

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Applications of Level 3 Communications, Inc. and
CenturyLink, Inc. For Consent to Transfer Control
of Licenses and Authorizations
WC Docket No. 16-403

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2017

Released: October 30, 2017

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;
Commissioner Clyburn dissenting and issuing a statement; Commissioner Rosenworcel approving in part,
dissenting in part and issuing a statement.

TABLE OF CONTENTS

Table with 2 columns: Section Title and Para. Number. Includes sections like I. INTRODUCTION, II. BACKGROUND, III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK, etc.

VII. NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY, AND TRADE CONCERNS.....	63
VIII. CONCLUSION.....	65
IX. ORDERING CLAUSES.....	66

APPENDIX A – List of Licenses and Authorizations Held by Level 3 and its Operating Subsidiaries

APPENDIX B -- List of Locations Subject to Conditions

## I. INTRODUCTION

1. CenturyLink, Inc. (CenturyLink) and Level 3 Communications, Inc. (Level 3) (collectively, Applicants) filed a series of applications pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Act),<sup>1</sup> and the Cable Landing License Act of 1921,<sup>2</sup> seeking approval to transfer control to CenturyLink various licenses and authorizations<sup>3</sup> held by operating subsidiaries of Level 3 (the Transaction).<sup>4</sup> We find that approval of the Transaction will serve the public interest, convenience, and necessity and hereby grant the Applications, subject to the conditions set forth below.

2. On December 21, 2016, the Wireline Competition Bureau (WCB), Wireless Telecommunications Bureau (WTB), and International Bureau (IB) released a Public Notice accepting the Applications for filing and establishing a pleading cycle for public comments.<sup>5</sup> Seven parties timely filed comments in response to the Public Notice, and no petitions to deny were filed.<sup>6</sup> In addition, the Department of Justice (DOJ), with the concurrence of the Department of Defense (DOD) and the Department of Homeland Security (DHS, collectively, the Executive Branch Agencies), requested that the Commission defer action on the Transaction while they reviewed potential national security, law

<sup>1</sup> 47 U.S.C. §§ 214, 310(d); Consolidated Application to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-403 (filed Dec. 12, 2016) (Lead Application, and together with the other applications listed in Appendix A herein, Applications). On December 19, 2016, Applicants filed supplemental information in response to questions from the staff of the Commission’s Wireline Competition Bureau that are part of the Applications. See Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel to Level 3 Communications, Inc., and Yaron Dori, Michael Beder, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Dec. 19, 2016) (Dec. 19, 2016 Supplement).

<sup>2</sup> 47 U.S.C. §§ 34-39; see also Executive Order No. 10530, section 5(a), reprinted as amended at 3 U.S.C. § 301 (delegating the President’s authority under the Cable Landing License Act to the FCC).

<sup>3</sup> Applicants seek consent to transfer control of Level 3’s operating subsidiaries that hold domestic and international section 214 authorizations, 23 satellite earth station authorizations, three wireless licenses, and seven cable landing licenses. See Lead Application at 2 & Exh. D; see also Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel to Level 3 Communications, Inc., and Yaron Dori, Michael Beder, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403, at 1 (filed Feb. 9, 2017) (withdrawing six transmit-receive satellite earth station authorizations and one receive-only satellite earth station authorization from the Applications).

<sup>4</sup> After the Applications were filed, Level 3 completed a reorganization that resulted in the *pro forma* assignment of the license and authorizations held by its operating subsidiary Global Crossing Americas Solutions, Inc. to Global Crossing Americas Solutions, LLC. See Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel to Level 3 Communications, Inc., and Yaron Dori, Michael Beder, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403, at 1-2 (filed Jan. 17, 2017).

<sup>5</sup> *Applications Filed For The Transfer Of Control Of Level 3 Communications, Inc. To CenturyLink, Inc.*, Public Notice, 31 FCC Rcd 13408, 13415-17, Exh. A (WCB, IB, WTB 2016) (Public Notice).

<sup>6</sup> See INCOMPAS Comments, National Congress of American Indians (NCAI) Comments, Nez Perce Tribe Reply, Frontier Reply, Ho-Chunk Nation Legislature Reply, Confederated Tribes of the Colville Reservation (Colville Tribes) Reply, and Public Knowledge Reply. In addition, the California Emerging Technology Fund (CETF) and FairPoint Communications, Inc. (FairPoint) submitted late-filed comments, which we will consider as *ex parte* submissions in this proceeding.

enforcement, and public safety issues.<sup>7</sup> On March 30, 2017, WCB staff requested additional information from the Applicants to help conduct the review of the Transaction.<sup>8</sup>

3. We carefully and thoroughly reviewed the record, including the material submitted by the Applicants pursuant to WCB's requests, which is subject to the Protective Order issued in this proceeding.<sup>9</sup> We conclude that, with the conditions we impose herein and the divestitures and other conditions agreed to by the Applicants in the DOJ Consent Decree, the harms of the Transaction have been remediated and that the Transaction serves the public convenience and necessity.

## II. BACKGROUND

### A. Description of the Applicants

#### 1. CenturyLink, Inc.

4. CenturyLink is a publicly-traded telecommunications company incorporated in Louisiana and provides high-speed broadband, voice, video, data, and managed services using its 250,000 route-mile U.S. fiber network and its 300,000 route-mile international transport network.<sup>10</sup> CenturyLink provides communications services, including wholesale local network access, wholesale and retail transport, and high-speed Internet access and data transmission over copper and fiber networks to consumers and businesses in all 50 states.<sup>11</sup> CenturyLink provides services as an incumbent local exchange carrier (LEC) in portions of 37 states,<sup>12</sup> and outside of its incumbent LEC territory, CenturyLink operates as a competitive LEC.<sup>13</sup>

#### 2. Level 3 Communications, Inc.

5. Level 3 is a publicly-traded Delaware corporation.<sup>14</sup> Through its operating subsidiaries, Level 3 offers communications services over its fiber networks in North and South America, Europe, and Asia, including IP-based services, broadband transport, collocation services, and voice services.<sup>15</sup> Level

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<sup>7</sup> Letter from Joanne P. Ongman, National Security Division, DOJ, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Jan. 18, 2017) (NSD Letter).

<sup>8</sup> See Letter from Madeleine Findley, Deputy Chief, WCB, FCC, to Thomas Jones and Mia Guizzetti Hayes, Counsel to Level 3, and Yaron Dori, Michael Beder, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, WC Docket No. 16-403 (Mar. 30, 2017) (Mar. 30, 2017 Information and Data Request). Following notice from the Applicants that they intended to file additional documents in response to WCB's information requests, WCB paused the Commission's informal 180-day clock for review of the proposed Transaction. See Letter from Kris Monteith, Chief, WCB, FCC, to Thomas Jones and Mia Guizzetti Hayes, Counsel to Level 3, and Yaron Dori, Michael Beder, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, WC Docket No. 16-403 (June 9, 2017). WCB restarted the clock on October 6, 2017.

<sup>9</sup> See *CenturyLink, Inc., and Level 3 Communications, Inc., Consolidated Applications for Consent to Transfer Control of Domestic and International Authorizations Pursuant to Section 214 of the Communications Act, As Amended*, Protective Order, 32 FCC Rcd 519 (WCB 2017) (Protective Order). In this Order, Highly Confidential Information, as defined in the Protective Order, will be marked by the terms "[BEGIN HIGHLY CONF. INFO.]" and "[END HIGHLY CONF. INFO.]", and Confidential Information, as defined in the Protective Order, will be marked by the terms "[BEGIN CONF. INFO.]" and "[END CONF. INFO.]" Such information will be redacted from the publicly available version of this Order. The unredacted version will be available upon request to persons qualified to view it under the Protective Order.

<sup>10</sup> Lead Application at 3.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Dec. 19, 2016 Supplement at 2-3 n.9 and Attach. A, "CenturyLink ILEC Regions".

<sup>13</sup> Lead Application at 3.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 3.

3's global network includes more than 209,000 owned or controlled fiber route miles, including approximately 129,000 fiber route miles in North America (at least 128,000 of which are in the United States), 47,000 fiber route miles in the Latin America and Europe/Middle East/Africa regions, and 33,000 subsea fiber route miles.<sup>16</sup> Level 3 focuses primarily on large enterprise customers and has a significant Internet backbone.<sup>17</sup> Level 3 does not provide services to residential customers.<sup>18</sup>

## B. Description of the Transaction

6. On October 31, 2016, CenturyLink and Level 3 entered into an Agreement and Plan of Merger (Merger Agreement) pursuant to which CenturyLink will acquire Level 3 in a cash and stock transaction valued at approximately \$34 billion, including the assumption of debt.<sup>19</sup> Pursuant to their Merger Agreement, Applicants will enter into a series of concurrent internal merger transactions with CenturyLink entities that were created for the purpose of facilitating the transactions that will result in Level 3 and its operating subsidiaries becoming indirect wholly-owned subsidiaries of CenturyLink.<sup>20</sup> Following consummation, Applicants estimate that current CenturyLink shareholders will own approximately 51 percent of the combined company, and former Level 3 stockholders will own approximately 49 percent of the combined company.<sup>21</sup> The Board of Directors and the shareholders of both Applicants approved the Transaction.<sup>22</sup> In connection with the Transaction, Applicants made filings or notifications with the Federal Trade Commission, the DOJ pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, various state public utility commissions,<sup>23</sup> and relevant local governments and municipalities.

7. On October 2, 2017, DOJ filed a complaint, along with a proposed Final Judgment (DOJ Consent Decree), that imposed certain conditions on the Transaction agreed to by the Applicants.<sup>24</sup> Once

<sup>16</sup> Dec. 19, 2016 Supplement at 2 (of the 209,000 route miles of fiber owned or controlled by Level 3 in the North America region, approximately 70,000 are long-haul fiber and 59,200 are metro fiber).

<sup>17</sup> Lead Application at Exh. B, Public Interest Statement, at B-2 (Public Interest Statement).

<sup>18</sup> *Id.* at B-2.

<sup>19</sup> Lead Application at 4; Press Release, Level 3, *CenturyLink to Acquire Level 3 Communications* (Oct. 31, 2016), [http://s1.q4cdn.com/840339377/files/doc\\_downloads/Other%20Downloads/FINAL-CTL-LVLT-Joint-Press-Release-2016-10-31.pdf](http://s1.q4cdn.com/840339377/files/doc_downloads/Other%20Downloads/FINAL-CTL-LVLT-Joint-Press-Release-2016-10-31.pdf).

<sup>20</sup> Lead Application at 4-6.

<sup>21</sup> See Letter from Glen F. Post III, CEO and President, CenturyLink, and Jeff K. Storey, President and CEO of Level 3, to CenturyLink and Level 3 Shareholders, issued as part of the joint proxy statement/prospectus (Feb. 13, 2017).

<sup>22</sup> See Press Release, CenturyLink, *CenturyLink and Level 3 shareholders approve merger* (Mar. 16, 2017), <https://www.connectingtheneweconomy.com/content/uploads/2017/03/CenturyLink-and-Level-3-shareholders-approve-merger-Release.pdf>.

<sup>23</sup> Applicants state that they have obtained all required state and local approvals for the Transaction, with the exception of one state. See Letter from Yaron Dori, Counsel to CenturyLink, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Oct. 5, 2017). That state, California, approved the Transaction on October 12, 2017. *Joint Applications of Broadwing Communications, LLC (U5525C); Global Crossing Local Services, Inc. (U5685C); Global Crossing Telecommunications, Inc. (U5005C); IP Networks, Inc. (U6362C); Level 3 Communications, LLC (U5941C); Level 3 Telecom of California, LP (U5358C); WilTel Communications, LLC (U6146C); and Level 3 Communications, Inc., a Delaware Corporation; and CenturyLink, Inc., a Louisiana Corporation, for Approval of Transfer of Control of the Level 3 Operating Entities Pursuant to California Public Utilities Code Section 854(a)*, Application 17-03-016, Decision Approving Settlement Regarding Proposed Transfer of Control, Agenda ID No. 15977, at 14-15 (Oct. 12, 2017) (CPUC Decision), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M197/K184/197184463.pdf>.

<sup>24</sup> *U.S. v. CenturyLink, Inc. and Level 3 Communications, Inc.*, Civil Action No. 1:17-cv-02028, Complaint, [Proposed] Final Judgment (D.D.C. Oct. 2, 2017).

final, the DOJ Consent Decree requires Applicants to divest their fiber and other assets in the metropolitan statistical areas (MSAs) of Albuquerque, New Mexico; Boise City-Nampa, Idaho; and Tucson, Arizona, and to divest, via infeasible rights of use (IRUs), 24 strands of dark fiber in each of 30 overlapping long-haul transport routes.<sup>25</sup>

### III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

8. Pursuant to sections 214(a) and 310(d) of the Act<sup>26</sup> and the Cable Landing License Act,<sup>27</sup> the Commission must determine whether the proposed transfer of control to CenturyLink of certain licenses and authorizations held and controlled by operating subsidiaries of Level 3 will serve the public interest, convenience, and necessity. In making this determination, the Commission first assesses whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules.<sup>28</sup>

9. If the proposed transaction does not violate a statute or rule, then the Commission considers whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.<sup>29</sup> Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.<sup>30</sup> The DOJ has independent authority to examine the competitive impacts of proposed mergers and transactions involving transfers of Commission licenses, but the Commission's competitive analysis under the public interest standard is somewhat broader. Notably, the Commission may impose and enforce narrowly tailored, transaction-specific conditions that address the potential

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<sup>25</sup> DOJ Consent Decree at 3-6, 7-16, Appx. B; *see also* the Asset Preservation Stipulation and Order, and the Explanation of Consent Decree Procedures filed by DOJ in *U.S. v. CenturyLink, Inc. and Level 3 Communications, Inc.*, Civil Action No. 1:17-cv-02028 (D.D.C. Oct. 2, 2017).

<sup>26</sup> 47 U.S.C. §§ 214(a), 310(d). Section 310(d) of the Act requires that we consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g., AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, para. 19 (2007) (*AT&T-BellSouth Order*).

<sup>27</sup> 47 U.S.C. §§ 34-39. The Cable Landing License Act provides that approval of a license application may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service." 47 U.S.C. § 35. The Commission does not conduct a separate public interest analysis under this statute. *See, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, para. 16, n.59 (2005) (*SBC-AT&T Order*).

<sup>28</sup> 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, 9139-40, para. 18 (2015) (*AT&T-DIRECTV Order*); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4247, para. 22 (2011) (*Comcast-NBCU Order*); *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar-DIRECTV HDO*).

