

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

WC Docket No. 14-104

JOINT OPPOSITION AND REPLY

Level 3 Communications, Inc. (“Level 3 Parent”), and tw telecom inc. (“TWT Parent”) urge the Commission to grant consent expeditiously for Level 3 Parent’s proposed acquisition of TWT Parent (the “Proposed Transaction”). The pro-competitive and public-interest benefits of the Proposed Transaction remain undisputed. The few comments filed seeking delay or conditions on Commission consent raise collateral commercial disputes and industry-wide policy issues that fall far short of the Commission’s long-standing standard for conditioning or withholding consent: the creation of transaction-specific harms as a consequence of the transaction. To the contrary, these commenters have sought to misuse the Commission’s transaction-review process to address issues and allegations that pre-date the Proposed Transaction, and the Commission should reject their efforts accordingly.

I. The Proposed Transaction's Pro-Competitive and Public-Interest Benefits Remain Undisputed

Consummation of the Proposed Transaction will promote, not hinder, competition by creating a more robust competitor in wholesale and enterprise markets. As explained in the underlying applications,¹ the operating subsidiaries of Level 3 Parent and TWT Parent are small, non-dominant competitors in the relevant markets for voice and data services demanded by enterprise and wholesale customers. The Proposed Transaction will serve the public interest, convenience, and necessity by joining the complementary assets and service offerings of the two companies.

As a result of the merger, the Level 3 Subsidiaries' global customers will benefit from the TWT Subsidiaries' deep metropolitan footprint and network-connected buildings, enabling a higher-quality and more reliable on-net experience for customers doing business in North America. The TWT Subsidiaries' customers will benefit from the Level 3 Subsidiaries' extensive local-to-global footprint, with owned network and data centers in more than 60 countries and significant global subsea networks. These improvements in network capabilities and customer service offerings will enable the merged firm to compete more effectively with the much larger incumbent carriers, such as Verizon, AT&T and CenturyLink. Moreover, the Proposed Transaction raises no public-interest concerns that warrant an extended review or transaction-specific conditions for consent (other than the Team Telecom condition expressly requested by the Applicants).

¹ See Application of tw telecom inc. and Level 3 Communications, Inc., to Transfer Control of Section 214 Authority, WC Docket No. 14-104, at 8-14 (filed July 7, 2014); Application of tw telecom inc. and Level 3 Communications, Inc., to Transfer Control of a Joint Interest in the Cable Landing License for the Hawaiian Islands Fiber Network, WC Docket No. 14-104, File No. SCL-T/C-20140707-00005, at 17, 18 (filed July 7, 2014).

II. The Commenters Seeking Conditions or Deferral Each Fail to Allege Transaction-Specific Harms and Otherwise Raise Issues Beyond the Scope of the Commission’s Transaction Review

The commenters seeking Commission conditions on, or deferral of consent for, the Proposed Transaction each fail to allege transaction-specific harms and otherwise raise issues beyond the scope of the Commission’s review of the Proposed Transaction.² The remedies sought by the opponents would not address any alleged transaction-specific harm. Each of these customers has filed in the Commission’s merger review in order to seek leverage in existing commercial disputes on which the Proposed Transaction has no bearing whatsoever. The Commission should therefore deny FSFA’s petition and reject the requests of Proximiti and CenturyLink to defer or condition Commission consent to the Proposed Transaction.

The Commission conditions transaction approvals “to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes.”³ The Commission has repeatedly explained that it does not consider alleged harms that exist “both before and after the proposed transaction.”⁴ The rationale of the Commission's longstanding policy is self-

² See Opposition of Foreman Seeley Fountain Architecture, WC Docket No. 14-104 (filed Aug. 18, 2014) (“FSFA Opposition”); Comments of Proximiti Technologies, Inc., WC Docket No. 14-104 (filed Aug. 18, 2014) (“Proximiti Comments”); Comments of CenturyLink, Inc., WC Docket No. 14-104 (filed Aug. 18, 2014) (“CenturyLink Comments”); and Reply Comments of FairPoint Communications, Inc., WC Docket No. 14-104 (filed Sept. 2, 2014) (“FairPoint Reply Comments”).

