

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)

OPPOSITION OF COMPTTEL

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Introduction and Summary

COMPTTEL respectfully submits these comments opposing CenturyLink’s Petition for Forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirements with respect to its packet-switched and optical transmission services (together, “enterprise broadband services”).¹ In addition to these abbreviated comments, COMPTTEL supports the *Joint Opposition* filed today by tw telecom *et al* (“Joint Opposition”).² CenturyLink fails to meet the statutory requirements for forbearance under Section 10 of the Communications Act. Specifically, CenturyLink has not shown that dominant carrier regulation of its packet-based

¹ CenturyLink Petition for Forbearance, *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 Docket No. 14-9, filed Dec. 13, 2013 (“*CenturyLink Petition*”).

² Opposition of tw telecom, Level 3, Integra, EarthLink, and Cbeyond, *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, filed Feb. 14, 2014 (“*Joint Opposition*”).

special access services (1) is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions; (2) is no longer necessary to protect consumers; and (3) is in the public interest.³ As discussed in detail in the *Joint Opposition*, in particular, CenturyLink fails to show that it is now, or will be anytime in the foreseeable future, subject to sufficient facilities-based competition in the provision of packet-based special access services in the legacy CenturyTel and legacy Embarq regions to justify forbearance. Nor does CenturyLink proffer any additional “evidence” that demonstrates that forbearance is warranted. Accordingly, the Commission must deny the petition.

COMPTTEL files these comments separately to highlight certain aspects of the *CenturyLink Petition*. In particular, we emphasize that the *CenturyLink Petition* instead provides compelling evidence as to why the Commission should revisit its policies regarding wholesale last mile access, including the forbearances previously granted certain ILECs for non-TDM special access services, as the industry transitions from using TDM to IP technology. Specifically, as we discuss below, the *CenturyLink Petition* highlights the significant extent of competition in the business market that comes from traditional CLECs that rely on the competitive provisions of the Act in order to provide business consumers the competitive services they need. Moreover, the *CenturyLink Petition* emphasizes the importance of a carrier’s footprint to its threshold ability to compete for - and thus ultimately invest to serve - business customers that have multiple locations. Given this market reality, and the technology and network transitions underway, granting CenturyLink’s petition is contrary to the interest of business consumers and the criteria for forbearance. Rather it would impose further barriers on competitors’ ability to obtain the necessary wholesale inputs to serve their business customers,

³ 47 U.S.C. ¶ 160.

only serving to allow yet another major ILEC to exploit its unique advantages within its footprint.

Separately, it is important for the Commission to fully consider the relationship between this petition and Commission proceedings that are already underway. CenturyLink argues the petition does not interfere with any other proceedings pending before the Commission,⁴ but this is patently false. The Commission currently has pending before it a petition filed jointly by Ad Hoc Telecommunications Users Committee, *et al* to reverse the forbearance that was granted -- for the very same dominant carrier regulation and certain *Computer Inquiry* requirements at issue here -- to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest in their provision of non-TDM-based special access services (“Reverse Forbearance Petition”).⁵ The *Reverse Forbearance Petition* raises the *threshold* question as to what should be the appropriate standard for evaluating the market for enterprise broadband services for purposes of granting or reversing forbearances from these rules.⁶ As we discussed in our comments in that proceeding,⁷ the

⁴ *CenturLink Petition* at 8.

⁵ 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 Docket No. 05-25, RM-10593 (filed Nov. 2, 2012)(“Reverse Forbearance Petition”).

⁶ The D.C. Circuit explicitly affirmed the Commission has the authority to reverse the grants of forbearance from dominant carrier regulation of AT&T, legacy Embarq, Frontier, and legacy Qwest and the deemed granted forbearance of Verizon, stating that “the FCC’s forbearance decision[s are] 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.” *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (2009).

