

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

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

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2014

Released: October 24, 2014

By the Chief, Wireline Competition Bureau and Chief, International Bureau:

I. INTRODUCTION

1. Level 3 Communications, Inc. (together with its subsidiaries, Level 3) and tw telecom inc. (TWT Parent and, together with Level 3, Applicants) filed a series of applications¹ pursuant to sections 214 of the Communications Act of 1934, as amended (Act),² and the Cable Landing License Act,³ seeking approval for various transfers of control of licenses and authorizations held by TWT Parent's subsidiaries (TWT Subsidiaries, together, with TWT Parent, TWT) to Level 3.

2. In order to decide whether or not the transfer applications should be approved, we are required to review the record evidence submitted by Applicants to determine if the proposed transaction would serve "the public interest, convenience, and necessity."⁴ In conducting our review, we assess several important criteria, including (1) whether the Applicants are qualified to hold Commission licenses, (2) whether the proposed transaction would result in public interest harms by, for example, diminishing competition or degrading service for consumers, and (3) whether there are potential benefits attributable to the transaction.⁵

3. We have reviewed the record and have requested and analyzed additional data from the Applicants. Based on our analysis, we find that the transaction is likely to increase competition by resulting in a combined company with a larger network footprint and a strengthened ability to compete for business customers. On balance, we find that any potential loss of competition that may occur as a result of the transaction is outweighed by the public interest benefits that will likely result from this increased competition. Accordingly, we find that the transaction serves the public interest and consent to the transfer.

¹ See *tw telecom inc. and Level 3 Communications, Inc. Application for Consent to Transfer Control of Authority to Provide Global Facilities-Based and Global Resale International Telecommunications Services and of Domestic Common Carrier Transmission Lines, Pursuant to Section 214 of the Communications Act of 1934, as Amended*, WC Docket No. 14-104 (filed July 8, 2014) (Domestic 214 Application); ITC-T/C-20140707-00193 (filed July 7, 2014); and SCL-T/C-20140707-00005 (filed July 7, 2014) (International 214 Applications) (collectively, Applications).

² 47 U.S.C. § 214.

³ See 47 U.S.C. §§ 34-39.

⁴ 47 U.S.C. § 214(a).

⁵ See *infra* paras. 8-22.

II. BACKGROUND

A. Description of the Applicants

1. Level 3 Communications, Inc.

4. Applicants state that Level 3, a publicly-traded Delaware corporation, through its operating subsidiaries, offers communications services to enterprise customers and carriers over its broadband fiber-optic network, including Internet Protocol (IP)-based services, broadband transport, collocation services, and voice services.⁶ Applicants state that its network reaches more than 60 countries in the Americas, Europe and Asia.⁷ After consummation of the proposed transaction, Applicants assert that the following entities will hold a ten percent or greater interest in Level 3: Southeastern Asset Management, Inc. (16.6 percent), a Tennessee corporation, and, indirectly, Temasek Holdings (Private) Limited (Temasek) (16.3 percent), which is wholly owned by the Government of Singapore.⁸

2. twt telecom inc.

5. TWT Parent, a publicly traded Delaware corporation, wholly owns tw telecom holdings inc. (TWTH), a Delaware corporation that is the direct or indirect parent of 35 TWT Subsidiaries currently providing interstate and international telecommunications services in 46 states and the District of Columbia.⁹ Applicants state that the TWT Subsidiaries provide business Ethernet, data networking, IP-based virtual private network, Internet access, voice, Voice over Internet Protocol, and network services to enterprise customers and carriers.¹⁰ They further state that the TWT Subsidiaries serve 76 U.S. metropolitan markets.¹¹ One of the subsidiaries, tw telecom of hawaii l.p. (TWT Hawaii), has a joint interest in the Hawaiian Islands Fiber Network (HIFN), a non-common carrier submarine cable system connecting six of the Hawaiian Islands.¹²

B. Description of the Transaction and Application Review Process

6. According to Applicants, Level 3 will acquire all of the issued and outstanding stock of TWT Parent through what they describe as a two-step “double reverse triangular merger.”¹³ They explain that Level 3 and its special-purpose subsidiaries, Saturn Merger Sub 1, LLC (Merger Sub 1) and Saturn Merger Sub 2, LLC (Merger Sub 2), both Delaware limited liability companies, have agreed to acquire TWT Parent in a stock and cash transaction that will result in Level 3 controlling the TWT Subsidiaries.¹⁴ In the first step of the merger, Merger Sub 1 will merge into TWT Parent, with TWT Parent surviving. In the second step, Merger Sub 2 will merge into TWT Parent, with Merger Sub 2 surviving as a wholly-owned, direct subsidiary of Level 3 and renamed as tw telecom llc.¹⁵ After consummation of the

⁶ Domestic 214 Application at 6.

