

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Applications of)
Broadwing Communications, LLC (U5525C);)
Global Crossing Local Services, Inc. (U5685C);)
Global Crossing Telecommunications, Inc.)
(U5005C); IP Networks, Inc. (U6362C); Level 3)
Communications, LLC (U-5941-C); Level 3)
Telecom of California, LP (U5358C); WilTel)
Communications, LLC (U6146C); 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).)

A.17-03-016
(Filed March 23, 2017)

**Comments on Proposed Decision of
the California Emerging Technology Fund**

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Dated: September 28, 2017

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**Comments on Proposed Decision of
the California Emerging Technology Fund**

Pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure, the California Emerging Technology Fund (“CETF”) hereby timely files its comments on the Proposed Decision (“PD”) entitled “Decision Approving Settlement Regarding Proposed Transfer of Control” mailed on September 8, 2017 in the above referenced docket. CETF objects to portions of the PD and requests that it be amended including certain terms and conditions of the Settlement Agreement.

I. SUMMARY

CETF respectfully disagrees with the PD in that it reviews the proposed transfer solely under the Section 854(a) standard, finding that the transfer of control has no adverse impact on the public interest and provides tangible California-specific benefits. The PD looks only at the combined revenues of Joint Applicants in the state, and, because it is under the \$500 million threshold for application of Sections 854(b) and (c), the PD concludes that “given this revenue level, the combined entities do not constitute a dominant market force, or possess significant market power, and the more rigorous standard of Section 854(b) and (c) does not apply.”¹

This one dimensional, revenue-only approach is inappropriate given high priorities placed on bringing broadband to all residents of California by the Legislature, Governor’s Office and this Commission, and the unique wholesale role that Level 3 plays in the California broadband and wireless back haul marketplace. To draw analogies, the electric utilities cannot

¹ PD, at pp. 26-27.

serve its retail customers or set prices without the services of transmission companies that carry power to the retail distribution electric utilities. Similarly the landline telephone system is reliant on the long distance companies and the Internet that pass traffic between local exchange telephone companies who serve retail customers. These wholesale rates are key inputs to the retail rates of telephone consumers. Level 3 is a unique wholesale company in California that builds and provides backbone services to a broad array of retail Internet Service Providers, wireless telephone companies (providing back haul for cellular traffic), rural telephone companies, government, enterprise customers and large commercial companies. Its impact is immense on the California broadband ecosystem.

The combined market cap of CenturyLink and Level 3 will be \$35.1 billion with a combined 52,600 employees nationwide, yet the PD refuses to consider this factor and instead treats the Joint Applicants like they are a small “mom and pop corner store.” CETF urges that the Commission use other criteria from Sections 854(b) and (c) *as it has in the past* to provide context for a public interest assessment.¹ In 2007, the Commission found: “The Section 854 Application represents that no Applicant meets this financial threshold, but recognizes that even when Section 854(b) and (c) do not expressly apply to a transaction, the Commission has used the criteria set forth in those statutes to provide context for a public interest assessment.”² In prior pleadings, CETF recommended to the Commission that this include a review of impacts on the services provided by the Joint Applicants to this state’s broadband infrastructure and on customers who purchase wholesale services from the Joint Applicants. Given there was no hearing in this proceeding due to the early settlement agreement struck by the three consumer groups – the Office of Ratepayer Advocates (ORA), TURN, and The Greenlining Institute (“Greenlining”) (collectively, the “Consumer Advocates”), CETF is not able to refer this Commission to record evidence but can refer the Commission to the Competition OII 2016 decision where these services are described.³ CETF urges the Commission to use other criteria from Sections 854(b) and (c) to review the transfer, and not just rely on the lower Section 854(a) standard of the transfer not being adverse to the public interest.

Further, CETF urges the Commission to find that the proposed Settlement Agreement is not in the public interest unless amended consistent with CETF’s requested changes to the Settlement Agreement, on grounds that it is not consistent with prior Commission communications transfer of control cases where explicit public benefits were made to be conditions of Commission approval and enforceable by the consumer interest groups who secured those benefits. In the broadband area, the Settlement Agreement only requires that Joint

² Interim Opinion, Decision No. (D.) 07-05-061, Joint Application of SFFP, LP (PLC-9 Oil), CALNEV Pipeline LLC, Kinder Morgan, Inc. and Knight Holdco LLC for Review and Approval under Public Utilities Code Section 854 of the Transfer of Control of SFPP, LP and CALNEV Pipeline, LLC, A.06-09-016, at 24 (mailed May 30, 2007)(“Knightco”). See discussion by CETF in its initial Protest in this docket, at pp. 10-11.