⁷ COMPTTEL hereby incorporates by reference the comments we filed in response the *Reverse Forbearance Petition*. COMPTTEL Comments, WC Docket No. 05-25, RM-10593, filed Apr. 16, 2013.

Commission should perform a market analysis based on the *DOJ-FTC Horizontal Merger Guidelines*⁸ that it used in the *Phoenix UNE Forbearance Proceeding*.⁹

The Commission should first conclude the proceeding on *Reverse Forbearance Petition* before compounding the error of prior forbearance decisions by extending similar relief to CenturyLink. Indeed, in the National Broadband Plan, the Commission stressed “the hodgepodge of wholesale access rights and pricing mechanisms that were developed *without the benefit of a consistent, rigorous analytical framework*...For example, some wholesale access policies vary based on technology – including whether the facility or service operates using a circuit-or packet-based mode or is constructed from copper or fiber – regardless of economic viability of replicating the physical facility.”¹⁰ A perfect example of this “lack of rigorous analytical framework” is the Commission’s failure to perform a market analysis based on the DOJ-FTC guidelines in granting forbearance relief to AT&T, Qwest, Frontier and Embarq, as well as the “deemed granted” relief afforded Verizon, for non-TDM-based special access services and, as a consequence, it neglected to adequately considered market conditions and, equally important, the market consequences of its decisions.

Additionally, in its recent *Technology Transitions Order and Further NPRM*, the Commission discusses the continued importance of maintaining wholesale access.¹¹ Along with

⁸ See generally U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Aug. 19, 2010).

⁹ *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 Forbearance Order”).

¹⁰ Federal Communications Commission, *Connection America: The National Broadband Plan at 47*, available at: <http://www.broadband.gov/download-plan/> (“National Broadband Plan”).

the proceeding on the *Reverse Forbearance Petition*, wholesale access to last mile facilities/services are being considered – *but yet to be resolved* - in the context of the technology transition,¹² the pricing of special access services,¹³ the continued availability of TDM-based special access services,¹⁴ and the availability of a functionally equivalent unbundled loop at the similar price, terms and conditions when copper facilities are replaced with fiber or another alternative facility.¹⁵ The ability of competitors to obtain certain of these alternative forms of

¹¹ 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, *Technology Transitions et al*, GN Docket No. 13-5, *et al*, FCC 14-5, at ¶ 59 (2014) [“Competitive LECs often serve customers *by relying significantly on incumbent LECs’ last mile networks*, including by leasing as variety of copper-based UNEs and TDM-based DS1 and DS3 special access services.” (emphasis added)]

¹² *Id.* [“We note that the Commission may authorize experiments in the future involving traditional wholesale access inputs to proceed in stages, with appropriate approvals at each stage, to ensure that *comparable services* are available during the experiment *at equivalent prices, terms and condition.*” (emphasis added)]

¹³ Report and Order and Further Notice of Proposed Rulemaking, Special Access for Price Cap Local Exchange Carriers, *et al*, WC Docket No. 05-25, *et al*, FCC 12-153, ¶ 1 (2012)(“Special Access Further NPRM”) [“In this Report and Order and Further Notice of Proposed Rulemaking, we continue the process of reviewing our special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to dedicated communications services businesses across the country rely on every day to deliver their products and services to American consumers.”]

¹⁴ *See* Letter of Patrick Doherty, AT&T to Marlene H. Dortch, FCC, FRN:0005-9352-75, Application No. 573, dated Jan. 7, 2014 [On November 25, 2013, AT&T proposed to grandfather term plans of 36 months or greater for Voice Grade, MegaLink Data, High Capacity DS1, MegaLink Customer services, to be effective on December 10, 2012. The Commission suspended the tariff revision. AT&T requested a waiver to withdraw revised tariff “with plans to submit a revised filing shortly.”]

