

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Applications Filed for the Transfer of Control of) WC Docket No. 14-104
tw telecom inc. to Level 3 Communications, Inc.)

COMMENTS OF CENTURYLINK

Pursuant to the Commission’s July 18, 2014 Public Notice,¹ CenturyLink hereby submits these comments regarding the Application filed by Level 3 and tw telecom (collectively, the Applicants) in the above-captioned proceeding.²

I. INTRODUCTION.

In addressing a proposed merger, the Commission routinely considers whether a proposed transfer of control “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the [Communications] Act or related statutes.”³ Thus the Commission’s review in this proceeding must include an assessment whether the proposed combination will likely conflict with the public interest. CenturyLink does not ask the

¹ See *Applications Filed for the Transfer of Control of tw telecom inc. to Level 3 Communications, Inc.*, WC Docket No. 14-104, Public Notice, DA 14-1022 (July 18, 2014) (Public Notice).

² See *In the Matter of tw telecom inc., Transferor, Level 3 Communications, Inc., Transferee, Application for Consent to Transfer Control of Authority to Provide Global Facilities-Based and Global Resale International Telecommunications Services and of Domestic Common Carrier Transmission Lines Pursuant to Section 214 of the Communications Act of 1934, as Amended* (filed July 8, 2014) (Application).

³ See, e.g., *In the Matter of Applications Filed by Frontier Communications Corporation and AT&T Inc. for the Assignment or Transfer of Control of the Southern New England Telephone Company and SNET America, Inc.*, WC Docket No. 14-22, Memorandum Opinion and Order, 2014 FCC LEXIS 2713 ¶ 8 (citation omitted) (rel. July 25, 2014).

Commission to reject the proposed merger. Yet it does believe that the transaction raises three significant issues that the Commission must address:

First, there is a substantial risk that Level 3 will extend to tw telecom what appears to be a systematic practice of unreasonably withholding duly-owed payments for telecommunications services, in order to gain unfair leverage in unrelated disputes. Similar to the Commission’s finding regarding Level 3’s practice of “recalculating” universal service invoices with which it disagrees, Level 3’s withholding of duly-owed payments for telecommunications services undermines the predictability necessary for smooth functioning of wholesale telecommunications markets—particularly if this practice is expanded to tw telecom’s substantial enterprise operations. The Commission should mitigate this potential harm to the public interest by directing Level 3 to cease this unreasonable practice.

Second, the proposed merger of these leading providers of enterprise broadband services underscores the extent to which the Commission’s asymmetric conduit-sharing rules now conflict with the competitive realities of today’s enterprise broadband marketplace. Under those rules, CenturyLink, as an ILEC, will be required to provide the Merged Company access to CenturyLink’s entrance conduit to multi-tenant buildings, at regulated rates, even though the Merged Company will be a larger provider of Ethernet services than CenturyLink *and* the Merged Company will have no reciprocal duty to provide CenturyLink access to its conduit to its thousands of on-net buildings. The Commission should address this unfair competitive advantage by requiring the Merged Company to provide access to its entrance conduit to its on-net buildings on commercially reasonable rates, terms and conditions, for as long as CenturyLink and other ILECs are subject to conduit-sharing obligations.

Third, the proposed transaction increases the urgency for the Commission to grant CenturyLink's pending enterprise broadband forbearance petition. That petition asks the Commission to allow CenturyLink to operate under the same nondominant regulatory framework that has applied for more than six years to all other significant providers of enterprise broadband services, so that CenturyLink can offer the simple, customized arrangements that enterprise broadband customers demand. The Commission should grant CenturyLink's petition forthwith.

II. LEVEL 3 MUST END ITS UNREASONABLE PRACTICE OF WITHHOLDING DULY-OWED AND UNDISPUTED PAYMENTS FOR SERVICE.

CenturyLink is both a competitor and wholesale provider to Level 3, as well as tw telecom. CenturyLink has observed that Level 3, unlike tw telecom, has long maintained a pattern of systematically withholding legitimately-owed payments to CenturyLink, in order to gain leverage in unrelated disputes. For example, if Level 3 initiates a dispute claiming that it was overcharged \$1,000 per month for four years for a given CenturyLink service, Level 3's systems appear to be programmed to immediately begin withholding 100% of *undisputed* amounts currently owed to CenturyLink for *unrelated* services (as well as all amounts due for the service in question) until it has offset the entire \$48,000 it claims to have been overcharged.