³ D.16-12-025, Decision Analyzing the California Telecommunications Market and Directing the Staff to Continue Data Gathering, Monitoring, and Reporting on the Market, OII into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042, I.15-11-007 (issued Dec. 8, 2016), at pp. 16-17 (“Competition OII”).

Applicants spend \$323 million (an amount lower than prior years) on “business as usual” California projects for three years, and does not set forth any specific set aside amount for purely public interest projects. To find and promote the public interest as required by Section 854(a) review, CETF urges that \$300 million shareholder money of Joint Applicants be required to be used for some specific public interest projects as defined below. CETF recommends changes to the Settlement Agreement to make it more consistent with past precedent and to ensure concrete public benefits to the people of California as a result of this transfer of control. CETF requests that:

- The capital expenditure investment commitment of \$323 million over three years (\$107 million per year) for California investment should be increased to at least match the 2015 capex investment level in California per year, which would bring the commitment to approximately \$500 million.

- CenturyLink and Level 3 be required to provide tangible and explicit public interest benefits for California as required by Section 854(a), particularly for construction of middle mile and Internet Points of Presence that will benefit unserved and underserved broadband areas of the state. CETF has requested that the appropriate range of this commitment should be in the \$300 million in commitment over three years be required for *public interest projects exclusively*, which is appropriate, fair and comparable to commitments of communications providers in the state in recent transfers of control approved by this Commission.

- A “public interest project” should be defined as: (1) projects to bring middle mile broadband infrastructure or Internet Points of Presence (“POPs”) to unserved or underserved communities according to the CASF program definitions on the date the application was filed and the latest California broadband map; (2) projects to bring middle mile infrastructure or POPs to community anchor institutions such as schools, libraries, community colleges or community centers; and (3) projects to bring upgraded broadband facilities to public safety organizations, emergency responders, FirstNet, or State-owned county fairgrounds that lack Internet access and especially those used for emergency response command centers.

- CETF should be allowed to participate in all workshops with the Joint Applicants and the Consumer Advocates that settled with the Joint Applicants, to participate in the final approval process for any broadband projects that will serve unserved or underserved broadband areas, and receive any progress reports.

- The public interest broadband projects be approved by the Commission after review by the Communications Division to confirm that they meet the definition of a public interest project, serve a unserved and underserved geographic area as currently defined in the California Advanced Services Fund (“CASF”) program according to the current Commission’s California Broadband Map, and to review the budget for the project for reasonableness.

- The Commission make the Settlement Agreement enforceable by any consumer group participating in the proceeding should the Joint Applicants fail to perform any of their commitments. The current PD makes the terms and conditions of the Settlement Agreement enforceable by this Commission, however it would be better to make it clear that any of the Consumer Advocates or CETF may file an action with the Commission should commitments not be met by Joint Applicants.

- The Commission should require post-closing CenturyLink and Level 3 operating entities to continue offering PSTN Interoperability Services on an unbundled-basis for five additional years.

II. COMMENTS AND RECOMMENDED CHANGES TO THE PROPOSED DECISION

A. The PD Errs in Evaluating Transfer Using Section 854(a) Alone

The PD errs in evaluating the proposed transfer using Section 854(a) criteria alone, namely whether the transfer of control has any adverse impact on the public interest and otherwise provides tangible California-specific benefits.⁴ The PD at 27 specifically rejects CETF’s argument that the Settlement is inconsistent with past precedent because it fails to provide an explicit and quantifiable commitment to deploy broadband to unserved and underserved areas of the state as required in prior Commission cases.⁵ The PD dismisses this argument solely based on the level of California intrastate revenues of the Joint Applicants. It is undisputed that such revenues are less than the \$500 million threshold for application of Sections 854(b) and (c). The PD finds, “given this revenue level, the combined entities do not constitute a dominant market force, or possess significant market power, and the more rigorous standard of § 854(b) and (c) does not apply.” (PD at 27)

The approach taken in the PD is myopic; it looks only at the combined revenues of Joint Applicants in the state, and, because it is under the \$500 million threshold for application of

⁴ PD, at pp. 26-27.