¹⁵ *See* Cbeyond, Inc. Petition Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Docket No. 09-223, filed Nov. 16, 2009. A group of carriers has also requested that the Commission “take expedited action to update its copper retirement rules to preserve and promote affordable broadband over copper.” Letter of Joshua M. Bobeck to Marlene H. Dortch, RM-11358 *et al*, at 1 (filed Jan. 25, 2013)(“TelePacific *et al* Request”) The Commission issued a Public Notice on this issue. FCC

wholesale last mile access from the ILEC (e.g., unbundled loops and DS1s and DS3s) was relied upon to a large extent in the granting of the non-TDM special access forbearance decisions. CenturyLink is asking the Commission again to rely upon them to grant its petition. But, as explained further below, those means are at risk as the industry transitions from TDM to IP technology and copper to fiber loops due to the Commission's "hodgepodge" of inconsistent regulations.¹⁶ Prior to granting additional forbearance relief on last mile access services or facilities, the Commission should act expeditiously on the recommendations it made in the National Broadband Plan that it "comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers...[and] ensure that special access rates, terms and conditions are just and reasonable."¹⁷

The enterprise broadband market is far too critical for the Commission to continue to apply a faulty standard, even on a temporary basis as CenturyLink suggests. As COMPTTEL explained in its comments in support of the *Reverse Forbearance Petition*, enterprise broadband

Public Notice, "Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission's Copper Retirement Rules," DA 13-147, WC Docket No. 12-353 (2013).

¹⁶ Moreover, as discussed in the *Joint Opposition*, these are also not a complete substitute for next generation wholesale inputs. See *Joint Opposition* at 24 – 25 ["TDM-based DS1 and DS3 services are not viable inputs for higher capacity Ethernet services...And Ethernet-over-copper services cannot always provide as much bandwidth as Ethernet services delivered over fiber facilities."]

¹⁷ National Broadband Plan at 48. The Commission also recommended in Recommendations 4.9-4.10 that "[t]he FCC should ensure appropriate balance in its copper retirement policies ...[and] clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection where efficient." *Id.* at 48-49. The Commission should comprehensively address all of these recommendations that have been pending for four years, especially given the overall technology transitions that are underway.

service is a multi-billion dollar business, impacting a significant portion of the economy.¹⁸ The regulatory policies for wholesale access effect competition in the downstream markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.¹⁹ The Commission has recognized that its current approach undermines longstanding competition policy and has recognized its impact on the business market overall, finding, for example, that “it limits the ability of smaller carriers – often those specializing in serving niche markets such as [small to mid-size businesses] – to gain access to the necessary inputs to compete.”²⁰

Communications costs form a substantial portion of a business’ expenses, impacting their ability to invest, expand, and create jobs. Consequently, any failure to ensure just and reasonable rates for these services will have a significant negative impact on the economy as a whole, including reducing business consumers’ operating margins and squeezing employment. The country is paying a high price for a regulatory structure that resulted from the Commission’s failure to issue an order in one case, preceded, as well as followed, by a series of decisions that lacked any rigorous, consistent market analysis.

The CenturyLink Petition Further Confirms the Importance of Wholesale Last Mile Access Policies to Providing Business Consumers Choice.

A key feature of the medium–sized business and enterprise broadband markets is the interdependency of demand – *i.e.*, the fact that many customers have multiple locations and seek

¹⁸ These services comprise a rich set of services provided to business customers over dedicated last-mile telecommunications facilities that allow customers to connect from the served location to any other premises or service (point to any point). These are significantly different from “best efforts” Internet access services.

¹⁹ National Broadband Plan at 47.

