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 THE MOTION FOR APPROVAL OF SETTLEMENT

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Dated: July 25, 2017

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OF THE STATE OF CALIFORNIA

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I. INTRODUCTION

Pursuant to Rule 12.2 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), the Joint Applicants[1] submit these Reply Comments to the California Emerging Technology Fund's ("CETF") Comments filed on July 21, 2017 in

[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 (collectively referred to as the "Joint Applicants)

response to the pending Joint Motion for Approval of Settlement.[2] The Joint Applicants respectfully submit that nothing in CETF's comments justify rejecting the Settlement Agreement, denying the transfer of control or otherwise delaying this proceeding. [3]

Rather, CETF asks the Commission to reject and rewrite the Settlement Agreement to CETF's satisfaction and carve out a greater role in post-transaction activities for itself. CETF's criticism is based on an incorrect application of the legal standard for approval of settlements and transfers of control, its misinterpretation of the substantial capital expenditure commitment in the Settlement Agreement, and its unfounded and unsupportable notion that the Joint Applicants should devote more than half of their historical annual California capital expenditures to projects that further CETF's mission rather than focusing investment on creating a stronger competitor serving enterprise and wholesale customers in California. Such approach is not required by the law, is wholly inconsistent with sound business practices, and is based entirely on comparisons to commitments made in completely dissimilar mergers.

CETF's primary criticism of the Settlement Agreement is that the commitment to spend $323 million in California over three years is "merely aspirational" and too small when compared with mergers of market dominant ILECs and/or cable companies in recent years.[4] Its conclusion is based solely on the Joint Applicants' total worldwide market capitalization, a criterion not set forth in the law or Commission orders, and CETF's insistence that the Joint

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[2] The Joint Motion for Approval of the Settlement was submitted by the Joint Applicants and the other Settling Parties, i.e., ORA, TURN and Greenlining" (the "Consumer Advocates" for purposes of these motions). In light of the expedited filing deadline for reply comments set forth in the Joint Motion for Expedited Treatment, and the desire to resolve this proceeding as soon as possible, the Joint Applicants are filing these reply comments separate from any reply comments that may be submitted by the Consumer Advocates.

[3] In fact, as discussed more thoroughly below, many of the authorities that CETF relies on actually support approving the Settlement Agreement and the transfer of control.

[4] CETF Comments at pp. 10, 15.

Applicants' capital commitment must be comparable to financial commitments made by entities subject to the affirmative public interest requirements set forth in Section 854(b) and (c),[5] provisions of the code that are expressly inapplicable to the Joint Applicants.[6]

The Joint Applicants are discouraged that CETF either completely misapprehends the capital commitment in the Settlement Agreement, or is intentionally disregarding the unambiguous meaning of those terms and express provisions of the law in order to create leverage to obtain financial concessions from the Joint Applicants for CETF's favored projects. The explicit wording of the Settlement Agreement requires the non-dominant, competitive carrier Joint Applicants to make an extraordinary commitment to spend $323 million in capital investments in California over three years. The Settlement Agreement states, "Total California capital expenditures for calendar year 2018 through calendar year 2020 combined for CenturyLink and the Level 3 Operating Entities *shall be no less than* $323 million."[7] Such a commitment by competitive carriers like the Applicants is an affirmative benefit. The overwhelming majority of annual capital expenditures for the Applicants is driven by sales-based success and is not guaranteed or even routine regardless of past trends. Therefore, a commitment to any level of capital expenditure is significant and cannot be dismissed as meaningless. Further, the only aspirational element of the capital expenditure is the Joint Applicants'

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[5] All statutory citations refer to the California Public Utilities Code unless otherwise noted.

[6] Applicants' gross intrastate revenues alone or combined must exceed $500 million in order to trigger Section 854 (b) and (c), yet the record clearly establishes that their California revenues are less than half that amount.

[7] Joint Motion of the Office of Ratepayer Advocates, The Utility Reform Network, the Greenlining Institute and the Joint Applicants, Exhibit A (Settlement Agreement), at p. 5 (June 30, 2017) (emphasis added) [hereinafter cited as "Settlement Motion"].

agreement that they will attempt to front load the $323 million expenditure over the first two years (i.e., by the end of calendar year 2019), rather than over three years, as the Settlement Agreement permits.[8]

While CETF claims that it seeks an outcome that is "fair, appropriate and comparable",[9] its demand for an additional $250 - $300 million devoted solely to its own preferred projects is anything but. In the context of the scores of Section 854(a) approvals sought at the Commission, many of which were approved through the advice letter process on 30-day notice with no public interest commitments at all,[10] the Joint Applicants stand alone in their voluntary and explicit commitment to spend hundreds of millions of dollars on capital expenditures in California. Indeed, California is the only jurisdiction in the country, or the world, where the Joint Applicants have committed a specific and substantial capital expenditure in order to gain approval of its proposed transfer of control.

CETF also urges rejection of the entire $323 million capital expenditure provision in the Settlement Agreement, claiming it "fails to state adequate criteria for projects."[11] The Settlement Agreement, however, clearly identifies middle-mile fiber and points of presence as the type of public interest projects for which a portion of the $323 million will be spent.[12] The source of CETF's complaint actually is that the Settlement Agreement doesn't explicitly identify

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[8] *Id.*

[9] CETF Comments at pp. 12, 14, 15.

[10] See Section III, *infra*.

[11] CETF Comments at p. 15

[12] Settlement Motion, Exhibit A, at p. 5, ¶1 ("CenturyLink and the Level 3 Operating Entities will work with the CPUC Communications Division, TURN, ORA and Greenlining, to identify mutually agreeable locations where the companies will invest in new middle mile infrastructure and new points of presence . . . focusing on locations where unserved/underserved communities exist.").

projects it favors, such as communications facilities services at fair grounds that could be used for public safety purposes, or middle mile facilities for schools and libraries.[13] CETF's desire to promote its own vision of public interest projects does not indicate a flaw in the Settlement Agreement that needs to be rewritten. Instead, CETF should more properly seek to accomplish its objectives at the legislature rather than by extracting commitments from the Joint Applicants.[14] The Joint Applicants and Consumer Advocates intentionally identified broad categories of public interest projects so they would have maximum flexibility to identify and fund the most suitable projects. Rather than urge rejection of the capital expenditure provision, it would be more productive for CETF to participate in the post-closing workshop (as the Settlement Agreement expressly permits it to do)[15] at which it may propose public interest projects it believes are suitable for funding.

