.”¹⁷

Respectfully submitted,

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¹⁷ *Technology Transitions et al*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, GN Docket No. 13-5, *et al*, FCC 14-5, at ¶ 12 (2014).