²⁰ *Id.*

a single provider to serve them all. For many customers, as the *CenturyLink Petition* demonstrates, the ability to serve all locations is a *threshold* consideration in their evaluation of alternative vendors. For instance, more than 50% of CenturyLinks' enterprise broadband agreements are with customers that have a national presence:

Enterprise customers typically seek broadband services for nationwide or other large geographic areas. They frequently solicit bids through requests for proposal ("RFPs") for service to numerous locations throughout the country, in order to command better prices and minimize the expense of managing their telecommunications suppliers. Of Century Link's 312 commercial agreements for enterprise broadband services, more than half are with customers having a national presence.²¹

At the same time, national purchasers of enterprise broadband services frequently seek uniformity throughout the area served by a given arrangement in the rates and unique terms and conditions they specify. Such uniformity makes it much easier to manage all aspects of the services they are purchasing.²²

The presence of regional and national customers should come as no surprise to the Commission. The Commission recognized the existence of the multi-location customer segment *and* the fact that there are relatively few providers that can offer ubiquitous service:

For larger, multi-location enterprise customers, we reach a slightly different conclusion. We find that these customers typically seek service from a provider that can serve all their locations, and generally only a few carriers serving a particular location have such capabilities. In light of the fact that there are relatively few providers that can offer a high level of ubiquitous service, we conclude that this geographic market should encompass all the geographic locations where these multi-location business customers may have a presence.²³

²¹ *CenturyLink Petition* at 24-25.

²² *Id.* at 42

²³ Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, FCC 05-183, ¶ 63 (2005).

The importance of the multi-location customer in the business market is critical because their prevalence creates a substantial barrier to entry: In order to compete in this market, carriers must have an extensive network footprint to offer services widely. As a practical matter, only incumbent local exchange carriers enjoy the benefit of a ubiquitous network that represents the cumulative investment of decades, supported by a geographically dispersed customer base that is still significant, even after years of competition.²⁴ Certainly parts of this network must be replenished, but much of the core investment – in poles, conduits, rights-of-way, fiber and even copper – is easily reusable in a broadband infrastructure.²⁵ CLECs, on the other hand, would have to duplicate the entire ILEC network. As the Commission is aware, however, it is not economically viable for competitors to replicate the ILEC network in its entirety.²⁶ Given the harsh reality that last-mile facilities are uneconomic to duplicate in many instances,²⁷ the

²⁴ According to the FCC’s Local Competition Report, ILECs still serve 60% of the voice market (switched access lines and VoIP subscriptions). Importantly, the remaining 40% of that market is divided among (depending upon the area) dozens of competitors (or more), which makes the relative scale advantage even larger than the raw data suggests (*i.e.*, the ILEC is 50% larger than the entire market served by competitors combined). *See* Local Telephone Competition: Status as of December 31, 2012, Industry Analysis and Technology Division Wireline Competition Bureau, Federal Communications Commission, November 2013, Table 1.

²⁵ We provide additional detail on the enduring advantages of incumbency, even when deploying new facilities, in the final section of these Comments.

²⁶ Even in those markets that the ILECs claimed to be *most* competitive, the Commission found that “reasonably efficient competitors face barriers to entry that are likely to make entry into these markets uneconomic without access to [UNE loops].” *Qwest Phoenix Forbearance Order* ¶ 93.

²⁷ Consider the broadband deployment strategy of even the largest provider in the country, AT&T. As the Commission is aware, AT&T’s broadband deployment (U-verse) exploits the cost-advantage of having a pre-paid – *i.e.*, a fully, or near-fully, depreciated – copper loop investment to avoid incurring the cost of replacing these facilities with fiber or some other facility.

footprint-barrier can only be overcome through wholesale access policies that enable entrants to extend the geographic reach of their networks to off-net locations, as provided for under the Communications Act, to create the multi-location service packages that this customer segment demands, while providing the customers and revenues needed to fund network construction where duplication is economical.