As discussed in detail below, the Joint Applicants have demonstrated that its Settlement Agreement with ORA and two prominent consumer groups is fair and reasonable in light of the entire record, and serves the public interest. Further, the Settlement Agreement far exceeds the requirement in Section 854(a) that the transfer not be adverse to the public interest. It sets forth not only concrete, enforceable California-specific commitments for capital expenditures, but also

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[13] CETF Comments at p. 14.

[14] As CETF is well aware, the legislature may – or may not - ultimately decide to institute new programs or to make more public funds available to existing ones (e.g., California Advanced Services Fund) in an effort to further address perceived broadband issues with respect to availability or affordability. See e.g., AB 1665 (proposed legislation seeking $330 million authorization to fund existing California Advanced Services Fund programs). https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB1665

Those issues, however, are well beyond the scope of the pending Motion for Approval of the Settlement or the underlying Joint Application for Transfer of Control.

[15] Settlement Motion, Exhibit A, at p. 5, ¶1 ("A workshop with these [Consumer Advocate] stakeholders and other Protestors to this proceeding, to discuss possible locations for expansion must be held no later than four months from the date of the closing of this transaction.")

commits to multiplexer replacement expenditures, contracting continuity, enhanced outage reporting obligations, increased diversity procurement goals and various reporting requirements.[16]

CETF, however, would have the Commission reject the collective experience and judgment of the settling parties and re-write the Settlement Agreement according to CETF's narrow and misguided view of what is required for the proposed transfer of control to serve the public interest. CETF is also apparently prepared to impose unnecessary and time consuming procedures on this proceeding to accomplish its objectives. CETF claims the record is "skinny",[17] yet it fails to identify a single piece of additional information it believes the Commission needs in order to evaluate the settlement or the transfer application. The Settlement Agreement is the product of months of discussions with the Consumer Advocates during which the Joint Applicants provided information verbally and in response to written information requests. The parties submitted almost 100 pages of detailed operational, technical and financial information that was provided to the Consumer Advocates (all of which was also provided to CETF with its Motion to approve the settlement). Thus, the record is significant and more than sufficient for the Commission to determine the reasonableness of the Settlement Agreement and the transfer.

CETF requests a pre-hearing conference and briefing schedule "on the legal issues relating the [sic] Section 854(a) and the standard of review for transfers of control involving non-dominant carriers."[18] A pre-hearing conference has already been scheduled for August 8, 2017 and as CETF

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[16] Settlement Motion, Exhibit A, at pp. 5-8.

[17] CETF Comments at p.4.

[18] CETF Comments at p.2.

acknowledges, it has already "argued extensively in its initial Protest"[19] about what it views as the proper application of Section 854, and it includes further briefing in its Comments. CETF fails to identify any specific aspect of Section 854 or any other legal issue that has not been fully briefed, thus further briefing at this late date would only be redundant. What is clear, however, is that adding an unnecessary briefing schedule will almost certainly delay resolution of the proceeding. CETF is well aware that the Joint Applicants need to close their transaction by September 30, 2017 in order to meet certain business imperatives.[20] The procedural tactics proposed by CETF seem calculated to achieve its own objectives rather than providing the Commission with anything needed to evaluate the requested transfer of control.

The Joint Applicants respectfully submit that the Settlement Agreement meets the well-established legal standard that it be reasonable in light of the entire record. Further, the Joint Applicants submit that the commitments in the Settlement Agreement and other benefits arising from the transfer of control more than satisfy the legal standard set forth in Section 854 that the transfer not be adverse to the public interest. Therefore, the Joint Applicants ask that the transfer application be approved expeditiously so that the transaction can close by the end of September.

II. APPLICABLE LAW

A. Legal Standard for Approving Settlements

The Commission has a long-standing and strong policy favoring settlements.[21] This policy supports many goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce

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[19] CETF Comments at p. 8 (*citing* CETF Protest at pages 4-5).

[20] CETF Comments at pp. 4-5.

[21] *See e.g.*, D.14-01-017; D.11-05-018; D.07-05-060; D.92-07-076; D.88-12-083.

unacceptable results. The Commission has held that "[a]s long as a settlement is reasonable in light of the whole record, consistent with the law, and in the public interest, it should normally be adopted.[22] In recognition of the puts and takes involved in negotiations between settling parties, the Commission's policy "weighs against the Commission's alteration of agreements reached through negotiation."[23]

1. The Settlement Agreement Meets the Commission's Legal Standard

The Commission has codified its standard for approval of a settlement in Rule 12.1(d), which requires the parties to demonstrate that the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.[24] The Settlement Agreement satisfies all three requirements of Rule 12.l(d) and should be adopted without modification as the resolution of all issues raised by Protestors in the proceeding.

First, the terms of the Settlement Agreement are reasonable in light of the whole record. The Settlement Agreement resolves multiple issues related to the Transaction that were raised by ORA, TURN, and/or Greenlining in this proceeding. The compromises represented by the terms of the Settlement Agreement are reasonable in light of the information provided by the Joint Applicants as part of the Application and in the context of settlement discussions.

Second, the Settlement Agreement is consistent with applicable law. The Joint Applicants and the Consumer Advocates agree that the commitments memorialized in the Settlement Agreement satisfy the public interest standard in Section 854 in that, among other things, the transfer of control has no adverse impact on the public interest and otherwise provides

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[22] *See e.g.*, D.14-08-011, 2014 Cal. PUC LEXIS 360, at *26-27 (Aug. 14, 2014) (*citing* (D.06-06-014 and D.90-08-068.)

[23] D.06-06-014 at p. 12 (mimeo).

