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)

REPLY COMMENTS OF THE JOINT APPLICANTS TO THE CALIFORNIA EMERGING TECHNOLOGY FUND'S COMMENTS ON PROPOSED DECISION APPROVING TRANSFER OF CONTROL AND SETTLEMENT

Kristie Ince
Level 3 Communications
Vice President State Public Policy
1025 Eldorado Blvd.
Broomfield, CO 80021
Tele: 972.455.7833
Email: kristie.ince@level3.com

Jeffrey L. Lindsey
CenturyLink, Inc.
VP Regional Regulatory and Legislative Affairs
20 East Thomas Road
Phoenix, AZ 85012
Tele: 602.630.1942
Email: jeffrey.l.lindsey@centurylink.com

[continued on next page]

Catherine Wang, Esq.
Danielle Burt, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20006
Tele 202.739.3000
Fax: 202.739.3001
E-mail: catherine.wang@morganlewis.com
danielle.burt@morganlewis.com

Anita Taff-Rice
iCommLaw
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Tele: 415.699.7885
Email: anita@icommlaw.com

On Behalf of Level 3 Communications, Inc. and the Level 3 Operating Entities

Norman G. Curtright
Senior Counsel
CenturyLink, Inc.
20 East Thomas Road
Phoenix, AZ 85012
Tele: 602.630.2187
Email: norm.curtright@centurylink.com

Leon M. Bloomfield
Law Offices of Leon M. Bloomfield
1901 Harrison St., Suite 1400
Oakland, CA 94610
Tele: 510.625.1164
E-mail: lmb@wblaw.net

On behalf of CenturyLink, Inc. and the CenturyLink Operating Entities

Dated: October 3, 2017

Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, Joint Applicants[1] submit these Reply Comments to the California Emerging Technology Fund's ("CETF") Comments on the Proposed Decision ("PD"). The Joint Applicants respectfully submit that CETF's comments should be given no weight because they fail to comply with the Commission's rules and improperly rely on extra-record information.

Rather than identifying errors in the Commission's legal reasoning or factual recitations in the PD, as required,[2] CETF primarily repeats its criticism of the $323 capital expenditure commitment in the settlement agreement between the Joint Applicants and the Office of Ratepayer Advocates ("ORA"), the Utility Reform Network ("TURN") and the Greenlining Institute ("Greenlining") ("collectively Consumer Advocates"). Indeed, the single instance in which the CETF comments actually use the word "err" is when they criticize (incorrectly) the PD as "one-dimensional" and "myopic" for applying only Section 854(a)[3] to evaluate the proposed transfer of control.[4]

Oddly, CETF urges that the heightened public benefit standard in Section 854(b) and (c) should apply[5] despite admitting "[i]t is undisputed that such [Joint Applicants'] revenues are less than the $500 million threshold for application of Sections 854(b) and (c)."[6] The PD correctly declines to "apply" those subsections because, as it notes, the Joint Applicants' combined intrastate California revenues "are less than half of the $500 million threshold that applies for purposes of § 854(b) or (c) . . . and the more rigorous standard of § 854(b) and (c) does not apply." Perhaps because CETF acknowledges that Sections 854(b) and (c) do not "apply" (*i.e.* each and every factor must be met) CETF

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[1] 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) (collectively the "Level 3 Operating Entities"); CenturyLink, Inc., the post-merger ultimate parent of the Level 3 Operating Companies; and Level 3 Communications, Inc., the current ultimate parent of the Level 3 Operating Entities ("Joint Applicants").

[2] Rule 14.3(c) requires comments to address legal or factual errors with citation to the record. CETF acknowledges that it "is not able to refer this Commission to record evidence," and instead its comments refer to non-public information in the Commission's competition docket, as the basis for its criticism of the PD.

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

[4] *See* CETF Opening Comments, at p. 1.

[5] CETF Opening Comments, at p.8.

[6] CETF Opening Comments, at p.4.

falls back to an argument that "some criteria" from subsections (b) and (c) should have been taken into consideration.[7] But that is precisely what the PD did. Even though Sections 854(b) and (c) do not apply, the PD determined that the settlement agreement between the Consumer Advocates and Joint Applicants exceeds the standard in Section 854(a) (i.e. that "the transfer of control has no adverse impact on the public interest" (*i.e.* Section 854(a)) and "provides tangible California-specific benefits . . . beyond what the Application offered" (*i.e.* benefits consistent with Section 854(b) and (c) factors).

