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)

PROTEST OF CALIFORNIA EMERGING TECHNOLOGY FUND TO THE

PROPOSED MERGER OF CENTURYLINK AND LEVEL 3 COMMUNICATIONS

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May 5, 2017

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PROTEST OF CALIFORNIA EMERGING TECHNOLOGY FUND TO THE PROPOSED MERGER OF CENTURYLINK AND LEVEL 3 COMMUNICATIONS

Pursuant to Rule 2.6 of the California Public Utilities Commission (Commission or CPUC) Rules of Practice and Procedure, the California Emerging Technology Fund (CETF) hereby files a protest to the above-referenced application (Application) relating to the proposed transfer of control of Level 3 Communications (Level 3) to CenturyLink, Inc. (CenturyLink). CETF hereby protests the Application on grounds it fails to affirmatively state any tangible public interest benefits for the people of California and thus does not meet the Section 854(a)[1] standard of review, which includes criteria of Sections 854(b)[2] and (c)[3] in the public interest assessment.

[1] Cal. Pub. Util. Code § 854(a) (2017).
[2] Cal. Pub. Util. Code § 854(b) (2017).
[3] Cal. Pub. Util. Code § 854(c) (2017).

I. Introduction

CETF is a statewide non-profit organization with the mission to close the Digital Divide in California. CETF was founded as a public benefit from the mergers of SBC-AT&T and Verizon-MCI approved by the California Public Utilities Commission (CPUC) in 2005. CETF studies and addresses the challenges of both "supply" (deployment) and "demand" (adoption) of technologies enabled by broadband.

In pursuing its mission in the last three years, CETF has participated through public comment or as an official party in most major corporate consolidations in the broadband space – Comcast/Time Warner, Frontier/Verizon, AT&T/DirecTV, Charter/Time Warner/Bright House – with consistent recommendations regarding the need for tangible public benefits for broadband deployment and adoption in this state that are derived as a result of the mergers and acquisitions. CETF participates as a legal party before both before the FCC and CPUC. With the assistance of consumer organizations, CETF has been successful in obtaining, through voluntary commitments enforced by a regulatory agency, a variety of verifiable public benefits for consumers including discounted broadband rates and free/discounted electronic devices for low income and underserved communities, public WiFi hotspots, and voluntary commitments for broadband infrastructure construction in unserved or underserved areas in California. Federal regulators and this Commission have relied upon CETF's broadband data and testimony in several major merger decisions.

CETF has negotiated legally-enforceable memoranda of understanding with two communications companies that have benefited low income and underserved communities in the state in the area of broadband access and adoption. It is with this background and in this context that CETF proffers its protest to the CenturyLink acquisition of Level 3 as lacking any public interest benefits relating to broadband.

II. Issues that the CPUC Should Consider When Reviewing the Proposed Acquisition

A. The Standard for Review

The applicable standard of review is Section 854(a) of the California Public Utilities Code (PU Code). Applicants allege that none of the merging entities has gross annual intrastate revenues exceeding $500 million. (Application, at 15.) Section 854(a) provides:

> No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section. Any merger, acquisition, or control without that prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.

The standard generally applied by the Commission to determine if a transaction should be approved under Section 854(a) is whether the transaction will be "adverse to the public interest."[4] Even "where §§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."[5] Under Sections 854(b), for mergers involving utilities with gross annual California revenues exceeding five hundred million dollars, the Commission must find that the proposed transaction does all of the following: (1) provides short-term and long-term economic

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[4] 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. (D.) 07-05-061, in A.06-09-016, et al., (issued May 24, 2007), 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, (issued June 22, 2000) 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, 2006 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.
[5] *Id*.

benefits to ratepayers; (2) equitably allocates total short-term and long-term forecasted economic benefits of the merger between shareholders and ratepayers; and (3) does not adversely affect competition. Under Section 854(c), the Commission should consider each of the eight criteria below and find, on balance, that the merger, acquisition or control proposal is in the public interest: (1) maintain and improve the financial condition of the resulting public utility; (2) maintain or improve the quality of service to public utility ratepayers; (3) maintain and improve the quality of management of the public utility; (4) be fair and reasonable to affected employees; (5) be fair and reasonable to the majority of the affected public utility shareholders; (6) be beneficial on an overall basis to the state and local economies and to the communities in the area served by the resulting public utility; and (8) providing mitigation measures to prevent significant adverse consequences which may result.