This last point – the interrelationship between last-mile access and facilities construction – is worthy of elaboration, in part because it is somewhat a paradox (*i.e.*, that wholesale last-mile access promotes facilities construction). Importantly, carriers will not build without first obtaining a sufficient customer-base to support the build or if they are not first able to win the customer with a product offering that meets all of the customer’s needs, *i.e.*, unless they can serve all of the customer’s locations. This is demonstrated in the Level 3 Communications transcript attached to the *CenturyLink Petition*. Jeff Storey, the President and COO of Level 3 Communications, explains, “[sometimes] the building doesn’t justify it on a single customer. We will win a couple of customers. We’ll buy off-net service in there and then we will build our fiber and capture those net [expenses]...But it is important for us to use off-net providers in the meantime. We can’t go everywhere and so it is a big component of our business...”²⁸ Thus, where access to unbundled last mile facilities is not available and/or special access rates (for TDM and non-TDM services) are unreasonable, investment opportunities are lost along with the consumers’ ability to have a choice in a provider.

²⁸ *CenturyLink Petition*, Attachment 21, p. 10.

The Correct Policy Response to the CenturyLink Petition is to Reform Last-Mile Access Policies for All Providers

Having added to the extensive body of proof establishing the importance of the multi-location customer in the business segment, the *CenturyLink Petition* completely misses the mark as to how to ensure competition in this customer segment. The relevant question is not *whether* a multi-location customer and footprint-barrier exists; the question is what to do to *correct* it. CenturyLink's approach is to continue to forgo the competitive provisions of Act. But this approach is the cause of the problem, not the solution. The problem is not that CenturyLink owns multiple ILEC affiliates subject to differing levels of regulation, the problem is that there is no coherent last-mile access policy that *all* carriers (including, we would add, a CenturyLink CLEC affiliate that could create national offerings on the same terms as other competitive providers)²⁹ can depend upon to compete. Remarkably, the *CenturyLink Petition* itself recognizes the critical role that ILEC last-mile access plays in creating competition. For instance, CenturyLink emphasizes how virtually every non-ILEC competitor addresses this customer segment (which forms the backbone of the competition that CenturyLink confronts in the business market):

CLECs continue to use multiple alternatives to ILEC broadband services to provide their own competing enterprise broadband services. They can deploy their own facilities, use a cable provider's or other third party's wholesale services, use TDM-based DS1 and DS3 services or use copper loops purchased at TELRIC rates, as many CLECs have successfully done.³⁰

²⁹ CenturyLink *today* can prepare uniform national offerings through a CLEC affiliate – it just must do so by obtaining the necessary inputs (such as unbundled loops) within its ILEC regions on the *same* terms as a CLEC. It is not the ability to provide national uniform offerings to the enterprise market that CenturyLink seeks in its petition, it is the ability to *exploit* its ILEC advantages to do so.

³⁰ *CenturyLink Petition* at 15.

The first two options are impacted by the realities of facility-based deployment by non-ILECs, discussed further below. The others means are based on wholesale last mile access from the ILEC pursuant to the Act.³¹ Indeed, CenturyLink emphasizes how Ethernet-over-Copper, for which the CLEC relies on the availability of the unbundled loop at TELRIC rates pursuant to Section 251 of the Act and Commission implementing rules, provides not only one needed option but has created a significant portion of the competition in the broadband market.³² We do not necessarily agree that the services created from Ethernet-over-Copper are always sufficient to satisfy an enterprise customer's demand (a point discussed in the *Joint Opposition*),³³ but we do agree that the availability of wholesale last mile access from the ILEC at just and reasonable rates can – and, to the extent possible under existing Commission rules, does – provide valuable competitive alternatives for business consumers. Indeed, as evident in

³¹ According to the Commission's latest Local Competition Report, as of December 31, 2012 there were 59 million wireline retail local telephone service connections to businesses, 25 million of which are served by a non-ILEC. Local Telephone Competition, Status as of December 31, 2012, Industry Analysis and Technology Division, Wireline Competition Bureau, November 2013, p. 5, Figure 4 ("November 2013 Local Competition Report"). USTelecom estimates that 96 percent of cable telephony lines serve residential customers, USTELECOM, "Evidence of Voice Competition and ILEC Non-Dominance Mounts," April 2, 2013, at 8 ("2013 USTELECOM Brief"); Available at: <http://www.ustelecom.org/news/research-briefs/ustelecom-research-brief-april-4-2013>. Using this estimate, of the 29 million lines on coaxial cable (*see November 2013 Local Competition Report* at 17, Table 6), only 1.2 million lines served business customers. Based on these calculations 95% of the competition in the business market comes from traditional (non-cable) CLECs and, as discussed in the *November 2013 Local Competition Report*, they rely substantially on wholesale inputs from the ILEC to provide their services to this critical market. *November 2013 Local Competition Report* at 9-10.