For example, as the PD notes,[8] the Joint Applicants agreed that their capital expenditures for the next three years "shall be no less than $323 million" including a $3 million commitment to replace multiplexer equipment in locations that have experienced multiplexer outages.[9] Further, the Joint Applicants committed to maintain existing customer contracts unchanged.[10] Although the PD correctly determined that Sections 854(b) and (c) are inapplicable, these commitments address the issues in Section 854(c)(2) and (c)(6), which concern whether the transfer of control will "maintain or improve the quality of service to public utility ratepayers in the state," and whether it will "be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility."

The Joint Applicants' commitment to provide progress reports on their capital expenditures, California-specific synergy savings, number of California employees, supplier diversity, network outages based on expanded criteria, commencement of any FCC investigation of alleged switched access charge arbitrage, and prior notice if dark fiber leasing will be terminated,[11] address the factors in Section 854(c)(7) to preserve the ability of the Commission to effectively regulate and audit the combined entity.

Beyond the settlement agreement conditions, the PD notes the record establishes that "the proposed change in ultimate ownership will not adversely impact its operations or financial status" and that "CenturyLink, has sufficient managerial and technical

[7] *Id.*, at p.5.
[8] PD, at pp. 3, 17.
[9] Settlement agreement at ¶¶1, 3, 5.
[10] Settlement agreement at ¶5.
[11] Settlement agreement at ¶¶2, 4, 6, 7, 8, 9, 10, 11.

expertise and sufficient financial resources to operate the acquired carrier."[12] These showings, which are critical to the evaluation of any Section 854(a) application such as here, where the acquiring company is not a regulated entity, address the factors in Section 854(c)(1) and (c)(3) to "maintain or improve the financial condition of the resulting public utility doing business in the state" and "to "maintain or improve the quality of management of the resulting public utility doing business in the state."

CETF's complaint with the PD then, cannot be that it fails to "take into consideration *some* criteria from Sections 854(b) and (c) to give context,"[13] but rather that the PD doesn't use CETF's *preferred* criteria, some of which do not appear in the statute. For example, CETF faults the PD for not requiring the Joint Applicants to "commit to significant voluntarily broadband investments in the state."[14] CETF then "cites" a statutory provision that doesn't exist:

> The PD errs in not taking into consideration three factors from Sections 854(b) and (c) in assessing the public interest benefits relating to Joint Applicant's commitments: (1) the short term and long term economic benefits to ratepayers; (2) whether it maintains ***and*** improves the quality of service ***for broadband users***; and (3) whether the merger will be beneficial on an overall basis to the state and local economies and to the communities in the areas served by the resulting provider.[15]

Even though Section 854(b) and (c) are inapplicable, the PD considers Joint Applicant commitments that clearly provide benefits that impact "the short and long term economic benefits to ratepayers" and are "beneficial on an overall basis to the state and local economies and to the communities in the areas served by the resulting provider." CETF's second "preferred" factor, however, is a creation. The actual language in Section 854(c)(2) is whether a merger will "[m]aintain ***or*** improve the quality of service ***to public utility ratepayers in the state***," so the actual language is disjunctive and it does not mention "broadband users". While the Joint Applicants appreciate CETF's advocacy on increasing access to broadband in under and unserved areas, a worthwhile public policy

[12] PD, at p. 32.
[13] CETF Opening Comments, at p. 5.
[14] CETF Opening Comments, at p. 8.
[15] CETF Opening Comments, at p. 8 (emphasis added).

goal does not justify re-writing the statute and then alleging the PD has erred by failing to apply the newly minted language.

Similarly, CETF would have the Commission do a "market power"[16] analysis but then "strongly disagrees"[17] when the PD determines that the Joint Applicants lack significant marker power, based on their combined California intrastate revenues[18] even though that is the explicit statutory criterion.[19] Instead, CETF would have the PD rely on "facts" of highly questionable relevance that are not in the record of this proceeding and some of which are confidential and therefore could not be known to CETF.

