Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Applications filed by Qwest Communications	)	
International Inc. and CenturyTel, Inc, d/b/a	)	WC Dkt. No. 10-110
CenturyLink for Consent to Transfer of Control	)	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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July 27, 2010

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With the adoption of targeted, common sense conditions, the Federal Communications Commission ("Commission") should grant approval of the proposed merger of Qwest Communications International, Inc., ("Qwest") and CenturyTel d/b/a/ CenturyLink ("CenturyLink"). (Referred to collectively as the "Combined Entity")[1]. In these Reply Comments[2], Level 3 Communications LLC[3] supports some of the conditions suggested in the initial comment period. Level 3 also urges the Commission to reject a number of proposed conditions as they seek actions that are inappropriate for a merger review process. With the adoption of appropriate commitments by the Combined Entity, this transaction will meet the public interest tests and should be approved.

I. EXECUTIVE SUMMARY

This transaction is one of first impression since the entire operation of a Regional Bell Operating Company will be taken over by an Independent Incumbent Local Exchange carrier that serves predominately rural territories. The Combined Entity represents a unique mix of the economics and policies that have supported expansion of

1 *Applications Filed by Qwest Communications International Inc. and CenturyTel Inc d/b/a CenturyLink for Consent to Transfer of Control*, WC Docket No. 10-110, May 10, 2010 ("Application").
2 Id. See *Pleading Cycle Established*,. Public Notice 255 FCC Rcd 5957 (2010)
3 "Level 3" includes Level Communications, LLC, Broadwing Communications LLC and Wilt Communications.

telecommunications in rural territories with one that has been forced to open its markets to local competition. For the Company's management, the introduction to the ways of competition or rural service may be diametrically opposed to past obligations or experiences. In order to ensure that the Combined Entity understands its obligations and meets them, the Commission will need to adopt simple common sense conditions before it approves the transaction. While many were set out by others in Initial Comments, Level 3 believes the Commission should:

1. Extend the time period of existing interconnection agreements for three years;
2. Provide explicit guidance on the treatment of ISP bound traffic, especially involving Virtual NXX traffic;
3. Address discriminatory switched access pricing in the Combined Entity's operating territory by eliminating "demand lockup" provisions in volume and term plans; and
4. Take steps to prevent the Combined Entity from arbitraging the Rural CLEC exemption to circumvent the CLEC access rate cap.

Just as importantly, Level 3 urges the Commission to decline to impose these conditions dealing with IP interconnection or a requirement that forces to pay access charges to companies who might be involved in traffic pumping. In both cases, these issues are industry impacting and should be considered and evaluated through the development of a full record and should not be imposed as part of merger review process. These proposals are not appropriate for this proceeding.

II. THE COMMISSION SHOULD EXTEND INTERCONNECTION AGREEMENTS AND RESOLVE ISSUES RELATING TO THE EXCHANGE OF ISP-BOUND TRAFFIC

Level 3 joins the universal chorus that approval of this transaction requires a condition on the extension and portability of interconnection agreements to any Combined Entity property that does not maintain a rural exemption under 47 U.S.C. 251(f). In addition, Level 3 agrees that this commitment "only be subject to state specific pricing and technical feasibility."[4] Since these conditions are based on similar obligations imposed in the mergers of AT&T and BellSouth and SBC with Ameritech, the Combined Entity is not being treated any differently than other similarly situated carriers. As the Commission noted in the *AT&T/BellSouth Order*, the conditions "should reduce any incremental effect on the pending merger on the incentive to discriminate."

While extending the interconnection agreements and providing flexible and full portability will mitigate any negative impacts of this transaction on the wholesale markets, those commitments will be meaningless unless the Commission takes explicit, direct action to enforce its polices surrounding operational support systems and intercarrier compensation for ISP-bound traffic.

a. The Commission should adopt the recommendations concerning operational support systems.

Like many filing carriers, Level 3 is concerned about the ability of the Combined Entity to meet its obligations regarding operational support systems. Level 3's experiences in Maine, Vermont and New Hampshire following the Verizon and Fairpoint transaction are a clarion's call for vigilant oversight when a relatively untested independent ILEC takes over the significantly greater operations of a Regional Bell Operating Company. The ink has not dried on the recent transfer of the West Virginia operation of Verizon to Frontier Communications and a complaint has been filed alleging Frontier has not met its OSS commitments. [5]

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[4] Comments of Joint Commenters ("Joint Commenters") at. 55; See also Comments of Cox and Charter ("Cox Comments"), at 9-10; Opening Comments of Leap Wireless International, Inc. ("Leap Comments") at p. 4 to 7, Comments of Cbeyond,, Integra Telecom, Socket Telecom, and tw Telecom ("CBeyond Comments") etc. at Attachment II; and Comments of Comptel.