B. The Application Does Not Meet the Applicable Standard for Review

CETF posits that the 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. When considering broadband commitments, such commitments provide short-term and long-term benefits to consumers and benefit the broadband competitive landscape under Section 854(b). Under Section 854(c), broadband public commitments (1) are beneficial to the state and local economies and to the communities served, (2) improve the quality of service to broadband users, and (3) ensure fair and reasonable service to the majority of users, particularly those living in unserved or underserved rural areas.

The public benefits cited by the Applicant at pages 18-20 of its Application offer very little other than "business as usual" for future customers of the post-merger CenturyLink. First, the Applicants allege they will make "significant capital investments in the state" but offer not a single enforceable firm commitment to do so, making it clear in footnote 28 at page 18 of the Application that they will only build what they are paid to build by a paying customer. Second, the Applicants further state that by integration of operations, they will better "coordinate network planning and engineering to offer new advanced services and maximize facilities deployment" and thus "help create a more robust, non-affiliated competitor to the large incumbent and cable providers (e.g. AT&T, Verizon, and Comcast) in the state." (Application, at 18.) Again, not a single voluntary commitment or any detail is given to this Commission as to what those promised "advanced services facilities" may be, and how that in any way provides a viable or more stable competitor to the incumbent providers cited. Third, the Applicants tout that combining the entities will "ensure route diversity" increasing security for enterprise and wholesale customers, and provide "on-Net capabilities on a national and global level." (Application, at 19.) As to this alleged public benefit, the Applicants admit at page 19, paragraph two, that "no detailed plans regarding California networks or service offerings have been developed at this stage" and so assertions that overlapping facilities could be combined and that connectivity for national or global enterprise customers could be improved are mere assertions without substance. CETF suggests that the people of California deserve more concrete public benefits than these amorphous promises.

CETF has filed comments in the FCC WC 16-403 docket[6] on this proposed merger. Among issues raised by commenters at the FCC include a review of unfair business practices and possible rate increases by Level 3, and implementation of safeguards to prevent rate increases post-merger; requests for "lock-in" contract mechanisms for existing contracts of non-profit and public interest organizations; and requests for enforceable voluntary commitments to build

[6] See FCC WC Docket 16-403, https://www.fcc.gov/transaction/centurylink-level3

broadband infrastructure in underserved and unserved areas of the state, particularly in rural, remote and tribal areas. While CETF limits its concerns to the ones expressed herein, it requests that this Commission review the FCC docket for concerns expressed by parties at the national level who may not have the resources to file in every state.

III. The Commission Should Require Public Interest Benefits as a Condition of Approval of this Merger

A. Applicants Should Commit to Broadband Infrastructure Commitments

CETF finds the current Application sorely lacking in that there is not a single concrete public interest commitment for broadband set forth in the Application. In April 2017, the Commission released its 2016 Annual Report on the California Advanced Services Fund (CASF Annual Report), a Commission program to fund, among other things, broadband infrastructure grants to areas with no broadband or broadband under the speed of 6 megabits per second (Mbps) down and 1.5 Mbps up ("served speeds"). The goal of the CASF infrastructure program was to achieve funding for infrastructure projects that will provide broadband access to no less than 98% of California households by the end of 2015. The California legislature is in the process of extending the program to reach the 98%. The CASF Annual Report states that an estimated 95% of the state's households (12,323,230 households) have access to wireline broadband at served speeds, leaving 325,955 households with broadband service slower than served speeds and 292,764 households with no broadband service at all.[7] Most telling, the 98% broadband access goal has been met for households located in urban areas *while only an estimated 47% of households in rural areas have access to broadband at served speeds*.[8] The CASF Annual Report succinctly highlighted that "there is an urban versus rural broadband

[7] CASF Annual Report, Table 12, at page 37.
[8] CASF Annual Report at 4.

availability divide." Attachment F of the CASF Annual Report (pages 77-78) shows that only six California counties have met the 98% standard, while the other fifty two primarily rural counties fall below the 98% statewide goal.[9]

Further, the FCC has set a fast speed goal for broadband of 25 Mbps down and 3 Mbps up. Under this national 25/3 Mbps speed metric, California's broadband progress falls flat or falls far short of the goal. There would be only 94% of the state served by wireline broadband at this national broadband speed, leaving 745,587 households underserved or unserved in the state. (See CASF Annual Report at Table 15, page 43.)

