

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Level 3 Communications, Inc.)
)
Transferor,)
)
and) WC Docket No. 16-403
)
CenturyLink, Inc.)
)
Transferee)
)
Consolidated Application for Consent to)
Transfer Control of Domestic and International)
Authorizations Pursuant to Section 214 of the)
Communications Act of 1934, As Amended)

COMMENTS OF INCOMPAS

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Pursuant to the Commission’s Public Notice (DA 16-1435), INCOMPAS hereby submits these comments with regard to the Application of Level 3 Communications, Inc. (“Level 3”) and CenturyLink, Inc. (“CenturyLink” and together with Level 3, the “Applicants”), for consent to transfer control to CenturyLink of various licenses and authorizations held by operating subsidiaries of Level 3 (Transaction), in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In considering its approval of the transaction, the Commission is not limited to traditional antitrust principles, but rather also considers the broader public interest. Applicants assert that

¹ FCC Public Notice, DA 16-1435, WC Docket No. 16-403, Dec. 21, 2016 (“FCC Public Notice”); Consolidated Application to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-403 (filed Dec. 12, 2016) (“Application”); 47 U.S.C. §§ 214, 309(d); 47 C.F.R. §§ 1.939, 63.52(c).

there is a public interest benefit from the transaction claiming that the transaction will “bolster” competition for enterprise services, and cite factors such as the combined company’s ability to reduce Applicants’ dependency on leased networks,² the combination of the Applicants’ footprint,³ the combined company’s improved financial profile,⁴ and the experienced management team the combined company will have in place.⁵ These benefits, however, are not so much affirmative *public interest* benefits as benefits to the Applicants themselves.

As the Commission has recognized, mergers can create “more efficient collections of assets,” but they also can threaten the continued existence of competition, eliminate competitors, or create opportunities to disadvantage rivals in anticompetitive ways.⁶ Dedicated business service markets—in which both CenturyLink and Level 3 compete with respect to the same products and geographies—are highly concentrated. With this transaction, CenturyLink will see further consolidation of its market power, especially in its incumbent region.

This transaction would eliminate choice of last-mile facilities-based providers for enterprise customers at many buildings and enable the combined company to more easily execute price squeezes to push other retail enterprise business solution providers out of the market, including for multi-location customers that need enterprise business solutions at

² Application at B-5.

³ *Id.* at B-4.

⁴ *Id.* at B-13.

⁵ *Id.* at B-12.

⁶ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12, at ¶ 15 (2001) (“*AOL Time Warner Order*”).

locations that fall at least within part of the CenturyLink incumbent region. The Applicants attempt to gloss over these issues by understating buildings where they have overlaps, while overstating alternative facilities-based options for business data services at these buildings.

The Applicants also have not demonstrated in their application or supplemental filing that the combined company will increase facilities-based competition—namely that it will build connections to buildings on a larger scale than Level 3 would on its own—outside of CenturyLink’s incumbent territory—or assure competitive use of those facilities at rates offered by Level 3 today. This Application, in fact, may dampen CenturyLink’s plans for fiber deployments to buildings lit by Level 3. Further, the Applicants have failed to offer adequate information as to dark fiber used for long-haul transport, and their citation to remaining transport providers is inadequate, as INCOMPAS has been informed those providers do not offer dark fiber for competitive use. Before approving this transaction, the Commission must ensure that the competitive force Level 3 has provided is not lost.

I. Standard of Review

In reviewing CenturyLink’s acquisition of Level 3, the Commission must conduct the public interest analysis required by Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a) and 310(d), to determine whether CenturyLink and Level 3 have shown that approval of the acquisition would serve the public interest, convenience, and necessity. In making that determination, the Commission must weigh the potential public interest harms resulting from the proposed acquisition against the potential public interest benefits to ensure that “the proposed transaction, on balance, serves the public interest.”⁷

⁷ *AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, 5671-5672 ¶ 19 (2007) (*AT&T/BellSouth Merger Order*). See also *Sprint/Clear-wire License Transfer Order*, WT Docket No. 08-94, FCC 08-259, at ¶ 19 (2008) (“*Sprint/Clear-wire Order*”).