⁷ *Id.* at 9.

⁸ *Id.* at 18-19.

⁹ *Id.* at 3-6. Applicants state that TWT Parent was originally founded as a division of Time Warner Cable, which was owned by Time Warner Inc. Time Warner Inc. sold its ownership stake in TWT Parent in 2006, and, according to Applicants, neither Time Warner Inc. nor Time Warner Cable currently holds any ownership interest in TWT Parent. *Id.*

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 3.

¹² TWT Hawaii owns HIFN jointly with Wavecom Solutions Corporation (Wavecom), a subsidiary of Hawaiian Telcom Inc. This transaction does not affect the Wavecom ownership in HIFN. *Id.* at 13.

¹³ *Id.* at 7.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 6-7.

proposed transaction, TWT and the TWT Subsidiaries will be direct or indirect subsidiaries of tw telecom llc. As a part of the transaction, Applicants state that Level 3 anticipates issuing approximately 98 million shares of common stock, which will dilute the ownership interest of Level 3's existing shareholders, including existing foreign shareholders.¹⁶

7. On July 18, 2014, the Wireline Competition Bureau and the International Bureau released a Public Notice seeking comment on the proposed transaction.¹⁷ In response to the Public Notice, CenturyLink, FairPoint Communications, Inc. (FairPoint), Foreman Seeley Fountain (FSF), and Proximiti Technologies, Inc. (Proximiti) filed comments either opposing grant of the applications or requesting conditions.¹⁸ We discuss the issues raised by commenters as part of our analysis below. On August 18, 2014, the Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI), with the concurrence of the Department of Homeland Security (DHS) (collectively, the Executive Branch Agencies) filed a petition to defer Commission action pending their review for national security, law enforcement, and public safety issues related to the proposed transaction.¹⁹ On October 22, 2014, the Executive Branch Agencies withdrew their request to defer action.²⁰ We address national security, law enforcement, and public safety issues related to the proposed transaction below. On September 5, 2014, DOJ granted early termination of its pre-merger review under the Hart-Scott-Rodino Antitrust Improvements Act of 1975.²¹

III. DISCUSSION

A. Standard of Review

8. Pursuant to section 214 of the Act, as amended, and sections 34 through 39 of the Cable Landing License Act, the Commission must determine whether the proposed transfer of control of certain licenses and authorizations held and controlled by TWT to Level 3 will serve the public interest, convenience, and necessity.²² 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

¹⁶ *Id.* at 7-8.

¹⁷ *Applications Filed for the Transfer of Control of TW Telecom Inc. to Level 3 Communications, Inc.*, WC Docket No. 14-104, Public Notice, 29 FCC Rcd 8521 (WCB/IB 2014).

¹⁸ Comments of CenturyLink, WC Docket No. 14-104, at 4-7 (filed Aug. 18, 2014) (CenturyLink Comments); Reply Comments of FairPoint Communications, Inc., WC Docket No. 14-104, at 1-2 (filed Sept. 2, 2014) (FairPoint Reply); Foreman Seeley Fountain Opposition to Level 3 Communications and tw telecom inc. 214 Applications to Transfer Authorizations of Subsidiaries of tw telecom inc. to Level 3, WC Docket No. 14-104, at 16 (filed Aug. 18, 2014) (FSF Opposition); Comments of Proximiti Technologies, Inc., WC Docket No. 14-104, at 3 (filed Aug. 18, 2014) (Proximiti Comments).

¹⁹ Letter from Joanne P. Ongman, National Security Division, DOJ, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-104 (filed Aug. 18, 2014).

²⁰ Letter from Joanne P. Ongman, National Security Division, DOJ, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-104 (filed Oct. 22, 2014) (DOJ Oct. 22, 2014 *Ex Parte* Letter).