In light of this strong interest of the Commission in broadband deployment, Applicants could acknowledge the Commission's decade of effort to upgrade broadband infrastructure in the state and make 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. Or Applicants could agree to participate in specific public private partnerships with entities that provide broadband service to anchor institutions such as schools, community colleges, universities, libraries, emergency responders, government agencies, public health care providers, and non-profit, community-based organizations. But instead the Application is silent.

In a competitive broadband environment dictated by federal telecommunications law, the State must rely on the goodwill of its broadband providers to provide broadband infrastructure for all in addition to the competitive marketplace for new infrastructure. The CASF program is one way the State has contributed telephone consumer surcharges to fund rural broadband infrastructure. Another important way this Commission has provided incentives for broadband infrastructure builds has been to look for voluntarily commitments by corporations when

[9] CASF Annual Report at 5; see also Attachment F thereto.

approving mergers in the communications area. In the very recent past, this Commission has required voluntarily rural infrastructure commitments conditions to mergers in dockets involving broadband and telecommunications providers. See, for example, D.15-12-005, the Frontier Verizon merger decision,[10] in which this Commission ordered Verizon California Inc. and Frontier Communications Corp. to take all steps necessary to apply for and obtain FCC Connect America Fund and Remote Area Fund support from the FCC. 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 pole structures may be absent. (D.15-12-005 at Ordering Paragraph 12, at 82). In D.16-05-007, the Charter-Time Warner Cable-Bright House merger decision,[11] Charter Communications executed Memoranda of Understandings with various consumer and public interest groups and made numerous voluntary public interest commitments, including to deploy 70,000 new broadband passing to current analog–only cable service areas in six rural counties within 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. *Id*.

Similarly, the FCC has ordered merger conditions that include voluntary broadband infrastructure builds. See In the Matter of Applications of AT&T, Inc. and DIRECTV for

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[10] D.15-12-005, In the Matter of the Joint Application of Frontier Communications Corp, Frontier Communications of America, Inc. Verizon California, Inc., 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 (filed March 18, 2015), issued Dec. 9. 2015 (Frontier-Verizon Decision).
[11] 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; Advance/Newhouse Partnership; Bright House Networks Information Services (California), LLC Pursuant to California Public Utilities 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 to 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), at Ordering Paragraph 2 (outlining conditions of the approval).

Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, FCC 15-94 (rel. July 28, 2015). In this case, AT&T committed to, among other things, (1) offer Fiber to the Home[12] broadband Internet Access Service to at least 12.5 million mass-market customer locations, including residences, home offices and very small businesses but excluding large enterprises and institutions; (2) to offer 1 gigabit per second (Gbps) Fiber to the Premises (FTTP) service to cover E-rate eligible schools and libraries in its service areas with FTTP service; and (3) offer a discounted broadband services program for $10 a month for eligible households (one person participating in the Supplemental Nutritional Assistance Program) in its footprint.

In the Comcast – NBC Universal merger decision before the FCC, Comcast made enforceable commitments to offer an Internet Essentials program to bring $10/month Internet access to families with at least one student on the National School Lunch Program, including a low-cost computing device and free digital literacy training.[13] Comcast has extended its program beyond the initial 3 year term; this program has benefited low income families whose children require access to the Internet to perform Internet-enabled homework, research and collaboration. These precedents should be followed by Applicants as to this merger.

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[12] Fiber-to-the-Home (FTTH) and Fiber-to-the-Premises (FTTP) refers to fiber-optic communication delivery, in which an optical fiber is run in an optical distribution network from the central office all the way to the premises occupied by the subscriber.

[13] In the Matter of Applications of Comcast Corp, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56, FCC 11-4, rel. January 20, 2011. See Appendix A (Conditions), Section XVI. Broadband Deployment and Adoption, at pp. 141-144 (Comcast will expand broadband network by at least 1,500 miles per year during 3 years after closing; upgrade Internet service to six additional rural communities in 2011; provide 600 courtesy video and broadband Internet access service account locations to schools, libraries and community institutions in underserved areas where broadband penetration is low and high concentrations of low income residents for 3 years; and provide the Internet Essentials program which provides $10 discounted Internet access, discounted electronic devices, and free digital literacy training to low income families with at least one child on the National School Lunch program.)