³ *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC; For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17,444, 17,463 ¶ 29 (2008) (“*Verizon-ALLTEL Order*”).

⁴ *Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees; For Consent To Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd. 7358, 7364 ¶ 15 (2006); *Verizon-ALLTEL*

evident: to prevent the hijacking of transfer and assignment proceedings to achieve a remedy unrelated to the transaction at issue.⁵

Neither FSFA nor Proximiti even attempts to raise issues that are cognizable under the Commission’s standard of review for proposed transactions. FSFA’s attack on TWT Parent’s character is meritless and misplaced. FSFA seeks redress for a toll fraud scheme that was entirely the result of FSFA’s failure to establish the appropriate settings on customer premises equipment (“CPE”) that FSFA controls. FSFA’s assertion that TWT, which had nothing to do with the toll fraud scheme, should somehow be held liable is flatly contrary to longstanding Commission precedent.⁶ In all events, the toll fraud has nothing to do with and is wholly unaffected by the Proposed Transaction.

Similarly, Proximiti improperly has sought to resolve a preexisting quality-of-service dispute with a Level 3 subsidiary through the Commission’s transaction review process.⁷ Proximiti’s proposed remedy—deferral of any Commission action on the Proposed Transaction

Order, 23 FCC Rcd at 17,463 ¶ 29 (stating that the Commission “will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”).

⁵ See, e.g., *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 534 ¶ 131 (2004) (“*GM-News Corp. Order*”) (stating that “an application for a transfer control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.”)

⁶ See e.g., *Gerri Murphy Realty, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 19,134, 19,140 ¶ 14 (2001) (holding that a long distance provider has no duty to warn a customer about the possibility of toll fraud and that the customer is liable for long distance charges associated with unauthorized calls originating from the customer’s number where the toll fraud resulted from customer’s failure to establish settings on its CPE that could have prevented the fraud); *Directel, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 11 FCC Rcd. 7554, 7563 ¶ 19 (Comm. Carrier Bur. 1996) (same); *Chartways Technologies, Inc. v. AT&T Communications*, Memorandum Opinion and Order, 8 FCC Rcd. 5601 ¶ 16 (1993) (same).

⁷ See Proximiti Comments at 1-3.

pending Proximiti's preferred changes in service quality—only confirms that Proximiti's objection is wholly unrelated to the Proposed Transaction.⁸

CenturyLink and FairPoint also seek to use the Commission's review process to gain leverage in preexisting commercial disputes. Essentially, CenturyLink and FairPoint are engaged in commercial disputes with a Level 3 subsidiary regarding alleged existing payment and withholding practices.⁹ These disputes pre-date the Proposed Transaction entirely. Regardless of whether Level 3's payment practices are consistent with the Communications Act—and Level 3 Parent maintains that they absolutely are—such dispute is appropriately resolved through contractual provisions governing the commercial relationship between the parties or through a Section 208 complaint.¹⁰ CenturyLink's belated invocation of the Proposed Transaction at the very end of the recitation of its grievance with Level 3 does not cure the absence of any transaction-specific harm.¹¹ FairPoint does not even attempt to characterize its allegations about Level 3 as transaction-specific.¹² Instead, it asserts incorrectly that the Commission should intervene in commercial disputes because harms are imminent and dispute-resolution costs could be reduced for parties other than those engaged in a merger—a transaction-review standard that the Commission has never endorsed.¹³ It is therefore

⁸ *See id.* at 3.

⁹ *See* CenturyLink Comments at 3-5; FairPoint Reply Comments at 4-6.

