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Via Electronic and Hand Delivery

June 2, 2017

Irene Kim Asbury, Board Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Fl., Ste. 314
P.O. BOX 350
Trenton, New Jersey 08625-0350

Re: I/M/O the Joint Petition of Level 3 Communications, Inc., Together with CenturyLink, Inc., for Approval of Indirect Transfer of Control of: Level 3 Communications, LLC, Level 3 Telecom of New Jersey, LP, Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Telcove Operations, LLC and WilTel Communications, LLC to CenturyLink, Inc. and Related Approvals.
BPU Docket No.: TM16121159

Rate Counsel's Reply Comments to CenturyLink's Reply Filed May 19, 2017

Dear Secretary Asbury:

The Division of Rate Counsel ("Rate Counsel") hereby files an original and ten copies of Reply Comments for the New Jersey Board of Public Utilities' review and consideration in the above referenced matter.

Kindly return a date-stamped "Received/Filed" copy for Rate Counsel's records. Thank you for your attention to this matter.

Respectfully Submitted,

STEFANIE A. BRAND, DIRECTOR
DIVISION OF RATE COUNSEL

Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel

MNR/ld
w/encl.
c. Service List

I/M/O the Joint Petition of Level 3 Communications, Inc., together with CenturyLink, Inc. for Approval of Indirect Transfer of Control of: Level 3 Communications, LLC, Level 3 Telecom of New Jersey, LP,

Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Telcove Operations, LLC and WiTel Communicaitons, LLC to CenturyLink, Inc. and Related Approvals

BPU Docket No.: TM16121159

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**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

I/M/O the Joint Petition of Level 3 Communications, Inc., Together with CenturyLink, Inc., for Approval of Indirect Transfer of Control of: Level 3 Communications, LLC, Level 3 Telecom of New Jersey, LP, Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Telcove Operations, LLC and WilTel Communications, LLC to CenturyLink, Inc. and Related Approvals

BPU Docket No.: TM16121159

**THE STATE OF NEW JERSEY DIVISION OF RATE COUNSEL'S REPLY COMMENTS
TO CENTURYLINK'S REPLY FILED ON MAY 19, 2017**

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On the Comments:
Susan M. Baldwin

Dated: June 2, 2017

**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

I/M/O the Joint Petition of Level 3 Communications, Inc., Together with CenturyLink, Inc., for Approval of Indirect Transfer of Control of: Level 3 Communications, LLC, Level 3 Telecom of New Jersey, LP, Broadwing Communications, LLC, Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Telcove Operations, LLC and WilTel Communications, LLC to CenturyLink, Inc. and Related Approvals

BPU Docket No.: TM16121159

**THE STATE OF NEW JERSEY DIVISION OF RATE COUNSEL'S REPLY COMMENTS
IN RESPONSE TO CENTURYLINK'S REPLY FILED ON MAY 19, 2017**

I. Introduction

In this Reply filing Rate Counsel incorporates by reference herein its Initial Comments filed with the Board on April 20, 2017, containing recommended conditions for improvement of service, service quality and to ensure continued competition as a basis for Board approval of Joint Petitioners' application for merger filed with the Board on December 15, 2016.

Joint Petitioners' reply dismisses Rate Counsel's recommendations on various conditions and commitments relating to service, service quality, employment and competition as unnecessary to find that the merger is in the public interest. Joint Petitioners state that any claimed benefits from Rate Counsel's proposed conditions and commitments are unsubstantiated by evidence and outweighed by significant regulatory costs.¹ It is evident from the filings that Rate Counsel and Joint Petitioners have differing interpretations concerning what constitutes

¹ Joint Petitioners' comments at pp.5-8.

positive benefits, which under the statute Joint Petitioners must demonstrate will flow to the public. Contrary to their contention, Joint Petitioners fail to address Rate Counsel's concern about the potential impact on consumers of the upcoming shift in degree of focus by CenturyLink more toward enterprise customers and away from residential.²

The Board has an overarching responsibility on behalf of customers to ensure that post-merger benefits flow to New Jersey ratepayers. The determination of positive benefits in terms of service quality and the transaction's impact on competition rests squarely before the Board in this matter. The Board is the one arbiter with the ability to evaluate existing service and ensure sufficient competition to safeguard the public against any potential negative impact once the transaction is completed. There is ample Board precedent where the Board has ascertained the level of current service and has imposed conditions to ensure that tangible, measureable benefits exist and will continue to flow to New Jersey customers. The Board should follow the logical approach it has employed in recent merger transactions and not deviate from Board precedent and policy.³

Rate Counsel takes this opportunity to expand on some of the points raised in Petitioner's Response.