[24] Rule 12.1(d).

tangible California-specific benefits.[25] Chief among these benefits is the Joint Applicants' commitment to spend $323 million in capital expenditures in California over the next three years. Such investment will include, among other things, new facilities to underserved and unserved areas. Moreover, CETF – the only non-settling party has the explicit right to participate in workshops that will be held between the Joint Applicants and Consumer Advocates to identify projects for such investment.[26] The Commission – and the Consumer Advocates - will also receive significant ongoing information regarding the combined company's operations in California regarding network reliability, outages, diversity procurement and capital expenditures.[27]

Third, as the above discussion confirms, the public interest supports adoption of the Settlement Agreement. The conditions set forth in the Settlement Agreement address the concerns raised by the Consumer Advocates in a manner that is acceptable to the Joint Applicants and the Consumer Advocates. In its comments, CETF provides a detailed description of its expertise in encouraging broadband deployment,[28] but it provides no support to demonstrate that it is in a better position to determine the public interest than the Consumer Advocates and the Communications Division.

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[25] As noted in the Joint Motion to Approve at pp. 6-7, the Settling Parties did not come to consensus on what particular criteria or commitments, if any, are *required* by applicable law but they did agree that the commitments made in the Settlement Agreement satisfied any applicable public interest standard.

[26] Settlement Motion, Exhibit A, at p. 5, ¶1 ("A workshop with these [Consumer Advocate] stakeholders and other Protestors to this proceeding, to discuss possible locations for expansion must be held no later than four months from the date of the closing of this transaction.")

[27] The Joint Applicants are willing to provide CETF with the capital expenditure reports provided for in the Settlement Agreement and to agree to that as a condition of the approval of the pending application. See CETF Comments requesting copies of reports, at p. 16.

[28] CETF Comments at pp. 2-3, 10-11.

2. CETF Fails to Demonstrate That the Settlement Agreement Should Be Modified or Rejected

CETF claims that the Commission should override the settling parties' efforts and rewrite the portion of the Settlement Agreement related to capital expenditures. It raises no objection to any other portion of the Settlement Agreement. CETF's criticism is unfounded and misplaced and should be rejected.

a. CETF Fails to Demonstrate that the Settlement Agreement is not Reasonable

CETF claims that the Settlement Agreement is not reasonable in light of the whole record, but it fails to point to anything in the record that suggests the Settlement Agreement is not reasonable. Instead, CETF complains that "only the skinniest factual record has been established."[29] Such a statement, however, is completely at odds with the record. As discussed above, the Joint Applicants submitted almost 100 pages of detailed factual information about its operations, network and finances (including information regarding revenues, customer counts, fiber miles, network maps, on-net buildings and capital expenditures) as exhibits to the Application and supplemented that with additional information in response to inquiries from the Consumer Advocates. All of this information has been made part of the record (and otherwise provided to CETF). In addition, the Settlement Agreement is indisputably the product of months of discussions with the Consumer Advocates during which the Joint Applicants provided information verbally and in response to written information requests. CETF does not identify a single bit of information that it believes is missing. Further, the Joint Applicants voluntarily provided responses to CETF's information requests and CETF did not ask for anything further. CETF cannot now reasonably claim that the record is too "skinny" to determine whether the Settlement Agreement is reasonable in light of the record.

[29] CETF Comments at p. 4.

b. CETF Fails To Identify Any Inconsistency With the Law

CETF claims that the Settlement Agreement is not consistent "with recent Commission communications transfer of control cases where *explicit public benefits* were made conditions of Commission approval and were enforceable by the consumer interest groups who secured the public benefits on behalf of consumers."[30] As discussed more thoroughly below (see Section II.B.3), CETF ignores the fact that it relies on mergers involving the major ILECs and/or cable companies which were expressly subject to Sections 854(b) and (c). Moreover, CETF simply disregards the express text of the Settlement Agreement, through which the Joint Applicants make explicit commitments that provide public benefits, and it includes an explicit enforcement mechanism.

The Joint Applicants expect that the Settlement Agreement will be included as a condition for approval of the transfer of control, as such will be part of an enforceable Commission order. Further, in the unlikely event the Settling Parties cannot agree on an appropriate project(s) for capital expenditures in unserved and underserved areas, the Settlement Agreement provides that the Joint Applicants will submit a Tier 2 Advice Letter to the Commission for review and resolution.[31]

CETF asserts erroneously that the Settlement Agreement is not consistent with the law because it is "devoid" of benefits to schools, libraries, emergency responders, government agencies, public health care providers, and non-profit, community-based organizations."[32] As

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[30] CETF Comments at p. 5 (emphasis in original).

[31] Settlement Motion, Exhibit A, at p. 5, ¶1 ("A workshop with these [Consumer Advocate] stakeholders *and other Protestors* to this proceeding, to discuss possible locations for expansion must be held no later than four months from the date of the closing of this transaction.") (emphasis added).

[32] CETF Comments at p.5.

with other claims made by CETF, this statement ignores the plain text of the Settlement Agreement – which was executed with consumer - focused and non-profit organizations. Further, Level 3 recently reached an agreement on a long-term contract renewal with CENIC, a non-profit organization that operates the California Research and Education Network ("CalREN"), a high-capacity network that serves the California public school system, California Community Colleges, the California State University system, California's Public Libraries, the University of California system, Stanford, Caltech, and USC. The renewal addressed pricing and continuity concerns raised by CETF in its protest to the transfer Application.[33]

CETF also claims that the Settlement Agreement is inconsistent with the law purportedly because it does not provide the same commitment to deploy broadband in unserved and underserved areas as other transactions such as the Frontier acquisition of Verizon's local network and the Charter/Time Warner Cable merger.[34] The Joint Applicants explain in detail below why these mergers are not comparable to the instant transfer application, most notably because the annual California intrastate revenues of these entities were above the $500 million trigger[35] for application of Sections 854(b) and (c), which require affirmative public interest commitments. The unrebutted record in this proceeding shows that the combined revenues of Joint Applicants are less than half of the $500 million threshold, and thus the proposed transfer of control does not trigger Section 854(b) or (c).

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[33] Settlement Motion at p. 10.

[34] CETF Comments at pp. 5-6.

[35] See e.g., Section II.B.3 and 4, *infra*.

c. CETF Fails to Demonstrate that the Settlement is not in the Public Interest

CETF claims that the Settlement Agreement is not in the public interest based on its unsupported and erroneous assertion that the Joint Applicants' capital expenditure commitment should be a percentage of their national and worldwide market capitalization. The Joint Applicants respectfully request that this assertion be rejected out of hand.