³² *CenturyLink Petition* at 30. *See also id.* at 29 ("...potential providers also can rely on CenturyLink's special access services and Unbundled Network Elements ("UNEs") to provide enterprise broadband services ... Likewise, CLECs can use, and are using, UNE loops to provide DSL-based Ethernet services at an even lower cost than TDM-based special access services.").

³³ *See supra* n. 16.

CenturyLink's pleading, *such access is a necessary precondition to effective competition in the business market.*

The problem is, as discussed below, the Commission's existing policy of varying wholesale last mile obligations based on whether the transmission format is TDM or IP, or the facility is copper or fiber, do not sufficiently address the bottleneck ILECs maintain over the last mile. Significantly, this will become even more pronounced as the industry transitions further away from TDM to IP technology and from copper to fiber facilities. Thus, while CenturyLink's petition demonstrates the importance of wholesale access to last mile facilities/services on just and reasonable rates and why the Commission should protect this form of competition, the relief that it seeks – *i.e.*, granting the *CenturyLink Petition* and failing to act on the *Reverse Forbearance Petition* – will simply move the market further along in the wrong direction, making real solutions to ensure that competition for enterprise broadband services will be promoted that much harder for the Commission to consider and adopt.

Commission Rules/Forbearance Grants have Put Next Generation Competition at Risk

A central purpose of the Telecommunications Act of 1996 was the elimination of barriers to entry, not just for TDM-based services, but for any subsequent technology that confronts the same problems. Despite this clear intent, the Commission gave the incumbent LECs the option to “retire” the copper loop in “overbuild” situations,³⁴ without any requirement to provide a functionally and economically equivalent alternative over the replacement facilities. This policy significantly diminished the unbundling provisions of the Telecommunications Act, without any empirical proof that market could continue to develop once the impact of the Commission's rules

³⁴ 47 CFR § 51.319(a)(3)(iv).

take meaningful effect. As a result, even in areas where “impairment” is found to exist, the Commission relieved incumbent LECs from the Section 251 obligation to offer fiber to the curb (“FTTC”) and fiber to the home (“FTTH”) loops on an unbundled basis (with the limited exception of a voice grade capacity in overbuild situations and high capacity TDM offerings such as DS1 and DS3s), and relieved incumbent LECs from the Section 251 obligation to offer the packetized functionality of hybrid loops.³⁵ The Commission also granted forbearance from enforcing the RBOCs’ 271 obligations to offer certain broadband elements on an unbundled basis.³⁶

Because the Commission has yet to revisit and rectify its quagmire of conflicting unbundled loop policies, competitors are left largely with only access to TDM special access services that they convert (through bonding and other means) into contemporary IP-based services. Even this option, however, is frustrated by the desperate need for price reform pending in the *Special Access Further NPRM*. Moreover, at least one major ILEC has indicated it has plans to discontinue such offerings in the not so distance future,³⁷ even though it can easily offer

³⁵ *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“Triennial Review Order”); *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, 19 FCC Rcd 20293 (2004).

³⁶ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c); SBC Communications, Inc.’s Petition for Forbearance Under 47 U.S.C. §160(c); Qwest Communications International Inc Petition for Forbearance under 47 U.S.C. §160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004).

³⁷ *Supra* n. 14.