The Commission, in applying this public interest standard, considers whether the proposed merger “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act”:⁸

In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger *will accelerate the decline of market power by dominant firms* in the relevant communications markets, and *the merger’s effect on future competition*. . . . For instance, combining assets may allow the merged entity to . . . create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.⁹

In particular, the Commission considers whether a proposed transaction “*will enhance*, rather than merely preserve, existing competition.”¹⁰

Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets¹¹

As discussed further below, the Applicants have not met their burden of demonstrating that the public interest benefits outweigh the harms or that the merger will enhance competition.

II. Applicants Have Not Demonstrated the Merger Will Enhance Competition in the Enterprise Market

Recent proceedings at the Commission demonstrate the critical need for an increase in the number of competitors for enterprise services, namely dedicated business data services. The

⁸ *Id.*

⁹ *AT&T/BellSouth Merger Order* at ¶ 21 (emphasis added).

¹⁰ *Sprint/Clearwire Order* at ¶ 21 (emphasis added).

¹¹ *AT&T/BellSouth Merger Order* at ¶ 20. *See also Sprint/Clearwire Order* at ¶ 20.

Commission has found that “concentration by any measure appears high in this industry.”¹² Virtually no commercial buildings are subject to significant actual dedicated business data services competition. Indeed, as of 2013, the vast majority of commercial buildings with demand for business data services were served by only one facilities-based competitor, and 99 percent were served by only one or two such providers.¹³ As Level 3’s economist found, “[w]hen there is one provider, it is nearly always an incumbent local exchange carrier . . . [and m]ost duopoly markets are served by an ILEC.”¹⁴ Likewise, the Commission recently asserted that these markets remain highly concentrated as “costs and conditions exist in the market with enough significance in any measure of a geographic market to deter rapid competitive entry or expansion, including high capital expenditures, large sunk costs, long lead times, scale economies, and cost disadvantages.”¹⁵ This led Level 3’s economist to conclude that “the prospect of entry is unlikely to deter incumbents from charging supracompetitive prices.”¹⁶ CenturyLink—due to loss of competition from Level 3 and reduction in competition offered by

¹² *Business Data services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, at ¶ 216-224 (rel. May 2, 2016) (“BDS Further Notice”).

¹³ *See id.* ¶ 220.

¹⁴ Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 3-4, ¶ 6 (dated Jan. 27, 2016) (refiled Apr. 14, 2016) (“Baker Declaration”).

¹⁵ *BDS Further Notice* at ¶ 224.

¹⁶ Baker Declaration at 3-4, ¶ 6.

solutions providers using Level 3 last-mile inputs to provision their retail services—will be even less restrained in charging supracompetitive prices.

As the Applicants are well aware, the business data services market is critical to the economy. The dedicated business data services market comprises a \$45 billion industry in itself. Importantly, these services are a critical input to the operation of countless businesses, educational and health care institutions, government entities, and wireless providers. For example, as mobile providers explained, access to dedicated business data services at 100 Mbps and above at reasonable prices is vital for wireless providers to meet the current demand for wireless broadband services and to build next generation mobile broadband networks.¹⁷ Moreover, competitors use business data services to offer competitive service to the incumbents. Accordingly, the rates, terms, and conditions on which these services are offered have a significant effect on consumer welfare. The economic impact these services generate is estimated to be in the range of \$75 billion annually.¹⁸ Therefore, the Commission must critically assess the impact this transaction will have on business data services customers as the Applicants propose to eliminate a business data services competitor—one that currently offers wholesale and retail business data services at more reasonable rates than incumbents.