<sup>29</sup> *See AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18; *Comcast-NBCU Order*, 26 FCC Rcd at 4247, para. 22; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25.

<sup>30</sup> *See Satellite Bus. Sys.*, 62 FCC 2d 997, 1068-73, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *see also Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

harms of a transaction.<sup>31</sup> Specifically, the Commission has repeatedly held that it will impose conditions “only to remedy harms that arise from the transaction (i.e., transaction-specific harms)” and “related to the Commission’s responsibilities under the Communications Act and related statutes,” and it “will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”<sup>32</sup>

10. If the Commission has determined that a transaction raises no public interest harms or any such harms have been ameliorated by narrowly tailored conditions, the Commission next considers a transaction’s public interest benefits. Notably, the Commission has long recognized the clear public interest benefits in a license or authorization holder being able to assign or transfer control of its license or authorization freely.<sup>33</sup> Indeed, the Commission has adopted streamlining procedures—including the automatic approval of a transaction—when a “transaction is unlikely to raise public interest concerns.”<sup>34</sup> The Commission will also review other claimed public interest benefits of a transaction, with the applicants bearing the burden of proving those benefits by a preponderance of the evidence.<sup>35</sup>

11. Finally, if the Commission is able to find that narrowly tailored, transaction-specific conditions are able to ameliorate any public interest harms and the transaction is in the public interest, it may approve the transaction as so conditioned.<sup>36</sup> In contrast, if the Commission is unable to find that a

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<sup>31</sup> *AT&T-DIRECTV Order*, 30 FCC Rcd at 9141, para. 22; *Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4199, para. 10 (2011) (*Qwest-CenturyLink Order*).

<sup>32</sup> *See SBC-AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations et al.*, WT Docket Nos. 04-70, 04-254, 04-255, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21545-46, para. 43 (2004); *see also Applications of Nextel Partners, Inc. Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0002444650, 0002444656, 0002456809, Memorandum Opinion and Order, 21 FCC Rcd 7358, 7361, para. 9 (2006); *Applications of AT&T Inc. and CellCo Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd 8704, 8747, para. 101 (2010).

<sup>33</sup> *See, e.g., Amendment of Section 73.3596 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control)*, Memorandum Opinion and Order, 4 FCC Rcd 1710 (1988), affirming 59 RR 2d 1081 (1982) (affirming elimination of requirement that broadcast licenses be held three years before they can be assigned or transferred, stating “the public interest is usually best served by allowing station sales transactions to be regulated primarily by marketplace forces,” and holding that the listening public benefits from freely allowing sales to new owners); *id.* 55 RR 2d at 1087-88 (holding buyer who is willing to pay market price more likely to deliver service audiences desire and recognizing public benefit of ready market for broadcast licenses); *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10841-44 (2003) (eliminating anti-trafficking policy for satellite licenses expedites service to the public by facilitating the transfer of licenses to those parties that have the greatest incentive and ability to construct a satellite system; enables satellite spectrum to move more efficiently to its highest and best use; and helps licensees mitigate risk thereby encouraging investment).

<sup>34</sup> *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, CC Docket No. 01-150, Report and Order, 17 FCC Rcd 5517, 5533-35, paras. 29-34 (2002).

<sup>35</sup> 47 U.S.C. § 309(e); *see AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelpia Communications Corp., Assignors to Time Warner Cable, Inc. et al.*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8217, para. 23; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25.

<sup>36</sup> Although the Commission has suggested in the past that it may employ a “balancing test,” *see, e.g., AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18, or a “sliding scale approach,” *see, e.g., AT&T-BellSouth Order*, 22 FCC Rcd at 5761, para. 203, in practice the Commission has not allowed potential competitive harms to go unremedied nor allowed them to be offset by benefits that are not transaction-specific, i.e., benefits that do not naturally arise from the transaction at issue.

proposed transaction even with such conditions serves the public interest or if the record presents a substantial and material question of fact, then it must designate the application for hearing.<sup>37</sup>

#### IV. QUALIFICATIONS OF APPLICANTS AND COMPLIANCE WITH COMMUNICATIONS ACT AND FCC RULES AND POLICIES

12. Section 310(d) of the Act requires that we make a determination as to whether the Applicants have the requisite qualifications to hold Commission licenses.<sup>38</sup> Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>39</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to a proposed transaction meet the requisite qualification requirements to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules.<sup>40</sup>

13. No party has raised an issue with respect to the basic qualifications of either CenturyLink or Level 3. The Commission generally does not reevaluate the qualifications of transferors unless issues related to basic qualifications have been sufficiently raised in petitions to warrant designation for hearing.<sup>41</sup> We find that there is no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications of Level 3 under the Act or our rules, regulations, and policies. The Commission previously found CenturyLink to be qualified to hold Commission authorizations and licenses,<sup>42</sup> no parties allege that CenturyLink now lacks the requisite qualifications, and there is no evidence in the record to support such a finding. Accordingly, we find that CenturyLink continues to have the requisite citizenship, character, financial, technical, and other basic qualifications under the Act and our rules, regulations, and policies.

14. The proposed Transaction must comply with the Act, other applicable statutes, and the Commission’s rules before we can find that it is in the public interest.<sup>43</sup> We find that the proposed Transaction will not violate any statutory provision or Commission rule.

#### V. POTENTIAL PUBLIC INTEREST HARMS

15. Based on our evaluation of the record, with the conditions we impose herein and the divestitures and other conditions agreed to by the Applicants in the DOJ Consent Decree, we find that the proposed Transaction is unlikely to result in any material public interest harm in any geographic area where the Applicants operate. We review and reject claims in the record that the Transaction has the

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<sup>37</sup> 47 U.S.C. § 309(e); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20562-63, para. 3. Section 309(e)’s requirement applies only to those applications to which Title III of the Act applies. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but may do so if we find that a hearing would be in the public interest.

<sup>38</sup> 47 U.S.C. § 310(d).

<sup>39</sup> 47 U.S.C. §§ 308, 310(d); *see also AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 24; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, para.11; *AT&T-BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *SBC-AT&T Order*, 20 FCC Rcd at 18379, para. 171.

<sup>40</sup> *See AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 24; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, para.11; *AT&T-BellSouth Order*, 22 FCC Rcd at 5756, para. 191.

<sup>41</sup> *See AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 25; *Applications of SoftBank Corp., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation For Consent to Transfer Control of Licenses and Authorizations*, IB Docket No. 12-343, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642, 9653, para. 27 (2013) (*SoftBank-Sprint Order*).

<sup>42</sup> *See Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, paras.11-12.

<sup>43</sup> *See AT&T-DIRECTV Order*, 30 FCC Rcd at 9154, para. 52.

potential for competitive harm from the loss of Level 3 as a competitive provider of: (1) last-mile facilities-based enterprise business data services (BDS)<sup>44</sup> and other business solutions over fiber; and (2) long-haul fiber transport, including dark fiber.<sup>45</sup> We also review and reject claims concerning Level 3's recent BDS pricing changes<sup>46</sup> and its billing and payment practices,<sup>47</sup> and we find it unnecessary to impose requested conditions on the approval of the Transaction that would require CenturyLink to upgrade fiber infrastructure on Tribal lands<sup>48</sup> or require the combined company to offer wholesale voice switching and transport services for interconnected voice-over-Internet-protocol (VoIP) providers post-Transaction.<sup>49</sup> Finally, while no commenter raised a potential for harm from the loss of Level 3 as a competitive provider of Internet transit service or international submarine cable transport service, because the Applicants specifically claim that the Transaction will have little or no impact on competition for these services,<sup>50</sup> we have evaluated those claims to confirm their accuracy and find no significant potential competitive harms.

16. *Horizontal and Vertical Effects of the Transaction.* In conducting our analysis of the competitive impacts of a proposed transaction, the Commission considers both horizontal and vertical effects.<sup>51</sup> Because CenturyLink and Level 3 compete to provide certain services in geographic areas that overlap, we must consider the horizontal effects of the Transaction. We also consider potential vertical harms resulting from the Transaction, including the extent of Level 3's price-constraining effect in the marketplace for wholesale BDS and as a wholesale transport provider, including dark fiber.<sup>52</sup>

**A. Loss of Level 3 as a Competitive Provider of Last-Mile Business Data Services and Long-Haul Transport**

17. Based on our evaluation of the record, and the divestitures and other conditions agreed to by the Applicants in the DOJ Consent Decree as well as the Applicants' compliance with the conditions set forth herein, we find that the Transaction will have only a *de minimis* effect on last-mile BDS competition in CenturyLink's incumbent LEC region and no harmful competitive effect outside of CenturyLink's incumbent LEC territory. Further, we find that the Transaction will not result in any transaction-specific competitive harm from the potential loss of Level 3 as an independent facilities-based provider of long-haul transport, including dark fiber. In our analysis below, we evaluate the competitive effects of CenturyLink's acquisition of Level 3 with respect to each Applicant's position as a facilities-

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<sup>44</sup> See *Applications of XO Holdings and Verizon Communications Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-70, Memorandum Opinion and Order, 31 FCC Rcd 12501, 12507, para. 15 & n.44 (WCB, IB, WTB 2016) (*Verizon-XO Order*).

<sup>45</sup> CETF *Ex Parte* Comments at 3-4; INCOMPAS Comments at 2, 12-13; Public Knowledge Reply at 5-7.

<sup>46</sup> See Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed Mar. 10, 2017) (*Windstream Ex Parte Letter*).

<sup>47</sup> Frontier Reply at 4-6; FairPoint *Ex Parte* Comments at 3-4; Windstream *Ex Parte Letter* at 1, 3.

<sup>48</sup> See Colville Tribes Reply at 2; Nez Perce Tribe Comments at 2; NCAI Comments at 1; Ho-Chunk Nation Legislature Reply at 1 (collectively, Tribal Commenters).

<sup>49</sup> See Letter from Mark C. Del Bianco, counsel to Telnix LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 3 (filed Apr. 17, 2017) (*Telnix Ex Parte Letter*). See also Letter from Harold Barr, President, Barr Tell USA, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403, at 2-3 (filed June 5, 2017) (*Barr Tell Ex Parte Letter*).

<sup>50</sup> Public Interest Statement at B-16—B-17.

<sup>51</sup> See *Applications Filed for the Transfer of Control of tw telecom Inc. to Level 3 Communications, Inc.*, WC Docket No. 14-104, Memorandum Opinion and Order, 29 FCC Rcd 12842, 12848, para. 16 (WCB, IB 2014) (*Level 3-tw telecom Order*) (citing *AT&T-BellSouth Order*, 22 FCC Rcd at 5675, para. 23 & n.82); see also *Qwest-CenturyLink Order*, 26 FCC Rcd at 4201, para. 13 & n.50.

<sup>52</sup> See INCOMPAS Comments at 6; CETF *Ex Parte* Comments at 3.

based fiber provider.<sup>53</sup> The Commission has long treated facilities-based services as the relevant services to consider in determining potential competitive harm arising from transactions such as this involving the combination of an incumbent LEC and a competitive LEC.<sup>54</sup> Accordingly, we carefully gauge below the potential for harmful transaction-specific competitive effects where Level 3 and CenturyLink both compete to provide last-mile BDS to the same locations over their owned wireline facilities and where they both have overlapping long-haul fiber routes.

### 1. Loss of Facilities-Based Fiber Competition for Last-Mile BDS in CenturyLink's Incumbent LEC Region.

18. Based on our analysis, the divestitures in three in-region MSAs that the Applicants agreed to in the DOJ Consent Decree, and Applicants' compliance with the condition not to raise rates for BDS services for five years at the locations identified in Appendix B hereto, we find *de minimis* harm from the loss of Level 3 as a last-mile facilities-based BDS provider in CenturyLink's incumbent LEC region. In accordance with Commission precedent, we begin our analysis by identifying those locations where both CenturyLink and Level 3 have last-mile fiber-based connections (i.e., "overlap locations"),<sup>55</sup> excluding from further review those overlap locations where we confirm that at least one alternative competitive fiber provider (in addition to the Applicants) is at the location.<sup>56</sup> Next, we assess the likelihood of competitive entry to the remaining overlap locations (2:1 locations) to determine if nearby facilities-based competitors are likely to connect their fiber to the location in response to any post-Transaction unilateral attempt by the combined company to increase prices to customers at that location.<sup>57</sup> The lower the demand in the 2:1 location, the closer another competitive fiber provider must be to that location for entry to be profitable and thus likely.<sup>58</sup> Because we cannot make a granular assessment,

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<sup>53</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12508-09, para. 18; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4202, para. 16; *Wavcom Solutions Corporation and Hawaiian Telcom, Inc., Applications for Consent to Transfer of Control*, WC Docket No. 12-206, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 16081, 16087, para. 13 (WCB 2012) (*Hawaiian Telcom Order*).

<sup>54</sup> *Verizon-XO Order*, 31 FCC Rcd at 12508-09, para. 18; *AT&T-BellSouth Order*, 22 FCC Rcd at 5677-78, para. 29; *Verizon-MCI Order*, 20 FCC Rcd at 18448, para. 26; *SBC-AT&T Order*, 20 FCC Rcd at 18305-06, para. 26 & n.89.

<sup>55</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12509, para. 18; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4202, para. 16; *AT&T-BellSouth Order*, 22 FCC Rcd at 5678, para. 31; *SBC-AT&T Order*, 20 FCC Rcd at 18307, para. 28; *Hawaiian Telcom Order*, 27 FCC Rcd at 16087, para. 12.

<sup>56</sup> *Verizon-XO Order*, 31 FCC Rcd at 12512, para. 22; *AT&T-BellSouth Order*, 22 FCC Rcd at 5682, para. 42.

<sup>57</sup> *Verizon-XO Order*, 31 FCC Rcd at 12512, para. 22; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4203, para. 17; *AT&T-BellSouth Order*, 22 FCC Rcd at 5682, para. 42. We assess the likelihood of competitive entry by applying demand/distance screens, initially developed by DOJ in 2005, that have long been used by the Commission in evaluating transactions such as this to determine whether competitive entry to a location will be profitable and thus likely. *Verizon-XO Order*, 31 FCC Rcd at 12512, para. 22; see also *AT&T-BellSouth Order*, 22 FCC Rcd at 5682-83, paras. 41-43 & n.114; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4203, para. 1. Based on these screens, competitive entry is likely: (1) if demand in the overlap location is equivalent to two DS-3s ( $\approx 100$  Mbps) and the closest alternative fiber provider has facilities within 0.1 mile of the overlap location; (2) if demand in the overlap location is equivalent to an OC-12 ( $\approx 622$  Mbps) and the closest alternative fiber provider has facilities within 0.25 mile of the overlap location; or (3) if demand in the overlap location is equivalent to an OC-48 ( $\approx 2.488$  Gbps) and the closest alternative fiber provider has facilities within one mile of the overlap location. *AT&T-BellSouth Order*, 22 FCC Rcd at 5682-83, para. 42, n.114; see also *Verizon-XO Order*, 31 FCC Rcd at 12512-13, paras. 22-23.