For example, CETF cites from a portion of a statement in D.16-12-025, which analyzed the general state of competition in the California telecommunications industry, that the backhaul market is highly concentrated in three firms, with a "legacy" firm controlling over half of the cell site backhaul for the big four wireless carriers.[20] CETF points to no "fact" from the record in this proceeding indicating that Level 3 or CenturyLink provide cell site backhaul, but even if they did so, such point might be relevant to market power only if Level 3 or CenturyLink was the "legacy" carrier referenced (which they are certainly not) and the number two firm. CETF cannot know whether either company even provides wireless backhaul, much less their size in that market, from D.16-12-025 because the data regarding the backhaul providers was deemed "Highly Confidential" and therefore the Commission did not identify the carriers' names.[21] CETF then goes even further afield by attempting to rely on comments

[16] CETF Opening Comments, at p. 5.
[17] CETF Opening Comments, at p. 5.
[18] PD, at p. 27. CETF appears to argue that reliance only on intrastate California revenues is in error, but the express language of the statute "gross annual California revenues" and numerous Commission orders make clear that the analysis is limited to such revenues. *See e.g.*, 2002 Cal. PUC LEXIS 845, *4 (Sections 854(b) and 854(c) inapplicable because annual intrastate revenues generated by SureWest-California's utility companies in California are less than $5 million.")
[19] Under Section 854(b)(3), analysis of potential anticompetitive effects of a proposed transfer of control is not required if the intrastate revenues of the applicants are below $500 million.
[20] CETF Opening Comments, at p. 5-6 (*citing* D.16-12-025, at p. 108-109.
[21] D.16-12-025, at p. 108, n.288. The Joint Applicants strongly disagree that the combined company will have market power over dark or lit fiber in California, but any such issues were fully addressed in their settlement with the Department of Justice filed October 2, 2017. For purposes of California, that settlement prevents any substantial effect on competition by requiring Level 3 to divest 12 pairs of fibers between two sets of California cities, and three interstate routes with an end point in California.

from Telnyx, LLC that were explicitly rejected by Judge DeAngelis during the pre-hearing conference because they were filed on August 7, 2017, more than three months after the deadline for protests on the application.[22] The PD properly does not refer to the Telnyx comments, and it would be legal error to rely on any of its allegations because the Commission is required to base its decisions solely on the record of the proceeding.[23]

Finally, CETF criticizes the settlement agreement as inadequate because the $323 million capital expenditure commitment is purportedly "business as usual" and does not allocate $300 million for CETF to allocate. Again, CETF attempts to create its own standard. The actual factor in Section 854(c)(2) is whether a merger will "[m]aintain ***or*** improve the quality of service to public utility ratepayers in the state. Even if $323 million were "business as usual," (which it is not) it is certainly sufficient to *maintain* quality of service. The Joint Applicants note that as non-dominant carriers in California they are not required to invest any specific amount in their California networks. Committing three years in advance to spend hundreds of millions of dollars is anything but business as usual and California is the only place in the nation or world where the Joint Applicants made such commitment.

Further, the demand that an additional $300 million be spent in California is based on CETF's mistaken assertions about the Joint Applicants' worldwide market capitalization. As recognized by the PD, market capitalization is not relevant to the evaluation of the Application and CETF cites to no statutory or Commission authority to the contrary. The PD is correct to reject CETF's demand, which it wants to carve out for its own preferred projects rather than working with the Joint Applicants and Consumer Advocates in post-closing workshops to identify suitable public interest projects in under and unserved areas.

Signed and Dated at Walnut Creek, CA on October 3, 2017.

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[22] Pre-hearing conference transcript, 20:26-21:8 (excerpt attached as Exhibit 1).

[23] Section 1701.3(j); Rule 8.3(k) ("The Commission shall render its decision based on the evidence of record."); *see e.g.* D. 15-04-024, at p. 173-174 (issued April 9, 2015)(mimeo).

Respectfully submitted,

/s/ Anita Taff-Rice

Leon M. Bloomfield
Law Offices of Leon M. Bloomfield
1901 Harrison St., Suite 1400
Oakland, CA 94610
Tele: (510) 625.1164
E-mail: lmb@wblaw.net

Counsel for CenturyLink, Inc. and the CenturyLink Operating Entities

iCommLaw
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Tele: 415.699.7885
Email: anita@icommlaw.com

Counsel for Level 3 Communications, Inc.and the Level 3 Operating Entities