¹⁰ *See, e.g., Wavecom Solutions Corp., Transferor, and Hawaiian Telcom, Inc., Transferee*, Memorandum Opinion and Order, 27 FCC Rcd. 16,081, 16,089 ¶ 17 (Wireline Comp. Bur. 2012).

¹¹ *See* CenturyLink Comments at 5.

¹² *See* FairPoint Reply Comments at 4. Like FSFA, FairPoint also miscites Section 310(d) of the Communications Act, as amended, in a transaction that does not involve any transfers of assignments of Title III radiocommunication licenses. *See* FSFA Comments at 1; FairPoint Reply Comments at 4 and n.9.

¹³ *Id.* at 5.

particularly ironic that FairPoint complains about trying to “gain leverage in unrelated disputes,” which is exactly what FairPoint attempts here.¹⁴

CenturyLink’s pleas in this merger review for changes in the Commission’s conduit-sharing rules and action on a separate, pending forbearance petition confirm that CenturyLink is misusing the Commission’s merger review proceeding for commercial and policy ends unrelated to the Proposed Transaction. The Commission should therefore disregard them in the context of this transaction review.

CenturyLink’s issue with the Commission’s conduit-sharing rules is not specific to the Proposed Transaction or even to Level 3 Parent or TWT Parent.¹⁵ To the contrary, it is an industry-wide issue—as confirmed by CenturyLink’s “CLECs *such as* Level 3 and tw telecom” language—that is properly the subject of a rulemaking proceeding. It would be entirely inappropriate for the Commission to revise its generally-applicable conduit-sharing rules in the context of a transaction review, as such an issue is “better addressed in a rulemaking of general applicability.”¹⁶

As for CenturyLink’s complaint that it remains subject to dominant carrier regulation, which has served to safeguard competition in markets where CenturyLink remains a dominant incumbent, the Commission is already addressing that issue in its review of CenturyLink’s

¹⁴ *Id.* at 6.

¹⁵ *See* CenturyLink Comments at 5-6.

¹⁶ *Qwest Communications International Inc. and CenturyTel, Inc., d/b/a CenturyLink*, Memorandum Opinion and Order, 26 FCC Rcd. 4194, 4203 ¶ 18 n.62 (2011) (rejecting commenters’ attempts to raise issues involving access charge litigation, local pole attachment disputes, and ongoing intercarrier compensation litigation in the context of a transaction review).

pending petition for forbearance from dominant carrier regulation.¹⁷ Where parties raise issues in a Commission transaction review that are already being addressed in separate, ongoing proceedings, the Commission's practice is, appropriately, to address those issues in the other pending proceedings. It should do so here as well.¹⁸

As an incumbent carrier active in many geographic markets served by the operating subsidiaries of Level 3 Parent and TWT Parent, CenturyLink will face greater competition from the combined companies post-consummation. As noted in part I above and in the underlying applications, the public interest will be served by such a pro-competitive outcome.

¹⁷ See *id.* at 7-8; CenturyLink Petition for Forbearance, WC Docket No. 14-9 (filed Dec. 13, 2013).

¹⁸ See *e.g.*, *Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4516 n.299 (2011) (“To the extent commenters raise concerns regarding the Commission's program carriage rules more generally, we note that the Commission has an open rulemaking proceeding regarding these issues. We defer discussion of the Commission's program carriage rules to the larger rulemaking proceeding.”); see also *AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5696 ¶ 60 & n.172 (2007); *SBC Commc'ns Inc. & AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18,290, 18,320 ¶ 55 & n.161 (2005); *Verizon Commc'ns Inc. & MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18,433, 18,462 ¶ 55 & n.157 (2005).

CONCLUSION

For the reasons stated above and in the underlying applications, the Applicants respectfully request that the Commission deny FSFA's petition, reject the conditions and remedies requested by other commenters, and grant the applications for consent to transfer control to Level 3 Parent of the international Section 214 authorization, domestic common-carrier transmission lines, and cable landing license of TWT Parent's operating subsidiaries.

Respectfully submitted,



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