<sup>58</sup> *Verizon-XO Order*, 31 FCC Rcd at 12512, paras. 22-23; *AT&T-BellSouth Order*, 22 FCC Rcd at 5682, para. 42 n.114. We acknowledge that the Commission has found competitive constraints exist at lower levels of demand or at further distances than those used in these demand/distance screens. The Commission's recent *BDS Order* provides numerous examples of competitive BDS providers' evidence that they can and do extend fiber to locations where the decision to extend fiber depends on multiple factors other than individual demand in a particular location, including potential sources of BDS revenue from different locations along the fiber extension route. See *Business*

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based on the information in this record, to determine the specific criteria that every potential entrant would consider in deciding whether to enter each particular overlap location we evaluate, we continue to rely on the Commission's traditional demand/distance screen precedent to find that when the screens are met, competitive entry is likely and will provide a competitive constraint on the prices charged at an overlap location.<sup>59</sup> Any remaining overlap locations that do not meet the traditional screens are then evaluated individually to determine whether a remedy is warranted, and if so, what appropriate remedy (if any) would mitigate any potential harm.<sup>60</sup> We follow this precedent in conducting our overlap analysis, but in considering whether a remedy is required to mitigate potential harm in 2:1 locations that do not meet the traditional demand/distance screens, we take into account changes in competitive fiber providers' business practices that the Commission recently found to be the norm for fiber buildout and competitive entry decision making in the *BDS Order*.<sup>61</sup>

19. The record shows that CenturyLink has 115,215 locations nationwide where it owns or controls fiber, 110,173 of which are located in its incumbent LEC region.<sup>62</sup> Level 3 has 34,755 locations where it owns or controls fiber connections, 6,225 (approximately 18 percent) of which are in CenturyLink's incumbent LEC territory, and 28,530 (approximately 82 percent) of which are outside of CenturyLink's incumbent LEC territory.<sup>63</sup> Of the 6,225 in-region Level 3 fiber locations, Applicants initially identified 3,468 in-region overlap locations where both Level 3 and CenturyLink have fiber.<sup>64</sup> Through various data submissions reflecting overlap analysis refinements, Applicants' evidence now reflects, and we have independently verified, a total of 3,220 in-region fiber overlap locations.<sup>65</sup>

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*Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Report and Order, 32 FCC Rcd 3459, 3482, 3484, paras. 44-45, 52 (2017) (*BDS Order*).

<sup>59</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12513, para. 23; *AT&T-BellSouth Order*, 22 FCC Rcd at 5682, para. 42.

<sup>60</sup> Potential remedies for non-competitive 2:1 locations range from location divestiture or pricing limitations to a finding of *de minimis* harm in lieu of ordering any remedy based on specific characteristics of the locations. See, e.g., *Verizon-XO Order*, 31 FCC Rcd at 12513, para. 25; *AT&T-BellSouth Order*, 22 FCC Rcd at 5686, para. 49; *SBC-AT&T Order*, 20 FCC Rcd at 18309, para. 37; *Verizon-MCI Order*, 20 FCC Rcd at 18453, para. 40; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4203, para. 17; *Hawaiian Telcom Order*, 27 FCC Rcd at 16087, para. 13.

<sup>61</sup> See *BDS Order*, 32 FCC Rcd at 3482, 3512, paras. 45, 118-124. We note that the competitive market test (CMT) contained in the *BDS Order* was designed to determine on a countywide basis whether the benefits of continued price-cap regulation outweighed the costs, not whether at a particular location the loss of a competitor as a result of a transaction would lead to a potential competitive harm that could be remedied through targeted conditions. See *id.* at 3519-27, paras. 130-44 (describing the CMT); see also *id.* at 3503, para. 96 (noting that the Commission will consider targeted complaints and remedies "even in those areas where we eliminate ex ante pricing regulation," citing section 208's complaint process).

<sup>62</sup> See CTLLVLT-000129, transmitted by Letter from Yaron Dori and Brandon Johnson, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed May 24, 2017).

<sup>63</sup> Dec. 19, 2016 Supplement at 2.

<sup>64</sup> *Id.* at 3. Applicants later revised the number of in-region overlap locations to 3,149. Applicants' Reply at 3-4. According to Applicants, they determined the number of overlap locations based either on an address match or on the CenturyLink and Level 3 fiber locations being within 164 feet ( $\approx$ 50 meters) of each other. See Initial Joint Response of CenturyLink, Inc. and Level 3 Communications, Inc. to Information and Document Requests, transmitted by letter from Yaron Dori, Counsel for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 4 n.8 (filed Apr. 7, 2017) (Initial Joint Response to Mar. 30, 2017 Information Request).

<sup>65</sup> See CTLLVLT-000129, transmitted by Letter from Yaron Dori and Brandon Johnson, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed May 24, 2017); CTLLVL-000155 transmitted by Letter from Yaron Dori, Brandon Johnson and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Aug. 4, 2017); CTLLVL-000160, transmitted by Letter from Yaron Dori, Brandon Johnson and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Aug. 15, 2017).

20. Applicants made multiple supplemental and revised data submissions to their competitive analysis of the 3,220 in-region overlap locations in order to fully respond to WCB's March 30, 2017 Information and Data Requests and provide sufficient data to enable us to replicate and analyze fully Applicants' competitive overlap analysis and the data and sources upon which Applicants relied.<sup>66</sup> Applicants completed their response on September 19, 2017.<sup>67</sup> Based on the totality of the Applicants' numerous data submissions, we independently analyzed: (1) where CenturyLink and Level 3 both have last-mile fiber-based end-user BDS connections; (2) where fiber location overlaps occur; (3) what demand exists in overlap locations lacking an alternative fiber provider; and (4) where other facilities-based fiber providers have fiber connections to locations within one mile or less of the overlap location. Based on this analysis, after disregarding Level 3's fiber locations within the three MSAs that Applicants have agreed to divest pursuant to the DOJ Consent Decree,<sup>68</sup> we confirmed that 66 of Applicants' 3,220 in-region fiber overlap locations have neither an alternative fiber competitor at that location nor one that meets the traditional demand/distance screen criteria.<sup>69</sup> We then further evaluated these 66 remaining

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<sup>66</sup> See CTLLVLT-000129 and CTLLVLT-000130, transmitted by Letter from Yaron Dori and Brandon Johnson, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed May 24, 2017); CTL-18029875, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed July 5, 2017); CTLLVLT-000154, transmitted by Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed July 20, 2017); CTLLVLT-000155, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Aug. 4, 2017); CTLLVLT-00160, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Aug. 15, 2017); CTLLVLT-000161, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Aug. 22, 2017); CTLLVLT-000179, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 5, 2017); CTLLVLT-000180, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 8, 2017); CTLLVLT-000182, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 11, 2017); CTLLVLT-000183, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 12, 2017).

<sup>67</sup> CTLLVLT-000184, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 19, 2017).

<sup>68</sup> DOJ Consent Decree at 7-13, Appx. A. Because the Level 3 fiber assets in these three MSAs will divest pursuant to the terms of the DOJ Consent Decree, we need not consider overlap locations in these MSAs. Any potential public interest harm that may have occurred within these three MSAs is eliminated by the required divestiture.

<sup>69</sup> Not included in our competitive analysis were overlap locations that Applicants stated should be excluded from consideration because they are network locations where no BDS customers exist or are locations not appropriately considered in a last-mile BDS analysis. These locations include stand-alone digital subscriber line access multiplexers (DSLAMs) and intermediate line amplifications (ILAs), as well as stand-alone macro cell tower locations. See CTLLVLT-000161, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 n.5 (filed Aug. 22, 2017) (first identifying DSLAMs and stand-alone cell towers); see also Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 1 n.2 (filed Sep. 5, 2017) (first identifying ILAs); CTLLVLT-000181, transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Sep. 8, 2017) (further discussing ILAs, DSLAMs and stand-alone cell towers). We agree that network connections like DSLAMs and ILAs are appropriate to exclude from our analysis of overlap locations. Cf. *Verizon-XO Order*, 31 FCC Rcd at 12520-21, para. 36 (considering cell tower backhaul issues raised by commenters separately from the in-region last-mile overlap analysis); *AT&T-BellSouth Order*, 22 FCC Rcd at 5684-85, paras. 44, 46 (finding that applicants' elimination of certain overlap locations from the competitive analysis (e.g., house network connections, vacant buildings, one of the applicants was the sole building tenant) to be both "reasonable

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locations based on additional information available in the record or publicly available information to determine if competitive harm is likely to occur at these locations, and, if so, whether remedies are warranted to mitigate the potential harm.

21. *Factors Considered in Determining Whether Remedies Are Warranted.* With regard to the 66 2:1 locations that failed the demand/distance screens, we considered, consistent with prior transactions,<sup>70</sup> certain factors specific to these locations, e.g., type of location, whether the location is vacant, type of occupancy, the number and proximity of the locations involved, and whether other types of competitors are in or near the location in determining whether a remedy is warranted to mitigate potential harm.

22. We also considered whether any of these 66 overlap locations had evidence of the existence of one or more facilities-based fiber competitors within a half-mile of the location.<sup>71</sup> The *BDS Order* found, based on an analysis of the most comprehensive data collection the Commission has ever undertaken,<sup>72</sup> that BDS providers actively compete for customers located within a half-mile of their networks,<sup>73</sup> and that a competitor providing BDS to a location within a half-mile of another location with BDS demand is an effective competitor.<sup>74</sup> The BDS data collected by the Commission in 2015,<sup>75</sup> as well as subsequent information submitted in the record for the BDS proceeding for the two-year period preceding the adoption of the *BDS Order*, provide real-world insight into BDS service providers' current business planning, operational decision-making, and buildout strategies today.<sup>76</sup> In light of this recent and detailed evidence of BDS marketplace suppliers' behavior, we consider the existence of fiber-based BDS competitors serving locations within a half-mile of Applicants' locations in determining whether remedies are warranted.<sup>77</sup>

23. *Remedies Analysis for Potential Harm to the 66 Remaining Locations.* First, we considered record evidence of fiber-based BDS competitors at locations within a half-mile of each of the remaining 66 in-region overlap locations. We found that 56 of the 66 overlap locations have one or more

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and consistent with the approach the DOJ adopted in the DOJ/AT&T/Verizon Consent Decrees”).

<sup>70</sup> See, e.g., *Verizon-XO Order*, 31 FCC Rcd at 12513, para. 25; see also, *AT&T-BellSouth Order*, 22 FCC Rcd at 5685, para. 46.

<sup>71</sup> See *BDS Order*, 32 FCC Rcd at 3513-14, para. 119.

<sup>72</sup> *Id.* at 3506, para. 103; see also *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4742-43, para. 43 (2016).

<sup>73</sup> *BDS Order*, 32 FCC Rcd at 3513-14, 3520, paras. 119, 132.

<sup>74</sup> *Id.* at 3513-14, para. 132 (“We use a half mile distance based on our analysis of the record, discussed above, that determined that competitive providers are actively competing for customers located within that distance and are generally willing to build out that distance in response to business data services demand.”); see also *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Order Denying Stay Motion, 32 FCC Rcd 5537, 5540, para. 8 (WCB 2017).

<sup>75</sup> The 2015 Collection is the data collected during the BDS rulemaking proceeding from both providers and purchasers of time division multiplexing (TDM)-based special access services (including DS1s and DS3s), packet-based dedicated services such as Ethernet, and best-effort business broadband Internet access services. *BDS Order*, 32 FCC Rcd at 3461, para. 2 n.1.

<sup>76</sup> *BDS Order*, 32 FCC Rcd at 3461, para. 2 (Commission relied on 491 facilities-based BDS providers' responses from the 2015 Collection in making its decision on the likelihood of competitive entry in the BDS market).

<sup>77</sup> *Id.* at 3467, para. 12 (citing *Comcast-NBCU Order*, 26 FCC Rcd at 4248, para. 23, for the proposition that a competition analysis may “consider technological and market changes as well as trends within the communications industry”).

facilities-based fiber competitors at locations within a distance of up to a half-mile.<sup>78</sup> For those 56 locations, we conclude that the potential for competitive harm is substantially reduced, even though these locations may not meet the traditional demand/distance screens. The existence of nearby fiber-based competitors reflects the potential for either competitive entry, should the combined entity attempt to raise prices supra-competitively at those locations post-Transaction, or for competitive pressure sufficient to keep the combined entity's prices at competitive levels at those locations.<sup>79</sup> With regard to the remaining ten overlap locations, Applicants contend that these remaining locations are not competitively significant because they are uniquely situated and represent only a *de minimis* portion of the total overlap locations.<sup>80</sup> Given the lack of nearby competitors, we take a closer look at the characteristics of these locations to determine if other factors demonstrating a risk of competitive harm warrant our consideration.

24. The ten locations are geographically dispersed throughout ten different MSA and non-MSA areas within CenturyLink's 38 state incumbent LEC region.<sup>81</sup> Based on publicly available information, several of these locations appear to be in somewhat remote areas. Consequently, divestiture does not appear to be a practical option.<sup>82</sup> Applicants have provided no evidence of any other fiber-based provider within even a mile of nine of the ten locations, in spite of the fairly high demand in some of these locations. Because Level 3 is the only fiber provider other than CenturyLink that directly connects to these ten locations and because competitive entry is unlikely, the Transaction may lead to potential competitive harm to customers at these locations.<sup>83</sup> To mitigate this possibility of competitive harm, we condition our approval of the Applications on the combined company refraining from increasing rates for any service provided by CenturyLink or Level 3 at the ten locations identified in Appendix B for five years following the closing date of the Transaction.<sup>84</sup> This condition extends to both new and existing customers at those locations, and CenturyLink, for so long as the condition applies, shall certify each year on the anniversary date of this Order, that it has not increased the prices for any service offered at the ten locations identified in Appendix B. The condition will cease to apply to a particular location: (1) if the merged company divests either CenturyLink's or Level 3's legacy fiber facilities at that location, or (2) 30 days after CenturyLink notifies the Commission in writing that an additional unaffiliated competitive fiber provider has connected to that location.<sup>85</sup> We conclude that this condition is sufficient to mitigate

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<sup>78</sup> We determined the "up to half-mile" distance in the same manner we determined the distances for the traditional demand/distance screens, i.e., based on the distance between the geo-coordinates of the Applicants' overlap building locations to the geo-coordinates of the fiber-based competitors' building locations.

