

Via ECFS

March 24, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: ***WC Docket No. 16-403***

Dear Ms. Dortch:

In reply comments and recent ex parte submissions in the above-referenced proceeding, CenturyLink and Level 3 (“the applicants”) focus their responses to INCOMPAS’s comments almost exclusively on the data sources used to determine the number of buildings within CenturyLink’s incumbent local exchange carrier (ILEC) service area that will go from two to one fiber-based provider as a result of the transaction. In so doing, the applicants neglect to address the main argument raised by INCOMPAS: The applicants have not met the standard of review for merger approval because they have failed to establish “the proposed transaction, on balance, serves the public interest.”¹

Precedent dictates that the Commission consider whether the proposed transaction “will enhance, rather than merely preserve, existing competition.”² The applicants have yet to demonstrate that the combined company will increase facilities-based competition—namely that it will build connections to buildings outside of CenturyLink’s ILEC territory on a larger scale than Level 3 would on its own—and assure competitive use of those facilities at the same or more favorable rates, terms, and conditions than those offered by Level 3 today. As it stands, the applicants have not provided evidence—or even a statement—of an intent to build vigorously outside CenturyLink’s ILEC region. The loss of a nationwide competitive builder creates a significant harm to customers who otherwise would have an alternative fiber provider to the incumbent monopolist. Instead, the applicants merely cite to benefits the transaction will bring

¹ *AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, 5671-5672 ¶ 19 (2007) (*AT&T/BellSouth Merger Order*). See also *Sprint/Clearwire License Transfer Order*, WT Docket No. 08-94, FCC 08-259, at ¶ 19 (2008) (“*Sprint/Clearwire Order*”).

² *Sprint/Clear-wire Order* at ¶ 10.

to the merged entity, not to the public. In particular, the applicants cite factors such as the combined company's ability to reduce the applicants' dependency on leased networks,³ the combination of the applicants' footprint,⁴ the combined company's improved financial profile,⁵ and the experienced management team the combined company will have in place⁶—all of which are beneficial to the combined entity, but the applicants have not shown how these factors translate into public interest benefits.

In addition to failing to demonstrate how the transaction increases competition in enterprise services markets to the benefit of enterprise customers, the applicants gloss over the public interest concerns that the transaction will actually *undermine* competition by eliminating choice of last-mile facilities-based providers for enterprise customers in many buildings. The applicants have entirely failed to respond to INCOMPAS's concern that they have limited their analysis of impacted buildings to only those buildings where they both have lit fiber facilities in place today and may omit buildings where they offer carriers the opportunity to buy wholesale fiber-based Ethernet at lit building rates.⁷ The applicants also have not responded to INCOMPAS's concern that their analysis may significantly understate competitive overlap between the applicants because it does not include buildings where CenturyLink is currently offering business data services via copper facilities.⁸

The Commission must ensure the applicants sufficiently address these concerns and the other concerns raised in the proceeding prior to approval of this transaction. Moreover, the applicants have stated that their overlap analysis is on-going and that they will submit their results in the record.⁹ The Commission should not make any decisions on the transaction until the applicants have updated the record and provided third parties a sufficient opportunity to review their revised analysis.

³ Consolidated Application to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-403, at B-5 (filed Dec. 12, 2016).

⁴ *Id.* at B-4.

⁵ *Id.* at B-13.

⁶ *Id.* at B-12.

⁷ INCOMPAS Comments, WC Docket No. 16-403, filed Jan. 23, 2017, at 8. These are buildings where deployment costs are so low that, based on their own pricing practices, the parties generally treat the buildings as if they are lit.

⁸ *Id.* at 8-9.

⁹ Letter of Yaron Dori and Brandon Johnson, Counsel to CenturyLink, to Marlene H. Dortch, WC Docket No. 16-403, at 2, dated Mar. 7, 2017.

Respectfully submitted,

/s/ Karen Reidy

Karen Reidy