B. The Commission May Look at Section 854(b) and (c) Factors in its Review

As noted above, in making its public interest judgment, this Commission also may look at the factors listed in Sections 854(b) and (c). CETF urges this Commission to take into consideration while weighing this merger three factors that relate to broadband infrastructure in the state: (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 public utility.

In making this judgment, the Commission should ask where are the public benefits that will ensure economic benefits to broadband users (both wholesale customers and resulting impacts on retail users) relating to this merger? Where are the commitments by the Applicants to improve broadband infrastructure and quality of service for its business and enterprise customers? Where are any specific, enforceable public interest benefits to the state and local economies and to the communities served by the Applicants? CETF finds the Application wholly lacking in all of these categories and thus feels obliged to lodge this protest on behalf of the people of California to urge this Commission to require enforceable conditions of the merger that would enhance broadband infrastructure to address the important rural Digital Divide in this state. Any voluntary commitments should include collaboration of Applicants with the Commission's Communications Division Broadband Mapping staff, rural broadband consortia, and other interested stakeholders who represent consumers. The existence of this Digital Divide has a direct negative impact on the economic health of rural and remote communities, as noted in the Commission's own CASF Annual Report.

In view of the public interest, it would also be appropriate for the Commission to require CenturyLink to make enforceable voluntary commitments to build out middle mile facilities and increase rural broadband access, thus helping to close the Digital Divide. 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. Also, the Applicants could voluntarily provide reliability data to the Commission as its network outages, and provide data about its broadband middle mile infrastructure to the Commission's broadband mapping group in order to improve this Commission's understanding of where the middle mile gaps exist for CASF funding purposes.[14]

Our state is in dire need of state-of-the-art broadband facilities for global competitiveness and economic prosperity. This merger presents an opportunity for this Commission to take action to ensure this merger provides adequate public benefits for customers.

C. Unfair Billing Practices and Rate Increases Negatively Affect Rural Broadband Deployment

Level 3 provides critical backhaul transport service to cellular and Personal Communications Service (PCS) providers, Internet service providers (ISPs) and Wireless Internet Service Providers (WISPs). 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 by competition, but FCC filings by competitors show that when the

[14] Notably, the lack of middle mile facilities in California has prompted two major grants from the American Recovery and Reinvestment Act (ARRA) program (Digital 395 and CVIN) and multiple grants from the California Advanced Services Fund program to try and bring much needed Internet backbone service to our vast rural areas, particularly in the far North, Eastern Sierra, Central Coast and Southern California areas.

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 infrastructure growth in rural markets.

In the CenturyLink – Level 3 merger proceeding at the Federal Communications Commission (FCC), WC Docket 16-403, three separate parties filed reply comments to the proposed acquisition alleging that Level 3 engages in unfair business practices regarding billing and rates.[15] The parties' comments all cite a common thread of problems stemming from Level 3's unwillingness to pay for services already rendered. There is also an allegation that Level 3 may be coupling these alleged unfair business practices with increases in rates that depart from its usual business practices.[16] Windstream Services, LLC (Windstream) filed in its comments assertions that Level 3 has already started to engage in extortionary pricing practices:

> "Since the announcement of the CenturyLink-Level 3 transaction, Windstream has received notification from Level 3 of numerous rate increases … Level 3 enacting only rate increases and applying the increases to existing circuits is contrary to usual practice and indicates that Level 3 is exercising its market power to engage in extortionate pricing. Following this transaction, the combined entity would have even more market power to engage in such price increases."[17]

These are mere allegations but notably there are three parties who have lodged similar complaints at the FCC. Like Windstream, CETF is concerned that if the transaction is approved, Level 3 could wield its increased market power to continue to systematically increase prices to ISPs, which ultimately may increase rates charged to retail consumers. This may further exacerbate the Digital Divide suffered by low income persons and underserved communities. These rate increases and potential unfair business practices are worrisome to CETF because they

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[15] FairPoint Communications, Inc., Frontier Communications Corporation and Windstream Services, LLC.

[16] Letter to Support and Supplement Reply Comments by Frontier Communications Corporation, filed by Windstream Services, LLC, March 10, 2017, at page 2.