² Joint Petitioners' comments at pp. 5-6.

³ IMO the Petition of Time Warner Cable, Inc., Charter Communications, Inc. and Time Warner Cable New York City LLC, For Approval of the Transfer of Control of Time Warner Cable New York City, LLC and Approval of Transaction Financing, Order Approving Stipulation of Settlement, BPU Docket Nos. CM15070770 and TM15070772, dated February 24, 2016, at pp. 8-12; IMO the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Order Approving Stipulation of Settlement BPU Docket Nos. CM15070770 and TM15070772, dated May 25, 2016, at pp. 4 and 7-16.

II. Joint Petitioners have provided no substantive proof that New Jersey customers will benefit from this transaction unless conditions are imposed.

Joint Petitioners' Application and its Reply Comments to Rate Counsel's Initial Comments provide purely generic and unsubstantiated generalizations as proof that positive benefits exist thus satisfying the statutory requirements for approval of this merger. However, a closer examination of the application and Joint Petitioners' reply comments demonstrate that the touted positive benefits do not in fact exist for New Jersey customers and therefore the transaction is not in the public interest and should not be approved absent conditions to ensure tangible, measureable and enforceable benefits to New Jerseyans.

Broadband, Voice and Service Quality

Joint Petitioners claim that "all customers of the combined company affirmatively benefit because a stronger combined company can . . . further improve, broadband networks and deployment speeds for both business and consumer customers..."⁴ Rate Counsel agrees that it is in the public interest to provide New Jersey customers with enhanced broadband networks and services. However, Joint Petitioners object to Rate Counsel's recommendations that would impose specific enforceable commitments to provide expanded broadband services as a condition for approval.⁵ The Board should reject this argument and impose such conditions.

Joint Petitioners correctly assert that the FCC does not require 25 Mbps down and 3 Mbps up under the federal Connect America Fund ("CAF") Phase II program. However, Rate Counsel is not requesting that Joint Petitioners use CAF funding for the expansion of broadband service offerings in New Jersey. The combined Company will have sufficient revenue growth and cash flow to expand these service offerings in New Jersey without CAF funding. The

⁴ Joint Petitioners' comments at p. 4

⁵ Id., at pp. 5-8.

combined Company is expected to have “improved adjusted EBITDA margins, revenue growth and pro forma net leverage of less than 3.7x at close” and will “generate \$975 million of annual run-rate cash synergies,” ... “with approximately \$19 billion in pro forma business revenue and \$13 billion in business strategic revenue” along with “\$10 billion in net operating losses that will substantially reduce the net tax cash expense over several years yielding substantial free cash flow”.⁶ The CenturyLink release acknowledges that the digital economy relies on broadband connectivity, and together with Level 3, the combined Company “will have one of the most robust fiber network and high-speed data services companies in the world . . .” The transaction will increase “CenturyLink's network by 200,000 route miles of fiber, which includes 64,000 route miles in 350 metropolitan areas and 33,000 subsea route miles connecting multiple continents. . . .” The transaction will also provide “cost efficiencies by focusing capital investment on increasing capacity and extending the reach of the combined Company's high-bandwidth fiber network.”⁷ CenturyLink will not only greatly increase its national footprint but globally will provide services in 60 countries.⁸ Joint Petitioners assert that enhanced broadband infrastructure will provide “increased opportunity to invest in its broadband infrastructure and enhance broadband speed for small business and consumers.”⁹

Joint Petitioners' ability to provide increased broadband speed is not only part and parcel of the merger, but is the “positive benefit” that should and/or will flow to consumers if the transaction is approved. Joint Petitioners ask the Board to take formal notice of the post-merger increase of bandwidth as the “positive benefit” flowing from the transaction in satisfaction of the

⁶ CenturyLink To Acquire Level 3 Communications, Company Release 10/31/2016.
<http://ir.centurylink.com/Mobile/file.aspx?IID=4057179&FID=36467109>

⁷ Id.

⁸ Id.

⁹ CenturyLink To Acquire Level 3 Communications, Company Release 10/31/2016.
<http://ir.centurylink.com/Mobile/file.aspx?IID=4057179&FID=36467109>

statutory requirement, but then argue that the Board should not require assurances that the only tangible positive consumer benefit will actually flow to New Jersey customers.¹⁰ Joint Petitioners can't have it both ways. If a "digital economy relies on broadband connectivity" and the merger will yield enhanced bandwidth then enhanced bandwidth can only be a "positive benefit" meeting the statutory requirements if New Jersey customers can enjoy it.