²¹ Early Termination Notices, <http://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20141222>.

²² 47 U.S.C. §§ 34-39, 214(a). 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); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18442, para. 16 n.58 (2005).

Commission's rules.²³ If the proposed transaction appears to not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.²⁴ The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.²⁵ Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.²⁶

9. The Commission's competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.²⁷ DOJ reviews telecommunications mergers pursuant to section 7 of the Clayton Act, and if it wishes to block a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.²⁸ DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to other public interest considerations.²⁹ The Commission's competitive analysis under the public interest standard is somewhat broader. For example, it considers whether a transaction will enhance, rather than merely preserve, existing competition, and it takes a more extensive view of potential and future competition and its impact on the relevant market.³⁰

10. The Commission applies several criteria in deciding whether a claimed benefit should be considered in assessing a proposed transaction.³¹ First, the benefit must be transaction-specific. Second, the benefit must be verifiable.³² Because much of the information relating to the potential benefits of a transaction is in the sole possession of the applicants, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude. Third, "the magnitude of benefits must be calculated net of the cost of achieving them."³³ Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims.³⁴ Under this sliding scale approach, where potential harms appear "both substantial and likely, a demonstration of claimed benefits

²³ *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. 7 (2011) (*Qwest/CenturyLink Order*); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5671-72, para. 19 (2005) (*AT&T/BellSouth Order*).

²⁴ See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5672, para. 19.

²⁵ See, e.g., *id.*

²⁶ See, e.g., *id.*

²⁷ See, e.g., *Applications of Softbank Corp., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation for Consent to Transfer Control of Licenses and Authorizations; Petitions for Reconsideration of Applications of Clearwire Corporation for Pro Forma Transfer of Control*, IB Docket No. 12-343, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642, 9651, para. 25 (2013) (*Softbank/Sprint Order*); *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 21.

²⁸ 15 U.S.C. § 18.

²⁹ *Id.*

³⁰ See, e.g., *Softbank/Sprint Order*, 28 FCC Rcd at 9651-52, para. 25; *AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 21.

³¹ See, e.g., *Softbank/Sprint Order*, 28 FCC Rcd at 9677-78, para. 91; *AT&T/BellSouth Order*, 22 FCC Rcd at 5760, para. 200.

³² See, e.g., *Softbank/Sprint Order*, 28 FCC Rcd at 9677-78, para. 91.

³³ See, e.g., *id.*

³⁴ See, e.g., *id.*

also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”³⁵ Conversely, where potential harms appear unlikely or less likely and less substantial, we will accept a lesser showing.³⁶

B. Applicants’ Qualifications

11. As part of its public interest review, the Commission generally considers the qualifications of the transferee in a proposed transaction.³⁷ The Commission has previously approved Level 3 to hold Commission licenses and authorizations in other merger proceedings, and we need not reevaluate its qualifications here.³⁸ Although commenters raise questions regarding both TWT’s and Level 3’s pre-existing commercial practices, there is no evidence in the record indicating that either entity is not qualified to provide service. We discuss commenters’ claims in greater detail below.³⁹

C. Public Interest Benefits and Harms

12. In this section, we consider the potential benefits and harms arising from the merger. As discussed below, we find that this transaction is likely to result in a stronger competitor and tangible benefits for enterprise customers. While TWT and Level 3 have overlapping facilities in a small fraction of buildings in which they provide service to enterprise customers, we find that there are mitigating factors to any potential competitive harm post-merger. In addition, we find that the arguments raised by commenters against Applicants’ pre-existing business practices are more appropriately addressed outside this proceeding. Overall, we find that the benefits, taken as a whole, outweigh any potential public interest harms.

1. Potential Benefits

13. In our expert judgment, the merged entity will be a significantly stronger competitor than the two companies are separately. The Wireline Competition Bureau has consistently found that, in transactions in which competitive local exchange carriers (LECs) combine to form a stronger competitor to the incumbent LEC, the transaction will enhance competition.⁴⁰ In this case, Applicants assert that the

³⁵ See, e.g., *id.* at 9678-79, para. 93.