⁵ Among the prior Commission cases referred to by CETF in its initial Protest at pp. 7-10 include the Frontier acquisition of Verizon’s landline telephone system, D.15-12-005, In the Matter of the Joint Application of Frontier Communications Corp., Frontier Communications of America, Inc., Verizon California, Verizon Long Distance LLC, and Newco West Holdings LLC for Approval of Transfer of Control over Verizon California, Inc. and related approval of Transfer of Assets and Certifications. A.15-03-005 (issued Dec. 9, 2015) (“Frontier-Verizon Decision”), and the Charter/Time Warner Cable transfer of control decision, D.16-05-007, In the Matter of Joint Application of Charter Communications Inc.; Charter Fiberlink CA-CCO, LLC, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC Pursuant to California PUC Code Section 854 for Expedited Approval of the Transfer of Control of Both Time Warner Cable Information Services (California), LLC and Bright House Networks Information Services (California), LLC, Charter Communications, Inc. and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC, A.15-07-009 (issued May 16, 2016)(“Charter-Time Warner Decision”). In CETF’s protest at pp. 7-10, it reviewed in detail the many voluntary public interest requirements imposed on these communications providers, including many relating to upgrades of broadband infrastructure to bring broadband to all residents, low income broadband service plans, free WiFi services in community centers, and free electronic devices to promote digital literacy among disadvantaged communities.

Section 854(b) and (c), the PD concludes that “given this revenue level, the combined entities do not constitute a dominant market force, or possess significant market power, and the more rigorous standard of Section 854(b) and (c) does not apply.”⁶ CETF objects to this approach, and requests again that this Commission review the transfer under Section 854(a) but also take into consideration some criteria from Sections 854(b) and (c) to give context to the public interest commitment component. As noted before, prior Commission precedent in the *Knightco* case is ample precedent. However, even under the Section 854(a) standard, CETF argues that the transfer will be adverse to the public interest because the Settlement Agreement commitments are vague, lack specificity as to the dollar amount of capital expenditure investment commitments and the approval process of projects that will bring broadband service to unserved and underserved areas of the state, and Agreement enforceability.

CETF strongly disagrees that one factor – the mere size of intrastate revenue – should be the sole indicator of market power or market force. The Commission should review a transaction’s public interest benefits using additional criteria provided by the Sections 854(b) and (c) when a provider plays an important role in the market, and the transfer of control will result in a large national entity with significant assets above the \$500 million mark. The mere reliance on an intrastate dollar figure of revenue does not fairly reflect the market power and unique role of Level 3 in the state. While there was no hearing in this proceeding, CETF can point the Commission to some facts. As the dominant provider of middle mile infrastructure and Internet Points of Presence, the Level 3 entities are one of a small handful of “carriers’ carriers”, that provide wholesale transport and transit and other inputs to retail carriers, in addition to providing retail service to business, enterprise or government customers. These carriers’ carriers typically sell to rural Internet Service Providers, wireless telecommunications carriers for backhaul of traffic, and competitive local exchange carriers. In this Commission’s December 2016 Competition OII decision, it stated:

There are also “carriers’ carriers” – such as XO, Global Crossing, and Level 3 [footnote omitted] -- that provide wholesale transport and transit (including cell-site backhaul) and other inputs to carriers offering retail services (while sometimes providing their own retail services, primarily to business customers).⁷

In footnotes 30 and 31 of the Competition OII decision, the Commission noted that these carriers of carriers like Level 3 provide innovative services using state-of-the-art fiber systems. They provide services that include provision of dark fiber, including dedicated high capacity transmission, cloud computing, data storage, IT, managed security, and video conferencing. At page 108 of the Competition OII decision, it is found that the backhaul market is highly concentrated in three firms, with one firm controlling over half of the cell site backhaul, and the

⁶ PD, at 26-27.

⁷ D.16-12-025, Decision Analyzing the California Telecommunications Market and Directing the Staff to Continue Data Gathering, Monitoring, and Reporting on the Market, OII into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042, I.15-11-007, (issued Dec. 8, 2016), at pp. 16-17 (“Competition OII”).

second biggest firm handling only 15%. This concentration has the opportunity to increase cellular rates to end users. *Id.* at pp. 108-109.