The theoretical concern raised by Joint Petitioners that broadband commitments could somehow conflict with the FCC's CAF program policy is unfounded.¹¹ The Telecom Act of 1996 clearly sets forth dual jurisdictional responsibility for promoting advanced telecommunications. Moreover, contrary to Petitioner's contention, there is ample Board precedent from similar merger applications where the Board included enhanced broadband service offerings as a condition of approval.¹² The Board not only has the statutory jurisdiction and authority but the obligation to ensure that "positive benefits" do in fact flow to New Jersey customers. For purposes of approval of this transaction it is only a positive benefit if the projected "benefits" can in some fashion issue to New Jersey customers.

Furthermore, contrary to Joint Petitioners' contention, the Board would not be regulating broadband service if it imposed such a condition for approval of this merger,¹³ but merely ensuring that the "positive benefit" asserted by Joint Petitioners as a basis for approval of the merger does in fact flow to New Jersey customers. This action in and of itself would not and

¹⁰ Joint Petitioners' comments at p. 9.

¹¹ Id., at p. 11.

¹² IMO the Petition of Time Warner Cable, Inc., Charter Communications, Inc. and Time Warner Cable New York City LLC, For Approval of the Transfer of Control of Time Warner Cable New York City, LLC and Approval of Transaction Financing, Order Approving Stipulation of Settlement, BPU Docket Nos. CM15070770 and TM15070772, dated February 24, 2016, at pp. 8-12; IMO the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Order Approving Stipulation of Settlement BPU Docket Nos. CM15070770 and TM15070772, dated May 25, 2016, at pp. 4 and 7-16.

¹³ Joint Petitioners' Comments at pp. 10-13.

does not constitute regulation of a service, but would be merely a condition for approval of the transaction.

In the alternative, Joint Petitioners contend that the Board should not concern itself with this issue as "...the market is sufficient to drive to higher speeds desired by customers."¹⁴ CenturyLink claims that "more than 95% of the homes and businesses in CenturyLink's incumbent New Jersey service territory have high speed internet service capability available" . . . and that "the thriving competitive marketplace for broadband services continually drives CenturyLink to increase broadband availability and in particular at higher speeds." CenturyLink concludes that "the bottom line is that the broadband marketplace is competitive and CenturyLink is best positioned to determine how to invest and how to market its broadband services."¹⁵ Rate Counsel is hopeful that market conditions do indeed spur CenturyLink to increase speeds for its own competitive benefit and for the sake of consumers. However, the evidence in this proceeding regarding broadband speeds is distressing and suggests that market forces have not been sufficient to yield speeds that serve the public interest. This provides additional support for imposing the condition sought by Rate Counsel.

A sampling of 2016 and 2017 CenturyLink customer complaints demonstrates this further. In Mansfield, Newton New Jersey and nationwide, CenturyLink internet customers complained of loss of internet service, slow internet speeds and evening degradation in service where it could take up to 10 minutes to download a 14.2 MB item, or customers who signed up for speeds of up to 40mbps registering speeds of 1mbps on a wired connection.¹⁶ In connection

¹⁴ Joint Petitioners' Comments at pp. 11-12.

¹⁵ Joint Petitioners' Comments at pp. 11-12.

¹⁶ 25 CenturyLink Reviews in New Jersey, USA, at:

<https://centurylink.pissedconsumer.com/state/new-jersey.html>; See also:

<https://istheservicedown.com/problems/centurylink/mansfield-burlington-county-new-jersey-united-states>; and 2,429 CenturyLink Complaints and Reviews, at:

<https://centurylink.pissedconsumer.com/ripoff-201705091044965.html>

with CenturyLink's voice service, customers predominantly complained of static on the line, no dial-tone for prolonged periods of time, no phone and no repair service for weeks at a time.¹⁷

The complaint sampling demonstrates that to date, despite CenturyLink's assertions that competition moves the market, it appears that competition and consumer demand for faster broadband or internet service, in New Jersey and nationwide, has not resulted in CenturyLink delivering to its customers adequate customer service, functional voice, internet and broadband service at the faster speeds necessary for customers to safely and successfully function in today's digital society.

