BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Broadwing Communications, LLC (U-5525-C); Global Crossing Local Services, Inc. (U-5685-C); Global Crossing Telecommunications, Inc. (U-5005-C); IP Networks, Inc. (U-6362-C); Level 3 Communications, LLC (U-5941-C); Level 3 Telecom of California, LP (U-5358-C); WilTel Communications, LLC (U-6146-C); and Level 3 Communications, Inc., a Delaware Corporation; and CenturyLink, Inc., a Louisiana Corporation, For Approval of Transfer of Control of the Level 3 Operating Entities Pursuant to California Public Utilities Code Section 854(a)	)	Application No.17-03-016 (Filed March 22, 2017)

CONSOLIDATED REPLY TO THE JOINT PROTEST OF ORA, TURN AND GREENLINING AND THE PROTEST OF THE CALIFORNIA EMERGING TECHNOLOGY FUND TO THE APPLICATION FOR APPROVAL OF THE TRANSFER OF CONTROL OF THE LEVEL 3 OPERATING ENTITIES PURSUANT TO PUBLIC UTILITIES CODE SECTION 854(a)

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Dated: May 15, 2017

Table of Contents

BEFORE THE PUBLIC UTILITIES COMMISSION

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On May 5, 2017, the Office of Ratepayer Advocates ("ORA"), The Utility Reform Network ("TURN") and the Greenlining Institute ("Greenlining") submitted a joint protest (the "Joint Protest") and the California Emerging Technology Fund submitted a protest (the "CETF Protest") to the above-captioned Joint Application for Section 854(a) approval to transfer control

of the Level 3 Operating Entities[1] from Level 3, their current non-certificated parent company, to CenturyLink, the current non-certificated parent company of three California certificated carriers.[2] The transfer would be accomplished pursuant to the Merger Transaction (the "Transaction") described in detail in Section III of the Joint Application.

Pursuant to Rule 2.6 of the Rules of Practice and Procedure of the California Public Utilities Commission, the Level 3 Operating Entities, Level 3 and CenturyLink (the "Joint Applicants") respectfully submit this consolidated reply to the Joint Protest and the CETF Protest and urge the Commission to reject them both and approve the Joint Application on an expedited basis.

I. EXECUTIVE SUMMARY

On March 22, 2017, the Joint Applicants filed the above-referenced Application seeking approval of the transfer of control of the Level 3 Operating Entities – *each of which is a non-dominant carrier that provides service exclusively to wholesale and enterprise customers* - from Level 3 to CenturyLink. The requested transfer was made pursuant to Section 854(a) of the California Public Utilities Code[3] as none of the transferees have annual California revenue (individually or combined) approaching the $500 million threshold which triggers a Section 854(b) or Section 854(c) review.

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[1] The Level 3 Operating Entities include the following: Broadwing Communications, LLC (U-5525-C), Global Crossing Local Services, Inc. (U-5685-C), Global Crossing Telecommunications, Inc. (U-5005-C), IP Networks, Inc. (U-6362-C), Level 3 Communications, LLC (U-5941-C), Level 3 Telecom of California, LP (U-5358-C), and WilTel Communications, LLC (U-6146-C).

[2] CenturyLink's three certificated operating entities in California include the following: CenturyLink Communications, LLC (U-5335-C); CenturyLink Public Communications, Inc. (U-6018-C); and CenturyTel of Eastern Oregon, Inc. (U-1022-C) (the "CenturyLink Operating Entities"). See Joint Application at Section II.A. for more detailed descriptions of those operating entities.

[3] All references herein are to the California Public Utilities Code unless otherwise noted.

As demonstrated by the Joint Application and discussed more thoroughly below, the Joint Application is entirely consistent with the well-established standard for Section 854(a) review and its use by the Commission in approving countless similar transactions. Approval of the transfer is also consistent with the mandate placed on this Commission by the Legislature to promote a healthy, vibrant and competitive telecommunications market.

The Protestors, however, seek to impose a new standard for approval of the indirect transfer of non-dominant carriers that is not supported by law, sound public policy, Commission precedent, or the facts presented by this Joint Application. In brief, the Protestors ask the Commission to completely ignore its standard for evaluating Section 854(a) applications and insist instead that the Commission "must" use the standards set by Sections 854(b) and (c) to require the Joint Applicants to identify, and commit, to a host of California-specific obligations (e.g., freeze unregulated rates, build-out network to underserved areas, utilize lower outage reporting requirements). As discussed below, the Joint Applicants do not trigger Section 854(b) and (c) and any attempt to impose the standards associated with those sub-sections would be, at a minimum, improper in this instance. The Level 3 Operating Companies are not required to make such commitments either legally or as a matter of sound business judgment. Moreover, the imposition of such obligations would be inappropriate, arbitrary and discriminatory in this instance. [4]

The Joint Applicants submit that Section 854(a) was not intended by the California Legislature as an opportunity for the Commission to rewrite carriers' business plans, dictate corporate governance issues such as employment decisions or impose regulatory obligations that do not otherwise exist. Despite the Protestors' assertions to the contrary, requests for approval of

[4] See e.g., Cal. Pub. Util. Code Section 1757.1(a); Cal. Const., Art. I § 7.

indirect transfers of control of non-dominant carriers are not intended to create novel regulatory obligations or otherwise advance particular broad public policy issues of specific concern to protestors. Instead, Commission approval of indirect transfers is primarily focused on ensuring that the acquiring entity is financially and technically qualified to continue meeting existing obligations without causing an adverse impact on the public.

