

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)	

COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these comments in response to the Commission’s Public Notice (DA 14-845) (herein after referred to as “Public Notice”), issued in the above-referenced proceeding on June 20, 2014, 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 its packet-switched and optical transmission services (together, “enterprise broadband services”). COMPTTEL supports the Commission’s proposal to use the traditional market power approach that the Commission applied in the *Qwest Phoenix Order*,¹ as well as in prior proceedings. Namely, the Commission should perform its market analysis, for purposes of evaluating CenturyLink’s petition, based on the *DOJ-FTC Horizontal Merger Guidelines*.²

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*”).

² *Qwest Phoenix Order* at ¶ 28, n. 82 [“The approach adopted in this order is consistent with the *DOJ/FTC Guidelines* and the proposed revisions in the *Draft Revised Horizontal Guidelines*.”] See Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Guidelines*). At the time of the *Qwest Phoenix Order*, the FTC had recently released for public comment a

CenturyLink would like the Commission to forgo this well-established framework and adopt the flawed analysis that led to grants of previous similar forbearance petitions. Specifically, CenturyLink has requested that the Commission perform a “competitive analysis of enterprise broadband services as a group, rather than individual services, and that a national market analysis, rather than a geographic market-by-market analysis [] be conducted.”³ As recognized in the *Public Notice*,⁴ the market for enterprise broadband services, however, is not a “one-size fits-all” market. This market, accordingly, cannot be adequately evaluated with a simplistic analysis. The *Qwest Phoenix Order* reaffirms that the assessment of a carrier’s individual market power instead “requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether entry would be timely, likely, and sufficient to counteract the exercise of market power.”⁵

Businesses purchase various enterprise broadband services based on their individual capacity needs and based on their specific geographic location(s), and wholesale customers purchase based on their end-user’s individual capacity needs and specific geographic location(s). As the *Qwest Phoenix Order* concludes, the Commission must return to the traditional approach that carefully defines the relevant product and geographic markets and examines whether a

proposed revision of the *DOJ/FTC Guidelines*. See *Horizontal Merger Guidelines for Public Comment*, Public Notice (*Draft Revised Horizontal Guidelines*) (Apr. 20, 2010), available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.

³ CenturyLink Petition at 16-17.

⁴ *Public Notice* at 2-3.

⁵ *Qwest Phoenix Order* at ¶ 28.

carrier, individually or jointly, has market power in those markets to prevent further “inappropriate grants of forbearance predicated on competition in a subset of service and customers....”⁶ As the Commission has previously explained, under this approach, it must “separately evaluate[s] competition for distinct services, for example differentiating among the various retail services purchased by [] small, medium, and large business customers, and the various wholesale services purchased by other carriers...[and] also consider how competition varies within localized areas ...”⁷ COMPTTEL offers the following recommendations in accordance with the well-reasoned approach articulated in the *Qwest Phoenix Order*.

First, it is important that the Commission apply the standard considering the wholesale market separate from the retail market, as it did in the *Qwest Phoenix Order*.⁸ The services for which CenturyLink seeks forbearance from dominant carrier price regulations are purchased by wholesale and retail customers. Only by vibrant competition in the wholesale market — particularly the wholesale market for contemporary Ethernet services — will the full range of

⁶ *Qwest Phoenix Order* at ¶¶ 21 and 38.

⁷ *Qwest Phoenix Order* at ¶ 1. *See also, id* at ¶ 28, n. 82, citing, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, CC Docket No. 96-149, 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, 15775–82, paras. 28–41 (1997) (*LEC Classification Order*) (explaining that the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999); *AT&T Domestic Nondominance Order*, 11 FCC Rcd at 3293–3309, paras. 38–73; *see also, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); William M. Landes and Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (Landes and Posner Market Power Law Review).

⁸ *See Qwest Phoenix Order* at ¶ 46.

business services be available to consumers.

As such, the Commission must attach particular importance to conditions in the underlying wholesale market in its evaluation. Effective, sustainable, competition for the full panoply of business services requires that entry barriers be minimized. Much of the competitive differentiation in the business market comes not from the capabilities of the underlying transmission facilities, but rather the provider's expertise in integrating those facilities into its retail customer's local network to provide a tailored communications solution. This competition, however, is critically dependent on the ability to obtain the necessary wholesale inputs to craft these solutions on just and reasonable terms. Consequently, just as the Commission concluded in the *Qwest Phoenix Order*, a comprehensive market analysis must be used to evaluate wholesale conditions here. These conditions also give rise to the urgent need for the Commission to consider policy reforms ensuring competitors can maintain access to last-mile facilities at reasonable rates, terms, and conditions during and after the IP transition.