[5] Petition to Reopen by FiberNet LLC, Case No. 09-871-T-PC, Frontier Communications Corporation (full cite omitted), Public Service Commission of West Virginia, July 21, 2010.

Unlike many of its competitive brethren, Level 3 does not rely upon unbundled network elements to provide services. Its use of UNEs is minimal so it will not provide additional metrics similar to those provided in the Cbeyond Comments. However, Level 3's own experience for provision of wholesale services from Qwest and CenturyLink is anecdotally similar to the competitive comments. Ensuring an even playing field in the wholesale market is a crucial litmus test for whether the transaction is in the public interest. Level 3 agrees that conditions are required to ensure wholesale transactions are completed in a timely, fair and efficient manner.

b. The Commission must resolve once and for all that all locally dialed traffic that terminates to an ISP is compensable under the FCC's Core Mandamus Order.

If the Commission requires the extension of existing interconnection arrangements and requires portability, the resulting condition will be hollow unless the compensation is explicitly addressed for ISP bound traffic especially for what Qwest and others have called "virtual NXX". Unless the Commission takes that step, the ability to port an agreement will be nothing more than an option to litigate the treatment of ISP-bound traffic.

It's no exaggeration to say that the most heavily litigated issue in the Qwest service territory for the past 10 years has been the treatment of locally dialed ISP bound traffic, especially involving virtual NXX arrangements. Qwest has taken every opportunity to oppose any obligation to pay for that traffic arguing that the ISP's modem must be in the same local calling area as that of the Qwest end user making the call. The dockets of the state commissions as well as state and federal courts are full of proceedings interpreting and reinterpreting the *ISP Remand Order*[6]. With each new or conflicting interpretation, the unsuccessful party pushes the matter further up the appellate ladder. Level 3 won't regurgitate the tortuous history here, sufficing it to say that its experiences are similar to those described by Pac-West.[7]

Resolution of the treatment of ISP bound traffic is necessary to ensure that the Combined Entity does not force its competitors to litigate issues that have been finally resolved by the United States Court of Appeals for the District of Columbia Circuit in its review of the *Core ISP Order*.[8] As incumbents, CenturyLink, Qwest and Embarq have every incentive to dispute the application of the intercarrier compensation regime for ISP-bound traffic by pressing specious arguments in order to avoid paying their competitors for traffic that Qwest's end users originate. In the context of this merger, however, the question isn't just whether the Combined Entity will thwart competition, but it also goes to the basic economic assumptions the parties have made when examining this transaction and whether they will force competitors to subsidize the operations of the Combined Entity.

In the case of ISP bound traffic, Qwest and CenturyLink have historically taken the position that unless the ISP's modem was in the same local calling area as their customer, then the call was interstate and that access charges were owed. While the *Core ISP Order* and the court's affirmation reject this interpretation, Level 3 expects Qwest to

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6 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-bound traffic,* CC Docket Nos 96-98, 99-68, 01-92 *et. al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547, (rel. Nov. 5, 2008) ("*Core ISP Order*")

7 See Comments of Pac-West Telecomm. Inc. ("Pac-West comments")

8 *Core Communications Inc, v. Federal Communications Commission*, United States Court of Appeals (District of Columbia), No. 08-1365, consolidated with 08-1393, 09-1044 and 09-1046. (Dec. Jan. 12, 2010)

continue using regulatory alchemy to argue that the terminating local exchange carrier is not really a local exchange carrier but an interexchange carrier. In Qwest's view, the local exchange carrier owes Qwest the prevailing intrastate rate (let's say .002 cents for purposes of discussion) instead of paying the CLEC the appropriate ISP rate of .0007, presuming that Qwest has opted into the compensation regime outlined in the *ISP Remand.* So one question for the Commission is whether the Combined Entity is assuming it will receive access charges for ISP bound traffic, thus inflating its revenue, or whether it will pay the reciprocal compensation rate, thus reducing some revenue. The second question is how either outcome impacts the ability of the Combined Entity to meet its commitments.