To impose the standard and commitments sought by the Protestors expands Section 854(a) beyond any reasonable interpretation of the statute and directly conflicts with the Commission's mandate of promoting the deployment of infrastructure through pro-competitive policies.[5] As such, and for the reasons discussed below, the protests should be rejected in their entirety.

II. BACKGROUND

As described in detail in the Joint Application,[6] this is a parent-level transaction that will enable CenturyLink and Level 3 to combine their complementary fiber networks and capabilities on a state-wide, national and international basis. This combination will allow the Combined Company to offer wholesale and enterprise customers a broader range of services and solutions than they currently provide individually, reduce dependence on competitors' fiber facilities, ensure continued capital expenditures in the state, and enhance the Combined Company's financial profile. The proposed Transaction thus will allow the Combined Company not only to provide a fuller suite of services to its base of enterprise customers but also to serve as a stronger and more robust competitor to the larger, incumbent carriers and providers in the marketplace.

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[5] *See e.g., In re Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities*, D.06-08-030, 2006 Cal. PUC Lexis 367 at *250 ("the California Legislature calls upon us to support deployment of advanced telecommunication services and infrastructure through pro-competitive policies.").

[6] See Joint Application at Section III.

Because this is a parent-level-only transaction, with no change in day-to-day operations of the regulated entities that operate in California, the Commission retains exactly the same regulatory authority over the Level 3 Operating Entities that the Commission possessed immediately prior to the Transaction. In addition, the Transaction is transparent to Level 3's customers[7] as the Level 3 Operating Entities will continue to honor their existing contractual and tariff obligations. No customer transfers will occur, no certificates will be transferred, and no new regulated entities will be created or dissolved by the Transaction.

Moreover, the Level 3 Operating Entities are, both individually and combined, non-dominant providers of long haul and middle mile facilities with combined revenues that do not approach the $500 million threshold set forth in Sections 854(b) or (c). Indeed, even when combined with the CenturyLink Operating Entities' revenue, the $500 million threshold is not met.[8] Moreover, as noted in the recent Competition Decision, the Level 3 Operating Entities compete in markets dominated by incumbent and cable carriers and this transaction will not change that situation in any appreciable way.[9]

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[7] As noted above, all of the Level 3 Operating customers are enterprise or wholesale customers. Similarly, and with the exception of the few residential customers of the small ILEC operation in New Pine Creek, Modoc County, the CenturyLink Operating Entities do not offer local exchange services or internet access services to residential consumers in California.

[8] See Joint Application, Confidential Exhibits A and B.

[9] The Joint Protestors repeated efforts to insinuate that the Level 3 Operating Companies will somehow become a dominant player in this market (see e.g. Joint Protest at p. 1) are undermined by the Commission's own findings in the Competition Docket. See, e.g., *In re Competition Docket*, D.16-12-025 at p. 99, n. 262 ("…special access/BDS services are largely, but not completely, in the hands of the incumbent carriers…); see also id. at p. 104 ("The FCC has found that (i) legacy carriers still exercise considerable market power in the special access market, with ILECs and their affiliates accounting for $37 billion of the $ 45 billion in national BDS revenue…); see id. at p. 82 ("The two largest ILECs provide approximately 4.2 million wireline business connections, more than the largest CLECs and cable companies combined.").

Given the conventional nature of the underlying Transaction including (a) the limited revenues associated with California operating entities, (b) the lack of market power associated with those entities, (b) the potential benefits of the Transaction for California and beyond, (c) the lack of any adverse effects associated with the Transaction, and (d) the transparency of the indirect transfer of the Level 3 Operating Entities to its customer base, the Joint Applicants submit that this Application is appropriate for expedited approval.

III. THE JOINT APPLICATION SATISFIES THE SECTION 854(a) STANDARD FOR REVIEWING REQUESTS TO TRANSFER CONTROL

Section 854(a) requires prior authorization from the Commission before the finalization of any transaction that results in the merger, acquisition, or a direct or indirect change in control of a public utility. In reviewing these applications over the years, the Commission has *repeatedly* and *consistently* found that the "primary question" to determine in a transfer of control proceeding under Section 854(a) is whether the transaction will be "adverse to the public interest."[10]

The myriad of cases in which the Commission has approved indirect transfer of control under Section 854(a), as well as cases in which this standard has otherwise been discussed,

[10] *See e.g., Joint Application of Webpass Telecommunications, LLC and Google Fiber Inc. for Approval of a Transfer of Control*, D. 17-03-018, 2017 Cal. PUC LEXIS 108 at *10; *Joint Application of G3 Telecom USA Inc. and Telehop Communications, Inc. for Section 854 Approval*, D. 14-08-016, 2014 Cal. PUC LEXIS 371 at *5; *Joint Application of Securus Technologies, Inc., T-NETIX Telecommunications Services, Inc., and Securus Investment Holdings for Section 854 Approval*, D. 13-10-004, 2013 Cal. PUC LEXIS 549 at *7; *Joint Application of Primus Telecommunications, Inc. and PTUS, Inc. for Approval of a Transfer of Control*, D. 13-09-017, 2013 Cal. PUC LEXIS 461 at **3-4; Joint Application of Yipes Enterprise Services, FLAG Telecom for Approval of a Change in Ownership of an Authorized Telecommunications Provider, D. 07-11-029, 2007 Cal. PUC LEXIS 643 at *8; *Joint Application of SFPP, CalNev PipeLine, Kinder Morgan, KnightCo, et al. for Section 854 Approval*, D. 07-05-061, 2007 Cal. PUC Lexis 227 at *34; *Joint Application of Wild Goose Storage Inc., EnCana Corp., Carlyle/Riverstone Global Energy and Power Fund III, L.P., et al. for Review under Section 854 et al.* D.07-03-047, 2007 Cal. PUC Lexis 309 at **6-8; *Application of Comm South Companies, Inc. and Arbros Communications, Inc. for Approval of Transfer of Control to Arcomm Holding Co*., *D.04-09-023, 2004 Cal. PUC Lexis 607 at **5-6; Joint Application of Qwest Communications et al. for Transfer of Control, D.00-06-079, 2000 Cal. PUC Lexis 645 at *17.*

