

March 29, 2017

VIA ELECTRONIC FILING

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

Re: Applications Filed For the Transfer of Control of Level 3 Communications,  
Inc. to CenturyLink, Inc. - WC Docket No. 16-403

Dear Ms. Dortch:

FairPoint Communications, Inc. ("FairPoint") respectfully requests that these informal comments be accepted in the above-referenced proceeding as a supplement to, and in support of, the Reply Comments of Frontier Communications ("Frontier").<sup>1</sup> FairPoint concurs that approval of the pending transaction would disserve the public interest unless the Commission requires the applicants to comply with specific and enforceable conditions to curb the historic abuses for which Level 3 is justifiably notorious in our industry.

At the outset, FairPoint wishes to state for the record that it has found CenturyLink senior management to be honorable in their business dealings, dealing fairly with FairPoint in various interconnection and inter-carrier compensation arrangements. However, FairPoint reiterates the criticism raised in the Frontier Comments of Level 3's anti-competitive methods and bad faith dealings with carriers with whom they interconnect.<sup>2</sup> Their tactics of dispute, delay and denial of legitimate invoice are very costly for carriers such as FairPoint, who have limited recourse and must pursue Level 3 through litigation in the courts.<sup>3</sup> Examples of these tactics are well known in the industry:

<sup>1</sup> Reply Comments of Frontier Communications Corporation, WC Docket No. 16-403 (filed Feb. 7, 2017) ("Frontier Comments").

<sup>2</sup> Frontier Comments at 3:  
Level 3's conduct goes far beyond a reasonable level of disagreement over the appropriate application of certain charges when parties are paying tens of millions of dollars in services. Level 3 routinely disputes a significant percentage of its bills, which is disproportionate to the number of charges that other purchasers dispute. [...] Level 3's practice is always to drag its feet in responding, or disagree with the denial, keeping money owed to Frontier in its accounts and earning interest on it. It appears Level 3 is seeking to so overwhelm the seller of services that some of the disputes will fall outside the collection window, or worse, it can force settlement of those disputes for a fraction of the amount due.

<sup>3</sup> FCC tariffs forbid FairPoint from discontinuing service for non-payment of charges that are the subject of a "good faith" dispute.

- Level 3 disputes far more bills than other carriers, so much so that this has become their routine practice, rather than an exceptional circumstance.
- Typically, when they initiate a dispute-resolution process, they fail to provide sufficient detail for FairPoint to investigate the dispute in a timely manner.
- While a bill is disputed, Level 3 employs “clawback” tactics, refusing to pay disputed amounts and *deducting* disputed amounts from undisputed amounts it owes, in violation of the terms of the applicable tariff.
- Even after a dispute is resolved, and Level 3 has agreed in principle on an amount that it owes, it withholds payment until it receives a *subsequent* invoice, rather than submitting the payment with the disputed invoice. This drives up late payment charges and creates unnecessary administrative costs for FairPoint.
- Level 3 refuses to pay late payment charges, regardless of the circumstances, though they are expressly prescribed in the applicable tariff.

The applicable tariffs provide for orderly dispute resolution procedures in the case of any “good faith” dispute. However, the Commission as a rule does not entertain collection actions, so these are most often resolved through litigation in federal courts (for services provided under FCC tariffs). In some cases, FairPoint has successfully proceeded against Level 3 through litigation or negotiated settlement. For example, the federal district court in Vermont questioned whether Level 3 had disputed FairPoint charges in “good faith,” and on that basis denied Level 3 a preliminary injunction, finding Level 3 did not have unclean hands but engaged in improper self-help:

More compelling, however, is FairPoint’s further claim that in the midst of the parties’ lengthy resolution process, Level 3 engaged in an unauthorized self-help method that undermines its repeated claims that it attempted to resolve the disputed charges in good faith. Level 3 concedes that it did not pay certain 2010 and 2011 invoices in full based upon an undisclosed belief that it had overpaid invoices for VoIP Traffic in 2009 and 2010. Level 3 neither adequately advised FairPoint that it was exercising this “claw back,” nor did it provide any evidence that would allow FairPoint or the court to conclude that previous overpayments had actually occurred. Thus, in the face of a mounting financial dispute between the parties, Level 3 deliberately increased the amount in controversy by failing to pay undisputed amounts on current invoices in full. A deliberate practice of withholding payment for undisputed charges belies any claim of good faith and undercuts Level 3’s repeated assertions that it has paid all undisputed charges in full.<sup>4</sup>