In CETF's initial Protest, at pages 10-12, it discussed the importance of Level 3's backhaul transport service to cellular and Personal Communications Service providers, Internet Service Providers (ISPs) and Wireless ISPs. These backhaul services provide important middle mile connections that enable other retail communications providers to connect residential, enterprise and mobile customers to the Internet or the Public Switched Telephone Network. These rates are kept fair and reasonable only by competition, but FCC filings by competitors in the Joint Applicants' federal transfer of control docket⁸ show that when competition is removed by news of impending merger, Level 3 increases rates and has additional market leverage to engage in unfair business practices. This in turn drives up operation prices for broadband providers, negatively impacting broadband growth, particular in high cost rural markets.

CETF cited in its initial protest (CETF Protest, at pp. 4-6) the adverse impact of removing Level 3 as a provider of PSTN Interoperability Services (both in California and nationally) on an unbundled-basis. Level 3, Peerless and Inteliquent were the three providers. According to a late filing by party Telnix LLC (Texnyx) in this docket,⁹ in March of this year, Inteliquent informed Telnix that it is in the process of exiting the market (March 2018) for providing unbundled PSTN Interoperability Services. In searching for other suppliers, Telnix contacted Level 3 regarding its competing PSTN Interoperability Services, which Level 3 presently sells to IP service providers including Vonage. Members of Level 3's sales team informed Telnix that Level 3 will not sell the product to Telnix, *because after the merger the combined CenturyLink will not offer the product to competing service providers*. If the combined CenturyLink does indeed refuse to offer this product to competitors going forward, then there may soon be only one provider of PSTN Interoperability Services – Peerless. Further, Telnix asserts that there are at least 21 rate centers in California that Telnix believes Level 3 is presently the only provider of PSTN Interoperability Services terminating to rate centers many of which are in rural or relatively low-population areas, such as: Alpine, Blythe, Coleville, Colusa, Courtland, Earp, Earp (Lost Lakes), Elk Grove, Ferndale, Havasu Lake, Isleton, McCloud, Meadowview, Millville, Palo Verde, Parker Dam, Petrolia, Rio Vista, Roseville (Citrus Heights), Susanville and Walnut Grove. CETF was not able to pursue these allegations by Telnix since its comments were late and there was no hearing in this case. But CETF notes this Telnix Comment because it concerns CETF that the reduction of competitors in the PSTN Interoperability Services sector may increase wholesale rate inputs which in turn will raise rates for retail broadband consumers. CETF works on digital access issues for low income and disadvantaged communities such as minority and disabled communities. Broadband affordability is a huge barrier of entry for these consumers.

⁸ See filings by FairPoint Communications, Inc., Frontier Communications Corp. and Windstream Services, LLC in CenturyLink – Level 3, FCC WC Docket 16-403. The FCC docket remains pending as of September 28, 2017.

⁹ Comments of Telnix LLC, filed August 7, 2017, in this proceeding, then refiled at a later date.

The potential competitive harm is not just limited to Telnix. These wholesale services are critical for other next generation providers to serve their potential customers, especially in the more rural service areas (such as those listed in the paragraph above) where Level 3 has more extensive coverage than either Inteliquent or Peerless. The absence of PSTN Interoperability Services offerings at reasonable rates and on reasonable terms will prevent the development of the types of new voice competition envisioned by the FCC in the Modern Numbering Order. Indeed, the Commission has repeatedly recognized that wholesale and middle mile services have a direct impact on wireless and last mile residential and small business customers.

The Joint Applicants claim that the “proposed transfer of control will benefit California and enhance competition in the California middle mile market.” However, no data or analyses are provided to support these claims. The Joint Application does not bother to address the effect of the transaction on wholesale markets. The truth is that the Proposed Transaction will eliminate Level 3 as an aggressive independent competitor in the wholesale space both nationally and in California. In addition to PSTN Interoperability Services, the Joint Applicants provide wholesale Internet access and backhaul services that provide essential middle mile connections that enable other providers to connect California residential and mobile customers to the Internet.