But the impact in the Qwest region does not stop with the question of reciprocal compensation. Qwest also argues that under the discredited theory that ISP bound traffic falls under Section 251(g), that it cannot be counted as local traffic when calculating the relative use charges that apply to local interconnection facilities. RUF charges are designed to apportion the cost of an interconnection facility based on the flow of the traffic. So if all the traffic on a facility was local and Qwest delivered 80 percent of that traffic, Qwest would issue a credit to the terminating carrier for that percentage of the usage. However, with ISP bound traffic, Qwest has argued successfully in some states that ISP bound traffic must be excluded from the calculation of RUF charges because it does not fall within the scope of Section 251(b) (5). The acceptance of this flawed position by a number of states has resulted in millions of dollars in subsidies by competitive carriers for the network operations of Qwest.

What has been more troubling about that position and the state decisions has been that it flew in the face of the *ISP Remand Order*. While finding that ISP bound traffic fell into Section 251(g), the Commission was explicit that that finding did not "alter carriers' other obligations under our Part 51 rules, 47 C.F.R.... "[9]. Yet despite that clear direction, Qwest confused a number of states into believing that the part 51 rules did not apply and then excluded ISP bound traffic from the calculation of RUF charges which they could not have done under 51 CFR 703(b) which states: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC network." And now the FCC's legal basis for treating such traffic as covered by Section 251(b) (5) has been affirmed by the Court in the *Core ISP Order*, the application of the Part 51 rules to ISP bound traffic is settled. Yet, Level 3 expects Qwest to continue to argue the opposite. Through its past actions trying to collect access charges for ISP bound traffic or imposing the cost of the interconnection facilities on its side of the point of interconnection with a competitive provider, Qwest has repeatedly violated this rule and will continue to do so unless the Commission acts.[10]

Unless the Commission is explicit in its language, these questions will continue to be litigated especially if the FCC requires the portability of interconnection agreements. In an interconnection agreement with Embarq, the Combined Entity has agreed to pay $.0004 per minute of use for ISP bound traffic exchanged with Level 3.[11] In that agreement, ISP bound traffic "includes ... traffic provisioned using virtual NXXs."[12]

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9 *ISP Remand* at FN 149

10 See 47 C.F.R. § 51.703(b).

11 It's worth noting that the rate is lower than the .0007 set by the *ISP Remand Order*.

12 Interconnection Agreement between Level 3 Communications and Embarq for the state of Nevada, § 55.1; See also § 55.7 which establishes a traffic threshold that can trigger negotiations.

Level 3 has no doubt that if it were to import that agreement elsewhere in the operating territory of the Combined Entity, it would be required to relitigate the meaning of the FCC's compensation regime for ISP bound traffic. The public interest will be best served if the Commission adds the following condition to this transaction:

1. Qwest/CenturyLink and Embarq will compensate terminating carriers in at the appropriate rate for ISP bound traffic and that ISP bound traffic shall include traffic provisioned using virtual NXX codes.
2. Qwest/CenturyLink and Embarq agree that ISP-bound traffic, including traffic provisioned using virtual NXX codes, shall be included in the calculation of relative use facilities for the purposes of 47 C.F.R. § 703(b).

By adopting such a condition, the Commission will provide the explicit guidance that the industry, regulators and courts have sought since the release of the ISP Remand Order. With that issue resolved, the industry can turn its attention to deploying capital in a manner that will grow networks and help expand broadband networks across the country instead of funding litigation. It's time that the telecommunications industry stops paying by the hour to determine what it can charge by the minute.

III. THE COMMISSION SHOULD IMPOSE CONDITIONS TO ADDRESS DISCRIMINATORY SWITCHED ACCESS PRICING

Before the Commission approves the transaction, it should take a hard look at the impact of the Combined Entity on special access services and prices and, if necessary, take steps to prevent anticompetitive behavior. The filings of Sprint, Cbeyond and the Joint Commenters provide ample evidence and recommendations for the Commission to consider. Adoption of these recommendations is in the public interest.