By doing so, Level 3 effectively awards itself the entire credit it claims to be owed—long before the dispute resolution process dictated by the applicable contract or tariff has run its course. When those dispute resolution processes have concluded, many of Level 3's past disputes with CenturyLink have been found only partially in Level 3's favor, and some have been totally rejected, leaving CenturyLink with the long and arduous task of collecting money withheld by Level 3, or negotiating some form of settlement. But in such situations Level 3 has little, if any, incentive to negotiate a settlement, which, by necessity, will require it to return money already in hand.

While other wholesale customers occasionally withhold payment regarding a particular dispute, it is certainly not an industry norm. Level 3 particularly stands out in the way it appears to have systematized this practice in its everyday payment process, by automatically withholding duly-owed payments for virtually *all* its disputes with CenturyLink. CenturyLink understands that Level 3 employs the same practice for disputes with other wholesale providers. And it appears that, at least in the past, Level 3’s “self-help” approach has extended to its payment of federal universal service contributions as well.⁴

Level 3’s practice of withholding duly-owed payments is both unreasonable and inconsistent with the public interest. Like any business, CenturyLink depends on its customers’ predictable payment for services rendered, so it can pay its own bills, maintain its network and compensate its employees. Thus the smooth functioning of telecommunications markets requires providers to be confident that their wholesale customers will fulfill their contractual commitments to pay for the services they have been provided. Without that confidence, wholesale providers may feel compelled to withhold service in order to obtain duly-owed payment for services already rendered, further interfering with the fluid commerce on which the wholesale marketplace depends. In point of fact, CenturyLink has been able to stem Level 3’s unreasonable withholding practice only by refusing to process Level 3’s new orders for service, after first completing its standard dispute review process, notifying Level 3 that it is not

⁴ See *In re Universal Serv. Contribution Methodology Emergency Request for Review of Universal Service Administrator Decision by Level 3 Communications, LLC, et al.*, 25 FCC Rcd 1115 (2010). In 2010, the Commission denied a request for review of a decision by the Universal Service Administrative Company (USAC) filed by Level 3 and other companies. *Id.* In that order, the Commission also denied Level 3’s request for a waiver of the interest that had accrued on its earlier Form 499-A filings. The Commission noted that Level 3 had ignored USAC’s “pay and dispute” policy and instead “fashion[ed] a remedy of its own in advance of credits being processed.” *Id.* at 1120 ¶ 9. The Commission noted that widespread adoption of Level 3’s approach of “recalculating invoices with which they disagree [would harm] the predictability of the universal service fund.” *Id.* (citation omitted).

entitled to 100% of the amount disputed, and following the collections process outlined in the applicable contract or tariff.

For its part, the Commission has made clear that it does not endorse withholding of payment outside the context of any applicable tariffed dispute resolution provisions and has “caution[ed] parties of their payment obligations under tariffs and contracts to which they are a party.”⁵ To the extent Level 3 withholds payment for services tariffed pursuant to section 204(a)(3) of the Act,⁶ that practice may also conflict with the statute’s “deemed lawful” provision.

Level 3’s withholding practice has a direct tie to the proposed merger. As noted, CenturyLink has not observed such conduct by tw telecom. But, as the acquiring entity, there is a substantial risk that Level 3 will extend its unreasonable withholding practice to tw telecom once the merger is consummated. Indeed that is exactly what happened when Level 3 acquired Global Crossing. As a condition of its approval of this transaction, the Commission therefore should direct Level 3 to cease this unreasonable practice.

III. THE MERGED COMPANY SHOULD BE REQUIRED TO PROVIDE RECIPROCAL ACCESS TO ITS ENTRANCE CONDUIT.

The proposed merger highlights a glaring asymmetry in the Commission’s rules regarding access to conduit. As interpreted by the Commission, the conduit access provisions of sections 224 and 251(b)(4) allow CLECs, such as Level 3 and tw telecom, to demand access to ILEC-constructed conduit—at below-market rates—while denying ILECs reciprocal access to

⁵ *In the Matter of Connect American Fund, et al.*, WC Docket No. 10-90 *et al.*, Report and Order, 26 FCC Rcd 17663, 17890 ¶ 700 (2011) (subsequent history omitted), citing *In re All American Telephone Co., et al. v. AT&T Corp.*, File No. EB-10-MD-003, Memorandum Opinion and Order, 26 FCC Rcd 723, 728 (2011).

⁶ 47 U.S.C. § 204(a)(3).

CLEC-constructed conduit.⁷ While there may have been some justification for such a rule in a day when ILECs were monopoly providers and CLECs lacked significant facilities of their own, both premises are no longer true. And, just as importantly, ILECs and CLECs face the same deployment barriers when they construct entrance conduit to deploy fiber to a new or existing building. Under these circumstances, it is indefensible to allow the Merged Company to obtain access to conduit that CenturyLink constructs to an office building, for example, without a reciprocal obligation on the Merged Company.