¹⁷ Letter from Steven Berry, President and CEO, Competitive Carriers Assoc., Chip Pickering, CEO, INCOMPAS, Vonya McCann, Senior VP, Govt. Affairs, Sprint, Kathleen O’Brien Ham, Senior VP, Govt. Affairs, T-Mobile, and Grant Spellmeyer, VP, Fed. Affairs and Public Policy, U.S. Cellular to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Apr. 21, 2016) (“Joint Wireless Letter”).

¹⁸ *BDS Further Notice* at ¶ 44.

A. Applicants Significantly Understate the Degree to Which This Transaction Will Result in a Loss of Competition for Retail Business Solutions Customers

Applicants acknowledge that CenturyLink is the third-largest incumbent in the country, with more than 17 million access lines.¹⁹ CenturyLink already provides enterprise service as an incumbent LEC in all or portions of 37 states.²⁰ As Level 3 has stated: “By virtue of their historical monopolies, the incumbent LECs possess ubiquitous networks that connect to virtually every commercial building within their service areas. This enables the incumbents to provide dedicated services to any of these locations without relying on the networks of other providers.”²¹ CenturyLink’s reach includes a 250,000-route-mile fiber network and a 300,000-route-mile international transport network. Moreover, CenturyLink has stated that Level 3 was “the second-largest provider of Ethernet Services....”²² As a competitor, Level 3 has been expanding its fiber network as well as its business grade and wholesale services.²³ So, while it is apparent that the acquisition of Level 3 will strengthen CenturyLink’s dominance in its incumbent territory, the Applicants have failed to show how the transaction *increases* the number of competitors for enterprise services to the benefit of enterprise customers. Indeed, the Applicants concede that there is overlap in the areas where CenturyLink and Level 3 provide enterprise services, so the merger necessarily results in a direct reduction in competition.

¹⁹ Application at B-12-13.

²⁰ FCC Public Notice at 2.

²¹ See Comments of Level 3 *et al*, WC Docket 05-25, RM-10593, at 19-20 and n. 48, filed Jan. 27, 2106 (“January BDS Comments of Level 3 *et al*”).

²² Comment of CenturyLink, WC Docket 05-25, RM-10593, at 15, filed Jan. 28, 2016 (“CenturyLink January BDS Comments”).

²³ *CenturyLink January BDS Comments* at 3.

Applicants' analysis, however, is faulty in its assessment as to the extent of the loss of competition and, consequently, fails to provide sufficient information to measure the full degree to which competing services may be eliminated by this transaction.

First, in calculating the buildings that go from 2 to 1 (or duopoly to monopoly) providers, the Applicants significantly understated the number of buildings where they have competitive overlaps in business data services offerings. In particular, there are many customers in buildings looking for Ethernet service—and today they have two options, but tomorrow will only have one option. The Applicant's approach toward the data suggest there are far fewer of these customers than is actually the case. Specifically, Applicants limit their analysis of impacted buildings to only those buildings where they both already have fiber facilities in place today—and may omit a large number of buildings where the companies offer fiber-based Ethernet service at standard rates but just have not yet lit the fiber. To correct for this, the Commission, at a minimum, should ask CenturyLink and Level 3 to disclose overlap data for any buildings where they offer carriers the opportunity to buy wholesale fiber-based Ethernet at lit building rates—i.e., all 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.²⁴

The Commission also should be mindful of any additional buildings where CenturyLink is currently offering business data services via copper facilities because, as the Commission is fully aware, business data services can be provided over copper or fiber facilities. Indeed, even CenturyLink's Chief Executive Officer, Glen F. Post, indicates the company's future plan is “to

²⁴ The list of non-lit buildings priced like lit buildings may be particularly long for an in-region ILEC, because, as elaborated on below, the ILEC has the unique ability to use its legacy infrastructure to avoid significant deployment costs (existing conduit, building entries, etc. can be used for fiber-based business data services) as well as a large pre-existing customer base over which to spread its lower costs.

get more life out of the old copper networks.”²⁵ Level 3 offers competition to CenturyLink’s copper-based enterprise services as well as its fiber-based enterprise services. Accordingly, the Commission must evaluate the entire overlap of all offerings of business data services—no matter the facilities over which the business data services is being delivered.