TDM-equivalent services over an all-IP network.³⁸ Each of these developments makes it clear that it is time for the Commission to review the availability of wholesale access to non-TDM services at just and reasonable rates in the *Reverse Forbearance Proceeding*, before it considers any further forbearance requests.

Moreover, the Commission should not proceed with further forbearance under the false presumption that CenturyLink (in the absence of oversight) is likely to offer reasonably priced Ethernet services. COMPTTEL has previously filed (and we incorporate by reference into the record here) two analyses that evaluated BOC pricing in this market.³⁹ Our analysis of AT&T's and Qwest's (which have the forbearance that CenturyLink seeks here) prices show, they are far above the cost to derive comparable services using the wholesale broadband transmission offering of rural ILECs in NECA #5.⁴⁰ This comparative analysis supports removing the forbearance from AT&T and Qwest, rather than granting CenturyLink the forbearance requested here.

The only viable approach is to directly address the footprint barrier by reforming last-mile access policies, which should address CenturyLink's concerns as well. As CenturyLink describes, its real issue is creating a uniform offering (across the nation) when it has a number of affiliates.

³⁸ See COMPTTEL presentation "Transition of the PSTN" at 26, *attached to COMPTTEL Ex Parte Notice*, WC Docket NO. 05-25 *et al*, filed Dec. 6, 2013.

³⁹ See *Evaluating the Just and Reasonableness of BOC Ethernet Offerings*, filed as Attachment A to Comments of COMPTTEL, WC Docket No. 05-25 and RM-10593, April 16, 2013 ("*Retail Ethernet Analysis*"), and *Analysis of Ethernet Access Options Under NECA #5*, Attachment A to the Comments of COMPTTEL, GN Docket 12-353, filed January 28, 2013 ("*Wholesale Ethernet Analysis*").

⁴⁰ *Retail Ethernet Analysis* at 5-9.

In a recent example, a national customer expressed satisfaction with the Metro Ethernet services it is purchasing from legacy Qwest and sought to extend that serving arrangement to legacy Embarq and CenturyTel areas. When informed that this arrangement would conflict with legacy Embarq and CenturyTel's tariffs, the customer expressed deep frustration with this constraint and stated its intention to obtain service from another provider if Century Link could not offer uniform terms, in a simple manner, across its serving area.⁴¹

The rationale solution to the cited problem is not to deregulate the CenturyLink ILECs, but rather to pursue a solution that makes it possible for *any* carrier (including CenturyLink or its Qwest affiliate when operating out-side their incumbent regions) to create a uniform national Metro-Ethernet offering by obtaining the necessary inputs from ILECs in every market. Granting the *CenturyLink Petition* does not further the goal of creating a national marketplace, it merely further balkanizes the industry by enabling yet another major ILEC the opportunity to exploit its unique advantages within its footprint, without doing anything to correct for barriers elsewhere.

Reforming Last-Mile Access Will Promote Investment

CenturyLink argues that Section 706 and its focus on promoting broadband investment justify its request for Section 10 forbearance relief. Despite its repetition, the claim that regulation of wholesale access prices reduces incentives to invest in and deploy the infrastructure needed to deliver broadband services has never been proven. In fact, the Commission recognized evidence to the contrary 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 watershed relief from their wholesale obligations – the industry experienced “a torrent of new

⁴¹ *CenturyLink Petition* at 44.

investment deployed over 200,000 miles of trenches and approximately 18 million miles of fiber – enough fiber to circle the equator 750 times.”⁴²

As discussed above, regulatory certainty to wholesale access to last mile facilities at just and reasonable rates encourages CLECs to invest in their own facilities because they can supplement their reach where they cannot build. The fact that wholesale regulations promote competition and spurs investment is recognized in Section 706, which states:

...in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁴³

Indeed, in its *Open Internet Order*, the Commission found that regulations that protect the ability of edge providers to reach end-users spur innovation and “the likely rate of improvements to network infrastructure.”⁴⁴ The Commission’s finding that protecting and promoting edge-providers access to end-users spurs innovation and investment is just as applicable with regard to a competitors’ access to business customers. The last mile bottleneck is the same irrespective of the traffic-type. Specifically, regulations that protect and promote competitive access to consumers protect and promote a “virtuous cycle” of investment and development, because it drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.⁴⁵

⁴² *Technology Transitions and Further NPRM* at ¶ 12.

