



PUBLIC NOTICE

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WIRELINE COMPETITION BUREAU SEEKS COMMENT ON APPROPRIATE MARKET ANALYSIS FOR CENTURYLINK ENTERPRISE FORBEARANCE PETITION

WC Docket No. 14-9

Comment Date: July 7, 2014

Reply Comment Date: July 14, 2014

On December 13, 2013, CenturyLink filed a petition pursuant to section 10 of the Communications Act of 1934, as amended (Act),¹ requesting that the Commission forbear from “dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to all of its packet-switched and optical transmission services (together ‘enterprise broadband services’) that are still subject to those obligations.”² Due to a series of mergers, CenturyLink’s enterprise broadband services are subject to different degrees of regulation depending on which CenturyLink affiliate—Qwest, Embarq, or CenturyTel—historically provided service in the area.³ To assist the Commission in evaluating CenturyLink’s petition, we invite comment on our proposed method, set forth below, for defining the relevant market or markets at issue, and analyzing the level of competition within the market(s).

In its petition, CenturyLink asserts that the relevant geographic market for analyzing competition for these enterprise broadband services is the entire country.⁴ CenturyLink notes that the Commission

¹ 47 U.S.C. § 160.

² Petition of CenturyLink 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, at 1 (filed Dec. 13, 2013) (Petition). Specifically, CenturyLink seeks forbearance from 47 U.S.C. §§ 203, 204(a)(3), 47 C.F.R. §§ 1.54(a)(1), (e)(1), 61.31–61.59, 63.03, 63.71, and requirements from related Commission Orders. Petition at 7-8. CenturyLink “stipulate[d] that any grant of this petition would be superseded by the outcome of any [] industry-wide proceeding.” *Id.* at 9. CenturyLink also filed an alternative petition for interim waiver, requesting that, “in the event that the Commission does not grant CenturyLink’s simultaneously filed petition for forbearance, the Commission should grant an interim waiver of its dominant carrier regulations and the *Computer Inquiry* tariffing requirement with regard to CenturyLink’s enterprise broadband services until such time as the Commission resolves how all incumbent enterprise broadband services should be regulated in an industry-wide context.” CenturyLink Alternative Petition for Interim Waiver, WC Docket No. 14-9, at iii (filed Dec. 13, 2013).

³ Petition at 5.

⁴ *Id.* at 16-17. CenturyLink seeks forbearance relief for the following services: Ethernet Private Line, Ethernet Virtual Private Line, Synchronous Optical Channel Services, Local Transport – Synchronous Optical Services, Video Transmission, Wave, Frame Relay and ATM. *Id.* at Attach. 1.

conducted its analysis of enterprise broadband services on a national basis when it granted forbearance petitions in 2007-08, and asserts that the Commission should define a nationwide market when evaluating its pending forbearance petition.⁵ More recently, however, the Commission used a traditional market power framework to evaluate competition when evaluating a forbearance petition.⁶ The *Qwest Phoenix Order* laid out specific criteria for defining markets and assessing market power. As the Commission noted, “[t]he traditional market power framework enables us to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted.”⁷

The Commission’s analysis of forbearance from dominant carrier regulation is not bound by a particular analytical framework. As the D.C. Circuit has held, section 10 “imposes no particular mode of market analysis or level of geographic rigor,” but rather “allow[s] the forbearance analysis to vary depending on the circumstances.”⁸ The Commission also has recognized the need to balance the precision obtained by analyzing competition at a granular or disaggregated level with the pragmatic need to evaluate competition at an aggregated level.⁹

CenturyLink asserts that the relief it requests would permit it to compete more easily for nationwide contracts.¹⁰ CenturyLink’s petition for forbearance, however, is not confined to customers seeking nationwide or large scale contracts, but would encompass smaller, local customers that might be less

⁵ See, e.g., *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*, *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18718, para. 21 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12272-73, para. 23 (2008).