If the Commission decides to focus on a narrow set of special access issues, Level 3 urges it to eliminate "demand lockup" provisions in special access agreements for a stated term. These arrangements require a carrier to purchase a specific percentage of their special access commitment from that carrier. These provisions are anticompetitive because they limit the competitive scope of the special access market to the 5 or 10 percent that is not committed to single carrier. Attachment III to the Sprint comments provides an illustration of the requirements for such a plan. In that document Sprint restates the Term and Volume Plans for CenturyLink and Embarq. Those plans require a 95 percent commitment of all circuits for the Premier Term Discount Plan of five years or 90 percent for a Term Discount Plan of three or five years. That same attachment contains the latest Qwest Regional Commitment Plan that went into effect on June 1, 2010 or approximately three weeks after the application for this transaction was filed with the Commission on May 10, 2010. There Qwest raises commitment threshold to 95 percent of the revenue for circuits. This is an increase of five percent yet Qwest does not increase its volume discount. Instead, Qwest merely requires a competitive access customer to increase its spend with Qwest just to maintain a the 22 percent price discount. It doesn't take an economist to raise questions about market power if a dominant carrier feels it can raise the threshold for its volume and term commitments another 5 percent without offering any additional discounts.

Both plans are the equivalent of a "take or pay" requiring the carrier to make up the financial difference between the actual spend and its commitment. While Level 3 does not oppose volume and term commitments in general, the "demand lockups" imposed by Qwest and CenturyLink deter other carriers from deploying risk capital to provide competitive special across since those investments may be able to compete for 5 percent of the addressable special access market.

IV. THE COMMISSION SHOULD DISREGARD OBJECTIONS FILED BY NORTHERN VALLEY AND AVENTURE COMMUNICATIONS LLC.

In a pleading that is shocking in its mendacity, Northern Valley Communications LLC and Aventure Communications Technology LLC want the Commission to condition approval of the transaction with a requirement that the applicants "pay switched access charges unless and until it receives an order from the Commission or court of competent jurisdiction declaring the charges are not consistent with the LEC's filed tariff."

What is so shocking is that Northern Valley and Aventure are two companies involved in any number of proceedings to determine if the legitimacy of their tariffed charges and whether or not they are engaged in traffic pumping, a subject that has drawn considerable attention at the Commission. Qwest has led the charge in the battle against traffic pumpers and has been successful in showing that many of these companies are abusing their certificates as local exchange carriers..

The Commission does not need to use this process to adjudicate these disputes. In a transaction earlier this year involving the acquisition of Comtel Telcom Assets L.P. and Comtel of Virginia LLC by Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc., the Commission rejected a similar effort to condition a transaction on the payment of access charges that were the subject to other legal and regulatory disputes.[13] In that case, Hypercube Telecom LLC made similar demands in the Comtel-Matrix proceeding. In the *Comtel Notice* the Commission found that the disputed access charges were "not sufficient to persuade us to deny the transaction or to impose conditions on the terms of

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13 *Public Notice, Domestic 214 Application Filed for the Acquisition of Assets of Comtel Telecom Assets L.P. and Comtel Virginia LLC by Matrix Telecom, Inc and Matrix Telecom of Virginia, Inc.,* DA 10-864, rel. May 14, 2010, ("*Comtel Notice*").

the transfer."[14] It is worth noting that Hypercube, Northern Valley and Aventure, all carriers battling charges of being engaged in traffic pumping, are represented by the same firm. The Commission should ignore another attempt to force a carrier to give up its legal rights to protect itself as part of a merger review process.

V. THE COMMISSION SHOULD TAKE STEPS TO PREVENT THE COMBINED ENTITY FROM ARBITRAGING THEIR ADJOINNG TERRITORIES BY ESTABLISHING RURAL CLECS

While the Commissions should not impose the conditions sought by Northern Valley and Aventure, their comments raise a novel issue involving rural competitive local exchange carriers ("Rural CLECs") and whether the transaction creates a new arbitrage opportunity with respect to access charges..

This is a unique transaction because a predominantly rural carrier is purchasing a Regional Bell Operating Company. Under FCC rules, a rural carrier can create a competitive local exchange carrier and can compete in the rural areas of an adjoining incumbent local exchange carrier. While that is not unique, the twist arises when the Rural CLEC takes advantage of an exemption from the FCC's requirement that CLECs cap their interstate access charges at the rate of the incumbent local exchange carrier. While the applicants have not indicated that they will act in such a manner, that exception would allow CenturyLink to set up a Rural CLEC in qualified Qwest exchanges. This would create an incentive for the Combined Entity to move conference call, chat line, adult entertainment or other high volume customers to the Rural CLEC. The incentive may be so great that Qwest stops marketing such services in its territory and cedes them

[14] Id at. 2.

to the Rural CLEC of its parent. In either case, the Rural CLEC would be able to charge higher access rates than Qwest or its competitors.