CETF became involved in this proceeding because it was clear that the Joint Applicants initial Application held no public interest benefits for the people of California, because all it promised was “business as usual” for the Level 3 entities in this state.¹⁰ In its initial Protest to the Application, CETF requested that this Commission not only review the transfer under Section 854(a) but also consider the criteria set forth in Sections 854(b) and (c), particularly “will it be beneficial on an overall basis to the state and local economies and to the communities in the area served by resulting public utility” and will the transfer “be fair and reasonable to the majority of the affected public utility shareholders.” One focus CETF requested was the impacts on the services provided by the Applicants to this state’s broadband infrastructure and on customers who purchase wholesale services from the Applicants, given this Commission’s strong focus since 2006 on bringing broadband to all California residents, whether urban, rural, remote or tribal.¹¹ As discussed in CETF’s initial protest at pages 4-5, the Application was full of fluffy promises but no meat. CETF made the case that given the inadequate broadband infrastructure in the state as evidenced in the CASF Annual Report, there should be affirmative public interest benefit proposals to provide investment in middle mile access infrastructure to last mile ISPs that provide service to unserved and underserved areas for the state.

¹⁰ See pages 18-20 of the Application, where Joint Applicants said they would make “significant capital expenditures” within the state but offered not a single enforceable commitment to do so where they say in footnote 28 at page 18 of the Application that they will only build what they are paid to build by a paying customer.

¹¹ Protest of CETF to the Proposed Merger of CenturyLink and Level 3 Communications, filed May 5, 2017, in A. 17-03-016, at 3-4 (“CETF Protest”).

This Commission has provided incentives for broadband infrastructure builds by our state's providers when reviewing mergers in the telecommunications area. This Commission has made voluntary rural infrastructure commitments conditions to merger in dockets such as D.15-12-005 (March 18, 2015), the Frontier-Verizon Decision, where this Commission ordered Verizon and Frontier to take all steps necessary to apply for and obtain FCC Connect America Fund and Remote Area Fund support from the FCC. Further, Frontier was directed to spend such FCC funding first on the most remote and underserved portions of the Verizon California service area where connections to school and other anchor institutions may be deficient and where energy facilities and poles may be absent. (D.15-12-005, at OP 12, at 82). Similarly, in D.16-05-007, the Charter-Time Warner-Bright House merger decision, Charter executed a voluntary MOU with various consumer groups including CETF and made a number of voluntary public interest commitments, including to deploy 70,000 new broadband passings to current analog-only cable service areas in six rural counties in three years, increase broadband speeds to all California households over three years, and bring all households in California to an all-digital platform with increased download speeds over three years. (D.16-05-007, at O.P. 2). The FCC has also ordered merger conditions that include voluntary broadband infrastructure builds including AT&T-DirecTV, and the Comcast-NBC Universal decision, where there were infrastructure commitments and low income \$10 broadband service plans. (See CETF Protest at 8.)

In short, CETF is sorely disappointed that after this clear series of precedents that show that both the FCC and this Commission find it very important that merging communications companies commit to significant voluntarily broadband investments in the state as part of its public interest findings, the PD chooses to ignore this precedent and the unique role in the market that Level 3 plays in the state. 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. The Commission may consider criteria of Sections 854(b) and (c) in its public interest assessment, as it has in the past. Or if the Commission decides not to apply Sections 854(b) and (c), it may still find that the offering of the Joint Applicants in the Settlement Agreement is not adequate to find the transaction in the public interest, as set forth in the following section.

B. The Proposed Settlement Is Not Reasonable in Light of the Whole Record

CETF further argues that the Agreement struck by Consumer Advocates is not reasonable in the light of the whole record, and does not meet the Section 854(a) standard of being in the public interest. This is because the Agreement is not "appropriate, fair or comparable" to recent voluntary settlements entered into by broadband providers in this state, such as Frontier, Charter, AT&T, and Comcast when merging. In those cases heard before the FCC and this Commission,

there were *significant and explicit voluntary commitments* including: (1) hundreds of millions of dollars in commitments to upgrade rural infrastructure builds in areas that are unserved or underserved as defined by the California Advanced Services Fund program; (2) provision of \$10-\$15 affordable broadband rates for low income consumers; (3) provision of free WiFi hot spots and free electronic devices in disadvantaged communities; (4) enforceable commitments to upgrade consumer speeds of broadband service; and (5) free gigabyte broadband service to schools and libraries.¹² Yet the PD ignores this precedent and deems the paltry broadband commitment in the Settlement Agreement as adequate.