<sup>79</sup> *BDS Order*, 32 FCC Rcd at 3467-68, para. 14.

<sup>80</sup> See Initial Joint Response to Mar. 30, 2017 Information Request at 10-11.

<sup>81</sup> See *infra* Appx. B.

<sup>82</sup> The Commission has not required specific location divestitures, voluntary or mandatory, in transactions between incumbent LECs and competitive LECs since August 31, 2007, when WCB granted Qwest Communications Corporation (QCC) a waiver of the divestiture condition to sell IRUs of OnFiber fiber connections to five in-region QCC and OnFiber overlap locations; however, QCC could not find a willing buyer to comply with that condition. See *Application for Transfer of Control of OnFiber Communications, Inc. to Qwest Communications Corp.*, WC Docket No. 06-111, Public Notice, 21 FCC Rcd 9933 n.4 (WCB 2006); Letter from Kim E. Laakso, Corporate Counsel to QCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-111 (filed Aug. 28, 2007).

<sup>83</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18309, para. 37; *Verizon-MCI Order*, 20 FCC Rcd at 18452, para. 37 (stating that "absent appropriate remedial measures, like those imposed by the DOJ Consent Decree, the proposed merger is likely to have anticompetitive effects in buildings where MCI is the only competitive LEC with a direct wireline connection and where entry appears unlikely").

<sup>84</sup> See, e.g., *Qwest-CenturyLink Order*, 26 FCC Rcd at 4203, para. 17; *Hawaiian Telcom Order*, 27 FCC Rcd at 16087, para. 13.

<sup>85</sup> *Id.*

potential competitive harm resulting from the Transaction to the customers at the ten locations.<sup>86</sup> Applicants have agreed to abide by this condition.<sup>87</sup>

25. *Additional Analysis of In-Region Counties Deemed Competitive by BDS Order.* Separate from the traditional BDS competitive overlap analysis described above, we also considered whether the proposed Transaction would adversely affect the Commission's determination of competitive counties in the *BDS Order*. Under the CMT adopted by the Commission in the *BDS Order* to determine whether an incumbent LEC faces sufficient competition in its provision of TDM DS1s and DS3s in any particular county,<sup>88</sup> a county is considered competitive for the purpose of pricing regulation "if 50 percent of the locations with BDS demand in that county are within a half mile of a location served by a competitive provider based on the *2015 BDS Collection* or 75 percent of the census blocks in that county have a cable provider present based on the Commission's Form 477 data."<sup>89</sup> Based on our review, we find that had the proposed Transaction occurred prior to the release of the *BDS Order*, one county's CMT finding would have been affected such that it would not have been deemed competitive. However, because this county is included in one of the three MSA's subject to DOJ's divestiture requirement, we find that the Transaction will have no impact on the Commission's competitive county determinations in the *BDS Order*.

## 2. **Loss of Facilities-Based Fiber Competition Outside of CenturyLink's Incumbent LEC Region.**

26. We find that the proposed Transaction poses no material risk of harm to competition in the provision of enterprise or wholesale BDS outside of CenturyLink's incumbent LEC territory, where both CenturyLink and Level 3 operate as competitive LECs.<sup>90</sup> Of the approximately 28,530 Level 3 fiber buildings outside of CenturyLink's incumbent LEC territory, CenturyLink and Level 3 have overlapping fiber facilities in approximately 1,400 buildings (fewer than five percent of Level 3's out-of-region buildings).<sup>91</sup> Of these overlap buildings, Applicants submitted evidence reflecting that more than 98 percent of those locations had another competitor either within the building or nearby<sup>92</sup> and that the remaining locations are widely scattered throughout the country in geographic areas where the combined company will be competing against AT&T or Verizon as the incumbent LEC, or against other smaller incumbent LECs.<sup>93</sup> We agree with Applicants that rather than harming competition, combining CenturyLink's and Level 3's facilities-based networks and services will better enable the combined

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<sup>86</sup> *Id.*

<sup>87</sup> Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 1 (filed Oct. 6, 2017).

<sup>88</sup> *BDS Order*, 32 FCC Rcd at 3499, para. 86.

<sup>89</sup> *Id.* at 3499, para. 86. If a county is found to be competitive, then any price cap incumbent LEC serving BDS customers in the county will be relieved of ex ante pricing regulation. *Id.*

<sup>90</sup> Lead Application at 3. The Commission previously has found that a competitive LEC that is also an incumbent LEC in a contiguous territory does not have any unique advantage over other competitors when competing outside of its incumbent LEC region. *Verizon-XO Order*, 31 FCC Rcd at 12514, para. 27; *AT&T-BellSouth Order*, 22 FCC Rcd at 5691, para. 55.

<sup>91</sup> Initial Joint Response to Mar. 30, 2017 Information Request at 5.

<sup>92</sup> CTLLVLT-000001, Summary Table tab, Category 4 for Out of Region Buildings, transmitted by Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 7, 2017) (identifying [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] out-of-region overlap locations without another competitor either at the location or within 2,000 feet).

<sup>93</sup> *Id.* at Out of Region Overlap Buildings tab; see also Public Interest Statement at B-8, B-11.

company to compete against the larger incumbent LECs outside of CenturyLink's incumbent LEC region.<sup>94</sup>

27. We reject INCOMPAS' contention that, outside of CenturyLink's territory, CenturyLink might not connect to buildings on a larger scale than Level 3 would have on its own or allow competitive use of its fiber facilities at rates offered by Level 3 today.<sup>95</sup> Applicants provided documentary evidence demonstrating that, as a result of the Transaction, they could justify increasing the number of fiber-connected on-net locations beyond Level 3's ordinary course pre-Transaction projections from **[BEGIN HIGHLY CONF. INFO.]** **[END HIGHLY CONF. INFO.]**,<sup>96</sup> a potential doubling of the number of on-net locations that Level 3 would have connected to on a stand-alone basis absent the Transaction. We also find that the presence of multiple other BDS competitors, including incumbent LECs, outside of CenturyLink's incumbent LEC territory will ensure that no competitive harm will occur if CenturyLink fails to aggressively compete for business customers using Level 3's fiber assets.<sup>97</sup> We further find it unlikely that the combined entity would fail to vigorously compete out of region, given Applicants' assertions that the acquisition of Level 3's fiber assets will better enable CenturyLink to expand and improve service to enterprise and wholesale customers on a nationwide basis.<sup>98</sup> As a general matter, when service providers invest in network facilities, whether through building or buying assets, they have an incentive to use those facilities to provide service and collect revenue.<sup>99</sup>

28. Based on the specific record before us, and the current state of competition in the BDS industry generally,<sup>100</sup> we find that CenturyLink's acquisition of Level 3's fiber facilities outside of CenturyLink's incumbent LEC region is unlikely to result in any public interest harm.

### **3. Loss of Level 3 as an Independent Provider of Lit and Dark Long-Haul Fiber Transport Services.**

29. We find no potential competitive harm from the Transaction related to the availability of long-haul transport service. In conducting our review, we evaluate the competitive availability of long-haul transport considering both lit transport services and dark fiber,<sup>101</sup> as we recognize dark fiber as a

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<sup>94</sup> See *infra* section VI.A.2; Public Interest Statement at B-3; see also *Verizon-XO Order*, 31 FCC Rcd at 12515, para. 28.

<sup>95</sup> INCOMPAS Comments at 5, 14; see also Public Knowledge Reply at 2.

<sup>96</sup> CTLLVLT-000162, transmitted as Attach. A by Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 7 (filed Aug. 31, 2017) (Applicants' Aug. 31, 2017 Benefits *Ex Parte* Letter).

<sup>97</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12515, para. 28; *AT&T-BellSouth Order*, 22 FCC Rcd at 5693, paras. 58-59; *SBC-AT&T Order*, 20 FCC Rcd at 18305, para. 34; *Verizon-MCI Order*, 20 FCC Rcd at 18448, para. 34.

<sup>98</sup> Public Interest Statement at B-4—B-6; see also CTLLVLT-000004 at 2, 9-10 (Applicants' Long-Haul Analysis), transmitted by Letter from Michael Beder, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 13, 2017).

<sup>99</sup> See e.g., *Verizon-XO Order*, 31 FCC Rcd at 12515, para. 28; *AT&T-BellSouth Order*, 22 FCC Rcd at 5693, para. 59; see also, *SBC-AT&T Order*, 20 FCC Rcd at 18319, para. 53; *Verizon-MCI Order*, 20 FCC Rcd at 18448, para. 54.

<sup>100</sup> *BDS Order*, 32 FCC Rcd at 3460-61, 3468, 3498-99, paras. 1, 16, 83-84.

<sup>101</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12521, para. 36. In evaluating the combined availability of lit and dark fiber transport in our review, we make no finding as to whether lit and dark fiber constitutes a relevant antitrust market for the purpose of analyzing this Transaction. Indeed, Applicant's Consent Decree with DOJ requires Applicants to divest certain dark fiber routes, suggesting its antitrust analysis considered dark fiber as a separate product market. DOJ Consent Decree at 13-16, Appx. B.

substitute for lit fiber transport services for purposes of our public interest analysis<sup>102</sup> and there is no basis in our record to distinguish between lit and dark fiber transport.<sup>103</sup> Although certain commenters raise the potential for anticompetitive effects from CenturyLink's acquisition of Level 3's lit and dark long-haul fiber routes,<sup>104</sup> we find that the combined company will face sufficient competition from multiple other providers of fiber-based long-haul transport on each of Applicants' overlapping transport routes.<sup>105</sup> To the extent commenters have specific concerns about the availability of dark fiber as a result of the Transaction, these concerns are rendered moot by the Applicants' agreement to divest dark fiber capacity on 30 overlapping long-haul fiber routes in the DOJ Consent Decree.<sup>106</sup>

30. Consistent with the Applicants' competitive analysis, our review of the record indicates that CenturyLink and Level 3 either own or lease (via IRUs) 52 long-haul fiber routes.<sup>107</sup> On each of these overlapping long-haul fiber routes, Applicants state that "CenturyLink and Level 3 would have at least seven fiber providers offering lit services post-Transaction."<sup>108</sup> Applicants provided documentary evidence supporting this assertion, reflecting the specific transport competitors on each route.<sup>109</sup> Many of these long-haul competitors provide lit transport service via IRUs with Level 3 or CenturyLink.<sup>110</sup> Applicants also provided detailed documentary evidence reflecting the specific routes these IRUs cover, the names of each competitor, and the remaining term of their respective IRUs.<sup>111</sup> Based on this evidence, and Applicants' statement that the Transaction will not affect existing contractual obligations,<sup>112</sup> we find that the likelihood of competitive harm resulting from the combination of Applicants' long-haul fiber routes to be minimal.

31. INCOMPAS argues that downstream business customers will be harmed if the combined company does not lease dark fiber to competitive carriers post-Transaction and asserts that it is important to distinguish between dark fiber and lit services.<sup>113</sup> However, INCOMPAS provides no explanation as to why distinguishing between lit and dark fiber transport is necessary to avoid harm to downstream business customers, particularly given the availability of competitive long-haul transport generally.<sup>114</sup> In

<sup>102</sup> *BDS Order*, 32 FCC Rcd at 3477, para. 35.

<sup>103</sup> See Dec. 19, 2016 Supplement at 2 n.3; Applicants' Reply at 11-12, n.34 (citing *SBC-AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90 (declining to analyze separate product markets for different capacities of BDS) and *Verizon-MCI Order*, 20 FCC Rcd at 18449, para. 27 n.89).

<sup>104</sup> See CETF *Ex Parte* Comments at 3-4; INCOMPAS Comments at 12-13; Frontier Comments at 1.

<sup>105</sup> See Public Interest Statement at B-18; Dec. 19, 2016 Supplement at 4; Applicants' Reply at 11-12.

<sup>106</sup> DOJ Consent Decree at Appx. B.

<sup>107</sup> Further Joint Response of CenturyLink, Inc. and Level 3 Communications, Inc. to Information and Document Requests, transmitted by letter from Michael Beder, Counsel for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 3 (filed Apr. 13, 2017) (Further Joint Response to Mar. 30, 2017 Information Request) (according to Applicants, "[r]outes were considered overlapping if the endpoints on a route from one company matched the endpoints on the route of the other.").

<sup>108</sup> *Id.* at 3; see also CTLLVLT-000017 – CTLLVLT-000068, transmitted by Letter from Michael Beder, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 13, 2017).

<sup>109</sup> See CTLLVLT-000017 – CTLLVLT-000068.

<sup>110</sup> CTLLVLT-000148, transmitted by Letter from transmitted by Letter from Yaron Dori, Brandon Johnson, and Ani Gevorkian, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed July 12, 2017).

<sup>111</sup> *Id.*

<sup>112</sup> Public Interest Statement at B-4.

<sup>113</sup> INCOMPAS Comments at 13.

<sup>114</sup> See *BDS Order*, 32 FCC Rcd at 3499, para. 85.

addition, Applicants indicate that there is a high degree of competitive choice for dark fiber customers throughout the country, including along the long-haul fiber transport routes served by Applicants.<sup>115</sup> Applicants also state that to forego post-Transaction dark fiber opportunities [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.]<sup>116</sup>

32. We find that when service providers invest in network facilities, they have an incentive to put those facilities to use.<sup>117</sup> Similarly, in this Transaction, we conclude that post-Transaction, the combined company will have an incentive to put Level 3's long-haul fiber assets, whether lit or dark, to use to generate revenue and provide service to customers, especially those with strategic value to the combined company.<sup>118</sup> However, even if the combined company did need all of Level 3's dark fiber assets for its own internal use, the record reflects that there are sufficient other lit or dark fiber providers to mitigate any potential harm.<sup>119</sup>

33. In conclusion, considering the record evidence reflecting the number of post-closing long-haul fiber competitors on the 52 overlapping CenturyLink-Level 3 routes, and in light of the divestitures agreed to by the Applicants in the DOJ Consent Decree, we find the likelihood of competitive harm resulting from the combination of long-haul fiber routes to be minimal.

#### **B. Other Issues**

34. *Fiber Buildout on Tribal Lands.* We decline to adopt the requests of NCAI and the Nez Perce Tribe for the Commission to use this Transaction "to address the lack of access to affordable, modern broadband service on Tribal lands."<sup>120</sup> We similarly decline the requests of the Colville Tribes and the Nez Perce Tribe to impose conditions relating to CenturyLink's use of its Connect America Fund (CAF) funding to upgrade or extend CenturyLink's network on Tribal lands.<sup>121</sup> We find that these requests are not specific to this Transaction and therefore decline to impose the conditions sought.<sup>122</sup>

35. Nevertheless, the Tribal Commenters raise important issues regarding service to Tribal areas in CenturyLink's incumbent LEC territory, such as the need to address fiber connectivity for

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<sup>115</sup> See Applicants' Long-Haul Analysis at 1 & n.1. Applicants state that there are "many options" for enterprise customers to consider when seeking to lease dark fiber, including [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.] *Id.* at 1.