As an initial matter, a parent company's market capitalization is not a recognized criterion for evaluating whether the obligations of Section 854(b) or (c) are applicable. The legislature and this Commission have been clear, those sections are applicable to transactions where one of the utilities and/or one of the parties has annual California intrastate revenues – *not market capitalization* - of $500 million or greater.[36] It is undisputed that the Joint Applicants, either individually or collectively, do not approach that threshold.

Moreover, the conditions imposed in the mergers that CETF relies on (i.e., the Verizon/Frontier and the Charter/Time Warner Telecom mergers) were predicated on their annual California revenues. The Commission decisions approving those transfers of control do not reference the market capitalization of any of the companies in particular or the concept of market capitalization in any way.[37] Nor do the CETF MOUs rely or refer to market capitalization.[38] Indeed, the Joint Applicants have been unable to locate any Commission

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[36] *See e.g.*, Section 854(b) and (c); *see also, 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).").

[37] *See* D.15-12-005 at p. 8 ("Joint Applicants acknowledge that because Verizon California has gross annual California revenues exceeding $500 million, the Transaction is subject to Public Utilities Code §§ 854(b) and 854(c)."); see also Scoping Memo in A.15-07-009 (November 11, 2015) (Charter/TWC) at p. 4 (discussing applicability of 854(c) criteria in light of annual California revenues of parent companies).

[38] *See e.g., D.12-12-005*, Appendix E (Frontier/CETF Memorandum of Understanding); see also Joint

decision regarding the approval of a Section 854 transfer of control – with or without conditions – that was based on a party's market capitalization.

CETF's own actions completely undermine its suggestion that market capitalization is an appropriate criterion for imposing conditions on Section 854 mergers. As discussed below (see Section II.B.4), CETF did not protest, or otherwise seek to impose conditions, on any of a number of telecommunications mergers regardless of the fact that the market capitalization of the entities involved dwarfs that of the Joint Applicants. For example, CETF was silent on the issue with respect to the recent Google Fiber/Webpass Application for Transfer of Control even though Google's market capitalization is estimated to be in excess of $670 billion, almost 20x that of the Joint Applicants.[39] In addition, CETF was similarly silent on the recently approved 854 application filed by XO in the context of the Verizon/XO merger although Verizon, at the time, had a market capitalization estimated to be over $217 billion, almost 7x that of the Joint Applicants. [40] Indeed, of the over one-hundred Section 854(a) applications submitted through the advice letter process, and the myriad of 854(a) applications that have come before the Commission over the years, neither CETF (nor apparently any other party) has previously suggested that market capitalization is the appropriate criteria for determining whether to impose conditions on a requested transfer or settlement or what those commitments should be.[41]

Motion to Modify Positions in Proceeding to Reflect Memorandum of Understanding Between Parties, Attachment 1 ("Charter/CETF MOU").

[39] See https://ycharts.com/companies/GOOG/market_cap

[40] "Verizon Communications Inc's quarterly market cap increased from Sep. 2016 ($211,903 Mil) to Dec. 2016 ($217,613 Mil) but then declined from Dec. 2016 ($217,613 Mil) to Mar. 2017 ($198,741 Mil)." See www.gurufocus.com/term/mktcap/VZ/Market%252BCap/Verizon+Communications+Inc

[41] The Joint Applicants further note that CETF's assertion that a "conservative valuation" of the Verizon/Frontier and Charter/TWC merger broadband commitments were $327 million and $511 million respectively is completely unsupported and self-serving. See CETF Comments at p. 13. There is no such

Finally, the Joint Applicants note that the CETF's suggestion that "at a bare minimum", the Joint Applicants should be required to spend the confidential figure specified at the bottom of page 13 of CETF's Comments per year on public benefit programs as that represents "10% of the last reported year of revenue of the Joint Applicants"[42] is both incorrect and reckless. As an initial matter, and as confirmed by the confidential materials provided on the record and otherwise available to CETF, the suggested figure is not 10% of the combined annual California revenue of the Joint Applicants but approximately 50% of that combined revenue (as well as the average annual combined capital expenditures for the companies in California).[43] Moreover, the suggestion that the Joint Applicants, or any other competitive carrier, be forced to dedicate those types of resources as a "public benefit" in order to complete a non-controversial transfer of control at a parent level is irresponsible, discriminatory and potentially crippling. In essence, it would create a situation where the Joint Applicants would have their proverbial hands tied behind their backs as they attempt to enhance the competitive offerings for these services in the face of other competitors and the dominant players in the market, none of whom would be subject to this type of (non-revenue producing) capital expenditure. Such a suggestion should not be condoned in any way.

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valuation in either of those settlement MOUs nor in the decisions adopting the MOUs in those proceedings and CETF offers no evidence to support its bald assertions.

[42] See CETF Comments at p. 13.

[43] See Joint Application, Confidential Exhibits A and B; see also, Joint Motion to Approve, Confidential Exhibit B (last page of Exhibit).

B. Legal Standard for Approving Transfers of Control

Under California law, any merger or transfer of control of a utility must be submitted to the Commission for approval.[44] For non-dominant carriers such as the Joint Applicants, approval may be obtained through the Commission's advice letter process[45] or through a formal application,[46] which is evaluated by an assigned Administrative Law Judge and approved by a decision issued by a vote of the full Commission.

The "primary question" in a transfer of control proceeding under Section 854(a) is whether the transaction will be "adverse to the public interest."[47] The myriad of cases in which the Commission has approved indirect transfers of control under Section 854(a), clearly establish that in instances where – *as is the case here* – there is no interruption of service, no change of tariffs, no transfer of operating authority, no customer transfers, and no elimination of providers,

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[44] Cal. Pub. Util. Code Section 854(a).

[45] *See* D.04-10-038 (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).

[46] Rule 3.6 of the Commission's Rules of Practice and Procedure.