Under the proposed Settlement Agreement (Agreement), the capital expenditure investment language is so vague and unclear that CETF reasonably thought that the Applicants' "commitment" was to only "aspire to commit the \$323 million" over three years in California capital expenditure investment "to meet customer demand and anticipated need for network expansion and/or upgrades by the end of calendar year 2019".¹³ CETF is relieved that in a subsequent filing, the Joint Applicants have made clear that it is committing to invest a firm dollar figure of \$323 million in California capital expenditures over the 2017-2020 time period. CETF points out, however, that there is no specific set aside dollar figure designated for public interest projects. This is just *business as usual* serving Level 3's normal business and enterprise customers. CETF is astonished that the PD could find that this vague offer is acceptable, given the precedents set in the Frontier-Verizon and Charter – Time Warner decisions.

First, the \$107.66 million per year of California capital expenditures is significantly lower than the capital expenditure spend level reported by Level 3 for 2015 in terms of California-only investment. Why the Consumer Advocates accepted such a low number leaves CETF scratching its head.

Second, the Agreement language does not *require* a single project be for unserved or underserved broadband areas, nor is there some dollar figure set aside for exclusively for public interest projects. In the past Commission commitments from communications providers, the projects in the voluntary settlement agreements were quantified and clearly in the public interest. For example, they required upgraded broadband infrastructure projects where service was subpar in terms of broadband minimum speeds according to CASF definitions and the California broadband map. They provided for free WiFi service provided in low income communities, free electronic devices for low income persons, and low cost broadband service plans for low income residents. For the Digital Divide to be closed in rural California, there must be providers who

¹² See the discussion of four CPUC and FCC decisions including full citations contained in CETF's Protest at pp. 7-9, including Frontier-Verizon Decision, Charter-Time Warner Cable Decision, the FCC's Comcast-NBC Universal and AT&T DirecTV decisions.

¹³ See Agreement, at p. 5, "Investment – Capital Expenditures" to review the commitment language involving broadband by Joint Applicants.

step up to the plate to construct necessary middle mile broadband infrastructure to reach rural areas.¹⁴

This Agreement does not meet the Section 854(a) public interest standard nor Sections 854(b) and (c) criteria because it lacks significant and quantifiable public benefit commitments approved by this Commission in cases like the Frontier Verizon and Charter Time Warner decisions. The mere level of intrastate income of Level 3 does not excuse it from meeting the public interest standard and making comparable public interest commitments in its area of work in the state. *The combined market cap of CenturyLink and Level 3 will be \$35.10 billion, with a combined 52,600 employees.* The combined entity will be a national company of significant scope, assets and size, yet the Joint Applicants offer little to the state. Other companies' public interest commitments were comparable to their size of business in California, see the Frontier–Verizon decision with a public interest broadband commitment of \$327 million, and the \$511 million broadband commitment in the Charter–Time Warner Cable merger.¹⁵

After reviewing both the market cap data and the California-only data, *CETF concluded that a reasonable public interest benefit for this Level 3-CenturyLink merger should be \$300 million.*¹⁶ This should be for capital investment in California broadband infrastructure that truly serves the public interest, not “aspirational” capital expenditures that do not have a required public interest component approved by Consumer Advocates and CETF. The Agreement falls short and should be amended as follows in Section 3 below.

C. The Settlement Agreement Should Be Amended to Provide an Explicit Tangible Public Interest Benefit of \$300 Million

The Settlement Agreement fails to affirmatively provide for any tangible and explicit public interest benefits for California as required by Section 851(a), particularly for construction of middle mile and Internet POPs, the heart of Level 3's activities in our state. Its commitment is for \$323 million of California capital expenditures over three years, lower than the last reported level of annual California-only Level 3 revenue. If the yearly dollar commitment from the last reported California revenue is maintained, the commitment should be closer to \$500 million in California business.

The Settlement Agreement language on the capital expenditure commitment is merely “aspirational” and fails to set forth a pot of money for public interest projects. At the prehearing conference, a Consumer Advocate representative stated that the new company will do business

¹⁴ If the AB1665 (Internet For All Act) is signed by the Governor, the new law would prohibit the Commission from approving CASF grants for middle mile projects. The need is clearly there for Commission creativity to meet the urgent need for middle mile projects and Internet POPs for rural California residents.

¹⁵ CETF has very conservatively valued the voluntary broadband related commitments made in Frontier-Verizon and Charter-Time Warner mergers, as noted in prior pleadings.