This legacy infrastructure gives incumbents the added benefit of a “leg up” when deploying fiber-based Ethernet service. CenturyLink often can readily leverage its extensive existing conduit, rights of way, and building entries to deploy fiber and thereby assumes far lower costs when deploying fiber. (This advantage is in addition to its incumbent advantage of being able to spread costs over a far larger base of current subscribers than any other business data services providers.) In contrast, competitors must overcome substantial barriers to the provision of facilities-based fiber services that the incumbents do not face—such as the need to obtain building and rights-of-way access and permission to build new conduit in a timely manner—to deploy last-mile fiber connections to business customer locations.

Second, while Applicants omit a large degree of their overlap in providing business data services, they simultaneously overstate the competitive presence of other providers. The Applicants’ seem to suggest that they are looking at competitive entry in the same way as the FCC did in its evaluation of competition in the Verizon-XO transaction²⁶—where the FCC found that competitive entry is likely only at buildings where demand is at least 100 Mbps and there is a competitive fiber provider within 0.1 miles of the building. But it does not appear that Applicants are using appropriate data sources to actually replicate this analytical framework.

²⁵ CenturyLink, Inc. FQ1 2016 Earnings Call, May 4, 2016 at 12.

²⁶ See Application at B-19, fn. 31 (asserting that its analysis of alternative providers “reflect the ‘conservative view’” that “the Commission used in its order approving the merger of Verizon and XO”).

Specifically, they cite four sources that are largely, if not entirely, unhelpful in assessing whether a building currently has another last-mile facilities based provider or is likely to attract a such provider to deploy fiber in the future:

- Form 477: This Commission dataset is not more granular than the census-block level (i.e., does not identify demand conditions at a building specific level) and does not distinguish best efforts service from dedicated business data services (i.e., it does not show whether 100 Mbps in demand is for the relevant service).
- GeoResults GEOLIT dataset: Our understanding is that these GeoResults data do not distinguish between retail providers that own fiber to a building versus those that lease fiber (but have their own equipment at the location). So using this, a company may be construed as facilities-based provider when it does not actually own last-mile fiber.
- Level 3 competitive intelligence: INCOMPAS has no visibility into the Level 3 intelligence, so cannot verify how good (or not) this information is in identifying alternative facilities-based providers, assuming the dataset even can distinguish those from other competitors' merely leasing last-mile access.
- Cable companies' websites: Our members' experience is that it can be difficult to use cable websites to pinpoint individual buildings where these providers offer dedicated business data service by address—and even if they respond to addresses, websites may overstate potential coverage to get a prospective customer to call in.

Moreover, the Applicants' apparent attempt to "count" irrelevant best efforts service as competition in the business data services market is contrary to advocacy of both cable providers and even Level 3 itself. Cable providers agree that disparities between cable hybrid fiber-coaxial ("HFC") networks and fiber networks render HFC-based services "at best, an inferior, occasional substitute for business data services," and that construction and capacity limitations make it infeasible for cable companies to deliver a BDS-like product at scale.²⁷ NCTA concluded that to the extent performance objectives of Ethernet over HFC services are even offered, they "often

²⁷ Letter of Jennifer P. Bagg, Counsel to Sprint Corporation, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 15-247, and 05-25, RM-10593, at 6, filed Sept. 28, 2016 (*quoting* Windstream Reply Comments, WC Docket No. 05-25, RM-10593, at 18-19, filed Aug. 9, 2016).

are well below the performance commitments offered with TDM or fiber-based Ethernet services.”²⁸ Even Level 3 executives have explained that “while the cable companies’ Ethernet-over-fiber and DSn-over-fiber services are competitive with Level 3’s dedicated services, the cable companies’ best-efforts broadband Internet access and their Ethernet-over-HFC services generally are not competitive with Level 3’s dedicated services.”²⁹ The service quality of these services does not meet the needs of Level 3’s existing customer base or prospective customers. As a result, “Level 3 generally does not monitor or respond to the cable companies’ rates, terms, and conditions for these services.”³⁰

In short, in terms of overlap, the Commission must consider all of the buildings where Level 3 and CenturyLink are offering business data services. The Commission then should take care to address competitive concerns arising out of overlap buildings where last-mile facilities-based business data service competition is lacking and seems unlikely to emerge in the future. Availability of best efforts services offerings does not obviate competitive concerns.