clearly establish the meaning of that standard. In brief, where – as is the case here – there is no interruption of service, no change of tariffs, no transfer of operating authority, no customer transfers, no elimination of providers, the transactions have unfailingly been found not to have any adverse impact on the public.[11] In other words, where the transaction is "seamless" to consumers, the transaction satisfies the standard.

Indeed, in the context of applications seeking to transfer control of certificated entities to non-certificated entities, the Commission focuses primarily on the qualifications of the new ultimate parent in terms of meeting the Commission's financial and technical requirements for obtaining a CPCN (i.e. $100,000 in liquid assets and appropriate technical experience).[12] There is no doubt that CenturyLink meets those qualifications and no party has challenged that here.[13]

The Joint Applicants do not dispute that the Commission *may* consider a broad range of criteria in evaluating whether the public interest standard has been met and they do not dispute that the Commission may, where it deems necessary, impose conditions on a transaction. However, the use of those criteria does not alter the standard to be applied or in any way suggest that new California-specific commitments are required.[14] Indeed, the Commission recognizes

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[11] *See Joint Application of TeleCommunications Systems, Comtech and Typhoon for Transfer of Control*, D.16-06-048, 2016 Cal PUC Lexis 378 at *7; *see also* D.14-08-016, *supra*, 2014 Cal. PUC Lexis 371 at ** 7-8; D.07-11-029, *supra*, 2007 Cal. PUC Lexis 643 at **7-8; D. 04-09-023, *supra*, 2004 Cal. PUC LEXIS 607 at **6-7.

[12] *See e.g.,* D.16-06-048, *supra*, 2016 Cal. PUC Lexis 378 at **7-10; D.14-08-016, *supra*, 2014 Cal. PUC Lexis 371 at * 5; D. 13-10-004, *supra*, 2013 Cal. PUC LEXIS 461 at ** 5-6; D.12-03-040, 2012 Cal. PUC Lexis 89 at * 7. *See also,* D. 13-10-004, *supra*, 2013 Cal. PUC Lexis at *3 (based on financial and technical qualifications of acquiring company, the transaction is deemed "not adverse to public interest").

[13] See Joint Application at Section IV.D.

[14] *See e.g.,* D.07-03-047, *supra*, 2007 Cal. PUC Lexis 309 at *7 (…"using criteria from other subsections as guidance does not change the standard of review for this transfer of control [under Section 854(a)].")

that corporate mergers do not necessarily lend themselves to certainty. For example, it has approved Section 854(a) requests even when there was "no immediate" change to management or services anticipated[15] and even where all the Commission can determine is that the public "may" benefit from the transaction.[16] Moreover, the Commission has repeatedly stated that it is in the public interest to promote "a business climate that is hospitable to utilities" and that Section 854(a) transactions should be approved "absent a compelling reason to the contrary."[17] No reason to deny, compelling or otherwise, exists in the instant Application.

The Commission's desire to facilitate these types of approvals is reflected in its 2004 decision to create an expedited process for non-dominant carriers to utilize advice letters for 854(a) approval.[18] Per that decision, non-dominant carriers could use an advice letter provided they were already certificated (or were already the parent company of a certificated entity), were not affiliated with a California ILEC, had less than $500 million in annual California revenues

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[15] *See e.g.,* D.14-08-016, *supra*, 2014 Cal. PUC LEXIS 371 at *4 (No immediate change to direct management or services"); D. 13-09-017, *supra*, 2013 Cal. PUC LEXIS 461 at *6 ("no immediate" change to management or service).

[16] *See e.g., In the Matter of Supra Telecommunications and Information Systems, Inc. and H.I.G Supra, Inc., for Section 854 Approval*, D. 05-06-012, 2005 Cal. PUC LEXIS 216 at *10 ("Third, the public may benefit from the transaction to the extent it enhances Supra's ability to compete in California."); D.04-09-023, *supra*, 2004 Cal. PUC Lexis 607 at *6 ("…the public may benefit from the reorganization…").

[17] *See e.g., Application of SJW Corp for Approval of Reincorporation*, D.16-05-037, 2016 Cal. Lexis 607 at **7-8; *Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., et al. For Approval of the Sale of Assets, Transfer of Certificates and Customer Bases, and Issuance of Additional Certificates*; D. 09-10-056, 2009 Cal. PUC LEXIS 546 at *21-22; *Application of PacifiCorp and MidAmerican Energy Holdings Company for Exemption under Section 853 (b) from the Approval Requirements of Section 854(a)*, D. 06-02-033, 2006 Cal. PUC LEXIS 49 at *57; D. 05-06-012, supra at *10; *Joint Application of Lynch Telephone Corporation, Brighton Communications Corporation, Cal-Ore Telephone Co., et al*., D. 05-05-014, 2005 Cal. PUC Lexis 176 at *7; D.04-09-023, *supra*, 2004 Cal. PUC Lexis 607 at *7.