¹⁶ A non-profit organization, CETF makes clear that none of what it asks for goes to benefit CETF itself; CETF has been found not to be eligible for Intervenor Compensation and self-funds its involvement in public policy dockets consistent with its mission to close the Digital Divide.

here and that alone is in the public interest. CETF strongly disagrees; *merely doing business in California as opposed to other states does not constitute a public interest benefit by itself.* California is the birthplace of the computer industry, and many of the giants of the industry – Apple, Google, Facebook, Twitter, Intel, Hewlett Packard, eBay – are headquartered in this state. Level 3 is presented tremendous opportunities to serve these large enterprise customers with its services.

In its Comments on Motion to Approve the Settlement Agreement, CETF requested a \$300 million commitment over three years that is *exclusively dedicated to public interest projects.* This level of commitment is appropriate, fair and comparable to commitments of broadband providers to the state in transfers of control and mergers approved by this Commission.¹⁷ The PD errs in not requiring a comparable commitment.

The Settlement Agreement language on the capital expenditure investment commitment is exceedingly vague as to the project(s) selection and criteria. CETF urges the Agreement to be amended to add specific criteria as to what constitutes an acceptable “public interest project.” CETF suggests these definitions: (1) projects to bring middle mile broadband infrastructure or Internet POPs to unserved or underserved communities according to the current CASF program definitions and the latest California broadband map; (2) projects to bring middle mile infrastructure or POPs to community anchor institutes like schools, libraries, community colleges or community centers; (3) project to bring upgraded broadband facilities to public safety organizations, emergency responders, or State-owned county fairgrounds that lack Internet access and especially those used for emergency response command centers.

While the proposed Agreement allows CETF to participate in a workshop with Applicants and the Consumer Advocates, CETF is shut out from the final approval process for Applicants projects, and excluded from receiving progress reports. CETF should be allowed to participate in all workshops, participate in the final approval process and receive any progress reports.

The broadband projects do not require explicit Commission approval if there is lack of agreement on projects between Applicants and the Consumer Advocates, because the Agreement provides only for a Tier 2 advice letter filing in the event of a dispute. The Agreement should be amended to require Commission approval.

The PD should be amended to allow any protesting party to petition the Commission should the Applicants fail to perform on their commitments.

¹⁷ CETF Comments on the Motion to Approve the Settlement, at 10.

III. CONCLUSION

WHEREFORE, CETF respectfully requests that the Proposed Decision be amended to make changes to the Settlement Agreement consistent with the above, and with the Findings of Fact and Conclusions of Law contained in Appendix A.

Respectfully submitted,

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Dated September 28, 2017

**SUBJECT INDEX LISTING RECOMMENDED CHANGES
TO THE PROPOSED DECISION**

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Decision No. (D.) 16-12-025, Decision Analyzing the California Telecommunications Market and Directing the Staff to Continue Data Gathering, Monitoring, and Reporting on the Market, OII into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042, I.15-11-007, (issued Dec. 8, 2016), (“Competition OII”). Page 6

**APPENDIX WITH PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Findings of Fact (FOF)

Replace Existing FOF 10 with the following:

10. Section 854(b) or (c) apply to transactions where one of the utilities and/or one of the parties has annual California intrastate revenues of \$500 million or greater. While market capitalization and a unique market role is not usually used as a criterion for when to apply Sections 854(b) and (c), we consider these factors in providing context for a public interest assessment. In this proceeding, we have relied on Section 854(a) for our review, with some criteria from Sections 854(b) and (c) in our public interest assessment, namely providing short-term and long-term economic benefits for ratepayers, not adversely affecting competition, maintaining and improving the quality of service to public utility ratepayers, and being beneficial on an overall basis to the state and local economies and to the communities in the area served by the resulting public utility.

Add the following text to the end of existing FOF 11:

11. CETF objects to the Settlement's provision involving the capital expenditures investment by Joint Applicants, as being vague, and lacking a specific, quantified public benefit that will bring short-term and long-term economic benefits to California ratepayers as relating to broadband middle mile and Internet Points of Presence infrastructure that benefit unserved or underserved communities. Past communications transfers of control have contained multimillion dollar voluntary commitments for public benefit projects, which are lacking in the Settlement.