B. Applicants Provide No Evidence the Combined Entity Will Increase Fiber-Based Competition for Enterprise Services

Applicants state that AT&T and Verizon are the “largest players in the nationwide provision of enterprise services” and that the “transaction will enhance the Applicants’ ability to compete against these larger providers.”³¹ Level 3, as an independent entity, has stated it

²⁸ Comments of the National Cable & Telecommunications Association, WC Docket Nos. 16-143, 05-25, at 28, filed Jun. 28, 2016.

²⁹ *January BDS Comment of Level 3 et al* at 16.

³⁰ *Id* at 16-17.

³¹ Application at B-8– B-9.

“deploys new loops at a faster pace than most (possibly all) other competitive carriers.”³²

According to the Applicants’ supplemental filing, the bulk of this deployment is in the AT&T and Verizon territory.³³ Level 3 has also stated it aimed to deploy new loops to approximately 3,000 to 4,000 commercial buildings in the U.S. each year.³⁴ In order for this merger to be in the public interest and for CenturyLink to be a competitive force to AT&T and Verizon, the Applicants must demonstrate that as a combined entity it would build (not just have the capability to build) fiber connections to more buildings, at a faster rate, and offer wholesale and retail services at the same or better terms, than Level 3 would offer independently. As it stands, the Applicants have not provided that showing. Indeed, the Applicants offer no statement—let alone supporting evidence—of an intent to build vigorously outside CenturyLink’s incumbent region. It is not clear the combined entity would even continue to build at the same pace as Level 3—a significant harm to those customers that would not obtain an alternative fiber provider to the monopoly incumbent. Moreover, with this transaction, CenturyLink may lose the incentive to deploy fiber facilities in region, i.e., to serve as a second fiber-based provider in buildings where Level 3 already has deployed a fiber connection.

C. Applicants Do Not Demonstrate Continued, Let Alone Enhanced, Competition in the Provision of Dark Fiber Used for Long-Haul Transport

Applicants fail to acknowledge that this transaction would have a negative impact on downstream retail competition by significantly compromising, if not entirely eliminating,

³² *January BDS Comments of Level 3 et al.* at 7.

³³ Letter of Thomas Jones, Counsel to Level 3, and Yaron Dori, Counsel to CenturyLink, to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed Dec. 19, 2016) (Dec. 19, 2016 Supplement).

³⁴ *January BDS Comments of Level 3 et al.* at 7.

competitive carriers' ability to continue purchasing dark fiber used for long-haul transport over certain routes. In considering the extent of competition, it is important to distinguish between dark fiber and lit services. Based on membership feedback, INCOMPAS understands that alternative long-haul transport providers cited by Applicants (AT&T, Verizon, and Comcast) generally refuse to offer leased access to dark fiber. If the combined company refuses to offer this leased access going forward, competitive carriers that use dark fiber and downstream retail business solutions customers they serve will be harmed. Competitive carriers would need to be more selective in future sales and renewing any existing customer agreements to areas served by long-haul routes if their existing dark fiber IRUs are not renewed.

CONCLUSION

One of the crucial tasks the Commission performs in evaluating acquisitions is ensuring that the transaction enhances competition. The dedicated business data services market—in which Level 3 currently competes with CenturyLink—is already highly concentrated. This market—which has a critical impact on the economy—needs an increase, rather than a decrease, in facilities-based competitors. Level 3 has been one of the strongest such competitors in this market. The Commission must ensure that the competitive force it provided is not lost as a result of this transaction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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