Second, it is appropriate to further distinguish product markets based on capacity. As the Commission has previously found with regard to the wholesale market, transmission services of different capacities generally constitute separate relevant product markets.⁹ Similarly, in the retail market, the relevant product markets are distinguished based on capacity, as well as complexity of the service. As COMPTTEL has explained in other proceedings, smaller commercial customers often (but not always) require relatively modest broadband facilities. This is likewise often the case for the smaller locations of larger, multi-location commercial customers. For instance, many branch offices may require no more than sufficient capacity to serve two to three voice lines and provide occasional access to "private virtual network"

⁹ *Qwest Phoenix Order* at ¶ 49.

connections to a main headquarters, along with occasional Internet access,¹⁰ whereas larger business customers often contract for more complex services, including Frame Relay and virtual private networks that also involve higher capacity at a single location.¹¹ Thus, the Commission should not “group” the services, but rather evaluate the market based on each of the various packet-based broadband enterprise services for which CenturyLink seeks forbearance, including distinctions in capacity levels.

For example, to the extent there is competition for Ethernet 100 Mbps, does not mean there is competition in the 10 Mbps. Consequently, assertions regarding the ranking on the Vertical Systems Group’s list of top Ethernet service providers in the U.S. in terms of retail business Ethernet ports are irrelevant to the Commission’s analysis in the special access rulemaking because those rankings do not differentiate between the level of competition in the provision of Ethernet services at different capacity levels (*e.g.*, between 10 Mbps services and 1 Gbps services). This omission makes it impossible for the Commission to rely on the rankings as a basis for determining the extent to which incumbent LECs face competition in a particular product market.

In determining if a carrier has market power, the Commission needs to consider, *among other things*, the availability at just, reasonable terms and conditions of the various products (*e.g.*, Ethernet at various capacity levels) that correspond to the needs of the various types of customers. It is important to note that as carriers transition from TDM to IP networks and contemplate the discontinuance of TDM special access services—services the Commission relied

¹⁰ See COMPTTEL Comments, *In the Matter of Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5 and 12-353, at 15-19, filed Mar. 31, 2014.

¹¹ *Qwest Phoenix Order* at ¶ 63, n. 193.

upon in prior grants of forbearance—it is especially critical for the Commission to carefully consider availability of lower capacity enterprise broadband services from facilities-based providers and the extent to which these providers are capable of serving multiple locations.

Fourth, special access services should not be assessed nationwide or large scale. Retail consumers purchase based on building location(s), and wholesale carrier customers purchase based on the location(s) of their retail customer(s). And as CenturyLink admits in its comments, not all of its customers of its broadband services have a national presence.¹² Even with regard to multi-location customers, if CenturyLink is dominant in the market in any location of that customer, it has a distinct advantage in serving that customer overall. Through this linkage, CenturyLink is able to extend its market power in locations where it is a sole provider, to other markets where it may face competition.¹³ This phenomenon is critical to the Commission’s analysis. Multi-location customers should be viewed as customers with *multiple localized needs*, a fact that requires that the Commission’s analysis comprehensively evaluate market conditions across multiple geographic areas simultaneously.¹⁴

Fifth, the Commission must look at substitutability of any alleged competitive alternative. Specifically, “best efforts” Internet generally is not a substitute for any class of customers of the broadband enterprise services at issue here (e.g., enterprise customers of all sizes, wholesale

¹² CenturyLink Petition at 24-25.

¹³ *Qwest Phoenix Order* at ¶ 74 [“[I]f a competitor seeks to serve a multi-location business customer, it must have access to facilities that reach all of the customer’s locations.”]