12. The Settlement is thus not reasonable, consistent with current law, or in the public interest under certain criteria from Section 854(a), (b) and (c). We find that new conditions of approval should be included in order to meet our standards of approval relating to the public interest assessment. These new conditions of approval as to the capital expenditure investment provision of the Settlement shall be as follows:

“Investment – Capital Expenditures

1. 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. Century Link and Level 3 Operating Entities will aspire to commit the \$323 million in California capital expenditures investment to meet customer demand and anticipated need for network expansion and/or upgrades by the end of

calendar year 2019.

1.5 In addition, these Operating Entities shall commit \$300 million of shareholder funds over this same three year time period for public interest projects, which may be included as part of the overall \$323 million commitment to California capital expenditure projects.

a. “Public interest projects” are here by defined as (1) projects to bring middle mile broadband infrastructure or Internet POPs to unserved or underserved communities according to the current CASF program definitions and the latest California broadband map; (2) projects to bring middle mile infrastructure or POPs to community anchor institutes such as schools, libraries, community colleges or community centers; (3) projects to bring upgraded broadband facilities to public safety organizations, emergency responders, FirstNet, or State-owned county fairgrounds that lack Internet access and especially those used for emergency response command centers.

b. Century Link and Level 3 Operating Entities agree to work with the CPUC Communications Division, TURN, ORA, Greenlining, and the California Emerging Technology Fund (CETF) to identify mutually agreeable locations where the companies will invest \$300 million of shareholder funds in new middle mile infrastructure and new points of presence as part of their public benefit commitment and their total California capital expenditures for calendar years 2018-2020, identifying projects that will benefit communities that are unserved or underserved as to broadband service, as defined by the California Advanced Services Fund program on the date the application was filed (March 23, 2017) and the California broadband map. A workshop with these stakeholders who are parties to the proceeding will be held to discuss possible locations for the public interest projects. This workshop must be held no later than four months from the date of the closing of the transaction. Parties to the Agreement agree to schedule subsequent workshops if necessary. If parties to this Settlement Agreement have not identified mutually agreeable locations for middle mile and point of presence projects by June 30, 2018, CenturyLink and Level 3 Operating Entities will submit a Tier 2 Advice Letter to the Commission by September 1, 2018 with proposal[s] for project(s) that meet the criteria set forth in this Settlement Agreement. The proposal shall include a detailed description of the project, the number of unserved and underserved households that have the potential to be served, and the budget for the project(s).

c. Reporting: CenturyLink and the Level 3 Operating Entities will jointly provide confidential detailed bi-annual progress reports to the CPUC’s Communications Division Director, ORA, TURN, Greenlining and CETF identifying the progress made on the total California capital expenditures for calendar years 2018 through 2020 by no later than September 1st for the months January through June of the same year; and by no later

than March 1st for the months July through December of the preceding year. For each middle mile and points of presence project, the progress report will include the budget, expenditures spent on each of these projects, and the work completed during that reporting period.

d. Enforcement. CenturyLink and Level 3 Operating Entities agree that any protesting party to this proceeding may petition this Commission for enforcement of any commitment made under this Settlement Agreement, and they hereby consent to the Commission's jurisdiction over this matter.

e. The Commission should require post-closing CenturyLink and Level 3 operating entities to continue offering PSTN Interoperability Services on an unbundled-basis for five additional years.

Replace FOF 15 with the following:

15. CETF raises specific objections regarding commitments relating to broadband deployment in the section of the Settlement entitled Investment –Capital Expenditures. The amendments to the section as set forth above in FOF 12 resolves its issues.

Add to the end of FOF 16 the following:

16. . . . The Settlement shall be amended with the language contained in FOF 12 as a condition of the transfer of control.

Conclusions of Law

Add to the end of COL 2:

2. . . . This Commission has added conditions outlined in FOF 12 above in order to protect and promote the public interest. This Commission has relied also Section 854(b) and (c) criteria given the importance of the role of Level 3 in the broadband marketplace in the state and the significant size of the merged entity, post closing.

Replace COL 4 with:

4. CETF did not enter into the Settlement and actively opposed it. A non-profit organization that works on Digital Divide policy issues, CETF presented convincing arguments based on recent Commission precedent in recent communications transfers of control that convinced us that CenturyLink and Level 3 should provide \$300 million in public benefit projects from shareholder funds for the state as a condition of the transfer of control, and this may be part of

the \$323 million it pledged in California capital expenditures between 2018 and 2020. The \$300 million of public benefit projects must be provided consistent with the language in FOF 12.