<sup>116</sup> *Id.* at 2, 9-10 (according to Applicants, [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.] In fact, there is evidence in the record that this Transaction will increase the Applicants' fiber inventory, resulting in excess fiber available for sale as dark fiber. *Id.* at 8 [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.]

<sup>117</sup> *Verizon-XO Order*, 31 FCC Rcd at 12521, para. 36.

<sup>118</sup> See Applicants' Reply at 13; Applicants' Long-Haul Analysis at 2, 9-10.

<sup>119</sup> Further Joint Response to Mar. 30, 2017 Information Request at 3; see also CTLLVLT-000017 – CTLLVLT-000068, CTLLVLT-000148. To the extent INCOMPAS members prefer dark fiber to lit fiber transport services, they can avail themselves of the opportunity to obtain additional dark fiber that Applicants have agreed to make available pursuant to the DOJ Consent Decree.

<sup>120</sup> See NCAI Comments at 1; Nez Perce Tribe Reply at 1; see also Ho-Chunk Nation Legislature Reply at 1.

<sup>121</sup> See Colville Tribes Reply at 2; Nez Perce Tribe Comments at 2.

<sup>122</sup> See *AT&T-DIRECTV Order*, 30 FCC Rcd at 9194, para. 167.

government, educational, and medical institutions, as well as other enterprise customers on Tribal lands.<sup>123</sup> In acknowledging these important issues, CenturyLink notes that it has “engaged with Tribal leaders on the issue of broadband availability, and the combined company expects to continue to do so in the future.”<sup>124</sup> Moreover, the issues raised by the Tribal Commenters are more appropriately addressed in other Commission proceedings and mechanisms, for example (1) consultation with the Commission’s Office of Native Affairs and Policy (ONAP) to ensure successful engagement between the Tribes and CenturyLink, in accordance with section 54.313(a)(9) of the Commission’s rules;<sup>125</sup> (2) the establishment of rules for the CAF Phase II auction, which will include bidding for projects to provide broadband service to Tribal lands;<sup>126</sup> (3) the adoption of procedures to apply for funding from Mobility Fund Phase II to advance the deployment of 4G LTE service to high-cost Tribal areas;<sup>127</sup> and (4) the *Wireline Broadband Infrastructure* proceeding that seeks comment on ways to remove regulatory barriers to broadband infrastructure investment at the federal, state, and local levels.<sup>128</sup>

36. *Provision of Access Homing Tandem Service.* We also reject the request of certain commenters to require Level 3 (or the combined company) “to offer at reasonable prices and on a nationwide basis wholesale switching and transport services for customer owned telephone numbers.”<sup>129</sup> According to Telnyx, a provider of VoIP numbering services to IP communications providers and to enterprise customers, Level 3 has indicated that, after consummation of the Transaction, the combined company likely will no longer offer an access homing tandem product<sup>130</sup> to VoIP providers, thus leaving only one other nationwide wholesaler of access homing tandem service.<sup>131</sup> In response, Level 3 maintains

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<sup>123</sup> NCAI Comments at 2.

<sup>124</sup> Applicants’ Reply at 14-15.

<sup>125</sup> 47 CFR § 54.313(a)(9); see *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17868-69, paras. 636-37 (2011) (requiring eligible telecommunications carriers serving Tribal lands to meaningfully engage with Tribal governments in their supported areas); see also *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, WC Docket No. 10-90 et al., Public Notice, 27 FCC Rcd 8176 (2012) (issuing guidance to facilitate the required discussions between Tribal government officials and communications providers either providing or seeking to provide service on Tribal lands with the use of Universal Service Fund (High Cost) support).

<sup>126</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6026, paras. 227-28 (2016).

<sup>127</sup> *Connect America Fund, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 2152, 2164-68, paras. 31-38 (2017).

<sup>128</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017).

<sup>129</sup> See *Telnyx Ex Parte* Letter at 3; *Barr Tell Ex Parte* Letter at 2-3; Letter from Gregory Borodiansky, CTO, Telengy, LLC, to Marlene Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed June 5, 2017); Letter from Sebastian Kiely, Director of Business Development, VoIP Innovations, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed June 13, 2017); Letter from Michael A. Crown, President, FracTEL, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed June 15, 2017); Letter from Sam Shiffman, President, commio, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 2 (filed June 16, 2017).

<sup>130</sup> The access homing tandem service allows Level 3’s wholesale VoIP customers to receive their customers’ local and long-distance calls using Level 3’s local exchange connections. Level 3’s nationwide tandem network consolidates traffic and delivers its customers’ calls over the best possible route. See Level 3 Wholesale VoIP Services, <http://www.level3.com/en/products/wholesale-voice-solutions/> (last visited Oct. 2, 2017).

<sup>131</sup> *Telnyx Ex Parte* Letter at 2-3 (noting that other providers of access homing tandem service have decided to exit the market).

that CenturyLink's proposed acquisition of Level 3 had no bearing on Level 3's decision not to make its access homing tandem product more widely available to companies such as Telnix.<sup>132</sup> Rather, Level 3 points out that its access homing tandem product is a non-standard offering requiring "significant resources to support" and that Level 3 has chosen not to offer the service to anyone for the time being.<sup>133</sup> Level 3 states that, to its knowledge, no decision has been made whether the combined company will offer an access homing tandem product post-closing.<sup>134</sup>

37. We find that Telnix's concerns are not specific to this Transaction. The record suggests that other access homing tandem providers have similarly decided to cease offering this product,<sup>135</sup> and Telnix provides no basis to compel Level 3 to continue doing so. Consequently, we decline to require Level 3 to continue to sell a "non-standard, not generally available product" as a condition of the approval of the Transaction.<sup>136</sup> Moreover, based on Level 3's assertion that no decision has been made whether the combined company will offer an access homing tandem product post-closing,<sup>137</sup> suggestions that it will not offer such a product after consummation of the Transaction are speculative.

38. *Modifications to Level 3's BDS Pricing Prior to Closing.* We decline to adopt Windstream's request to impose conditions on approval of the Applications with respect to the pricing of BDS that Level 3 sells to Windstream pursuant to contract.<sup>138</sup> Windstream claims it has recently received "a significant number of rate increase notices from Level 3 that are inconsistent with the company's past practices."<sup>139</sup> Windstream argues that upon completion of the proposed Transaction, the combined company will have "more market power to engage in such price increases and other practices that may be in violation of Section 201."<sup>140</sup> Windstream requests that the Commission condition its approval of the Transaction on requiring the combined company to charge the contract rate negotiated by a customer even after the initial purchase term expires, and to permit wholesale customers to continue to lease Level 3 facilities on a month-to-month basis after the initial term of a contract has been fulfilled.<sup>141</sup> Level 3 states that its pricing strategy **[BEGIN HIGHLY CONF. INFO.]**

**[END HIGHLY CONF.]**

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<sup>132</sup> See Letter from Nicholas G. Alexander, Associate General Counsel, Federal Affairs, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 1-2 (filed Apr. 27, 2017) (Level 3 Apr. 27, 2017 *Ex Parte* Letter).

<sup>133</sup> *Id.* at 2. Level 3 also states that it has never been approached by Barr Tell, Telengy, VoIP Innovations, FracTEL, or commio regarding its access homing tandem product. Letter from Nicholas G. Alexander, Associate General Counsel, Federal Affairs, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 1 (filed June 28, 2017) (Level 3 June 28, 2017 *Ex Parte* Letter).

<sup>134</sup> Level 3 Apr. 27, 2017 *Ex Parte* Letter at 2; Level 3 June 28, 2017 *Ex Parte* Letter at 1-2.

<sup>135</sup> Telnix *Ex Parte* Letter at 2.

<sup>136</sup> Level 3 June 28, 2017 *Ex Parte* Letter at 2.

<sup>137</sup> *Id.* at 2; Level 3 Apr. 27, 2017 *Ex Parte* Letter at 2.

<sup>138</sup> Windstream *Ex Parte* Letter at 3.

<sup>139</sup> *Id.* at 1. According to Windstream, "[s]ince the announcement of the CenturyLink-Level 3 transaction, Windstream has received notification from Level 3 of numerous rate increases for circuits currently being used by Windstream that are no longer under a term commitment. While these increases may not be against the terms of the contract, they are inconsistent with Level 3's past practice, which has been to continue billing at the term contract rates as long as the circuit is in service." *Id.* at 2.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 3.

**INFO.]**<sup>142</sup> We find that Windstream’s concerns are not specific to this Transaction, and we decline to condition approval of the Applications as requested by Windstream.

39. We also find that any current or future pricing disputes between Level 3 and Windstream are contractual matters that are more appropriately resolved by the parties pursuant to a section 208 complaint, litigation, or other appropriate dispute resolution mechanism provided for in the applicable service agreement between the parties. In any event, Windstream admits that Level 3’s pricing behavior “may not be against the terms of the contract,”<sup>143</sup> and we conclude that it is inappropriate to impose the requested merger condition, which could circumvent the normal contract negotiation process.

40. As for Windstream’s claim that the combined company could use increased market power as a result of the Transaction to impose unreasonable price increases, we find that claim speculative and unsupported by the record.<sup>144</sup> We have thoroughly analyzed the potential competitive effects of this Transaction, both within and outside of CenturyLink’s incumbent LEC region, and have determined that the acquisition of Level 3 is unlikely to harm the competitive provision of BDS or result in the combined entity’s ability to unreasonably raise prices for BDS.<sup>145</sup> Should the combined entity attempt to raise prices unreasonably, we find it likely that nearby facilities-based competitors will step in to compete for the combined company’s BDS customers.<sup>146</sup>

41. *Requested CETF Conditions.* We reject the request of CETF to impose the following conditions on approval of the proposed Transaction: (1) long-term rate protections to protect California non-profit customers; (2) commitments by Applicants to build additional middle-mile broadband infrastructure to help reach unserved and underserved areas; (3) commitments that CenturyLink will not engage in anti-competitive behavior in the wholesale market after consummation of the proposed Transaction; and (4) commitments that the quality and reliability of Level 3’s facilities remain intact after the Transaction, including for public safety and other anchor institutions such as schools, libraries, and health care providers.<sup>147</sup> We find no evidence in the record of harms that would support the imposition of the conditions sought by CETF. In addition, we note that several of the issues raised by CETF that are specific to California customers also were raised by CETF during the California Public Utilities Commission’s (CPUC’s) review of this Transaction.<sup>148</sup> The Applicants agreed to certain conditions in the CPUC proceeding to address these state-specific concerns.<sup>149</sup> Finally, we find that the conditions requested by CETF attempt to address speculative issues that might arise post-Transaction. To the extent

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<sup>142</sup> Response of Level 3 to Information and Document Requests, transmitted by Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 14 (filed Apr. 13, 2017). *See also* LVLTL-000013 at 4, transmitted by Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 13, 2017).

<sup>143</sup> Windstream *Ex Parte* Letter at 2

<sup>144</sup> *See, e.g.*, Response of CenturyLink, Inc. to Information and Document Requests, transmitted by letter from Michael Beder, Counsel for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 11 (filed Apr. 13, 2017) (CenturyLink Response to Mar. 30, 2017 Information Request) (“CenturyLink has not to date made any decisions to change legacy company product offerings or product terms and conditions.”).

<sup>145</sup> *See supra* sections V.A.1, V.A.2.

<sup>146</sup> *See BDS Order*, 32 FCC Rcd at 3467-68, para. 14.

<sup>147</sup> CETF *Ex Parte* Comments at 6-7.

<sup>148</sup> *See CPUC Decision* at 14-15.

<sup>149</sup> *Id.* at 17-18. Among other commitments, Applicants agreed to: (1) spend at least \$323 million in capital expenditures in California for network expansion and/or upgrades over the next three years; (2) identify locations where the companies will invest in new middle-mile infrastructure and new points of presence as part of their total California capital expenditures for the next three years, focusing on locations where unserved/underserved communities exist, and (3) preserve the terms of existing customer contracts. *Id.*

CETF or any other aggrieved party has an issue with the combined company's post-Transaction rates, network buildout, behavior in the wholesale market, or the quality and reliability of its network, those concerns can be addressed more properly through the complaint processes of the Commission or the applicable state public utilities commission.

42. *Billing Disputes.* We decline to adopt the requests of Frontier, FairPoint, and Windstream that the Commission impose conditions to ensure that the combined company does not engage in unreasonable bill payment practices post-closing.<sup>150</sup> Concerns relating to billing and payment practices generally are not transaction specific, and in this case, commenters specifically recognize that the Level 3 conduct for which they seek conditions pre-dates the Transaction.<sup>151</sup> At the same time, these commenters acknowledge that Level 3's behavior has improved since the Applications were filed with the Commission.<sup>152</sup> These commenters express concern that the combined company will use its increased scale to delay and refuse to pay its bills,<sup>153</sup> even though FairPoint states that "it has found CenturyLink senior management to be honorable in their business dealings"<sup>154</sup> and Windstream states that it "does not at present have concerns with CenturyLink's bill payment practices."<sup>155</sup> We find that commenters' concerns regarding speculative post-Transaction billing disputes are more appropriately addressed (to the extent they arise after consummation of the Transaction) through normal dispute resolution processes such as the Commission's complaint process, litigation, or arbitration, where specified. Regarding Frontier's claim that Level 3's billing practices drive up the costs of doing business and negatively impact broadband deployment capabilities (especially in rural communities),<sup>156</sup> we find such concerns to be speculative and unsupported by the evidence in the record.

### C. Loss of Level 3 as a Competitive Provider of Transit Service

43. We find that the Transaction is unlikely to produce competitive harm in the marketplace for Internet backbone transit services.<sup>157</sup> Applicants claim that both CenturyLink and Level 3 currently compete against some of the largest Tier 1 backbone providers in the provision of transit services and that this will not change as a result of the Transaction.<sup>158</sup> Our review of Applicants' documentary evidence and publicly available information indicates that the Transaction is unlikely to alter the competitive dynamic of the backbone transit services marketplace or enable the merged entity to raise prices for transit services.

44. At the outset, it is important to note that no commenter in this proceeding has alleged that the proposed Transaction will harm the transit marketplace.<sup>159</sup> However, Applicants themselves raise the

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<sup>150</sup> Frontier Reply at 4-6; FairPoint *Ex Parte* Comments at 3-4; Windstream *Ex Parte* Letter at 1, 3.