<sup>4</sup> *Level 3 Communications, LLC v. Telephone Operating Company of Vermont, LLC, Northern New England Telephone Operations, LLC*, Case No. 5:11-cv-280, slip op. (U.S.D.C. Vt. filed Dec. 15, 2011) (citation to the record omitted). FairPoint previously provided a copy of this slip opinion to the FCC and . See *Application for the Transfer of Control of tw telecom inc. to Level 3*

Although that case ultimately was resolved, Level 3 has continued to exercise self-help steps, including filing disputes without providing sufficient detail, employing claw-back tactics, and initiating disputes that lack any real merit but seem to serve only to harass FairPoint.

FairPoint and Frontier are not the only interconnecting carriers to perceive Level 3 as dealing in bad faith. Windstream recently concurred, "Windstream has found that Level 3 in particular has been unreasonably refusing to pay or delaying payment on millions of dollars for services rendered by Windstream."<sup>5</sup>

In short, Level 3's litigious tactics and culture of dealing with other carriers in bad faith have created a morass of litigation and billing problems, seriously harming interconnecting companies such as FairPoint. While CenturyLink has not characteristically displayed these tendencies, there is good reason to fear that the combined company, with its substantial size and market clout, could continue and expand upon these self-help practices, adversely affecting competition.<sup>6</sup>

FairPoint therefore supports the conditions proposed by Frontier on the applicants.<sup>7</sup> FairPoint requests specifically:

- That Level 3 be required *prior to closing* to provide assurance to the Commission that (i) it has fully paid all inter-carrier compensation and interconnection balances that are due and have not been disputed under the terms of the applicable tariff or interconnection agreement, (ii) for all disputed balances Level 3 shall have furnished sufficient detail that the disputes are capable of being investigated and resolved within the time frame specified in the applicable tariff or interconnection agreement, and (iii) Level 3 is not withholding any amounts from undisputed billings (as a claw-back for disputed amounts or for any other reason not expressly permitted under the applicable tariff);
- That Level 3 and CenturyLink (or the combined company) make an affirmative commitment, for five years from the date of closing, to resolve all billing disputes within 180 days, including making all required payments (including late payment

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*Communications, Inc.*, Reply Comments of FairPoint, WC Docket No. 14—104 (filed Sept. 2, 2014), attachment.

<sup>5</sup> Letter from Malena Barzilai, Windstream Services, LLC, to Marlene H. Dortch, FCC Secretary, WC Docket No. 16-403 (filed March 10, 2017).

<sup>6</sup> Frontier Comments at 1 ("If left unchecked, the Applicants will leverage their stronger market position as long-haul and core network providers to potentially squeeze competitors and unnecessarily drive up costs for rural broadband providers and thereby adversely affect rural broadband deployment"). *See also* Windstream Letter, *supra* ("Windstream is concerned that the combined [CTL-Level 3] entity will use its augmented scale and market power to engage increasingly in these and other practices that are contrary to the public interest and fair and reasonable competition, and are detrimental to Windstream's continued effort to invest in its network to provide robust and affordable broadband service").

<sup>7</sup> Frontier Comments at 5-6.

charges) under the applicable tariffs or interconnection agreements;

- That the Commission designate a specific procedure so that interconnection and inter-carrier compensation disputes, including collection actions and billing disputes, involving the Applicants arising in the first five years after the date of closing may be rapidly resolved through the Market Disputes Resolution Division; and
- That for five years from the date of closing, the CFO of the combined company be required to certify annually to the FCC that CenturyLink has handled all inter-carrier disputes and payment of charges for interconnection and inter-carrier compensation in good faith and in accordance with the requirements of the applicable tariffs, or note any exceptions.

Only by adopting reasonable conditions such as these will the Commission have some assurance that the proposed transaction will not compound the harms that Level 3 has perpetuated on small and midsize carriers, to the detriment of competition and service in rural areas.

Please direct any questions regarding this filing to me.

Respectfully submitted,



Michael T. Skrivan

cc: James R. Bird, Senior Counsel, Office of General Counsel  
Kris Monteith, Acting Chief, Wireline Competition Bureau  
Michael Ray, Wireline Competition Bureau  
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