

**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).

Application 17-03-016  
(Filed March 22, 2017)

**OPENING COMMENTS OF THE OFFICE OF RATEPAYER  
ADVOCATES, THE UTILITY REFORM NETWORK, AND THE  
GREENLINING INSTITUTE ON THE PROPOSED DECISION OF  
ADMINISTRATIVE LAW JUDGE DEANGELIS**

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## **I. INTRODUCTION**

Pursuant to Rule 14.3 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), and The Greenlining Institute (Greenlining) (collectively, Joint Consumer Groups), submit these opening comments to the September 7, 2017 Proposed Decision Approving Settlement Regarding Proposed Transfer of Control in the Joint Application (Application) of CenturyLink, Inc. (CenturyLink) and Level 3 Communications, Inc., et al. (Level 3) (collectively, the Joint Applicants). The Joint Applicants seek Commission approval to transfer control of Level 3 Operating Entities to CenturyLink (Proposed Transaction).

The Joint Consumer Groups support the Proposed Decision and Commission approval of the June 30, 2017 Settlement between the Joint Consumer Groups and the Joint Applicants (Settlement). The Proposed Decision properly finds that the terms of the Settlement address the concerns raised in the protests filed in this proceeding and provide substantial public benefits that bring this Proposed Transaction into the public interest. The approved Settlement benefits California consumers through multiple commitments by the Joint Applicants including, network investment, customer protections, reporting requirements, and a commitment to invest in network service quality. Therefore, the Joint Consumer Groups respectfully request that the Commission adopt the Proposed Decision with only the addition of clarifying language regarding the applicable legal standard for the Commission's merger review in this proceeding.

## **II. DISCUSSION**

### **A. The Commission should approve the Settlement.**

The Joint Consumer Groups support the Proposed Decision's conclusion that the Settlement "satisfies Rule 12 requirements in that it is reasonable in light of the record, consistent with law, and is in the public interest."<sup>1</sup> As the Proposed Decision acknowledges, the Joint Consumer Groups reviewed the Applicants' California-specific

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<sup>1</sup> Proposed Decision at p. 36; Conclusions of Law #3.

data and participated in detailed and numerous settlement talks to obtain public benefits which were sufficient to ensure that the Proposed Transaction would be in the public interest.<sup>2</sup>

The Proposed Decision approves the Application and Proposed Transaction pursuant to the Commission’s statutory obligations under Public Utilities Code § 854<sup>3</sup> by finding that the following terms in the Settlement not only resolve the issues in dispute among the settling parties, but also ensure that the Settlement and the Proposed Transaction are in the public interest:<sup>4</sup>

- Commitment to spend at least \$323 million in capital expenditures in California;
- Multi-stakeholder participation in a collaborative process for identifying and selecting mutually agreeable locations, focusing on unserved and underserved communities, for company investment in middle mile and points of presence infrastructure;
- Improve network reliability by replacing multiplexer equipment in the network serving California;
- Preservation of the terms of existing customer contracts from any effects of the merger;
- Granular reporting obligations on synergy savings, network deployment projects, employment levels and network outages;
- Commitment to take additional efforts to meet supplier diversity procurement goals in California;
- Advance notice to the Commission of any decision to stop leasing dark fiber to unaffiliated wholesale and enterprise customers;
- Advance notice to the Commission if either company is the subject of a formal FCC investigation or complaint regarding switched access arbitrage practices.

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<sup>2</sup> Proposed Decision at p. 24, (noting that Applicants submitted “almost 100 pages of detailed operational, technical, and financial information as provided to the Joint Consumer Groups” as part of the settlement process.)

<sup>3</sup> All subsequent references to code sections are to the Public Utilities Code.

<sup>4</sup> Proposed Decision at p. 30.

Furthermore, the Joint Consumer Groups support the Proposed Decision's conclusion that the "terms and conditions set forth in the Settlement are enforceable by the Commission pursuant to its general jurisdictional authority over the public utilities that are subject to the proposed transfer of control."<sup>5</sup>

**B. The Commission should clarify that § 854(b) and (c) may be used as guidance in determining whether a transaction is in the public interest.**

Section 854(a) provides the Commission with authority to "review the proposal and to take such action, as a condition of the transfer, as the public interest may require."<sup>6</sup> The Joint Consumers support the Proposed Decision's conclusion that the terms of the approved Settlement satisfy this public interest standard. The Proposed Decision also finds that because the settling parties agree that the Settlement "satisfies *any applicable public interest standard*, we need not resolve the Settling Parties' legal differences regarding the specific applicability of the criteria in § 854(b) and (c).<sup>7</sup> Joint Consumers agree that it is not necessary to reach a conclusion on the appropriate standard.

Therefore, Joint Consumers urge the Commission to revise the Proposed Decision to clarify its findings on the applicable criteria to approve this merger. The Proposed Decision clearly states that the Commission need not resolve the issue of which elements in § 854 should apply here. However, it appears subsequently to make a specific finding that the more specific criteria in § 854 (b) and (c) are inapplicable here because the parties to the Proposed Transaction do not meet the revenue threshold.<sup>8</sup> As a result, the Proposed Decision's inconsistency is an error in law.