<sup>151</sup> Frontier Reply at 4; FairPoint *Ex Parte* Comments at 2; Windstream *Ex Parte* Letter at 2.

<sup>152</sup> See, e.g., Frontier Reply at 4; Windstream *Ex Parte* Letter at 2.

<sup>153</sup> Frontier Reply at 1, 4; FairPoint *Ex Parte* Comments at 3; Windstream *Ex Parte* Letter at 1.

<sup>154</sup> FairPoint *Ex Parte* Comments at 1.

<sup>155</sup> Windstream *Ex Parte* Letter at 2.

<sup>156</sup> Frontier Reply at 5.

<sup>157</sup> As used herein, the term "transit service" refers to wholesale transport service offered by Tier 1 networks. These high-capacity services provide access to the entire Internet and typically route traffic between ISPs, other backbone networks, edge providers, and content delivery networks (CDNs). See *Verizon-XO Order*, 31 FCC Rcd at 12523, para. 40 & nn.134-36.

<sup>158</sup> See Public Interest Statement at B-16.

<sup>159</sup> Although two commenters mention "backbone transmission" service in their comments, it is solely for the purpose of listing the various services they purchase from, or sell to, the Applicants in expressing concerns about non-Transaction specific Level 3 contract rate, billing, and payment practices. See Windstream *Ex Parte* Letter at 2; see also Frontier Reply at 3.

potential impact of the proposed Transaction on transit services, relying on our recent order in a prior transaction to support their claim that the market for transit services is healthy.<sup>160</sup> For this reason, we evaluate the potential for the Transaction to affect the national marketplace for Internet backbone transit services to validate Applicants' claim that the Transaction will have little impact on the overall level of competition for IP transit services.<sup>161</sup>

45. Both CenturyLink and Level 3 operate what are often referred to as Tier 1 networks—global, high-capacity networks that collectively form the backbone of the Internet. The Applicants note that while Level 3 is currently the largest global transit provider, CenturyLink has “substantially smaller” backbone infrastructure.<sup>162</sup> According to the Center for Applied Internet Data Analysis, CenturyLink ranks as the fifteenth largest transit provider globally.<sup>163</sup> As a result of the disparity in size between Level 3 and CenturyLink, the Transaction is unlikely to significantly affect the dynamics of the transit marketplace.<sup>164</sup>

46. Furthermore, the transit services marketplace in the United States is highly competitive.<sup>165</sup> Despite consolidation in the transit services market and increased demand for bandwidth, prices for transit services have continued to fall dramatically for nearly two decades.<sup>166</sup> This is due in part to the presence of large international networks such as TeliaSonera and NTT competing with providers such as Level 3 for transit business.<sup>167</sup> Additionally, as Applicants observe, numerous potential competitors exist in the form of “other large Internet providers, such as AT&T, Comcast, and Charter,” all of which are “well positioned to compete aggressively in the transit marketplace,”<sup>168</sup> in addition to other network owners, including firms such as Apple and Google, that have built IP networks to transport content to ISPs serving end-users but historically have not sold transit services.<sup>169</sup> Finally, other developments in the transit services marketplace, such as falling capacity costs and the increasing tendency of large transit services customers to invest in their own network infrastructure, rather than purchasing capacity from transit providers, are further reducing transit prices.<sup>170</sup>

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<sup>160</sup> See Public Interest Statement at B-16.

<sup>161</sup> *Id.* at B-17.

<sup>162</sup> *Id.* at B-16.

<sup>163</sup> See Center for Applied Internet Data Analysis, AS Ranking, <http://as-rank.caida.org/> (last visited Aug. 9, 2017). Regarding the North American market, Level 3 and CenturyLink rank as the first and the seventh largest transit providers according to the most recent analysis by Dyn Research. See Further Joint Response to Mar. 30, 2017 Information Request at 5-6.

<sup>164</sup> As Dyn Research recently observed, the main effect of the proposed Transaction on the transit market will likely be to simply extend Level 3's preexisting lead over its nearest competitor, TeliaSonera. See Dyn Research, Baker's Dozen 2016 Edition, <http://dyn.com/blog/a-bakers-dozen-2016-edition/>.

<sup>165</sup> CTLLVLT-000080, Global Bandwidth Research Service, United States and Canada, transmitted by Letter from Michael Beder, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 13, 2017).

<sup>166</sup> See *Verizon-XO Order*, 31 FCC Rcd at 12526, para. 44.

<sup>167</sup> See Dyn Research, Baker's Dozen 2016 Edition, <http://dyn.com/blog/a-bakers-dozen-2016-edition/>.

<sup>168</sup> Further Joint Response to Mar. 30, 2017 Information Request at 5-6.

<sup>169</sup> *Id.* at 6.

<sup>170</sup> See LVLVLT-000067, transmitted by Letter from Thomas Jones and Mia Guizzetti Hayes, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 14 (filed Apr. 13, 2017); see also CTLLVLT-000074, transmitted by Letter from Michael Beder, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403 (filed Apr. 13, 2017) [BEGIN HIGHLY CONF. INFO.]

(continued....)

47. No commenter in this proceeding makes the case that the proposed Transaction will harm the transit marketplace. Despite being the largest transit player in North America, Level 3 is subject to significant competitive pressure from other transit providers and changing dynamics in the transit services marketplace. As a result, to the extent that the post-Transaction entity does attempt to raise transit prices, market forces are likely to mitigate any potential harm from these efforts.

#### **D. Loss of Level 3 as an International Submarine Cable Transport Provider**

48. We also find that the Transaction is not likely to result in competitive harm in the international transport services markets. Applicants argue that the international transport services markets are highly competitive and will remain so after the Transaction.<sup>171</sup> Level 3's operating subsidiaries are the owners and operators of seven U.S.-licensed submarine cables.<sup>172</sup> CenturyLink holds a small ownership interest in just one submarine cable and otherwise leases all of its submarine capacity from other entities.<sup>173</sup> No commenter addressed the international transport services markets.

49. The Commission generally employs a regional approach in analyzing the international transport services markets, evaluating access to submarine cables and cable landing stations in the Americas, Atlantic, and Pacific regions.<sup>174</sup> The Commission receives data on the capacity of each U.S.-licensed submarine cable and on capacity held on those cables by cable landing licensees and common carriers.<sup>175</sup> Based on our review of the 2016 capacity data filed by CenturyLink and Level 3, we find that the Transaction is not likely to result in any competitive harm in any of the three regions.<sup>176</sup> First, in the Americas region, market concentration will not change since CenturyLink does not hold any capacity on cables in the region.<sup>177</sup> Second, in the Atlantic region, the proposed Transaction is unlikely to result in competitive harm. We calculate that Applicants' combined market share in the region, post-Transaction,

(Continued from previous page) \_\_\_\_\_

**[END HIGHLY CONF. INFO.]**

<sup>171</sup> Public Interest Statement at B-17.

<sup>172</sup> The Americas-II, Atlantic Crossing-1, Mid-Atlantic Crossing, Pan American Crossing, South American Crossing, Yellow, and Hawaiian Islands Fiber Network submarine cables. See FCC IB File Nos. SCL-T/C-20161212-00022 et al., at 3-6 (filed Dec. 12, 2016).

<sup>173</sup> Lead Application at B-17. CenturyLink has a small ownership in the Japan-US Cable Network (JUSCN). Level 3 also has a small ownership interest in that cable. Neither CenturyLink nor Level 3 is required to be a licensee on the cable under the Commission's rules. 47 CFR § 1.767(h).

<sup>174</sup> A regional approach is typically used because U.S.-licensed submarine cable systems tend to serve entire regions and carriers deliver traffic indirectly, via third countries, if that permits them to reduce their transport costs. For each region, we calculate submarine cable capacity shares held by the Applicants, pre- and post-transaction, as well as a measure of the increase in concentration of capacity holdings. See *Applications of Cable & Wireless Communications Plc and Columbus New Cayman Limited for Transfer of Control of Cable Landing Licenses and Section 214 Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 12730, 12736, para. 13, n.46 (IB 2015); see also *AT&T-BellSouth Order*, 22 FCC Rcd at 5741, para. 159.

<sup>175</sup> 47 CFR § 43.62(a). See also Filing Manual for Section 43.62 Annual Reports (IB Feb. 2016) (*Section 43.62 Filing Manual*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-337916A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-337916A1.pdf).

<sup>176</sup> Entities filing Circuit Capacity Reports may request that the data be given confidential treatment under section 0.459 of the Commission's rules, certifying that public disclosure of such information would likely cause substantial competitive harm. 47 CFR § 0.459; *Section 43.62 Filing Manual* at 7-8, paras. 36-37. Level 3 filed its Circuit Capacity Report with a request for the data to be treated as confidential. See Level 3 Communications, LLC, Section 43.62 International Submarine Cable Circuit Capacity Holder Report (filed Mar. 31, 2017) (Level 3 2016 Circuit Capacity Report).

<sup>177</sup> See CenturyLink Communications, LLC Section 43.62 International Submarine Cable Circuit Capacity Holder Report (filed Mar. 31, 2017) (CenturyLink 2016 Circuit Capacity Report).

will be approximately [BEGIN CONF. INFO.] [END CONF. INFO.].<sup>178</sup> We calculate the delta HHI<sup>179</sup> to be [BEGIN CONF. INFO.] [END CONF. INFO.]. This indicates, consistent with the *Horizontal Merger Guidelines*, that the likelihood of competitive harm is low.<sup>180</sup> Third, in the Pacific region, we calculate that the combined market share post-transaction will be approximately [BEGIN CONF. INFO.] [END CONF. INFO.], and that the delta HHI is approximately [BEGIN CONF. INFO.] [END CONF. INFO.].<sup>181</sup> Based on this small market share, we find that the proposed Transaction is unlikely to result in competitive harm. We agree with the Applicants that their combined ownership interests in the JUSCN are not significant enough to influence the operation of the consortium cable.<sup>182</sup>

## VI. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

50. Having addressed and remediated with a narrowly targeted condition any potential public interest harms of the Transaction, we next review the public interest benefits of the particular transaction, beyond fostering the free transferability of licenses and authorizations. The Commission has recognized that efficiencies generated through a transaction can mitigate competitive harms only “if such efficiencies enhance the merged firm’s ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products.”<sup>183</sup> Specifically, the Commission finds a claimed benefit to be cognizable only if it is transaction-specific—meaning it naturally arises as a result of the transaction<sup>184</sup>—and verifiable, and is “more likely to find marginal cost reductions to be cognizable than reductions in fixed cost.”<sup>185</sup>

51. Applicants claim that the Transaction will bolster competition for enterprise services<sup>186</sup> and result in Transaction-specific public interest benefits by: (1) enabling Applicants to combine their complementary networks and enterprise services;<sup>187</sup> (2) enhancing the combined company’s ability to compete against larger and better capitalized competitors;<sup>188</sup> (3) retaining top leadership from both

<sup>178</sup> See CenturyLink 2016 Circuit Capacity Report and Level 3 2016 Circuit Capacity Report. We calculate that Level 3 has approximately a [BEGIN CONF. INFO.] [END CONF. INFO.] market share and that CenturyLink’s market share for the region is approximately 8.5 percent.

<sup>179</sup> DOJ and the Federal Trade Commission use the Herfindahl-Hirschman Index (HHI) as a measure of market concentration. See *Horizontal Merger Guidelines* at 18-19.

<sup>180</sup> *Id.* at 19. Mergers involving an increase in the HHI of less than 100 points or that result in unconcentrated markets (HHI below 1500) are unlikely to have adverse competitive effects and ordinarily require no further analysis. *Id.*

<sup>181</sup> See CenturyLink 2016 Circuit Capacity Report and Level 3 2016 Circuit Capacity Report. We calculate the market shares of CenturyLink and Level 3, pre-Transaction, are 0.65 percent and [BEGIN CONF. INFO.] [END CONF. INFO.], respectively.

<sup>182</sup> See FCC File Nos. SCL-T/C-20161212-00022 et al., at 3, 16-17. Applicants state that CenturyLink holds a 4.42 percent interest in JUSCN and Level 3 holds a 1.7 percent interest in that cable, for a post-Transaction combined share of 6.12 percent. JUSCN is a consortium cable with over a dozen entities having various ownership interests. See FCC File No. SCL-LIC-19981117-00025.

<sup>183</sup> *AT&T-BellSouth Order*, 22 FCC Rcd at 5760, para. 201.

<sup>184</sup> Or as the Commission has previously put it, “more likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.” *Id.* at 5761, para. 202.

<sup>185</sup> *Id.*

<sup>186</sup> Public Interest Statement at B-4.

<sup>187</sup> *Id.* at B-4—B-8.

<sup>188</sup> *Id.* at B-8—B-12.

companies that ensures continuity in leadership and integration experience;<sup>189</sup> and (4) bolstering the combined company's financial profile, including through approximately \$975 million in expected annual run-rate synergies.<sup>190</sup>

**A. Claimed Public Interest Benefits**

**1. Claims that the Combined Company Will Have Greater Reach and be a Stronger Competitor.**

52. We find there is sufficient evidence in the record that the Transaction will expand the on-net reach of the newly combined firm resulting in a more effective and stronger competitor against larger cable and incumbent LEC competitors, among others, particularly outside of CenturyLink's incumbent LEC region, where it, like Level 3, operates as a competitive LEC. As to areas where CenturyLink is a competitive LEC, this finding is consistent with long-standing Commission precedent concluding that the combination of facilities-based competitive LECs would result in a stronger competitor footprint and provide a transaction-specific benefit to consumers.<sup>191</sup>

53. Applicants claim that they are competitively disadvantaged due to "larger, better capitalized competitors with greater on-net reach in the provision of enterprise services."<sup>192</sup> They also claim that the newly-combined firm will be able to compete more effectively against these larger providers because it will have reduced costs, be better capitalized, and have a network able to provide better enterprise services.<sup>193</sup> Indeed, record evidence reflects that as a direct result of the Transaction, approximately [BEGIN HIGHLY CONF.] [END HIGHLY CONF.] new fiber-connected locations, in addition to Level 3's pre-Transaction plans to connect [BEGIN HIGHLY CONF.] [END HIGHLY CONF.] fiber locations, will come on-net due to the enhanced profitability of expanding to these locations as a result of [BEGIN HIGHLY CONF.]

[END HIGHLY CONF.].<sup>194</sup> But for the Transaction, these additional fiber-connected locations would not otherwise be connected to fiber by either stand-alone company. We find that the larger, combined company will have greater incentives and ability to extend its fiber network to new buildings than either Applicant would have as stand-alone entity, thus benefitting existing and new customers in these locations.

