

**Before the  
Federal Communications Commission  
Washington, DC 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	)	

**REPLY COMMENTS OF PUBLIC KNOWLEDGE**

**I. INTRODUCTION AND SUMMARY**

Public Knowledge files these Reply Comments in the above-captioned proceeding in response to the Application of CenturyLink, Inc. (“CenturyLink”) to acquire Level 3 Communications, Inc. (“Level 3”) (collectively, “Applicants”).<sup>1</sup>

---

<sup>1</sup> Consolidated Application to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket 16-403 (filed Dec. 12, 2016) (“Application”); Applications Filed for the Transfer of Control of Level 3 Communications, Inc. to CenturyLink, Inc., WC Docket 16-403, *Public Notice*, 31 FCC Rcd 13408 (2016).

As filed, the Application is deficient because it fails to address the harms to competition that are a likely result of combining CenturyLink and Level 3, and the Application fails to demonstrate that the transaction will service the public interest. The Applicants have not demonstrated how their combination will enhance, rather than eliminate competitive choices for enterprise broadband, or business data services (“BDS”) customers, including small businesses, startups, community anchor institutions, and state and local governments. As INCOMPAS has explained, the proposed transaction is likely to decrease existing competition and future competition in the BDS marketplace.<sup>2</sup>

Additionally, the Application fails to show that the transaction will serve the public interest, convenience, and necessity. In light of the likely competitive harm this transaction poses, the Applicants must sufficiently demonstrate and commit that the combined firm will serve the public interest by increasing BDS competition and enhancing the availability and affordability of residential broadband services, particularly in unserved and underserved markets. As filed, the Application fails to meet this burden.

## **II. THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE TRANSACTION SERVES THE PUBLIC INTEREST**

The Application, as filed and supplemented, fails to demonstrate that the proposed transaction serves the public interest. As INCOMPAS points out, CenturyLink and Level 3 fail to show that the transaction will serve the public interest. Further, the Application does not address or propose to mitigate the clear threats to consumers and competition.<sup>3</sup> This is a threshold matter,

---

<sup>2</sup> See Comments of INCOMPAS, WC Docket No. 16-403, at 7-11 (filed Jan. 23, 2017).

<sup>3</sup> See generally, *Id.*

and the Federal Communications Commission (“Commission”) cannot approve the Application until CenturyLink and Level 3 make the requisite public interest showing.

Under the Communications Act, CenturyLink and Level 3 must prove that the transaction serves the “public interest, convenience, and necessity” to gain the Commission’s approval.<sup>4</sup> The Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”<sup>5</sup> If the Commission cannot find that the proposed combination serves the public interest, or if the record presents a substantial and material question of fact, the applications must be designated for hearing.<sup>6</sup>

The Commission’s evaluation includes “a deeply rooted preference for preserving and enhancing competition . . . promoting a diversity of information services and services to the public[.]”<sup>7</sup> Further, the FCC’s competition analysis “considers how the transaction would affect competition by defining a relevant market, looking at the market power of incumbent

---

<sup>4</sup> See 47 U.S.C. § 310(d); Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, *Memorandum Opinion and Order*, 30 FCC Rcd 9131, 9139 ¶ 18 (2015) (“*AT&T/DIRECTV Order*”) (explaining that applicants bear the burden of demonstrating “that the proposed transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity”).

<sup>5</sup> *AT&T/DIRECTV Order* at 9140 ¶ 18; Applications of Cricket License Company, LLC, *et al.*, Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations, Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization; WT Docket No. 13-193; *Memorandum Opinion and Order*, 29 FCC Rcd 2735, 2742 ¶ 13 (2014).

<sup>6</sup> See 47 U.S.C. § 309(e); *AT&T/DIRECTV Order* at 9140 ¶ 18; Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10-56, *Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4247-48 ¶ 22 (2011) (“*Comcast/NBCU Order*”).

<sup>7</sup> *AT&T/DIRECTV Order* at 9140 ¶ 19; *Comcast/NBCU Order* at 4248 ¶ 23.

competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction.”<sup>8</sup>

Importantly, the Commission’s competition analysis is broader than the Department of Justice’s review because it includes the public interest standard. “[T]he Commission considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”<sup>9</sup>

It is clear that the proposed combination will reduce head-to-head competition between CenturyLink and Level 3 and remove an aggressive and innovative independent competitor from the marketplace. Also, the Applicants have not explained how they will mitigate this loss of competition; CenturyLink and Level 3 have not committed to build new facilities to compete against rival incumbents, promised to deploy new networks to close the digital divide, or pledged not to increase prices or otherwise exercise their increased market power. In short, the Applicants have not even attempted to show that the proposed combination will serve the public interest.

The Applicants tout that the transaction will improve the combined firm’s bottom line – through reduced dependence on leased fiber facilities and an enhanced footprint and financial profile to compete against AT&T and Verizon – but, they fail to actually make concrete commitments to build networks that serve new communities or build competitive networks that give customers real facilities-based fiber competition. To ensure the proposed combination will serve the public interest, the Commission should require the Applicants to make tangible

---

<sup>8</sup> *AT&T/DIRECTV Order* at 9140-41 ¶ 20; Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee; MB Docket No. 07-57; *Memorandum Opinion and Order and Report and Order*; 23 FCC Rcd 12348, 12365 ¶ 32 (2008) (“*Sirius/XM Order*”).

<sup>9</sup> *AT&T/DIRECTV Order* at 9141 ¶ 21; *Comcast/NBCU Order* at 4248 ¶ 24; *Sirius/XM Order* at 12365-66 ¶ 32.

commitments to deploy fast, affordable retail broadband service to unserved communities within the firm’s footprint, and to quickly deploy fiber networks to BDS customer locations served by other facilities-based providers.