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<sup>5</sup> Proposed Decision at p. 37, Conclusions of Law #6.

<sup>6</sup> Proposed Decision at p. 10.

<sup>7</sup> Proposed Decision at p. 27 (emphasis added).

<sup>8</sup> Proposed Decision at p. 27, "Accordingly, 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." See also, Finding of Fact #9 and #10.

Moreover, this error is compounded because the current language fails to acknowledge the latitude that the Commission has to review mergers using the criteria in § 854 (b) and (c) as guidance in its public interest analysis. Section 854 (b) and (c) require the Commission to apply specific criteria as part of its public interest review where one of the applicants has more than \$500 million in intrastate revenues.<sup>2</sup> However, the statute does not prohibit the Commission from applying these criteria more broadly. In fact, the Commission has applied the more detailed criteria under § 854 (b) and (c) as guidance to meet the public interest test in merger reviews that do not meet the \$500 million threshold.<sup>10</sup> The Commission should clarify the language in the Proposed Decision so that it does not unintentionally signal a change in the Commission's merger review processes and tie its own hands in reviewing future transactions.

Joint Consumers propose the following revision to p. 27 of the Proposed Decision to reflect this clarification:

The annual California intrastate revenues of these entities were above the \$500 million threshold for a mandatory application of § 854(b) and (c) by the Commission, ~~which require a showing of to show~~ affirmative public interest commitments. In this proceeding, however, the combined revenues of Joint Applicants are less than half of the \$500 million threshold that applies for purposes of

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<sup>2</sup> Pub. Util. Code § 854(b).

<sup>10</sup> *In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI*, D.05-11-029, Conclusion of Law 8, (November 18, 2005); *In the Matter of Joint Application of Charter Communications, Inc. et al. Pursuant to Cal. Pub. Util. Code Section 854 for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services, LLC et al.*, D.16-05-007, p. 25, May 12, 2016; *Joint Application of SFPP, L.P. et al, for Review and Approval under Pub. Util Code Section 854 of the Transfer and Control of SFPP, O.P. and CALNEV Pipe Line*, D.07-05-061, p. 24, September 18, 2006; *In the Matter of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S West Long Distance, Inc., and U S West Interprise America, Inc.*, D.00-06-079, p. 14, (June 22, 2000); *In the Matter of Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction*, D.10-10-017, p.15, (October 15, 2010). *Application of PacificCorp and Mid American Energy Holdings Company for Exemption Under Section 853(b)*, D.06-02-033, p. 23, (Feb. 16, 2006).

§ 854(b) or (c). Accordingly, given this revenue level, the combined entities do not constitute a dominant market force, or possess significant market power, and thus we may apply the more rigorous standard of § 854(b) and (c) does not apply as guidance for our review of this merger.

Further, Joint Consumers propose the following revisions to Findings of Fact 9 and 10 and addition to the Conclusions of Law with corresponding adjustments to numbering:

9. ~~The e~~Combined revenues- not market capitalization- of the Joint Applicants in this proceeding are less than half of the \$500 million threshold used to determine if it is mandatory that applies for purposes of to apply Section 854(b) or (c).

~~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 — not market capitalization — of \$500 million or greater. Accordingly a~~A market capitalization criterion is not relevant for purposes of evaluating the reasonableness of capital spending commitment levels as a condition of approval of the application.

Add the following as Conclusion of Law 3:

3. Since the Decision finds that the Settlement satisfies any applicable public interest standard, the Commission need not resolve the question of the specific applicability of the criteria in Section 854 (b) and (c).

### III. CONCLUSION

The Joint Consumer Groups urge the Commission to adopt the Proposed Decision with only minor clarifications to the language of the Proposed Decision because California stands to gain substantial public benefits from this Proposed Transaction through the Joint Settlement reached by the Joint Consumer Groups and Applicants.

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Respectfully submitted,

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September 28, 2017

## APPENDIX A

Revise language at page 27 to read:

The annual California intrastate revenues of these entities were above the \$500 million threshold for a mandatory application of § 854(b) and (c) by the Commission, ~~which require a showing of to show~~ affirmative public interest commitments. In this proceeding, however, the combined revenues of Joint Applicants are less than half of the \$500 million threshold that applies for purposes of § 854(b) or (c). Accordingly, given this revenue level, the combined entities do not constitute a dominant market force, or possess significant market power, and thus we may apply the more rigorous standard of § 854(b) and (c) does not apply as guidance for our review of this merger.

Further, Joint Consumers propose the following revisions to Findings of Fact 9 and 10 and addition to the Conclusions of Law with corresponding adjustments to numbering:

9. ~~The e~~Combined revenues- ~~not market capitalization-~~ of the Joint Applicants in this proceeding are less than half of the \$500 million threshold used to determine if it is mandatory that applies for purposes of to apply Section 854(b) or (c).

~~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— not market capitalization— of \$500 million or greater. Accordingly, a A~~ market capitalization criterion is not relevant for purposes of evaluating the reasonableness of capital spending commitment levels as a condition of approval of the application.

Add the following as Conclusion of Law 3:

3. Since the Decision finds that the Settlement satisfies any applicable public interest standard, the Commission need not resolve the question of the specific applicability of the criteria in Section 854 (b) and (c).