Level 3 expects that the arbitrage opportunities are limited to the Qwest operating territory and where CenturyLink is the incumbent provider in an adjoining territory. Using the application filed by Qwest and CenturyLink, this issue could be prevalent in Washington State, Oregon, Colorado, Wyoming and Minnesota. [15] There are other potential areas but these are the states where the carriers have their largest concentration of customers. For example, in Colorado, the Combined Entity will cover more than 90 percent of the state.

In order to ensure that the applicants are not tempted to crawl through this loophole, the Commission should condition transaction approval with a requirement that CenturyLink mirror the rates charged by Qwest if it operates as a Rural CLEC in the Qwest RBOC territory. In the event that CenturyLink is operating as a rural CLEC in the Qwest territory at the time of the closing of this transaction, it should be required to immediately reduce its access rates to mirror Qwest. In addition, to the extend that Qwest negotiates an off-tariff agreement with a CenturyLink Rural CLEC for the termination of intrastate or interstate traffic, the Combined Entity must make the same rate available to other interexchange carriers without requiring volume or term commitments. These simple conditions will prevent arbitrage, prevent expansion of the traffic pumping issues that plague the industry, make it easier for the FCC to unify compensation rates by eliminating rate variations within an incumbent's operating territory and to send appropriate pricing signals to the market place

[15] See http://www.fcc.gov/transaction/centurylink-qwest.html exhibit V

VI. THE COMMISSION SHOULD NOT ADDRESS IP INTERCONNECTION

The Joint Commenters urge the Commission to condition approval of this transaction on establishing requirements for interconnection at an IP level pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. Level 3 does not believe that such a condition is necessary and that its consideration is inappropriate in the context of a merger review.

Level 3 agrees with competitive providers that establishing a framework for interconnecting the public switched telephone network and IP networks is an important industry wide issue. Level 3 disagrees though, that a merger review process is the appropriate forum to resolving such issues.

As a threshold matter, the proposal is flawed because it tries to shoe-horn IP interconnection into the rubric of interconnection under Sections 251 and 252 of the Act. By doing so, the Joint Commenters would actually defeat the benefits of IP interconnection by imposing a set of interconnection rules that were constructed for, and directed to, the traditional economics and technological limitations of the copper networks. These rules at best are not relevant in an IP world and at worst would create unnecessary conflict and confusion in the continued development of IP networks. For example, carriers are generally allowed at least one interconnection point in each Local Access Transmission Area (LATA). In some instances, a carrier may be required to interconnect in additional local calling areas. If the commission adopted the Joint Commenters position, then IP interconnection would have to comply with the part 51 rules associated with interconnection under Sections 251 and 251.

Starting with such bedrock rules is misguided because those rules reflect the economics of the public switched telephone network as well as the arbitrary calling area and LATA boundaries established by regulators. In an IP world, companies may decide that two or three interconnection points are necessary to serve the entire country. Another example deals with the cost of transport. The existing regime for the PSTN is replete with charges for transport based on mileage, jurisdiction of traffic and capacity. Imposing the rules under Sections 251 and 252 to IP interconnection will only complicate the shift for to IP interconnection and will impose unnecessary interconnection costs and create disputes.

Ensuring a transition from the public switched telephone network to IP networks is critical to making broadband services available nationwide and demands a carful, comprehensive and fully debated analysis. The Joint Commentaters have not developed an appropriate record here. If the Commission is going to adopt g a regime for IP interconnection, it will require a more detailed record and a broader consideration of existing market conditions, technical requirements, jurisdictional concerns and other technical and business issues. Such a step is unwise and unnecessary in the context of reviewing a proposed merger.

VII. CONCLUSION

With the adoption of some common-sense conditions, the Commission should approve the transfer of control of Qwest to CenturyLink. These conditions are necessary to ensure that the Combined Entity maintains a level playing field for competitive carriers and that the public interest is met.

Respectfully submitted,

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Dated: July 27, 2010