[18] *See CALTEL Application to Modify Section 851-854 Procedures*, D.04-10-038, 2004 Cal. PUC Lexis 511 (granting CALTEL's application, in part, to provide advice letter process for non-dominant CLECs to obtain 854(a) approval via the advice letter process).

and there were no CEQA issues.[19] In other words, the process was created for exactly the kind of situation presented by the instant transaction. Although the Level 3 Operating Entities' attempt to utilize advice letters was summarily rejected after the receipt of protests filed by ORA, TURN and Greenlining, this process has been successfully used by carriers on many occasions, including as recently as March 2016 when the transfer of control of XO (also a provider of fiber exclusively to enterprise and wholesale customers) to Verizon (the holding company of what was then both an ILEC and a major wireless provider) was approved by advice letter filing.[20] The process created by the Commission in 2004 only reaffirms the limited review the Commission employs, and otherwise generally deems necessary, in considering 854(a) applications from non-dominant carriers.

IV. THE STANDARD FOR REVIEW PROPOSED BY THE JOINT PROTESTORS AND CETF IS BASELESS AND MISGUIDED

The Joint Protestors and CETF suggest that the Commission has regularly utilized the criteria set forth in Sections 854(b) or 854(c) to determine whether the 854(a) standard has been met and then insist – on multiple occasions and in multiple formats - that in the absence of "California-specific commitments, the record will not support, and the Commission cannot find, that the Proposed Transaction will be in the public interest."[21] Both propositions are false.

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[19] *Id.* at 2004 Cal. PUC Lexis 511 **14-17 (Appendix A).

[20] See XO AL 1281 (re transfer of XO to Verizon – March 18, 2016); see also Qwest AL 172 (re transfer of control of Qwest to CenturyLink – May 14, 2010), tw telecom california AL 577 (re transfer of control of tw telecom to Level 3 – July 3, 2014).

The Joint Applicants continue to believe that the advice letter process was (and is) appropriate in this instance. However, the protests of ORA, TURN and Greenlining to the January 17, 2017 advice letter filings, and the CD's rejection of the Advice Letters, compelled the Joint Applicants to pursue this application process.

[21] See e.g., Joint Protest at p. 3; see CETF Protest at p. 7 ("CETF finds the current Application sorely lacking in that there is not a single concrete public interest commitment for broadband set forth in the Application.").

As an initial matter, Section 854(b) applies to transactions where one of the utilities has gross annual intrastate revenues exceeding $500 million. Section 854(c) applies to transactions where any of the parties to the transaction have gross intrastate revenues exceeding $500 million. In this instance, as confirmed in the Joint Application, the Level 3 Operating Entities' annual revenues are far less than the $500 million threshold either individually or collectively. Indeed, even if the California revenues of the CenturyLink Operating Entities are taken into account, the revenues do not approach the $500 million threshold under Section 854(c).[22] Further, the Commission's long standing policy has been "uniformly" to exempt transactions involving CLECs and NDIECs, such as the Level 3 Operating Entities, from the requirements of Section 854(b) and (c).[23] Indeed, as far as the Joint Applicants have been able to determine, the Commission decisions regarding 854(a) approvals for telecommunications carriers do not rely on, or even reference, those provisions as a general matter.[24]

The primary case that both the Joint Protestors and CETF rely on for the proposition that the Commission should use the criteria set forth in Section 854(b) and (c) is, at best, inapposite.[25] Indeed, in *KnightCo*, the Commission explicitly acknowledged that the standard for an 854(a) application was, as discussed above, whether the "transaction will be adverse to the public

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[22] See Joint Application at Confidential Exhibits A and B.

[23] *Joint Application of SBC Communications, Inc. and AT&T Corp. Inc. for Authorization to Transfer Control*, D. 05-11-028, 2005 Cal. PUC LEXIS 516, at *33 (Commission notes that it has "authorized scores of transactions involving NDIECs and CLECs, but uniformly has exempted them from the detailed requirements of § 854(b) and, with limited exception, § 854(c).").

[24] See nn. 10 -17; *see also Joint Application of Sierra Pacific Power and California Pacific Electric*, D.10-10-017, 2010 Cal. PUC Lexis 403 at *21("…only where §§ 854(b) and (c) expressly apply, must the Commission make all of the findings those subsections require.").

[25] See Joint Protest at p. 2; CETF Protest at p.4. *See* D. 07-05-061, *supra*, 2007 Cal. PUC Lexis 227 at *34.

interest." [26] It further clarified that an examination of whether the transaction had "positive benefits" was only required when the $500 million dollar threshold was met. Otherwise, the Commission was able, *where appropriate*, to use the 854(b) and (c) criteria to provide "context for a public interest assessment." [27] It did not establish or even insinuate that a new standard was appropriate for 854(a) applications or that California-specific commitments were obligatory.

Accordingly, even on the unique facts of that case as noted below, the Commission's review was limited to the impact on future (regulated) gas rates, access to records and the resolution of a pending refund issue.[28] The Commission was not seeking to impose additional California-specific obligations as to how the parties operated their businesses - as insisted upon by the Protestors in this case - but primarily on ensuring that the Commission had access to sufficient information on an ongoing basis. Thus, although the Commission utilized the criteria set forth in 854(b) and (c) to determine whether the transaction was adverse to the public interest, it did not change the standard or otherwise suggest that these criteria were to be used to create new operational commitments specific to California.