[17] *Id*.

ultimately reduce investment in building rural broadband infrastructure and subscribership. Like Frontier Communications Corporation (Frontier), CETF is concerned that the proposed transaction will harm rural broadband deployment. Level 3's actions increase the costs of doing business and make it difficult for large providers like Frontier, and especially smaller providers, to allocate resources to contest these unfair practices.[18] In the words of Frontier:

> "While Frontier is eager to continue to support the growth and vibrancy of rural economies and to further expand rural broadband access, Frontier must be able to recover amounts it is owed from larger carriers in a timely fashion in order to fund that investment. It is not possible to plan for, and ultimately pay for, further broadband deployments, if larger carrier customers, such as Level 3, are leveraging their size to avoid paying for services rendered."[19]

CETF agrees with Frontier and Windstream that the results of these unreasonable practices, if true, will be unfairly borne by rural communities. If left unregulated, the Applicants may use their stronger market position as long-haul and core network providers to potentially drive up costs for rural broadband providers, thereby adversely affecting rural broadband deployment. To avoid the combined entity from using its market power to raise prices on last mile providers of broadband service, this Commission could mandate that the current contract rates be provided beyond the initial term of the contract, and allow the combined entity to lease these facilities on a month-to-month basis after the initial term has been fulfilled.

D. Additional Protections for Non-Profit and Public Service Organizations

Of particular concern to CETF is whether Level 3 will inflate its rates to non-profit and public service organizations in the state, such as CENIC (Corporation for Education Networks in California).[20] For the past 20 years, Level 3 has provided long-haul broadband to CENIC at a

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[18] Reply Comments in Response to Application for Merger, filed by Frontier Communications Corporation, February 7, 2017 at page 1.
[19] *Id*. at page 5.
[20] CENIC advances education and research statewide by providing a world-class network essential for innovation, collaboration, and economic growth. This nonprofit organization operates the California

reasonable price which has enabled an array of critical public-purpose services. CENIC supports all the research and higher education institutions, the K-12 High-Speed Network for public schools and libraries, and the California Telehealth Network, including connectivity to the seven largest academic medical centers. CENIC operations directly impact scientific research, economic productivity, environmental sustainability, public safety, and quality of life for all California communities and residents. In addition, CENIC serves 10,000 anchor institutions that touch the lives of 20 million Californians each year.

This long-haul business partnership between CENIC and Level 3 needs to be committed to by CenturyLink without service disruption or pricing dislocation to ensure that the public interest is served after this proposed acquisition. It would be appropriate as a public benefit from this corporate consolidation to require CenturyLink to contractually agree with CENIC through a contract "lock-in" mechanism to continue the long-haul service for these public institutions at an affordable and reasonable rate for an appropriate long term time period, for example, 20 years. Further, there should be a review and revision of "appropriate use policies" to recognize the nature of public-private collaboration and partnerships in the world of research and innovation that is supported by networks such as CENIC and enabled by long-haul broadband that has been provided by Level 3 and will be acquired by CenturyLink.

IV. Conclusion

WHEREFORE, for all the above reasons cited above, the Commission should ensure that any approval of this acquisition include the following enforceable conditions in order to serve the

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Research and Education Network (CalREN), a high-capacity network designed to meet the unique requirements of over 20 million users, including the vast majority of K-20 students together with educators, researchers and other vital public-serving institutions. CENIC's Charter Associates are part of the world's largest education system; they include the California K-12 system, California Community Colleges, the California State University system, California's Public Libraries, the University of California system, Stanford, Caltech, and USC. CENIC also provides connectivity to leading-edge institutions and industry research organizations around the world. http://cenic.org/about/about-overview public interest: (1) commitments that CenturyLink will not engage in anticompetitive behavior as to the wholesale market after this acquisition; (2) long term rate protections to protect important non-profit and public service customers similar to CENIC; and (3) voluntarily commitments by Applicants to collaborate with the Commission's Communications Division staff, rural broadband consortia, and other interested stakeholders to build significant new middle mile broadband infrastructure to serve unserved and underserved broadband areas in the state, to improve 9-1-1 emergency services to residents, and to provide data on network reliability and broadband infrastructure to this Commission.

Respectfully submitted,

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May 5, 2017