³⁶ See, e.g., *id.*

³⁷ See *id.* at 9652-53, paras. 26-27 (explaining the general character qualifications the Commission reviews under Title III of the Act for the proposed transferee and that the Commission generally does not review the qualifications of the transferor except in certain limited circumstances). See 47 U.S.C. § 308(b) (authorizing the Commission to prescribe citizenship, character, and other qualifications for station licensees under Title III of the Communications Act); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986), *modified* 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). Although not directly applicable to common carriers, the character qualifications standards adopted in the Title III context can provide guidance in the common carrier area as well. See *MCI Telecommunications Corporation Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515, para. 31 n.14 (1988) (applying the broadcast character standards in a common carrier case).

³⁸ See, e.g., *Applications Filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Memorandum Opinion and Order and Declaratory Ruling, 26 FCC Rcd 14056, 14064, para. 15 (WCB/IB 2011) (*Level 3/Global Crossing Order*).

³⁹ See *infra* paras. 19-22.

⁴⁰ See *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, Memorandum Opinion and Order, 27 FCC Rcd 497, 505-06, paras. 18-19 (WCB/IB/WTB 2012) (finding that the merged competitive LECs would benefit from combined networks and expanded services, and therefore be a stronger competitor to the incumbent LEC and enhance competition); *Application of XO Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, IB Docket No. 02-50, 17 FCC Rcd 19212, 19225-26, para. 30 (IB/WTB/WCB 2002) (finding that the merged competitive LECs would be a stronger competitor to the

(continued...)

proposed transaction will increase competition for enterprise and carrier customers by joining two complementary, non-dominant providers that will compete with larger incumbent providers, particularly AT&T, Verizon, and CenturyLink, and with other competitive carriers.⁴¹ Applicants state that Level 3 has a global footprint, which TWT lacks.⁴² At the same time, Applicants maintain that TWT has a more extensive metropolitan footprint as well as many more network-connected buildings than Level 3.⁴³ Applicants explain that TWT's inventory of on-net buildings coupled with Level 3's backhaul network will enhance the merged company's ability to compete for national and international enterprise customers.⁴⁴ In addition, Applicants expect that combining TWT's and Level 3's networks could reduce capital costs associated with further network deployment because it would increase the likelihood that, for a future build-out to a customer, existing facilities would be nearby to the customer. Nearby facilities would reduce the costs of a network build and may make reaching customers to provide on-net service more cost effective.⁴⁵ Overall, Applicants contend that the transaction would leverage TWT's presence in enterprise markets to make more extensive use of Level 3's global network footprint and offer large customers greater coverage and reliability.⁴⁶ Applicants also argue that the merger would allow the combined entity to offer a broader selection of services to all customers.⁴⁷

14. We agree that Level 3's scale and scope, combined with TWT's metropolitan footprint, suggests that, post-merger, the combined entity could be a stronger competitor to the incumbent LECs and large national providers, thereby resulting in benefits for consumers. We find that, based on the record before us, it is likely that the transaction will combine largely complementary networks and will ultimately have a net tangible public interest benefit of forming a stronger competitor.

15. Applicants anticipate that access to complementary networks and increased purchasing power with vendors will reduce costs for both sides of the merged entity.⁴⁸ Specifically, Applicants estimate that the transaction would result in approximately \$200 million in network and operations savings on an annualized basis for the combined company, and an additional capital-expenditure savings of approximately \$40 million on an annualized basis.⁴⁹ While it is reasonable to anticipate that the

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incumbent LEC in their overlap states and that the proposed transaction would therefore further competition rather than curtail it).

⁴¹ Domestic 214 Application at 10, 11; Level 3 Communications, Inc. and tw telecom inc. Joint Opposition and Reply, WC Docket No. 14-104, at 2 (filed Sept. 2, 2014) (Applicant Reply); Letter from Kent Bressie, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-104, at 1, 3 (filed Sept. 12, 2014) (Level 3 Sept. 12, 2014 *Ex Parte* Letter). The Applicants contend that the incumbent LECs are dominant in the enterprise market, often owning the only connection to buildings. *Id.* at 3.

⁴² Level 3 Sept. 12, 2014 *Ex Parte* Letter at 1, 3; Letter from Joseph C. Cavender, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-104, at 1 (filed Oct. 7, 2014) (Level 3 Oct. 7, 2014 *Ex Parte* Letter).