In addition, the facts of the *KnightCo* case were unique as evidenced by the sheer number of Section 854(a) applications where the use of the criteria in 854(b) and (c) are not even mentioned. In *KnightCo*, the application came on the heels of the California energy crisis and involved gas pipeline operators that were subject to rate regulation. Combined, these entities would become a major market player (the new entity would carry more than 1/3 of the total volume of refined petroleum products in California) and there were few, if any, competitive

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[26] *Id.*

[27] *Id.*

[28] *Id.* at *35.

alternatives available to customers.[29] Further, the Commission found that the proposed business structure explicitly allowed for the "funneling of large amounts of cash upstream" to the new privately-held owner, which the CPUC said would have the power to bankrupt the gas pipeline operators. [30] Moreover, two of the entities involved in the transaction had apparently been "plagued" by major rate disputes over the last decade and the main protestors were direct customers who seemed to be concerned with possible rate increases. [31] None of those factors are present in this Joint Application.

To the contrary, the Level 3 Operating Entities are not subject to rate regulation, they are all non-dominant carriers (a classification that will not change even when combined with the CenturyLink Operating Entities), are all in good standing, and there is no issue with the proposed business structure underlying this transaction. Moreover, as noted above, the proposed transfer in this Joint Application is seamless to consumers in that there are no customer transfers, no new certificated entities and no changes in contract or tariff terms.

V. THE PROTESTORS ASSERTIONS REGARDING ANTITRUST CONSIDERATIONS ARE UNFOUNDED

The Joint Protestors also assert that the Commission is "required pursuant to 854(b)(3) to consider whether this transaction will have an adverse impact on competition and whether the transaction raises antitrust concerns…."[32] To put it simply, these assertions are completely unfounded and contrary to existing law and practice at the Commission.

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[29] *Id.* at *39.

[30] *Id.* at *40.

[31] *Id.* at *44.

[32] See Joint Protest at p.3.

As discussed above, the Commission and the legislature have been clear that the criteria used to evaluate transactions set forth in Sections 854(b) and (c) are mandatory for transactions involving utilities with more than $500 million in annual California revenues. This transaction, even if the Commission were to combine the revenues of all the Level 3 and CenturyLink Operating Entities, does not even begin to approach that figure. The Joint Protestors cite no Section 854(a) decision to support their assertion regarding anti-trust considerations. Instead, they rely on a 1971 case involving the Commission's grant of a CPCN to PG&E to construct a geothermal plant despite contentions that the contracts under which the utility company planned to purchase steam violated federal and state antitrust laws.[33] On review, and despite PG&E's arguments to the contrary, the court annulled the Commission decision and instructed it to consider the antitrust issues in the context of granting the CPCN to construct the plant. The court made it clear that such considerations were appropriate, when raised, in the context of determining whether a particular project was in the public interest and thus entitled to a CPCN. The case, however, does not require that anti-trust considerations be reviewed in every application for approval of an 854(a) transfer of control.

Moreover, the Protestor's insinuation that the transfer of control will somehow create a dominant market player by virtue of the Transaction[34] is also demonstrably false. Indeed, the insinuation is directly contradicted by the facts presented in the Joint Application and in the Commission's recently concluded Competition Docket. As noted above, the annual California revenues of all of the Level 3 Operating Entities combined do not even reach the $500 million

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[33] See Joint Protest at p. 3 citing *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal. 3d 370, 377, 1971 Cal. LEXIS 259 at **377-381.

[34] See e.g., Joint Protest at p. 1 ("However, the Proposed Transaction would make CenturyLink one of the largest providers of enterprise and backhaul service in California.").

threshold set by the Commission to distinguish carriers whose applications warrant more in-depth review under Sections 854(b) and (c). The CenturyLink Operating Entities' California revenue is only a fraction of that combined figure and still falls well below $500 million even when combined with Level 3 revenues. Thus, even if the entities were all viewed as one entity, they do not constitute a dominant market force, or a provider with any particular market power, by any definition. Moreover, the Commission has already determined that the legacy carriers dominate this market (e.g., backhaul, long haul, enterprise, etc.) in a material way. [35] It is simply not credible to assert that this Transaction involving these non-dominant carriers, in and of itself, alters that reality.

VI. THE ATTEMPT TO IMPOSE ONEROUS COMMITMENTS IN THE CONTEXT OF AN APPLICATION TO TRANSFER INDIRECT CONTROL OF NON-DOMINANT CARRIERS SHOULD BE REJECTED

Perhaps even more strikingly, the Protestors' oft-repeated assertions that California-specific commitments are required for approval of the 854(a) transfer of control are wholly meritless. [36] There is nothing in the law or any statute that requires such commitments be made as a condition of approval for the transfer of control of non-dominant carriers and the Protestors cannot point to one. Moreover, there is no requirement for any CLEC or NDIEC in any context to satisfy or otherwise meet the commitments set forth in the Protests which are summarized below:

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[35] See n. 9, supra.

[36] See e.g., Joint Protest at p. 2 ("The Joint Applicants must make concrete California-specific commitments…."); see also id. at p. 3 ("…the Commission must require the Joint Applicants to submit more information demonstrating California-specific benefits and commitments…"; id. at 4 ("The Commission must investigate these issues and obtain Joint Applicants' written assurances that …"); id. at p. 6 ("The Commission must require the Joint Applicants to make California-specific commitments to ensure tangible public benefits…").