**2. Claims of a More Extensive, Robust Network and Expanded Array of Services.**

54. We find that the proposed Transaction will advance the public interest by expanding the reach and capacity of the newly-combined complementary fiber facilities and services to the benefit of

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<sup>189</sup> *Id.* at B-12—B-13.

<sup>190</sup> Applicants initially claimed approximately \$975 million in run-rate synergies, but later increased their estimated annual run-rate synergies to [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] See Applicants' Aug. 31, 2017 Benefits *Ex Parte* Letter at 4-5.

<sup>191</sup> See *Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, para. 151 (describing the potential competitive effects of an incumbent LEC-competitive LEC combination outside the incumbent LEC's territory and stating that "[r]ather than harming competition, we believe that the combination of the Applicants' facilities in these markets could result in a stronger competitive LEC and enhance the merged company's ability to compete against the incumbent LEC"); see also *Verizon-XO Order*, 31 FCC Rcd at 12535, para.61; *Level 3-tw telecom Order*, 29 FCC Rcd at 12842, para. 3.

<sup>192</sup> Public Interest Statement at B-8. ("AT&T and Verizon are the largest players in the nationwide provision of enterprise services and have a global reach that exceeds that of many competitors . . . in their fiscal year 2015, AT&T generated roughly \$30 billion in enterprise revenue and Verizon generated just under \$ 20 billion in such revenue." (citations omitted)).

<sup>193</sup> *Id.* at B-8—B-9.

<sup>194</sup> See Applicants' Aug. 31, 2017 Benefits *Ex Parte* Letter at 6-7.

enterprise customers.<sup>195</sup> Accordingly, we agree with Applicants that the Transaction will improve the combined company's ability to compete for and serve multi-location and other business customers, especially outside of CenturyLink's incumbent LEC region.<sup>196</sup>

55. Applicants state that more than 82 percent of Level 3's fiber locations are outside of CenturyLink's incumbent LEC footprint,<sup>197</sup> in sharp contrast to CenturyLink's currently less than five percent fiber locations out of region.<sup>198</sup> Through the Transaction, after accounting for overlapping fiber-connected locations, CenturyLink's on-net fiber connected buildings outside of its incumbent LEC region will increase by over 27,130,<sup>199</sup> no longer requiring it to rely on leased facilities to compete for multi-location and other enterprise customers at these locations.

56. INCOMPAS,<sup>200</sup> Public Knowledge,<sup>201</sup> and Frontier<sup>202</sup> urge us to reject this purported benefit, arguing that expanding the combined company's footprint will not benefit customers and instead result in various public interest harms.<sup>203</sup>

57. Multi-location customers prefer service providers to own the facilities over which they offer service.<sup>204</sup> Similarly, there are specific customer-facing benefits when a provider owns rather than leases fiber.<sup>205</sup> Here, for example, CenturyLink explains that post-Transaction, its provisioning time to set up service for a customer in a location that is on-net as a result of the Transaction will be **[BEGIN HIGHLY CONF. INFO.]** **[END HIGHLY CONF. INFO.]** shorter.<sup>206</sup> Applicants have

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<sup>195</sup> Public Interest Statement at B-6—B-7.

<sup>196</sup> *Id.* at B-4—B-5.

<sup>197</sup> *Id.* at B-4—B-5; Dec. 19, 2016 Supplement at 3.

<sup>198</sup> *See supra* para. 19.

<sup>199</sup> *Id.* (identifying the number of out-of-region overlap locations that must be accounted for in determining the net increase of on-net buildings).

<sup>200</sup> INCOMPAS claims that these “so-called benefits” are not public interest benefits, but will only benefit the Applicants because “the applicants gloss over the public interest concerns that the transaction will actually undermine competition by eliminating choice of last-mile facilities-based providers for enterprise customers in many buildings.” Letter from Karen Reidy, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at 3 (filed Mar. 27, 2017). INCOMPAS further argues that because CenturyLink has failed to establish or commit that the combined company will build fiber outside of CenturyLink territory faster than Level 3 would otherwise build on its own, the purported benefit of an expanded network “creates a significant harm to customers who otherwise would have an alternative fiber provider to the incumbent monopolist.” *Id.* at 4.

<sup>201</sup> Public Knowledge Reply at 4 (“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 . . . the Applicants have not explained how they will mitigate the loss of competition . . . and . . . have not committed to build new facilities 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.”).

<sup>202</sup> Frontier Reply at 1, 4 (“The combined company will be able to use its ‘increased scale . . . [and] will leverage their stronger market position as long-haul and core network providers to potentially squeeze competitors and drive up costs . . . and otherwise leverage its market power.’”).

<sup>203</sup> Commenters’ claims of potential harm are addressed in section V *supra*.

<sup>204</sup> *See Verizon-XO Order*, 31 FCC Rcd at 12536, para. 63.

<sup>205</sup> *Id.* at 12536, para. 63 (finding that facilities-based ownership enables the provider to maximize service reliability, identify and resolve service disruptions, process customers’ orders more quickly, avoid unintended route redundancy, and minimize customer traffic handoff to other networks).

<sup>206</sup> Applicants’ Aug. 31, 2017 Benefits *Ex Parte* Letter, Attach. at 7-8.

provided evidence that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] circuits will be moved from off-net (third-party access) to on-net as a direct result of the Transaction.<sup>207</sup> Applicants further provide evidence supporting an estimated marginal cost savings of approximately [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] associated with not having to purchase leased capacity from third parties.<sup>208</sup> We therefore find that the Transaction will result in benefits by reducing CenturyLink's reliance on leased facilities and increasing its ability to better serve existing and new customers through owned on-net facilities.

58. Although we find some indication in the record supporting Applicants' claim that the combination will enable them to broaden the scope of services they offer to enterprise customers compared to the services either party currently offers,<sup>209</sup> we find the evidence provided does not allow us to verify that the public would benefit from the Applicants: (1) providing "a more complete and fulsome array of connections and services"; (2) improving content delivery IP-based virtual private network (VPN) capabilities; and (3) advancing network security and advanced threat intelligence services.<sup>210</sup> Thus, we are unable to evaluate these claimed benefits.

### **3. Claims that the Combined Company Will Benefit from Continuity in Experienced Leadership and Success in Prior Acquisition Integration.**

59. We are unable to evaluate or quantify whether the claimed continuity in executive leadership comprised of talented and experienced management from both Applicants is likely to benefit the combined entity's ability to achieve its Transaction objectives.<sup>211</sup>

60. We note that no commenter refutes these claims by the Applicants, nor is there any record evidence to suggest the contrary. We also note the prior successful integration record of each Applicant, together with the plan to include experienced leaders from both companies in the management of the combined company.

### **4. Claims of an Improved Financial Profile, Including More than \$975 Million in Annual Run-Rate Synergies.**

61. We find record evidence supporting Applicants' claim that the combined company will be better able to leverage Level 3's debt across a larger revenue stream and will benefit from [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.].<sup>212</sup> However, based on Applicants' financial projections for the five-year period post-consummation, Applicants' documentary evidence demonstrates that the rate of realization for the claimed annual synergies each year is incremental and the newly combined firm will

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<sup>207</sup> *Id.*, Attach. at 6.

<sup>208</sup> *Id.*, Attach. at 5-6, 10.

<sup>209</sup> See Public Interest Statement at B-6—B-7 ("For instance, over time, the combined company expects that it will be able to utilize to greater effect L3's Adaptive Network Control service, which allows customers to dynamically scale bandwidth usage up or down to meet their specific needs . . .").

<sup>210</sup> *Id.* at B-7—B-8 ("Through this Transaction, the combined company will have a market-leading security services portfolio with a full complement of adaptive intelligence, threat prevention, threat management, incident response and analysis services to support customers' hosted or on premises enterprise security programs . . ."); see also CenturyLink Response to Mar. 30, 2017 Information Request at 13-14 and attachments referenced therein; Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, Attach. A at 8-10 (filed Sep. 1, 2017) (CenturyLink Sep. 1, 2017 *Ex Parte* Letter).

<sup>211</sup> *Cf.* Public Interest Statement at B-12—B-13; Applicants' Aug. 31, 2017 Benefits *Ex Parte* Letter at 15.

<sup>212</sup> See CenturyLink July 5, 2017 *Ex Parte* Letter, Exh. 4(c)-30 at 8. Applicants, however, have not explained how they plan to use such an increase in cash flow to create a public interest benefit.

not achieve 100 percent realization of the claimed annual run-rate synergies per year until [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.].<sup>213</sup>

62. Applicants initially claimed that “[t]he increased scale afforded by the combined company is expected to generate about \$975 million of annual run-rate cash synergies, primarily from the elimination of duplicative functions, systems and integration, and other increased operational and capital efficiencies.”<sup>214</sup> Subsequently, Applicants adjusted this amount to [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.],<sup>215</sup> consisting of operating cost synergies that include [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.] and an estimated [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] in capital synergies.<sup>216</sup> Applicants also explain that they will incur a one-time estimated [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.].<sup>217</sup> We presume that the Transaction is in the interest of the Applicants—and we agree that over the long-run Applicants will have some cost savings from these synergies—and consequently may result in public interest benefits. However, we do not find the Applicants’ claimed improved financial profile sufficiently cognizable under our precedent based on the record here.

## VII. NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY, AND TRADE CONCERNS

63. When analyzing a transfer of control or assignment application which includes foreign investment, we also consider any national security, law enforcement, foreign policy, or trade policy issues and take into account any concerns raised by the Executive Branch.<sup>218</sup> On October 2, 2017, the Executive Branch Agencies filed a Petition to Adopt Conditions to Authorizations and Licenses (DOJ Petition).<sup>219</sup> CenturyLink has submitted a Letter of Assurances (LOA) to DOJ, DHS, and DOD.<sup>220</sup> The Executive

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<sup>213</sup> *Id.* [BEGIN HIGHLY CONF. INFO.]

[END HIGHLY CONF. INFO.]

<sup>214</sup> Public Interest Statement at B-14.

<sup>215</sup> Applicants’ Aug. 31, 2017 Benefits *Ex Parte* Letter at 5.

<sup>216</sup> See CenturyLink Sep. 1, 2017 *Ex Parte* Letter at 4 (updating CenturyLink’s initial estimates provided in CenturyLink July 5, 2017 *Ex Parte* Letter, Exh. 4(c)-30 at 8-9); see also CenturyLink July 5, 2017 *Ex Parte* Letter at Exh. dated June 20, 2017, at 83.

<sup>217</sup> See CenturyLink July 5, 2017 *Ex Parte* Letter, Exh. 4(c)-30 at 8; CenturyLink July 5, 2017 *Ex Parte* Letter at Exh. dated June 20, 2017, at 83; Letter from Yaron Dori, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-403, at Attach. A, CTL-000457 (filed July 26, 2017).

<sup>218</sup> See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket Nos. 97-142 and 95-22, Order and Order on Reconsideration, 12 FCC Rcd 23891, 23918–21, paras. 59–66 (1997) (*Foreign Participation Order*).

<sup>219</sup> DOJ, Petition to Adopt Conditions to Authorizations and Licenses, WC Docket No. 16-403, File Nos. ITC-T/C-20161212-00344 et al. (filed Oct. 2, 2017).

<sup>220</sup> Letter from R. David Mahon, Vice President and Chief Security Officer, CenturyLink, to Assistant Secretary for Policy, DHS; Director, Foreign Investment Review Staff, National Security Division, DOJ; Department of Defense Chief Information Officer, DOD; and, General Counsel, Defense Information Systems Agency, DOD (Sep. 29, 2017).

Branch Agencies state that they have no objection to the Commission granting the Applications provided that the Commission condition its consent on compliance with the commitments set forth in the LOA.<sup>221</sup>

64. In assessing the public interest, we take into account the record and accord deference to Executive Branch expertise on national security and law enforcement issues.<sup>222</sup> As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.<sup>223</sup> In accordance with the request of the Executive Branch Agencies and in the absence of any objection from the Applicants, we condition our grant of the Applications on Applicants' compliance with the commitments set forth in the LOA. The DOJ Petition and LOA are publicly available on the Commission's website.<sup>224</sup>

## VIII. CONCLUSION

65. We conclude that granting the Applications serves the public interest. We have carefully evaluated the proposed Transaction in light of the documentary record, the related pleadings from commenters and the Applicants, publicly-available information, and other submissions in this proceeding. After a thorough review of this record, we conclude that the Applicants are fully qualified to transfer the licenses in Appendix A and that the potential public interest harms from the proposed Transaction are mitigated by the conditions set forth herein and the DOJ Consent Decree.

## IX. ORDERING CLAUSES

66. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i) and (j), 5(c), 214(a), 214(c), 303(r), 309, and 310(d) of the Act, 47 U.S.C. §§ 154(i), 154(j), 155(c), 214(a), 214(c), 303(r), 309, 310(d), and the Cable Landing License Act, 47 U.S.C. §§ 34-39, and sections 1.767, 1.948, 25.119, 63.04, and 63.24 of the Commission's rules, 47 CFR §§ 1.767, 1.948, 25.119, 63.04, 63.24, that the Applications to transfer control of the licenses and authorizations listed in Appendix A **ARE GRANTED** to the extent specified in this Memorandum Opinion and Order and subject to the conditions specified herein.

67. **IT IS FURTHER ORDERED** that the above grant shall include authority for CenturyLink, consistent with the terms of this Memorandum Opinion and Order, to acquire control of: (1) any licenses and authorizations issued to Level 3 during the Commission's consideration of the Applications and the period required for consummation of the Transaction following approval; (2) any applications that have been filed by Level 3 or its subsidiaries that are pending at the time of consummation of the Transaction; and (3) licenses that may have been inadvertently omitted from the Applications that are held by Level 3 at the time of consummation of the Transaction.

68. **IT IS FURTHER ORDERED** that, pursuant to sections 4(i)-(j) and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 214, and section 2 of the Cable Landing License Act, 47 U.S.C. §§ 34-39 and 3 U.S.C. § 301, the Petition to Adopt Condition to Authorizations and Licenses filed by the Department of Justice on behalf of the Executive Branch Agencies **IS GRANTED**. Grant of the Applications **IS CONDITIONED UPON** CenturyLink's compliance with the commitments set forth in the September 29, 2017 Letter of Assurances. A failure to comply and/or remain in compliance with any of these commitments and undertakings shall constitute a failure to meet a condition of the underlying authorizations and licenses and thus grounds for declaring the authorizations and licenses terminated without further action on the part of the Commission. Failure

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<sup>221</sup> DOJ Petition at 1.