⁴³ 47 U.S.C. § 706 (emphasis added).

⁴⁴ Report and Order, *Preserving the Open Internet, et al*, GN Docket No. 09-191, *et al*, FCC 10-201, ¶14 (2001).

⁴⁵ *See id.*

The principal difference between web-traffic and special access services (in this context) is that there is *no question* that special access service is a telecommunication service and, therefore, the Commission’s authority to address is unhindered by the U.S. Court of Appeals for the D.C. Circuit’s concerns with regard to the *Open Internet Order*.⁴⁶ Moreover, in addition to its responsibility under Section 706 to promote investment, in the case of special access services, pursuant to Sections 201 and 202 of the Communications Act, the Commission has a *duty* to ensure rates for the enterprise broadband services at issue in the petition are just and reasonable and non-discriminatory.⁴⁷

The CenturyLink Claim that there are No Advantages from Incumbency in Fiber Deployment is False

Finally, CenturyLink makes the remarkable claim that it “has no significant first-mover advantages in deploying fiber to a customer location, even if it has copper facilities there.”⁴⁸ This claim completely ignores its pre-established advantage (in region) of being the incumbent LEC, with existing physical assets that can be reused, and a widespread customer-base served by a network that it can incrementally build from. This is not a question of a *de novo* entrant to an area – for every new commercial building that CenturyLink builds fiber to, CenturyLink will pass dozens (perhaps hundreds or thousands) of pre-existing customers that it can include in its financial calculation.

⁴⁶ *Verizon v. FCC*, Case No. 11-1355 (slip op D.C. Cir., Jan. 14, 2014)

⁴⁷ 47 U.S.C §§201 and 202.

⁴⁸ *CenturyLink Petition* at 35.

Moreover, CenturyLink completely ignores the fact that many physical assets can be reused. The core facilities include trenches, poles, rights of way, conduit, fiber, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, rights of access to buildings, and all the other mundane but necessary inputs for any network.⁴⁹ The preexisting advantages of incumbency also ensure that an incumbent can deploy fiber more inexpensively, and more broadly, than any entrant can hope to achieve. For instance, Verizon's FiOS not only shares the same infrastructure that houses its copper facilities, its copper network sometimes *becomes* the supporting infrastructure (by lashing the fiber directly to the copper cable). As Verizon has explained to the California Commission:

Over the years pole lines and conduit systems have been constructed as a means to support copper cable placements. Placement of FTTP cables have taken advantage of the existing infrastructure, with fiber cables being placed alongside existing copper cables. It is not uncommon for fiber cables to be lashed to copper cables.⁵⁰

Additionally, as the Commission has recognized that, unlike the incumbent, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs.”⁵¹ The advantages of incumbency are real and enduring. They do not disappear merely because a new technology is being introduced into the wireline network.

⁴⁹ See Comments of Ad Hoc Comments, WC Docket No. 10-90 *et al*, at 2-3, filed Feb. 24, 2012.

⁵⁰ Panel Declaration of Richard L. Fowler, John C. Mannix, Louis D. Minion, and Warren E. Thomas on Behalf of Verizon-California, Before the Public Utilities Commission of California, Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services, 08-01-005 March 14, 2008, at ¶29.

⁵¹ *Triennial Review Order* at ¶ 237.

Conclusion

For the foregoing reason, the Commission should deny CenturyLink's petition for forbearance. Additionally, the Commission should act on the recommendations in the National Broadband Plan and comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework – such as ensuring that non-TDM special access rates, terms and conditions are just and reasonable – to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.

Respectfully submitted,

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