Rate Counsel does not dispute that CenturyLink is best positioned to determine which communities are most likely to be profitable and therefore where and when CenturyLink might invest in broadband services. However, Rate Counsel is not persuaded that broadband markets are competitive and is concerned about the parts of CenturyLink's service territory where investment may not be as profitable or a high priority. Thus, the conditions sought by Rate Counsel should be imposed.

In connection with recommended broadband commitments towards anchor institutions, CenturyLink asserts that "the federal E-rate program rules require competitive procurement," and "while CenturyLink can bid on competitive opportunities, ... it cannot provide financial support or discounts, free service or equipment, or any additional discount or special pricing – whether the product or service is E-rate eligible or not, ... as such would make the anchor institution ineligible for E-rate funding."¹⁸ Rate Counsel disagrees with this assertion and has a different understanding of how the E-rate program functions. The FCC's E-rate plan complements the efforts of states and localities to bring advanced telecommunications to America's classrooms

¹⁷ CenturyLink outage or service down? <http://downdetector.com/status/centurylink>

¹⁸ Joint Petitioners comments at p. 13.

and libraries. There are many potential sources of funding for broadband-related projects, and communities are encouraged to consider several funding sources to complete projects. Additional funding sources that may be used in conjunction with E-rate funding for broadband projects include: other federal, state, local, non-profit or private organizations.¹⁹ In the E-rate program, Broadband is not an end in and of itself but rather a tool for achieving other public policy goals such as education, employment, and economic development. Thus, the Company's assertion that a broadband condition would make anchor institutions ineligible for E-rate funding is not correct. Therefore, there does not appear to be a conflict or impediment and the Company should be able to commit to working with anchor institutions to determine the community's broadband needs and develop a scope of work and funding requirements on potential projects.

In reviewing this transaction the Board has the responsibility and the opportunity to ensure that overarching public policy concerns can be addressed through commitments by the Company to serve areas that might otherwise be neglected or anchor institutions that might be overlooked. The statute and the public interest demands that New Jersey customers receive enhanced broadband offerings touted by Joint Petitioners as a positive benefit resulting from this merger. By requiring specific and enforceable commitments as a condition of approval of the merger transaction, the Board can ensure that these benefits are obtained.

Company Focus

Joint Petitioners contend the transaction is "additive" and so will not detract from ILEC operations and there is no risk to residential and small business customers.²⁰ Joint Petitioners, however, fail to address Rate Counsel's concern that in the day-to-day reality of the merged

¹⁹ Broadband USA: Guide to Federal Funding of Broadband Projects, Additional Funding Sources at p. 4. https://www2.ntia.doc.gov/files/broadband_fed_funding_guide.pdf; See also:

http://www2.ntia.doc.gov/files/ntia_ppp_010515.pdf

²⁰ Joint Petitioners' comments at p.7-9.

Company – management focus and resources are more likely to be diverted to enterprise customers than would occur absent the merger. Therefore, the Board should impose conditions regarding broadband service/offerings and monitor service quality to ensure that the Company’s heightened focus on enterprise customers is not harming residential and small business service quality.

Tech Transitions

In connection with Rate Counsel’s request for Board oversight of “any transition to new technology,” Joint Petitioners note that the retirement of copper and network transitions is governed by federal law, 47 U.S.C. § 214, and is being addressed in ongoing FCC proceedings.²¹ Rate Counsel acknowledges that for the purpose of CenturyLink’s New Jersey operations, the issue is presently moot because CenturyLink has no plans at this time to retire copper plant in New Jersey. However, Rate Counsel disputes CenturyLink’s assertion that copper retirement is a matter that can only be addressed through federal proceedings. The FCC has acknowledged that there are rules and regulations in many states that relate to copper (see para. 120 of NPRM/NOI),²² and at this time, any possible pre-emption is speculative and uncertain.

Competition and anti-competitive practices

Common local exchange carriers have also voiced concern about anti-competitive practices which are beginning to occur and are expected to worsen if conditions on this transaction are not imposed.²³ Competing carriers are concerned that the combined Company may misuse its broader market power. The industry notes that the transaction will result in

²¹ Joint Petitioners’ comments at p.18.

²² *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84.