[47] *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.*

the transactions have unfailingly been found not to have any adverse impact on the public and have been approved.[48]

Indeed, in the context of these types of applications, 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."[49] The Commission's desire to facilitate these types of approvals was reinforced by its 2004 decision to create an expedited process for non-dominant carriers (like the Level 3 Operating Entities) to utilize advice letters for 854(a) approval.[50]

The Joint Applicants further note that in the context of Section 854(a) applications seeking to transfer control of certificated entities to non-certificated entities, the Commission

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[48] *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.

[49] *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.

[50] *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 Section 854(a) approval via the advice letter process).

In brief, the process established in D.04-10-038 allows non-dominant carriers to obtain Commission approval via the use of a Tier 2 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 and there were no CEQA issues. *Id.* at 2004 Cal. PUC Lexis 511 **14-17 (Appendix A). As noted previously, the Level 3 Operating Entities initially sought approval of the transfer of control utilizing the advice letter process but ultimately felt compelled to pursue approval the application process instead. See Joint Applicants' Consolidated Reply to Protests (May 15, 2017) at p.9 and at n. 20.

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).[51] There is no doubt that CenturyLink meets those qualifications and no party has challenged that here.[52]

1. CETF's Application of Sections 854 (b) and (c) is Legal Error

Transfers of control in which the entities' California revenues are greater than $500 million must meet a heightened requirement set forth in Section 854 (b) and (c) to demonstrate the transaction meets the public interest. The record in this proceeding demonstrates that the Level 3 Operating Entities, both individually and combined, have revenues that fall far below the $500 million threshold set forth in Sections 854(b) or (c).[53] For transactions with these characteristics, 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).[54]

CETF, however, asserts that the Commission must apply the criteria of Section 854(b) and (c) when evaluating the transfer.[55] It states that "[t]his public interest standard is not waived

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[51] *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").

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

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

[54] *See e.g., 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).").

[55] CETF Comments at p. 8.

for non-dominant carriers, nor is it relaxed for companies with less than $500 million in annual California revenue,"[56] and that "[t]he public interest demands the Commission review this significant acquisition and consider consistent with Sections 854 (a), (b) and (c) the impacts on the services provided by the Applicants to this state's broadband infrastructure and on customers who purchase wholesale services from Applicants."[57]

CETF's assertion that the Commission could or should apply Sections 854(b) and (c) to determine whether the transfer should be approved is legally unfounded. On their face, these subsections apply only to transactions that meet the $500 million revenue threshold. The requirements of Section 854(b) and (c) are limited to these types of mergers involving dominant providers in the State because they presuppose that a transaction has the likelihood of significantly affecting the California economy, and therefore may require mitigation.[58]

2. The Cases Cited By CETF In Support of Applying Sections 854(b) and (c) Are Inapposite to this Transaction and Do Not Support Its Position

In support of its argument that the criteria in Sections 854 (b) and (c) may be applied to entities with revenues below $500 million, CETF cites to five cases.[59] The facts in these rare cases do not support CETF's assertion that the Commission should apply those sub-sections to this transaction. If anything, they each explicitly support the use of the long-held "no adverse impact"

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[56] CETF Comments at pp. 7-8.

[57] CETF Comments at p. 8.

[58] *See* Section 854(c)(9).

[59] CETF Comments at p. 8, n.10 (*citing* pp.4-5 in CETF Protest). The cited cases are: *Interim Opinion Approving, with Conditions, Transfer of Indirect Control and Authorizing, with Conditions, Exemption from Public Utilities Code Section 852 for Some Investors in Knight Holdco*, Decision No. 07-05-061 at 24. *See also In the Matter of Qwest Communications Corp., LCI International Telecom Corp, et al*, D.00-06-079, 2000 Cal. PUC LEXIS 645 at *18; D.03-06-069, 2002 Cal. PUC LEXIS 975, authorizing a transfer of control over Wild Goose by EnCana; D.05-12-007, 2005 Cal. PUC LEXIS 527, authorizing the transfer of a 50% interest in the parent of Lodi Gas Storage, LLC; and by D.06-11-019, 2006 Cal PUC LEXIS 499, authorizing the transfer of control over Wild Goose to Niska Gas Storage.

standard which has been consistently applied by the Commission.[60] As discussed below, to the extent the criteria set forth in Sections 854 (b) and (c) have been used in the context of transactions involving providers with less than $500 million, they have been used to address unique concerns and at no time have they been used to impose capital expenditure obligations of any sort.

a. D.07-05-061 - KnightCo Holdings

In D.07-05-061, the Commission did not apply Section 854(b) and (c) because the companies involved in the merger had California revenues of less than $500 million. The Commission decided to use those subsections for guidance, however, due to the unique concerns raised by the merger. In *KnightCo*, the application involved gas pipeline operators that were subject to rate regulation and combined would be a major market player (the new entity would carry more than 1/3 of the total volume of refined petroleum products in California).[61] 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. [62] Moreover, two of the entities involved in the transaction had "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. [63] None of those factors are present in this Joint Application.

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[60] *See* e.g., D. 07-05-061, *supra*, 2007 Cal. PUC Lexis 227 at *34 (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 interest."); *see also* D.00-06-079, *supra*, 2000 Cal. PUC LEXIS 645, *17 (same); D.06-11-019, 2006 Cal PUC LEXIS 499 at ** 20-21 (same).

[61] D.07-05-061, 2007 Cal. PUC Lexis 227 at *34.

[62] *Id.*

[63] *Id.*

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

b. <u>D.00-06-079 - Qwest Merger with US West</u>

In D.00-06-079 the Commission again declined to apply Section 854 (b) and (c) because "applicants annual California gross revenues are substantially below the [$500 million] threshold amount."[64] In the Qwest merger, the Commission found the transaction to be in the public interest and required no capital expenditures to approve the transaction. Instead, the Commission ordered Qwest to take regulatory and recordkeeping measures, such as providing complaint contact information, tracking formal and informal complaints, and submitting quarterly complaint reports to the Consumer Service Division. Those measures were in direct response to ORA's allegations that the applicants had a "substantial number" of prior violations of slamming and cramming rules and had two formal complaints from California customers.[65]

As in the KnightCo case, none of the factors that warranted using subsection (b) and (c) for guidance exist in the present case. There have been no customer complaints filed against the Joint Applicants, and CETF does not identify any violations of state or federal law.

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64 D.00-06-079, at p. 13 (mimeo).

