

**DISSENTING STATEMENT OF COMMISSIONER  
MIGNON L. CLYBURN**

Re: *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-403

A \$34 billion merger between two major companies providing business data services in a highly-concentrated market. One would think that a transaction of this magnitude would trigger market-based conditions to mitigate potential public interest harms. However, the only condition imposed in this item is short-term price controls on 10 buildings nationwide.

Just how did we reach this point? By applying the wrong standards which brought about flawed conclusions. First, the item radically alters the Commission's long-standing merger review standards. Second, it resurrects a suspect market analysis from this year's *Business Data Services Order* that substituted potential competition for actual competition. Lastly, it ignores an entire portion of the market, by failing to conduct a technology-neutral market analysis.

The Communications Act is filled with references to the Commission's obligation to act in the public interest. This obligation is particularly relevant in the context of transaction reviews. We are charged with not only preserving, but advancing the goals of the Act, including universal service, competition, localism, and diversity. But with the new standard adopted by the Commission's majority, it is unclear going forward whether we will ever be able to effectively achieve those statutory goals.

Historically, the Commission balanced public interest harms versus public interest benefits when considering any transaction. We also contemplated potential remedies to those harms that did not fall within the typical market tests that guide the Department of Justice's review. This approach involved evaluating a transaction holistically and in a multi-faceted manner, which ensured that the Department of Justice and the Commission conducted similar, yet complementary analyses.

The revised test, however, will bring about untold negative consequences that will soon become apparent as the Commission reviews transactions in the future. We deserve a higher level of review. We should do more and better than this.

It was because of the now-former public interest balancing test, that we saw the launch of the Internet Essentials program which has brought affordable broadband to millions of low-income Americans. It was because of the former public interest balancing test, that we have witnessed one wireless provider emerge as a maverick competitor in the mobile wireless market. It was because of the former public interest balancing test, that millions of additional households are now connected to broadband, but today we abandon that review standard, and I fear, those public interest benefits may be no more.

The *Business Data Services Order* the FCC majority voted in favor of this year contained many flaws which I will not belabor in today's statement. I will simply note that "potential competition" does not equal or guarantee "actual competition." Relying on "potential market entrants" to produce anticipated price effects, leaves businesses with a monopoly at their location and at the mercy of supra-competitive prices.

Even if this test were sufficient to analyze the market, this Order does not apply the analysis evenly. A thorough test of potential competition would have counted as problematic, not only locations where both CenturyLink and Level 3 were located in a single building, but locations where one or the other was within half a mile of a building served by the other, which is far broader than the number of locations considered by this Order.

Finally, the Order fails to conduct a technology-neutral market analysis. Only locations where both companies have deployed fiber are deemed relevant to the competitive analysis, notwithstanding the

fact that CenturyLink has widely-deployed copper facilities over which it provides significant business data service offerings. None of those services apparently merit mention in this Order.

All of this adds up to a worrisome state of affairs in the Commission's review of transactions today, and going forward. It is because of this worry, that I must therefore, respectfully dissent.