This continuing asymmetry will particularly disadvantage CenturyLink, as the Merged Company seeks to extend tw telecom's predominance in Ethernet services to larger enterprise customers, as well as small- and medium-size business customers.⁸ In order to remedy this situation, the Commission should require the Merged Company to make its entrance conduit to its on-net buildings available to CenturyLink and other ILECs upon request, subject to commercially reasonable rates, terms and conditions, for as long as CenturyLink and other ILECs are subject to conduit-sharing obligations.

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16103-04 ¶ 1231 (1996). The Ninth Circuit expressed "serious doubts about the FCC's analysis" on this point, noting that in its view sections 224 and 251(b)(4) could be better harmonized as imposing reciprocal access obligations on all LECs (under section 251(b)(4)) but granting only CLECs a right to demand access to the facilities of non-LEC utilities (such as electric and gas companies). *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000), *reversed in part and vacated in part on other grounds*, 2000 U.S. App. LEXIS 26416 (9th Cir. Sept. 13, 2000) and *opinion amended and rehearing and clarification denied*, 2000 U.S. App. LEXIS 26417 (9th Cir. Oct. 23, 2000). Nonetheless, the court concluded that it was bound to defer to the Commission's analysis. *Id.* at 1054.

⁸ *See* Application at 10-11. According to the Application, the Merged Company will have approximately 31,000 on-net buildings. Application at 11.

IV. THE PROPOSED TRANSACTION ACCENTUATES THE NEED FOR QUICK ACTION ON CENTURYLINK’S ENTERPRISE BROADBAND FORBEARANCE PETITION.

The Applicants assert that the proposed merger will “greatly strengthen[] their ability to compete with larger incumbents[,]” including CenturyLink, “in the enterprise market.”⁹ In truth, tw telecom is *already* a larger provider than CenturyLink of Ethernet services¹⁰—the principal service now demanded by enterprise customers.

Yet, virtually alone among national providers of enterprise broadband services, CenturyLink continues to labor under dominant carrier regulation for many of its enterprise broadband offerings, including price cap regulation and its accompanying competition-inhibiting and time-consuming tariff rules. In December, CenturyLink filed a petition asking the Commission to forbear from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to its enterprise broadband services that are still subject to those obligations.¹¹ Predictably, Level 3, tw telecom and other CLEC competitors opposed CenturyLink’s petition, based on phantom concerns regarding CenturyLink’s purported ability to disrupt the national enterprise broadband market, even though CenturyLink holds less than a 10 percent share of that market.¹² Even more telling, these CLECs did not even dare mention the central premise of CenturyLink’s petition: the need to treat similarly situated parties similarly, by extending to CenturyLink the same nondominant regulation that applies to its enterprise

⁹ Application at 8.

¹⁰ See Vertical Systems Group, 2013 U.S. Carrier Ethernet LEADERBOARD (identifying tw telecom as the third largest provider of U.S. Carrier Ethernet services, based on retail ports, for year-end 2013, ahead of CenturyLink), available at <http://www.verticalsystems.com/vsglb/2013-u-s-carrier-ethernet-leaderboard/>.

¹¹ CenturyLink Petition for Forbearance, WC Docket No. 14-9 (Dec. 13, 2013).

¹² Opposition of tw telecom, *et al.*, to CenturyLink’s Forbearance Petition, WC Docket No. 14-9 (Feb. 14, 2014).

broadband competitors, including larger rivals, AT&T, Verizon and tw telecom.¹³ The other major ILECs providing enterprise broadband services have enjoyed forbearance from the regulations at issue in CenturyLink's forbearance petition since 2007 or earlier. Yet CenturyLink's CLEC opponents have failed to describe a single incident of any supposed harm resulting from the past seven years of forbearance. Instead, this period has been characterized by falling prices and increasing competition.¹⁴

The proposed combination of Level 3 and tw telecom provides further impetus for the Commission to grant CenturyLink's forbearance petition. The Commission should do so without further delay.

V. CONCLUSION.

For the foregoing reasons, the Commission should not grant the pending Application until it takes the actions described herein.

Respectfully submitted,

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¹³ *Id.*

¹⁴ *See* CenturyLink's Reply Comments in Support of Its Petition for Forbearance, WC Docket No. 14-9, at 4-5 (Feb. 28, 2014).

CERTIFICATE OF SERVICE

I, Keith D. Nieb, do hereby certify that I have caused the foregoing **COMMENTS OF CENTURYLINK** to be served, via first-class U.S. Postal Mail, or electronic mail on the persons listed herein below as indicated in the table below.

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