- make particular investments in unserved and underserved areas;
- submit additional outage reports beyond those covered by GO 133-D;
- freeze unregulated prices;
- expand on the provisions of General Order 156 with respect to diversity issues; or
- commit to maintaining any particular workforce level in California.

The requirements for obtaining and maintaining a CPCN in California are clearly set forth by the Commission and none of them include or even reference the commitments identified by the Protestors.[37] Nor should any these items be required. If they were, the barriers to entry in the state would be significant – and the impact on competition would be devastating - as carriers would find themselves suddenly subject to a raft of new obligations which apply specifically to them and, in the case of the Level 3 Operating Entities, would apply only to them and not to similarly situated competitors in the wholesale and enterprise markets.

Instead, the Protestors' list of "minimum" commitments which they assert "must" be met to meet the "no adverse impact" standard seems to be little more than a wish list of issues that they would like to see further promoted at the Commission. Indeed, the issues identified by the Protestors are currently the subject of existing programs or General Orders (e.g., CASF, diversity procurement, NORS reporting, deregulation of competitive rates) and ongoing proceedings[38] or are simply outside the scope of any Commission rule or statute (employment freezes). Although each of the subjects on the Protestors' list may, in and of itself, touch on a worthy public policy

[37] See Commission Website re Registration and Certification at http://www.cpuc.ca.gov/General.aspx?id=1019

[38] See e.g., General Order 133-D, General Order 156, CASF Program (http://www.cpuc.ca.gov/casf/); *see also, In re Rural Call Completion*, D.16-12-066 at Ordering Paragraph 20 (new outage reporting for certain carriers not including Level 3 or CenturyLink Operating Entities).

goal, the appropriate forum for expanding those programs or policies is in the context of a rulemaking or perhaps California legislation that would apply equally to all carriers – not just those with a pending 854(a) application. It is neither legally appropriate nor practical (nor efficient) to try and impose these additional burdens on non-dominant carriers who are, in essence, transferring parent companies and creating a more viable competitive alternative to the legacy carriers and large cable providers that so often seem to be the cause of concern for the Protestors and the Commission.

The Joint Protestors are aware that in the context of mergers of large, dominant California carriers the Commission has imposed affirmative conditions/commitments on carriers. Indeed, oftentimes those commitments arise in the context of settlement agreements with these very same Protestors. CETF in particular points to a number of such mergers, e.g. Verizon/Frontier, Charter/Time Warner Cable, ATT/Direct TV, Comcast/NBC Universal.[39] However, all of these mergers involve either legacy carriers or carriers that provide direct service to residential consumers. Leaving aside that the ATT/Direct TV and Comcast/NBC Universal have nothing to do with this Commission or Section 854(a) transfers, those mergers are completely unlike the Application at hand.

VII. THE PROPOSED COMMITMENTS ARE INAPPLICABLE TO AN 854(a) APPLICATION AND IGNORE THE FUNDAMENTAL NATURE OF THE LEVEL 3 OPERATING ENTITIES' OPERATIONS

The concept that commitments sought by the Protestors are required in an 854(a) application for non-dominant carriers is not only legally infirm, it also fails to recognize the fundamental nature of the Level 3 Operating Entities' business and existing obligations under the law.

[39] See CETF Protest at pp. 9-10.

- Investment in Underserved or Unserved Areas. While the Joint Applicants agree that that providing broadband to unserved or underserved areas is a worthy public policy, requiring carriers to build facilities unrelated to and even inconsistent with demand or their existing business plans is not the way to achieve those goals; especially not in the context of an 854(a) application. As CETF notes, the Commission already has in place programs such as the California Advanced Services Fund ("CASF") to provide loans and grants to entities that want to provide broadband services in rural unserved and underserved areas.[40] The Commission or the legislature may decide to institute new programs or to make more public funds available so that broadband is more economically viable in those areas[41] but that is an issue beyond the scope of this Joint Application.

Moreover, as noted above, the Level 3 Operating Entities are non-dominant carriers (by any measure) and provide services to wholesale and enterprise customers only.[42] They provide their customers with the ability to access the internet over a mix of facilities including long haul, middle mile, and (for enterprise customers) last-mile facilities. *They do not provide last-mile facilities to residential consumers*; they provide service to those entities that do provide last-mile connections to consumers or to enterprise customers. Thus, where there is sufficient demand, a last-mile provider or an enterprise customer may contact Level 3, legacy providers, or another competitive provider to determine which network and pricing are appropriate and economical. If so, Level 3 responds by providing the necessary services and facilities to support them. It would

[40] CETF Protest, at p. 7-8.

[41] The Joint Applicants note that most public funding for broadband deployment is generally restricted to last-mile providers. *See e.g.,* D.14-02-018 at Appendix 2 (Broadband Infrastructure Grant Account and Revolving Loan Account– Revised Application Requirements and Guidelines)

[42] As noted above, with the exception of about 60 consumers in New Pine Creek, the same is true for the CenturyLink Operating Entities (who are not actually part of the Joint Applicants).

be wasteful and counterproductive to the public interest (if not unlawful), to require Level 3 to build a middle-mile facility unless there is a last-mile provider (or an enterprise customer) with sufficient demand and demonstrated need to utilize such a facility. If Level 3 Operating Entities are required to divert resources to build an under-utilized middle mile facility in a rural area, its ability to channel resources to productive uses for wholesale or enterprise customers will be hampered as will its ability to compete with the major providers of these services in the state.