65 *Id.*, at p. 11.

c. D.03-06-069 - Encana Acquisition of Wild Goose

In D.03-06-069, the Commission used the factors set forth in 854(c) because the applicant for transfer of control "tied its public interest showing to the specific criterion listed there".[66] This case, then, cannot fairly be cited as an example in which the Commission thought it was appropriate to use Section 854(c) criteria as guidance, but rather it merely reviewed the Section 854(c) factors presented by the applicant.

d. D.05-12-007 - Lodi Gas Storage

D.05-12-007 analyzes the transfer of control of 50 percent of Lodi Gas Storage entirely under Section 854(a) and makes no mention of Section 854(b) or (c). Thus, this case is completely inapposite to CETF's argument that subsections (b) and (c) should be used for guidance for evaluating this transaction.

e. D.06-11-019 - Niska Gas Storage Acquisition of Wild Goose

As with its prior merger application, Wild Goose itself provided a discussion of the benefits of the transfer utilizing "most of the public interest criteria enumerated in § 854(c)".[67] The Commission, of course, evaluated the criteria presented by the applicant. Thus this order also cannot fairly be cited as an example in which the Commission thought it was appropriate to use Section 854(c) criteria as guidance.

3. CETF's Public Interest Analysis Is Based on Comparisons to Non-comparable Transactions Involving Large, Dominant California Carriers

CETF goes on to expound that when the Section 854 (b) and (c) criteria are applied, the Settlement Agreement is not "appropriate, fair, and comparable" in light of the commitments

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[66] D.03-06-069, at p. 10 (mimeo).

[67] D.06-11-019, at p. 15 (mimeo).

made by other carriers in the context of mergers of large, dominant California carriers. In particular, CETF points to the Verizon/Frontier, Charter/Time Warner Cable, AT&T/Direct TV, and Comcast/NBC Universal mergers.[68] However, all of these mergers involve either legacy carriers or carriers with franchised areas that provide direct service to residential consumers and/or otherwise generate annual California revenues that exceed the $500 million threshold in the relevant provisions of Section 854. Any substantive comparison of these transactions to the instant proceeding undermines the CETF position that these provide relevant guidance for the Commission. For example:

- **Verizon/Frontier Merger** – Verizon, the second largest ILEC in the state at the time of the transfer with over 2.2 million local service landline customers, transfers all assets to Frontier, with two California ILEC subsidiaries, 100,000 existing customers and over 62 local exchanges in the State. The applicability of Sections 854(b) and (c) was uncontested as annual California revenues for Verizon alone exceeded $500 million.[69]

- **Charter/Time Warner Cable** – Charter, a communications company that provides voice and business as well as broadband Internet and video services, merged with Time Warner Cable, "*the dominant supplier of cable-based Internet access in Southern California*" that also provides voice, video, and broadband services. Although none of the certificated entities had California revenues in excess of $500 million, both Charter Communications Inc. and Time Warner Corporation (the parent companies of the California operating entities) had gross annual California revenues exceeding $500 million.[70]

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[68] CETF Comments at p. 6-7; see also CETF Protest at pp. 9-10. The AT&T/Direct TV, Comcast/NBC Universal mergers referenced by CETF did not involve any Commission approval or proceeding. These involved the transfer of FCC licenses and were governed by the applicable FCC processes and federal law, much like the pending FCC proceeding regarding the CenturyLink/Level 3 merger. Moreover, the Joint Applicants note that each of these transactions involved the merger of providers that – *unlike the entities at issue here* – provide direct residential customer services or content to millions of subscribers in California and across the country. In brief, these transactions are neither relevant nor instructive in the context of the pending motion or the underlying application.

[69] *See* D.15-12-005 at pp. 5 (description of Verizon and Frontier) and 8 ("Joint Applicants acknowledge that because Verizon California has gross annual California revenues exceeding $500 million, the Transaction is subject to Public Utilities Code §§ 854(b) and 854(c).")

[70] *D.16-05-007* at pp. 3-6 (description of parties) (emphasis added); see also Scoping Memo in A.15-07-009 (November 11, 2015) at p. 4 (discussing applicability of 854(c) criteria in light of annual California

Moreover, in both of these mergers, the commitments negotiated by CETF are almost exclusively related to the provision of broadband services directly to end-users.[71] There is no capital expenditure requirement or obligation of any sort. There is not even a reference to capital expenditures except to the extent the agreements refer to programs like CASF[72] or monies already made available through the FCC's Connect America Fund II.[73] The Joint Applicants note that in the Charter/TWC merger, in addition to the commitments regarding direct low-income broadband services, the MOU also provided for the direct funding of CETF, another obligation that clearly had no bearing on Charter's capital expenditures.[74]

In contrast, the instant transaction involves the transfer of control at the parent level of the Level 3 Operating Entities that provide services to a (limited) number of wholesale and

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revenues of parent companies).

[71] *See e.g., D.12-12-005*, Appendix E (Frontier/CETF Memorandum of Understanding) at ¶ 2 (adhere to FCC Lifeline broadband program), ¶8 (network assessment re broadband access), and ¶¶ 15-22 (implement low-income broadband program); *see also D.16-05-007* at pp. 12-14 (discussing highlights of Charter/CETF Memorandum of Understanding including the provision of low-income broadband services, broadband service to particular anchor institutions, set aspirational goal of adding 350,000 broadband users over 5 years).

[72] The MOUs do not address the use of CASF monies but instead seem to obligate the carriers to support CETF's efforts to secure "authorized funding for CASF funding through legislation and/or other appropriate legislative or regulatory mechanisms…" See Joint Motion to Modify Positions in Proceeding to Reflect Memorandum of Understanding Between Parties, Attachment 1 ("Charter/CETF MOU") at ¶ 11. The Charter/CETF MOU can be found at: http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M161/K671/161671799.PDF; *see also, D.12-12-005*, Appendix E at ¶ 12. This provision has no impact on capital expenditure obligations but is striking given what the Joint Applicants understand to be the ongoing legislative debate over AB 1665.