²³ *In the Matter of 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 of 1934, As Amended*, WC Docket 16-403; See comments filed by INCOMPASS, Winstream and Frontier in connection with unfair practices that will diminish competition.

consolidation of CenturyLink's market power, and would eliminate an ability to choose among last-mile facilities-based providers for enterprise customers at many buildings. The transaction would thus enable the combined Company to more easily execute price squeezes to push other retail enterprise business solution providers out of the market, including for multi-location customers that need enterprise business solutions at locations that fall at least within part of the CenturyLink incumbent region. (WC Docket 16-403, Comments of INCOMPAS, filed January 23, 2017 at pp 2-3.).

Other carriers claim that as FCC approval gets closer, Level 3 Communications has engaged in unfair billing and payment practices, unreasonably refusing to pay or has delayed payment on millions of dollars for services rendered and initiated a significant number of rate increases that are inconsistent with the Company's past practices. (Docket 16-403, Windstream March 10, 2017 letter to the FCC). Frontier echoes the concerns that "the problems will only get worse if the transaction is approved and, certainly if it is approved without conditions, as the combined Company will be able to use its substantially increased scale and control over critical core network and long-haul facilities to further delay and refuse to pay amounts duly owed and otherwise leverage its market power." (Docket 16-403, Frontier Reply Comments, filed February 7, 2017 at p. 4-6).

These assertions are troubling and they underscore the need for conditions to ensure that effective competition exists. Where the CenturyLink and Level 3 footprints overlap, and in service areas where Level 3 would otherwise compete, the merger would diminish competition. Level 3 is a competitor in Verizon's service territory in New Jersey. Rate Counsel urges the Board to require CenturyLink to continue to compete in Verizon's service territory in BDS markets indefinitely, or in the alternative for a minimum period of five years.

Employment/Pension

Joint Petitioners state that there is no need for the Board to mirror the condition imposed by the Board in the Verizon/XO merger regarding reduction of employment in New Jersey.²⁴ Rate Counsel recommends the Board apply a similar condition to this transaction requiring the combined Company to retain jobs sufficient to maintain services and network quality. Given the September 2016 statements by both companies that they will be laying off employees,²⁵ the Board should require the Company to notify the Board and Rate Counsel when employment cuts will go over 15% for a period of four years from the close of this transaction. The Board could then review the proposed cuts to ensure that service quality is maintained. Although employment is a managerial prerogative, it should not come at the cost of services and customer service quality. Both the Board and Rate Counsel have an overarching obligation to customers to confirm that a merger is both financially sound and maintains the appropriate staffing level to ensure that adequate and safe service on all service offerings provided by the Company continues for New Jersey ratepayers. Rate Counsel maintains that a condition similar to that imposed by the Board in the Verizon/XO matter regarding employment levels be imposed in this transaction.²⁶ Rate Counsel notes that in Verizon/XO neither company had instituted plans for layoffs and stated that there were no plans for reduction of employees following the merger transaction.²⁷ In the transaction now before the Board both companies have already instituted layoffs in contemplation of this transaction. Therefore, before further employment attrition

²⁴ I/M/O the Verified Petition of XO Holdings, XO Communications Services, LLC and Verizon Communications, Inc. for Approval of a Proposed Transaction, Docket No TM16030248, (“Verizon/XO”) Order dated July 29, 2016, at p. 4.

²⁵ CenturyLink employees receive memo regarding layoffs, Posted: Sep 15, 2016, 09:35 AM CDT. <http://www.arklatexhomepage.com/news/local-news/centurylink-employees-receive-memo-regarding-layoffs/548311387>; and Level 3 trims North American operations with more layoff. Posted: September 28, 2016, at 5:25 pm. <http://www.denverpost.com/2016/09/28/level-3-north-american-more-layoffs/>

²⁶ I/M/O the Verified Petition of XO Holdings, XO Communications Services, LLC and Verizon Communications, Inc. for Approval of a Proposed Transaction, Docket No TM16030248, (“Verizon/XO”) Order dated July 29, 2016.

²⁷ Verizon/XO Order at p. 4.

occurs it would be reasonable for the Board to require the Company to notify the Board and Rate Counsel when employment cuts will go over 15% for a period of four years from the close of this transaction, to ensure that proper and adequate service and service quality is maintained for New Jersey customers.

III. Conclusion

For the foregoing reasons, it is in the public interest that the Board adopt the suggested recommendations provided by Rate Counsel in its initial filing of April 18, 2017, or adopt similar Board measures to ensure tangible, enforceable commitments and positive benefits issue to customers and minimize any potential adverse impact to New Jersey ratepayers.

Respectfully submitted,

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL



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On the Comments:
Susan M. Baldwin

Date: June 2, 2017.