With that said, the Combined Company fully expects to continue to make significant capital investments in the state as both CenturyLink and Level 3 have done for years.[43] By integrating their operations, they will also be better able to coordinate network planning and engineering to offer new advanced services and maximize facilities deployment. This will help create a more robust, non-affiliated[44] competitor to the large incumbent and cable providers (e.g., AT&T, Verizon, Comcast) in the state[45] and is otherwise consistent with the concerns noted in the Commission's recent Competition Decision.

- Rate Freeze. As the Commission has recognized, the California broadband/backhaul market is still dominated by the legacy carriers. Forcing the Joint

[43] See Joint Application at Confidential Exhibit I for a summary of CenturyLink's and Level 3's cap-X investment in California. As noted in the exhibit, the companies have not yet developed 2017 specific capital expenditure plans for California as expenditures to deploy network or expand on-net building inventory are based on successful sale of services that – by definition - cannot be predetermined.

[44] *See, e.g.*, D.16-12-025, *supra*, at p. 107 (noting concern with ILEC's providing backhaul to affiliated wireless carriers and noting that even now, "…cable and other providers of backhaul supply about 15-20 percent of that market, still leaving one legacy carrier supplying backhaul to a majority of cell towers statewide.")

[45] *See, e.g.*, *id.* at p. 99, n. 262 ("…special access/BDS services are largely, but not completely, in the hands of the incumbent carriers…); see also id. at p. 104 ("The FCC has found that (i) legacy carriers still exercise considerable market power in the special access market, with ILECs and their affiliates accounting for $37 billion of the $ 45 billion in national BDS revenue…); see id. at p. 82 ("The two largest ILECs provide approximately 4.2 million wireline business connections, more than the largest CLECs and cable companies combined.")..").

Applicants to freeze their unregulated rates in California (a commitment the Protestors seek on top of the existing commitment in the Application to honor all contracts after the transaction) would artificially limit their flexibility to compete effectively with the dominant carriers in market. Indeed, it would have the effect of preventing one competitor from responding to market changes while leaving the major providers free to adjust their rates as the market allows. Such a result seems directly in conflict with the legislature's "clear desire" to promote the availability of a wide choice of state-of-the-art services through pro-competitive policies.[46]

- Diversity Procurement and Outage Reporting. The Level 3 (and CenturyLink) Operating Companies already comply with the requirements of General Order 156 (diversity procurement) and 133-D (outage reporting). To the extent those General Orders are modified by the Commission, the certificated entities will continue to comply as required. To impose new and additional requirements on the Joint Applicants as suggested by the Joint Protestors is both unwarranted and discriminatory. Again, this Application is not the appropriate forum to address the broad policy concerns of the Joint Protestors.[47]

- Workforce Levels. Finally, the proposed commitment not to reduce the net workforce is unreasonable. It is a given that workforces fluctuate for a number of reasons (e.g., attrition, retirement, performance issues, changing economic circumstances) and that competitive carriers require flexibility to meet the fluctuating demands of a competitive market. That said, the Joint Applicants note that the post-merger company would have no reason to eliminate any jobs

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[46] *See e.g.,* D. 06-08-030, *supra*, 2006 Cal. PUC LEXIS 367, at *250 ("the California Legislature calls upon us to support deployment of advanced telecommunication services and infrastructure through pro-competitive policies."); Cal Pub. Util. Code Section 709(c). Joint Applicants have no plan to increase rates, or to otherwise alter regulated terms and conditions of service post-merger.

[47] *See e.g., Rural Competition Docket*, I.14-05-012, *Phase II Scoping Memo* (March 6, 2017)(identifying scope of issues including those related to outage reporting and monitoring of "the development of guidelines to ensure that transfers or mergers do not compromise safe and reliable service.").

where doing so would degrade its services or network quality. To act otherwise would be to undercut the business itself.

VIII. THE BENEFITS OF THE TRANSFER OF CONTROL ARE SIGNIFICANT

The Joint Protestors and CETF assert that the Joint Application does not adequately identify the benefits of the Merger Transaction. Leaving aside their reliance on an incorrect standard of review, their assertion is completely at odds with the facts of this Application. As discussed more thoroughly in the Joint Application, some of the key benefits are as follows:

- The Transaction will not have any adverse effect on, and will otherwise be seamless to, the Level 3 Operating Entities' customers. For example, each of the Level 3 Operating Entities will continue to operate as they do today and provide services under their existing contracts and/or tariffs. The customer service, network and operations functions that are critical to Level 3 Operating Entities' success today will continue when the Transaction is complete.

- The Level 3 Operating Entities will continue to be operated by highly experienced, well-qualified management, operational and technical personnel which are in and of itself a benefit to the State's telecommunications market. There is no anticipated change in the daily management or operations of these companies at this time.

- The underlying proposed merger will facilitate competition in the state by combining the financial and technical resources of both companies who have, as noted above, expect to continue to make significant capital investments in the state to serve its existing and future customers as they have done for years.

- The operating entities will be able to augment and rationalize existing facilities to further ensure route diversity (thereby increasing security for enterprise and wholesale customers), and provide on-Net capabilities on a national and global level and even more attractive offerings to their respective customer bases; i.e., the enterprise (*i.e.* business customer) market which is "critically important" to the California economy.[48]

- CenturyLink and Level 3 also will be better able to assure network quality and maintenance standards by relying more on owned fiber, either by reducing overlapping leased

[48] D. 16-12-025, *supra*, Finding of Fact 30. As is to be expected with a merger of this sort, no particular California specific plans regarding either the network or combined service offerings have been developed at this early stage. The companies will have to close the transaction in order to develop network plans and new service offerings in the integration process post-close. These activities cannot be completed at this stage of the transaction in the normal course as the companies remain separate legal entities until the transaction closes.

facilities or transitions to the owned facilities of the other.[49] Again, this will benefit enterprise and carrier customers and thus the overall state of the California economy.