[73] *See D.12-12-005*, Appendix E, *supra* at ¶7 (accept Connect America Fund obligations and monies), ¶9 (identify 50 public locations with "existing sufficient transport capacity" to install broadband access but no obligation "to construct or expand backhaul capacity"). It should be noted that by statute, middle mile projects like those the Applicants have or would construct are not eligible for CASF. Further, the Applicants are not recipients of Connect America Fund II support in California. Further evidence of CETF's misunderstanding of the Applicant's business plans and the inappropriate nature of their requests.

[74] *D.16-05-007* at p. 14 (MOU provides that "New Charter shall provide CETF $6.5 million for each of the five (5) consecutive years of the MOU for a total commitment of $32.5 million."); see also Charter/CETF MOU, *supra*, at ¶ 16.

enterprise customers only. The transfer is to CenturyLink, the parent company of a non-dominant carrier in California that also provides competitive services to wholesale and enterprise customers.[75] None of these entities provides broadband services to California residential customers but instead provide the network backbone to those providers who provide such "last-mile" services.

In addition, as noted above, the California revenues of these operating entities, either individually or collectively (including those associated with CenturyLink) are only a fraction of the $500 million threshold established by the Code. Moreover, by any measure, the Level 3 Operating Entities, even when combined with the CenturyLink Operating Entities, will remain a non-dominant competitive provider without any particular market power in any relevant telecommunications market (e.g., backhaul, long haul, enterprise, etc.). [76] There is simply no comparison between this transaction and any of those relied on by CETF.

4. CETF Ignores the Commission's Long History of Granting Section 854(a) Approvals When Evaluating the Proposed Transfer of Control

Despite CETF's expressed goal of ensuring "comparable" outcomes in merger proceedings, it focuses on completely dissimilar transactions and omits any mention of Section 854(a) transfers involving similar non-dominant carriers and, in many cases, significantly larger

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[75] CenturyLink is also the ultimate parent of CenturyTel of Eastern Oregon, a local exchange provider with less than 100 access lines, in New Pine Creek, Modoc County pursuant to the authority granted by this Commission. See Joint Application at pp. 5-6.

[76] *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."). *See also, id.* 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.").

California providers. For example, CETF did not protest or otherwise seek public interest commitments in last year's request to transfer control of XO (also a CLEC providing exclusively enterprise and wholesale services) to Verizon (the holding company of what was then both the second largest ILEC and a major wireless provider in California).[77]

Similarly, CETF did not protest or otherwise seek to impose conditions on Earthlink's request to transfer control to Windstream even though Windstream is an incumbent carrier in some states and operates a substantial fiber network that offers local and long-haul transport, broadband, and data services to consumers, businesses, enterprise and wholesale customers. The transfer was approved without the imposition of additional conditions by the Commission.

The same is true of the Zayo/Electric Lightwave transfer despite the fact that Zayo has a significant fiber network it uses to provide services to – much like the Joint Applicants - enterprise, carrier and government customers. In particular, Zayo provides video transport services and connectivity to data centers, enterprise locations, carrier exchange points, wireless towers, media centers, entertainment venues, financial exchanges and cloud providers.[78]

CETF further disregarded an application filed a few weeks after the instant application that involves similar facts but, unlike this transfer, directly implicates a California provider that provides emergency communications services and infrastructure systems to public safety organizations and service providers, including public safety answering points, wireless carriers, wireline CLECs, cable telephony providers, and VoIP providers.[79] In that application, Olympus

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[77] 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).

[78] Based on Zayo's current website, the combination resulted in a California network essentially the same size as the Applicants.

[79] *Id.*, at p. 10.

Holdings seeks to acquire control of West Corporation subsidiaries Hypercube Telecom, LLC and West Safety Communications, Inc. (formerly called Intrado Communications, Inc.) [80] Given CETF's expressed interest in public safety, it is particularly striking that it chose to remain completely silent in the context of that request although the Joint Applicants note that there is no more basis for imposing conditions on that transaction than there is on the instant Application.[81]

Nonetheless, CETF opposes this proposed transfer of control even though it has been subjected to substantial scrutiny through a formal application rather than advice letter process, the Joint Applicants have provided detailed information, and ORA and two prominent consumer groups reached a settlement through which the Joint Applicants are making affirmative public interest commitments. The application has now been pending just over four months, yet CETF asserts that the Joint Applicants are "short changing" and attempting to "rush" the process.[82]

Regardless of CETF's inconsistent notion of comparable transactions and commitments required for approval, the Commission should ensure consistency. To that end, a review of essentially any of the cases in which it has approved indirect transfer of control under Section 854(a) provides the proper standard of review.[83] In brief, where the transactions are seamless, as is the case with this proposed transfer of control, the Commission has found the "no adverse

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[80] *Id.*, at p. 11.

[81] CETF also remained completely silent in the wake of Google Fiber's acquisition of WebPass even though there is no credible debate regarding Google's financial position or that Google's involvement in the broadband market has significant potential implications for both residential consumers and wholesale/enterprise customers.

[82] CETF Comments at p. 5.

[83] See e.g., cases cited at nn. 47-50, *supra*.

impact" standard required by Section 854(a) to be satisfied and has otherwise approved the applications without the imposition of any additional affirmative commitments.

To be clear, the Joint Applicants fully support the terms and commitments set forth in the Settlement Agreement. However, CETF's assertion that the Agreement is somehow inadequate in light of "comparable terms" imposed in the context of "similar" requests for transfers of control is simply unsupportable as the commitment it seeks is not "comparable" and the merger transactions it relies upon are not "similar" in any way. Instead, CETF seeks to impose conditions on the very competitive forces the public and Commission rely on to ensure a healthy market. At best, this effort to create new public policy in the context of an application for transfer of control of non-dominant carriers seems counterproductive and otherwise directly conflicts with the legislature's clear desire to promote the availability of a wide choice of state-of-the-art services through pro-competitive policies.[84]

III. BENEFITS OF THE SETTLEMENT AGREEMENT

As noted in their Joint Motion, the Settlement Agreement reflects the conclusion of prominent consumer organizations and the Commission's own consumer protection staff, as well

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[84] *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).