<sup>222</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23918–21, paras. 59–66.

<sup>223</sup> *Id.* at 23919, para. 62.

<sup>224</sup> See DOJ Petition and LOA, available at [https://www.fcc.gov/ecfs/search/filings?limit=25&offset=0&proceedings\\_name=16-403&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?limit=25&offset=0&proceedings_name=16-403&sort=date_disseminated,DESC).

to meet a condition of the license may also result in monetary sanctions or other enforcement action by the Commission.

69. **IT IS FURTHER ORDERED** that, pursuant to section 214(c) of the Act,<sup>225</sup> grant of the Applications **IS CONDITIONED UPON** Applicants' compliance with the condition set forth in paragraph 24 of this Memorandum Opinion and Order.

70. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order **SHALL BE EFFECTIVE** upon release, in accordance with section 1.103 of the Commission's rules, 47 CFR § 1.103. Petitions for reconsideration under section 1.106 of the Commission's Rules, 47 CFR § 1.106 may be filed within thirty days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>225</sup> 47 U.S.C. § 214(c).

## APPENDIX A

Applications to Transfer Control of Licenses and  
Authorizations Held by Level 3 and its Operating Subsidiaries

## International Section 214 Authorizations

<u>File Number</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
ITC-T/C-20161212-00344	Level 3 Communications, LLC	ITC-214-19971229-00821
ITC-T/C-20161213-00345	Level 3 Telecom Holdings, LLC	ITC-214-20000927-00570
ITC-T/C-20161212-00346	Level 3 International, Inc.	ITC-214-19981214-00867
ITC-T/C-20161212-00347	Global Crossing North America, Inc.	ITC-214-19980520-00334
ITC-T/C-20161212-00348	Global Crossing Americas Solutions, Inc.	ITC-214-19950717-00062, ITC-19950831-00047, ITC-214-19970703-00372
ITC-T/C-20161213-00343	Global Crossing Americas Solutions, Inc.	ITC-214-19980430-00286

## Level 3 Entities That Provide Service Pursuant to Blanket Domestic Section 214 Authority

<u>Entity</u>	<u>FCC Registration Number</u>
Level 3 Communications, LLC	0003723822
Broadwing Communications, LLC	0008599706
TelCove Operations, LLC	0003709110
TelCove of Pennsylvania, LLC	0003709631
WilTel Communications, LLC	0003716511
IP Networks, Inc.	0009738279
Global Crossing Americas Solutions, Inc.	0003755709
Global Crossing Local Services, Inc.	0003733144
Global Crossing Telemanagement VA, LLC	0026094649
Global Crossing Telecommunications, Inc.	0002850519
Level 3 Telecom Holdings, LLC	0014942668
Level 3 Telecom of Alabama, LLC	0017347972
Level 3 Telecom of Arizona, LLC	0004352274
Level 3 Telecom of Arkansas, LLC	0017348012
Level 3 Telecom of California, LP	0004351110
Level 3 Telecom of Colorado, LLC	0004351086
Level 3 Telecom of D.C., LLC	0017348038
Level 3 Telecom Data Services, LLC	0017348145
Level 3 Telecom of Florida, LP	0004351466

Level 3 Telecom of Georgia, LP	0004351383
Level 3 Telecom of Hawaii, LP	0004351169
Level 3 Telecom of Idaho, LLC	0004352266
Level 3 Telecom of Illinois, LLC	0004352308
Level 3 Telecom of Indiana, LP	0004351276
Level 3 Telecom of Iowa, LLC	<i>Entity does not have an FRN</i>
Level 3 Telecom of Kansas City, LLC	0017348061
Level 3 Telecom of Kentucky, LLC	0017348087
Level 3 Telecom of Louisiana, LLC	0017348111
Level 3 Telecom of Maryland, LLC	0017348202
Level 3 Telecom of Minnesota, LLC	0004352290
Level 3 Telecom of Mississippi, LLC	0017348210
Level 3 Telecom of Nevada, LLC	0004352258
Level 3 Telecom of New Jersey, LP	0004351409
Level 3 Telecom of New Mexico, LLC	0004351417
Level 3 Telecom of New York, LP	0004351425
Level 3 Telecom of North Carolina, LP	0004351474
Level 3 Telecom of Ohio, LLC	0004351482
Level 3 Telecom of Oklahoma, LLC	0017348269
Level 3 Telecom of Oregon, LLC	0004351573
Level 3 Telecom of South Carolina, LLC	0004352282
Level 3 Telecom of Tennessee, LLC	0004351458
Level 3 Telecom of Texas, LLC	0004351128
Level 3 Telecom of Utah, LLC	0004351557
Level 3 Telecom of Virginia, LLC	0017348590
Level 3 Telecom of Washington, LLC	0004351532
Level 3 Telecom of Wisconsin, LP	0004351318

#### Submarine Cable Landing Licenses

<u>File Number</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
SCL-T/C-20161212-00022	Global Crossing Telecommunications, Inc.	SCL-LIC-19970506-00003, SCL-LIC-19981030-00023, SCL-LIC-19981103-00022, SCL-LIC-19990823-00015, SCL-LIC-19990913-00019
SCL-T/C-20161212-00023	Global Crossing Americas Solutions, Inc.	SCL-LIC-19980429-00019
SCL-T/C-20161212-00024	Level 3 Telecom of Hawaii LP	SCL-LIC-19950627-00024
SCL-T/C-20161212-00025	Level Communications, LLC	SCL-LIC-19990913-00019

#### Satellite Earth Station Authorizations

<u>File Number</u>	<u>Authorization Holder</u>	<u>Lead Call Sign</u>
SES-T/C-20161212-00944	Vyvx, LLC	E000358

Wireless Licenses

<u>ULS File Number</u>	<u>Authorization Holder</u>	<u>Lead Call Sign</u>
0007582013	Vyvx, LLC	WLN645
0007587844	Level 3 Communications, LLC	WQUL574

**APPENDIX B****List of Ten In-Region Overlap Locations Subject to Paragraph 24 Herein for Which Applicants Will Not Raise BDS Rates for Five Years Following Consummation of the Transaction**

8855 Grand Ave., West Des Moines, IA 50266  
300 O'Malley Ave., Schriever AFB, CO 80912-3001  
170 MacGregor Ave., Estes Park, CO 80517  
90 Ramon Lopez Rd., Bernardo, NM 87006  
2397 Loop Rd., Chambersburg, PA 17202-8847  
97 Progress Blvd., Shippensburg, PA 17257-9053  
39580 S. Lago Del Oro Pkwy., Tucson, AZ 85739-1091  
850 E. Ocean Hwy., Holly Ridge, NC 28445-8714  
700 Holiday Trail Ln., Charlottesville, VA 22903  
15760 W. Power Line St., Crystal River, FL 34428-6708

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-403.

As we approve this transaction, I am pleased to have worked with my colleagues to improve how we articulate the standard of review applied by the Commission. We don't change the standard of review. But we do make clear what had become increasingly hazy in recent years. This clarity will help the public to see that transactional review is an occasion to carefully consider how the transaction itself impacts the public interest, not an opportunity to extract a range of concessions, tangentially-related at best, from parties with applications in front of the Commission.

In particular, we explain what the Commission does (after determining the transaction does not violate the Act, other statutes, or Commission rules) to assure the transaction is in the public interest. In our review, the Commission must identify any public interest harms. If there are harms, the Commission then will consider narrowly-tailored, transaction-specific conditions to remedy the harm. As the item explains, this is in line with past pronouncements by the Commission that we will use conditions "only 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," and we "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction."<sup>226</sup> Then the Commission also will look at public interest benefits arising from the transaction.

With this standard once again articulated clearly, I am gratified that the Commission, in reviewing this transaction, does what it says it will. In those building locations where the data analysis shows the transaction would harm competition in the absence of a condition, we apply a price freeze to protect customers. This is appropriate because we are imposing a condition that is narrowly tailored to remedy a transaction-specific harm.

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<sup>226</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18303, para. 19; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations et al.*, WT Docket Nos. 04-70, 04-254, 04-255, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21545-46, para. 43 (2004).

**DISSENTING STATEMENT OF COMMISSIONER  
MIGNON L. CLYBURN**

Re: *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-403

A \$34 billion merger between two major companies providing business data services in a highly-concentrated market. One would think that a transaction of this magnitude would trigger market-based conditions to mitigate potential public interest harms. However, the only condition imposed in this item is short-term price controls on 10 buildings nationwide.

Just how did we reach this point? By applying the wrong standards which brought about flawed conclusions. First, the item radically alters the Commission's long-standing merger review standards. Second, it resurrects a suspect market analysis from this year's *Business Data Services Order* that substituted potential competition for actual competition. Lastly, it ignores an entire portion of the market, by failing to conduct a technology-neutral market analysis.

The Communications Act is filled with references to the Commission's obligation to act in the public interest. This obligation is particularly relevant in the context of transaction reviews. We are charged with not only preserving, but advancing the goals of the Act, including universal service, competition, localism, and diversity. But with the new standard adopted by the Commission's majority, it is unclear going forward whether we will ever be able to effectively achieve those statutory goals.

Historically, the Commission balanced public interest harms versus public interest benefits when considering any transaction. We also contemplated potential remedies to those harms that did not fall within the typical market tests that guide the Department of Justice's review. This approach involved evaluating a transaction holistically and in a multi-faceted manner, which ensured that the Department of Justice and the Commission conducted similar, yet complementary analyses.

The revised test, however, will bring about untold negative consequences that will soon become apparent as the Commission reviews transactions in the future. We deserve a higher level of review. We should do more and better than this.

It was because of the now-former public interest balancing test, that we saw the launch of the Internet Essentials program which has brought affordable broadband to millions of low-income Americans. It was because of the former public interest balancing test, that we have witnessed one wireless provider emerge as a maverick competitor in the mobile wireless market. It was because of the former public interest balancing test, that millions of additional households are now connected to broadband, but today we abandon that review standard, and I fear, those public interest benefits may be no more.

The *Business Data Services Order* the FCC majority voted in favor of this year contained many flaws which I will not belabor in today's statement. I will simply note that "potential competition" does not equal or guarantee "actual competition." Relying on "potential market entrants" to produce anticipated price effects, leaves businesses with a monopoly at their location and at the mercy of supra-competitive prices.

Even if this test were sufficient to analyze the market, this Order does not apply the analysis evenly. A thorough test of potential competition would have counted as problematic, not only locations where both CenturyLink and Level 3 were located in a single building, but locations where one or the other was within half a mile of a building served by the other, which is far broader than the number of locations considered by this Order.

Finally, the Order fails to conduct a technology-neutral market analysis. Only locations where both companies have deployed fiber are deemed relevant to the competitive analysis, notwithstanding the

fact that CenturyLink has widely-deployed copper facilities over which it provides significant business data service offerings. None of those services apparently merit mention in this Order.

All of this adds up to a worrisome state of affairs in the Commission's review of transactions today, and going forward. It is because of this worry, that I must therefore, respectfully dissent.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

*Re: Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations, WC Docket 16-403*

I support this order, which approves the transaction between CenturyLink and Level 3 Communications subject to one condition that is designed to remedy what has been deemed by the agency to be a transaction-specific harm. There are two points particularly relevant to this proceeding.

First, I am gratified that in issuing this item the Commission has taken the opportunity to clarify the standard of review for this and future transactions. For several years now, I have raised concerns that Commission merger orders had ventured into murky -- and potentially illegal -- waters by applying balancing tests and imposing conditions that had no connection to the applications at hand. Therefore, when I was initially presented with a Bureau-level item that contained some of the same problematic language, I joined Commissioner Carr to push that the forthcoming Commission-level order remove this troubling verbiage and focus on the analysis that is actually specified in the law.

Second, this order comes before the full Commission at the request of two Commissioners, in a process similar to one I had previously proposed for use of delegated authority.<sup>227</sup> Specifically, I recommended that if two or more Commissioners request that an item be elevated to the full Commission, the item would be circulated with a commitment to vote the item within days, otherwise the item would be released as approved by a quorum of the Commission. (Alternatively, the Chairman would have the discretion to immediately issue the item on delegated authority.) The process I envisioned was designed to strike a balance between the need to allow Commissioners to have a greater say in the workings of the Commission while preventing process abuses and unnecessary delays.

While the present order is being released at the full Commission level, there was some uncertainty as to whether it would revert back to the Bureau, creating unnecessary delay. In addition, there was much confusion outside of the Commission about the process. There should never be such gamesmanship displayed over Commission items. To remedy this going forward, I recommend that the Commission seek to codify the delegated authority procedure in a manner that reflects the lessons learned over the past two weeks.

I vote to approve.

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<sup>227</sup> See blog post entitled "A Modified Delegated Authority Proposal," February 22, 2017, <https://www.fcc.gov/news-events/blog/2017/02/22/modified-delegated-authority-proposal>.

**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket 16-403.

The record shows that approving this transaction between CenturyLink and Level 3 Communications will promote the public interest and benefit consumers, including by allowing the merged firm to operate as a more effective and stronger competitor against larger providers. I therefore support the Commission's decision to approve this transaction.

I am also glad that the standard of review and public interest framework in today's decision make it clear that this Commission will be adhering to the Communications Act and longstanding FCC precedent as it reviews proposed transactions. In particular, the Order emphasizes that the agency will only impose merger conditions that are narrowly tailored to remedy transaction-specific harms. We will not be using them as a vehicle to extract extraneous concessions from parties. I am pleased to see the Commission adhering to this approach.

Finally, I find curious the claim that the Commission is adopting a new merger review standard without following notice and comment procedures. To start, this is an adjudication, not a rulemaking, so the cited notice and comment procedures do not apply. What is more, in describing the public interest standard in this Order, the Commission is simply recognizing and adhering to both the statute and the agency's past adjudicatory decisions. This is evidenced by the dozens of citations to Commission precedent in the Order. Thus, the Order satisfies all procedural requirements imposed by the APA.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL  
APPROVING IN PART, DISSENTING IN PART**

Re: *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. For Consent to Transfer Control of Licenses and Authorizations*, WC Docket 16-403.

With today's order, the Commission approves a \$34 billion merger between CenturyLink and Level 3 Communications. I support this transaction.

However, I believe the Commission's review has a serious flaw. Instead of using the agency's decades-old merger review standard, it arbitrarily introduces a new one. This departure from the traditional merger balancing test should properly be the subject of public notice and comment. Our failure to do so is at odds with the most basic principles of administrative law. Moreover, I worry that our capricious disregard for precedent is simply part of a larger effort to speed the way for the next billion-dollar transaction before us.