¹⁴ *Qwest Phoenix Order* at ¶ 87, n. 259 [As the Commission has found in prior proceedings, it has “not had sufficiently detailed data to define localized relevant geographic markets in which all enterprise customers face the same competitive choices, and instead uses the most disaggregated data possible in performing the structural analysis for different types of business services and for certain broad classes of business customers, where such data is available.”]

customer or backhaul wireless customers).¹⁵ As Ad Hoc Telecommunications Users explained, “best efforts” broadband Internet access services are not a substitute for special access services in part because “[b]y definition, best efforts business broadband Internet access services take customers to the Internet and only to the Internet, via the carrier’s choice of Internet access point; they cannot provide a dedicated connection between two premises designated by the customer, such as a bank ATM machine, a merchant’s point-of-sale terminal, a secure data storage facility, or a cellular service tower.”¹⁶ In addition to lacking sufficient security and reliability of the service, best efforts broadband service often does not offer sufficient speeds in both directions. For example, in its Proposal for Wire Center Trials, AT&T lists a Comcast service that is (likely) nothing more than a “best efforts” broadband Internet access service as a potential replacement for AT&T’s DS1 and DS3 special access services in the Kings Point area. But this cited Comcast offering only provides speeds of 768 Kbps upstream.¹⁷

Sixth, the market analysis should be firmly grounded in the Commission’s recognition in the *Qwest Phoenix Order* of the critical importance of facilities-based competition.¹⁸ In previous

¹⁵ See, e.g., Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 50-57 (filed Feb. 11, 2013) (detailing the record evidence demonstrating that retail business customers that purchase special access services generally do not view “best efforts” broadband Internet access services as viable substitutes); Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 20-23 (filed Feb. 11, 2013) (discussing the reasons why “best efforts” offerings that are provided over HFC networks are “unsuitable for [Sprint’s] wireless macrocell-site backhaul needs or as wholesale inputs to the core retail services it sells to its enterprise customers”); Comments of XO Communications, LLC, WC Dkt. No. 05-25, Exhibit 1, ¶ 10 (filed Feb. 11, 2013).

¹⁶ Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, at 12 (filed Feb. 11, 2013).

¹⁷ AT&T Proposal for Wire Center Trials, GN Dkt. Nos. 13-5 and 12-353, Attachment, Exhibit E, Product Data Sheets # WSA2 and # WSA3 (filed Feb. 27, 2014).

¹⁸ *Qwest Phoenix Order* at ¶ 38.

grants of forbearance, the Commission held that granting forbearance would not harm competitors seeking Ethernet and other packet-based services to business customers in part because those competitors would still have access to TDM-based DS1 and DS3 special access inputs subject to price regulation.¹⁹ The CenturyLink Petition highlights the significant extent of competition in the business market that comes from traditional competitors that rely on the competitive provisions of the Act in order to provide business consumers the competitive services they need.²⁰ But as COMPTTEL has explained, the ability of competitors to purchase TDM special access services is frustrated by the significant need for price reform pending in the *Special Access Further NPRM* and may be completely eliminated if and when ILECs are granted the right to discontinue these services. Likewise, competitors' ability to provide Ethernet-over-Copper is at risk due to copper retirement. Thus, it is important that the Commission only consider facilities-based competition in evaluating the market for these broadband enterprise services.

Finally, the Commission analysis here, like in the *Qwest Phoenix Order*, should recognize the inherent inadequacy of a duopoly in protecting consumers.²¹ Retail competition that is based on a small number of firms provides an insufficient basis for any grant of forbearance. As the

¹⁹ *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, 22 FCC Rcd. 18705, ¶ 25 (2007).

²⁰ *CenturyLink Petition* 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.”); *See also id* at 15 and 30.

²¹ *Qwest Phoenix Order* at ¶ 38.

Commission has repeatedly observed, last mile facilities are costly to deploy.²² The core advantages of incumbency (which include trenches, poles, rights of way, conduits, fiber, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, right of access to buildings, and all the other mundane but necessary inputs for any network) extend to the provision of these broadband services. As the Commission recognized in the *National Broadband Plan*, the relevant factor is the economic viability of replicating the physical facility, not whether the facility or service operates using a circuit- or packet- based mode or is constructed from copper or fiber.²³ Consequently, the Commission’s market analysis must focus on whether facilities-based competition from *multiple* firms is present.

Respectfully submitted,

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²² See, e.g., *Qwest Phoenix Order* at ¶ 73; see also Federal Communications Commission, *Connection America: The National Broadband Plan* at 47, available at: <http://www.broadband.gov/download-plan/> (“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.”]

²³ National Broadband Plan at 47.