CETF's assertion that that proposed mergers in California must include funds for broadband infrastructure buildout in unserved and underserved areas in order to be approved (see e.g., CETF Comments at p. 5) is not supported by the law or Commission practice. The Joint Applicants note that there is no requirement for any CLEC or NDIEC in any context to commit a specific, not to mention significant, dollar amount to capital expenditures for network buildouts. Nor should there be. If there were, the barriers to entry in the state would be significant and the impact on competition and the ability of non-dominant carriers to merge would be devastating. For example, carriers would find themselves suddenly subject to potentially crippling and discriminatory obligations which apply specifically only to them and not to similarly situated competitors in the wholesale and enterprise markets. Moreover, such an obligation would constitute a significant deviation from the kind of communications services currently provided by the Joint Applicants in California.

as the Joint Applicants, that the Settlement Agreement is reasonable in light of the whole record, consistent with the law, and includes commitments which are in the public interest. These commitments include the Joint Applicants agreement to:

- Spend at least $323 million in capital expenditures in California over the next three years, with a stated aspirational goal of investing the committed amount in two years;
- Participate in a collaborative process for identifying and selecting mutually agreeable locations where the companies will invest in new middle mile infrastructure and new points of presence as part of their total California capital expenditures for calendar years 2018-2020, focusing on locations where unserved/underserved communities exist;
- Preserve the terms of existing customer contracts;
- Create and submit granular reports on synergy savings, broadband projects, employment levels, and network outages; and
- Strive to meet diversity procurement goals that exceed those set forth in General Order 156.

In addition, the benefits attendant to the underlying merger of the CenturyLink and Level 3 parent companies are significant in and of themselves.[85]

Moreover, the Settlement Agreement actually provides a role for CETF (the only non-settling party) to participate in the process agreed upon by the Settling Parties with respect to capital expenditures. In particular, it provides CETF (and the Communications Division) with a right to participate in workshops to help identify mutually agreeable locations where the companies will invest in new middle mile infrastructure and new points of presence as part of

[85] The key benefits of the underlying transactions (even without the commitments set forth in the Settlement Agreement) are discussed more thoroughly in the Joint Application (Section IV.C) and in the Consolidated Reply to the Protests (Section VII). See also, Joint Applicants' FCC Public Interest Statement, Exhibit B, pp. B-1 through B-21. The Public Interest Statement, including the referenced Exhibit B, can be found at: https://ecfsapi.fcc.gov/file/12131078120341/CenturyLink-Level%203%20214%20Application.pdf.

their total California capital expenditures.[86] The focus of those efforts will be on locations where unserved/underserved communities exist. Thus, to the extent CETF has ideas or concerns about specific projects (e.g., improving emergency communications services[87]), it has a forum for doing so even without joining the settlement.

Finally, even though the Joint Applicants were unable to reach a settlement with CETF, they respectfully note that all of the Settling Parties agree that their Settlement Agreement addresses CETF's stated concern regarding "affirmative public interest benefits proposals to provide investment in middle mile access infrastructure to last mile Internet Service Providers who desire to provide service to underserved and unserved areas in the State"[88] and "voluntary commitments" to help increase broadband facilities in California.[89]

Nonetheless, the Joint Applicants are willing to go even further to address CETF's requests in its Comments to receive the same reports they will provide to ORA, TURN and Greenlining and they will explicitly request that the Settlement Agreement be incorporated as a condition into the Commission's final decision approving the transfer of control.[90]

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[86] CETF sought just such participation for itself and the Communications Division in its Protest to the Application. See CETF Protest at p. 11.

[87] See CETF Protest at p. 12 ("The Commission should require the Applicants to work with the Communications Division staff, all emergency response agencies (federal and state), and FirstNet to see how its infrastructure might assist in improving the basic 9-1-1 emergency communications services to the state.")

[88] *Id.*, at p. 8.

[89] *Id.,* at pp. 8-9. See also Joint Motion to Approve Settlement at pp. 8-9 ("The Settling Parties believe that the instant Settlement Agreement addresses these [CETF's concerns noted above] by committing to a concrete amount of capital expenditures in California over three years that includes a process for identifying and selecting projects in underserved and unserved areas.").

[90] See CETF Comments at p. 16.

IV. REQUEST FOR EXPEDITED APPROVAL

As noted in previous pleadings, the parties to the transaction have committed to closing the merger nationwide by September 30, 2017.[91] Given the current schedule, the Joint Applicants feel compelled to reiterate that the consequences of any delay in the approval of this proposed Settlement Agreement, or the underlying Application for transfer of control, are significant. Among other things, the delay results in the additional accrual of substantial ticking fees and interest payments without the anticipated revenue benefits of the transaction to cover those costs. In addition, the inability to close in a timely fashion creates business uncertainty and otherwise delays the implementation of the commitments made in the Settlement Agreement as well as those which are inherent to the merger itself for employees, customers, and vendors (e.g., the outside vendors that do the actual buildout of the network) that rely on the Joint Applicants and the markets both in California and beyond. The Commission has been attentive to the significant negative effects of delay in prior mergers, such as ensuring completion of the Verizon/Frontier merger on a schedule that enabled Frontier to assume Connect America Fund monies awarded to Verizon. The Joint Applicants respectfully request similar consideration. The Joint Applicants request an opportunity to discuss scheduling issues at the August 8th PHC.

Accordingly, pursuant to Rule 12.1(c), the Joint Applicants reiterate their request that the Settlement Agreement and underlying transfer application be approved contemporaneous and as expeditiously as possible. They stand ready to work cooperatively with other parties to craft a schedule that will allow for approval by September 14, 2017.[92]

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[91] See Settlement Motion at Sections VI and VII; see also Joint Application at Section VII; see Consolidated Reply to Protests at Section X.

[92] The Joint Applicants respectfully note that it would be extremely helpful if Commission approval occurred at the September 14, 2017. They note that the Commission's second September meeting falls on

V. CONCLUSION

Based on the foregoing, the Settling Parties respectfully request that the Commission grant the Joint Motion to Approve the Settlement Agreement in its entirety and without modification (on an expedited basis) and that it otherwise simultaneously approve the underlying Joint Application accordingly.

Respectfully submitted this 25th day of July, 2017 in San Francisco, California.

/s/

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

/s/

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

September 28, 2017, only one business day prior to the anticipated Transaction closing date.