Requiring commitments to deploy new networks to unserved areas will further the Commission’s efforts to close the digital divide and are consistent with Chairman Pai’s first remarks as Chairman:

“[T]here is a digital divide in this country—between those who can use from cutting-edge communications services and those who do not. I believe one of our core priorities going forward should be to close that divide—to do what’s necessary to help the private sector build networks, send signals, and distribute information to American consumers, regardless of race, gender, religion, sexual orientation, or anything else.”<sup>10</sup>

Further, requiring these commitments would ensure that the Applicants meet their burden of demonstrating that the consummated transaction will further the public interest.

### **III. THE CENTURYLINK-LEVEL3 TRANSACTION WILL LIKELY FURTHER CONSOLIDATE THE ENTERPRISE BROADBAND MARKET**

The Commission recently observed that “concentration by any measure is high” in the BDS market.<sup>11</sup> The proposed CenturyLink/Level 3 merger is likely to eliminate competition between the firms, as well as remove a strong, independent competitor from the market, further consolidating an already unreasonably concentrated BDS market

Economic analysis in the Commission’s BDS docket overwhelmingly concluded that an incumbent provider, like CenturyLink, is the only facilities-based provider in three-quarters of all BDS customer locations, and that nearly all BDS customers are served by two or fewer

---

<sup>10</sup> Remarks of FCC Chairman Ajit Pai to FCC Staff, at 2 (Jan. 24, 2017), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0124/DOC-343184A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf).

<sup>11</sup> Business Data Services in an Internet Protocol Environment, WC Docket Nos. 16-143, 15-247, 05-25, RM 10593, *Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4723, 4818 ¶ 216 (2016).

providers.<sup>12</sup> Studies of concentration in the BDS market showed that in census blocks served by an incumbent provider, the Herfindahl-Hirschman Index (“HHI”) is 10,000 in more than eighty percent of census blocks, between 7,500-10,000 in about eleven percent, and between 5,000-7,500 in about five percent. HHI in the BDS market exceeds 5,000 in approximately ninety-nine percent of census blocks. The Department of Justice’s Merger Guidelines define a market with an HHI above 2,500 as “Highly Concentrated.”<sup>13</sup>

CenturyLink’s proposed acquisition of Level 3 will almost certainly exacerbate the lack of competition in the BDS market. First, the proposed transaction will eliminate Level 3 as a direct competitor to CenturyLink in the markets where the firms’ footprints overlap.<sup>14</sup> Contrary to the Applicants’ claims,<sup>15</sup> eliminating Level 3 as a direct competitor will adversely effect CenturyLink and Level 3 customers by enhancing the combined firm’s market power, giving it both the power and incentives to raise prices and reduce service quality to customers.

As INCOMPAS points out, the Applicants have underestimated or failed to disclose significant overlap between the two firms.<sup>16</sup> The Commission cannot adequately analyze the competitive effect of the proposed CenturyLink/Level 3 combination, and should not approve the transaction without a complete account of where and how the firms compete against each other.

Second, permitting CenturyLink to acquire Level 3 will eliminate an important, independent competitor from the marketplace. Level 3 not only competes directly with

---

<sup>12</sup> *See id.* at 4798-4803 ¶¶ 173-185.

<sup>13</sup> *Id.* at 4802 ¶ 183.

<sup>14</sup> Comments of INCOMPAS, at 7.

<sup>15</sup> *See* Application, Public Interest Statement, at B-3 – B-4, B-20 – B-21.

<sup>16</sup> *See* Comments of INCOMPAS, at 8-10.

CenturyLink, but it also competes as a facilities-based BDS provider in territories served by AT&T and Verizon, and deploys its network faster and more aggressively than other competitive providers.<sup>17</sup> As INCOMPAS correctly explains, for this transaction to enhance, rather than eliminate competition, the Applicants must demonstrate that they plan to deploy more new fiber connections in AT&T and Verizon territories, deploy those connections faster than a standalone Level 3 had planned, and offer wholesale and retail services on better terms than a standalone Level 3 would offer.<sup>18</sup>

Given the market overlap between the firms and the fact that the transaction will eliminate an aggressive independent competitor, the Commission must secure firm commitments that the transaction will increase, rather than reduce competition. The Commission should require the Applicants to commit that the combined firm will use its enhanced market power and financial resources to compete directly and aggressively against other incumbent providers, in those providers' territories. Such a condition would ensure deployment of competitive broadband choices for BDS customers. Failure to require competition and deployment commitments from the Applicants will likely lead to fewer competitive choices for enterprise business customers, including small businesses, startups, community anchor institutions, and government agencies, aggravating the more than \$150 billion in economic losses stemming from abuses of market power by incumbent BDS providers over the past five years.<sup>19</sup>

---

<sup>17</sup> See Letter of Thomas Jones, Counsel to Level 3, and Yaron Dori, Counsel to CenturyLink, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-403, at 2 (filed Dec. 19, 2016).

<sup>18</sup> Comments of INCOMPAS, at 12.

<sup>19</sup> See Mark Cooper, Director of Research, Consumer Federation of America, "The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excess Profits," at

#### IV. CONCLUSION

The Applicants have failed to show how the proposed CenturyLink/Level 3 combination will serve the public interest and mitigate the likely harms to competition and consumers in the BDS market. The Commission cannot approve this transaction until the Applicants have met this burden, as required by the Communications Act.

Respectfully submitted,

/s/ Phillip Berenbroick  
*Senior Policy Counsel*  
PUBLIC KNOWLEDGE

February 7, 2017

---

1, 35 (Apr. 2016), available at <http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf>.