⁶ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8642, para. 37 (2010) (*Qwest Phoenix Order*): “We thus return to a traditional market power framework, which the Commission established in the Competitive Carrier proceedings and developed further in subsequent decisions, to evaluate competition in telecommunications markets in forbearance proceedings such as this one. This approach also is comparable to the analysis used by the DOJ, FTC, and telecom regulators in other countries, including those in the European Community, to determine the extent of competition in a market.” (Footnotes omitted.) The Department of Justice released revised Horizontal Merger Guidelines in 2010. See <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

⁷ *Qwest Phoenix Order*, 25 FCC Rcd at 8646-47, para. 42. “Specifically, our market power analysis begins by defining the relevant product and geographic markets and by identifying the market participants. Next, we perform an analysis, in which we examine available evidence regarding market shares and evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by Qwest or by Qwest in concert with a few competitors. Based on this finding, we determine whether the regulations at issue remain necessary to protect against ‘unjust and unreasonable’ rate increases and are ‘necessary for the protection of consumers,’ and whether forbearance would not be ‘consistent with the public interest,’ as required by section 10 of the Act.” *Id.* That *Order* also noted, however, that “a different analysis may apply when the Commission addresses advanced services, like broadband services.” *Id.* at 8644-45, para. 39.

⁸ *EarthLink v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006).

⁹ See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5700, para. 68 (2007) (subsequent history omitted).

¹⁰ Petition at 4-5, 55-56.

likely to have competitive alternatives.¹¹ The level of competition may not be uniform for all customers that fall within the scope of CenturyLink’s petition. Therefore, we believe that assessing whether and how competition for these services varies across customer classes is critical to analyzing CenturyLink’s request in accordance with the criteria set forth in section 10 of the Act. We propose that our market analysis account for potential differences in competition for enterprise broadband services among various customer classes (e.g., small and medium businesses, as opposed to large enterprise customers; customers with localized or low-volume needs versus those with needs for nationwide contracts). We welcome comment on this proposal and on how we should delineate customer classes. We believe that an analysis that recognizes the potential for varying levels of competition among customer classes will provide a sound framework to consider CenturyLink’s assertion that it competes in a nationwide market for the provision of broadband enterprise services. We also believe that such an approach applies the traditional market power approach that the Commission used in the *Qwest Phoenix Order* to the facts before us in this petition, and is consistent with competitive market analyses routinely used by the Department of Justice and the Federal Trade Commission.¹²

We intend to issue a data request to help us determine the level of competition that various customer classes face for the enterprise broadband services at issue in CenturyLink’s forbearance petition. That data will improve our ability to analyze competition for the relevant services and allow us to assess whether competition varies for different types of customers.

Interested parties may file comments and reply comments on or before the dates indicated above. Comments are to reference **WC Docket No. 14-9**, and may be filed on paper copies or by using the Commission’s Electronic Comment Filing System (ECFS).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
 - All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber

¹¹ See, e.g., *Qwest Phoenix Order*, 25 FCC Rcd at 8656, para. 63 (“[C]arriers treat small enterprise customers differently from larger business customers, both in the way they market their products and in the prices they charge”); COMPTTEL Opposition, WC Docket No. 14-9, at 6-7 (filed Feb. 14, 2014) (“[R]egulatory policies for wholesale access [affect] competition in the downstream markets for retail broadband services provided to small businesses”; prior deregulation has limited “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,” citing the *National Broadband Plan* at 47).

¹² See *supra* note 6. We also note that using this approach is not intended to affect or prejudge separate, industry-wide proceedings that might assess competitive market conditions. We note accordingly CenturyLink’s stipulation that the forbearance proceeding would be superseded by the outcome of any industry-wide proceeding. See Petition at 9.

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The proceeding described in this Notice is being treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹³ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

For further information, please contact Alex Johns, Competition Policy Division, Wireline Competition Bureau, at (202) 418-1167 or Alexis.Johns@fcc.gov.

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¹³ 47 C.F.R. §§ 1.1200 *et seq.*; *Pleading Cycle Established for Comments on CenturyLink Petitions for Forbearance from or Interim Waiver of Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, Public Notice, 29 FCC Rcd 254, 255 (Wireline Comp. Bur. 2014).