- The Commission will retain the same regulatory authority over the Level 3 Operating Entities (as well as the CenturyLink Operating Entities) that it currently possesses. Thus, the Commission's ability to monitor and regulate the Level 3 Operating Entities, as well the respective regulatory obligations of those entities (e.g., reporting, user fees, surcharges, etc.) will remain unchanged.

In brief, the benefits that fall to California from this particular transaction dictate that under any reasonable application of the criteria used to establish that an 854(a) application is "not adverse to the public interest" this Joint Application should be granted.

IX. THE ALLEGATIONS REGARDING LEVEL 3'S ALLEGED UNFAIR BILLING PRACTICES ARE INAPPROPRIATE AND UNSUPPORTED

The CETF Protest alleges that Level 3 is somehow engaged in some type of unfair billing practices or predatory pricing. Such allegations are not only unfounded, they are also misleading.

As an initial matter, Level notes that it, just like any other carrier, bills carriers for charges, and often those carriers dispute Level 3 invoices in accordance with contractual/tariffed billing procedures. Likewise, Level 3 receives invoices from carriers for infrastructure and services and may, from time to time, have a good faith basis to dispute charges on bills. Level 3 works with carriers to then explain and resolve those disputes. The payment issues raised by Frontier, Fairpoint and Windstream in their FCC filings are billing issues (many of which are related to controversial intercarrier compensation issues) between these companies which are well within the industry norms of day-to-day give and take in the industry. For example, Frontier filed reply comments at the FCC alleging Level 3 has not paid certain bills and

[49] Information about CenturyLink's and Level 3's fiber route miles and on-net/off-net buildings was attached to the Joint Application as Confidential Exhibit K.

purportedly disputes a disproportionate percentage of its bills. Although confidential discussions among carriers regarding billing disputes are not properly the subject of an application to transfer control, Level 3 notes that its billing teams meet with their billing counterparts on a regular basis to resolve open billing disputes In brief, the use of protests to highlight these types of issues seems questionable at best.

The Joint Applicants further note that none of the entities CETF identifies in its protest, Windstream, Frontier, Fairpoint or CENIC, filed protests to this Joint Application and CETF does not indicate that it is somehow acting on its behalf. In other words, CETF is merely repeating comments made by other parties in another context to try and raise doubts about the Joint Application. The Joint Applicants suggest that such a practice should not be condoned or otherwise given any weight.

X. PROCEDURAL MATTERS

As explained in the Joint Application, the Joint Applicants seek an expedited resolution of this matter.[50] The transfer of control is part of a large $34 billion global merger which will bring benefits to consumers in California and throughout the country including many states where CenturyLink is the ILEC and not a non-dominant carrier as it is here. To date, the Joint Applicants have received the necessary approvals from ten (10) state commissions with several others expected to follow shortly. The Joint Applicants also understand that the FCC/DOJ review is proceeding in a timely manner. At this point, the Joint Applicants expect to have regulatory approval from the FCC and all other states by the expected close date of September

[50] See Joint Application at Section VII.

30 although the timetable in California is at best unclear at this point. The consequences of delay are not insignificant.[51]

The Protestors have in essence asserted that they believe that the Commission should utilize a standard for reviewing the Joint Application that would impose new and burdensome obligations on non-dominant carriers that they are not otherwise required to provide. However, regardless of the merits of their position, the primary issue seems to be a legal one; i.e., what standard should be applied and do the facts satisfy that standard. The facts surrounding the Transaction, and its impact (or lack of any adverse impact as the case may be) on California are set forth clearly in the Joint Application. *There are no additional facts and there is no credible dispute about the facts that have been presented*. Thus, the Joint Applicants suggest that this matter proceed without hearing based on the papers submitted so that the matter can be voted on by the full Commission no later than the September meetings.

In the meantime, the Joint Applicants commit to continue working productively with the Joint Protestors and CETF in an effort to resolve their concerns and, if possible, to bring a settlement forward to that end.

[51] As noted previously, the Transaction is expected to close by September 30. Meeting this closing deadline requires satisfaction of all conditions precedent to effectuating the Merger, as spelled out by the Parties' Merger Agreement. These conditions precedent include a requirement to obtain all necessary regulatory approvals and consents. Section 9.1(b) of the Parties' Merger Agreement establishes a Termination Date for the Agreement of October 31, 2017, if all conditions precedent to closing have not been satisfied or the agreement has not otherwise been extended. A delay in closing could result in ticking fees and interest expense associated with the new acquisition debt for an extended period before receiving the additional revenues from the transaction. In addition, the financial consequences of any potential delay are not only contractual, they are also market-based and include, but are not limited to, such impacts as the failure of both customers and shareholders to benefit from the increased free cash flow, improved network efficiencies, and ability to deploy infrastructure and increase/improve service offerings over time.

XI. CONCLUSION

For the reasons stated above, Applicants respectfully submit that the Protests should be rejected and the Joint Application should be granted on an expedited basis.

Respectfully submitted this 15th day of May, 2017.

/s/

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