⁴³ Level 3 Sept. 12, 2014 *Ex Parte* Letter at 1.

⁴⁴ Applicant Reply at 2; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 1-3; Level 3 Oct. 7, 2014 *Ex Parte* Letter at 1.

⁴⁵ Level 3 Oct. 7, 2014 *Ex Parte* Letter at 1.

⁴⁶ *Id.* at 1.

⁴⁷ Domestic 214 Application at 8-9; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2. For example, Level 3 states that it currently offers various collocation, data center, and video services that TWT does not offer to its customers. Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2.

⁴⁸ Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2.

⁴⁹ *Id.*

transaction would result in some cost savings, we reach our public interest findings independent of consideration of these savings.⁵⁰

2. Potential Harms

a. Competition

16. In order for a horizontal merger to have negative effects on competition, the parties must currently provide, or be very likely to provide, similar services within the same relevant geographic market.⁵¹ Applicants assert that they generally do not compete for the same class of customers; they argue that the proposed transaction will not impact competition for local exchange and interstate services because the TWT Subsidiaries and Level 3 have largely focused on different segments of the enterprise market for these services and typically compete against incumbent and competitive carriers rather than each other.⁵² Specifically, Applicants explain that TWT serves primarily small and medium-sized enterprises, and Level 3 primarily serves larger enterprise customers.⁵³ Applicants estimate that, post-merger, Level 3 will have approximately 30,538 on-net buildings in the United States.⁵⁴ Applicants state that Level 3 and TWT have overlapping facilities in 1,739 of the on-net buildings (approximately 5.7 percent of total on-net buildings).⁵⁵

17. In previous transactions in which an incumbent LEC has acquired a competitive LEC, the Commission has identified competitive harm where the merging carriers both provide service to a building over their own facilities and there is no evidence that another competitor is connected to the building, or is likely to connect the building to its network.⁵⁶ In contrast, in this proceeding, Applicants are both competitive providers and a source of competition in buildings where they overlap is likely the incumbent LEC.⁵⁷ Furthermore, we take into account Level 3's assertions that (1) the central focus of its corporate strategy is to provide communications services to enterprise and wholesale customers, that it has experience providing these services, and that, post-merger, it intends to compete aggressively against the incumbent LEC and other major providers for large enterprise customers with international

⁵⁰ Similarly in our consideration of the Frontier/Verizon transaction, the Commission found that transaction synergies were a potential transaction benefit, but relied on other merger benefits to support a determination that the transaction was in the public interest. *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, 5995, para. 57 (2010) (*Frontier/Verizon Order*).

⁵¹ The Commission has stated that a transaction is considered to be horizontal when the parties to the transaction sell products that are in the same relevant product and geographic markets. *See, e.g., AT&T/BellSouth Order*, 22 FCC Rcd at 5675, para. 23 & n.82.

⁵² Domestic 214 Application at 8-10.

⁵³ *Id.*

⁵⁴ Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2 and Attach. at para. 4 (Decl. of Michael J. Mooney). Level 3 and TWT explain that they provide service through a combination of "on-net" and "off-net" last-mile facilities or services. "On-net" last-mile facilities consist of fibers that are owned, held as indefeasible rights of use, or leased on a long-term basis and that are lit and managed by the competitive LEC to reach an end-user customer's building. "Off-net" last-mile services—such as DSIs, DS3s, unbundled network element loops, or Ethernet connections—are purchased from another provider, usually the incumbent LEC, and then combined with a competitive LEC's metro or intercity network facilities to provide service to a particular customer location. They state that the ability to connect to a customer location using "on-net" facilities provides the competitive LEC with a significant advantage in terms of control of the service, service quality, and costs. Domestic 214 Application at 11.

⁵⁵ Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2; Attach. at 1.

⁵⁶ *Qwest/CenturyLink Order*, 26 FCC Rcd at 4202-03, paras. 16-17.

⁵⁷ Domestic 214 Application at 10; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2-3 and Attach. at para. 8.

connectivity needs,⁵⁸ and (2) as explained above, Level 3 and TWT have largely focused on different segments of the enterprise market.⁵⁹ While we do not have evidence on the record that shows whether there will be any competitive effects in specific buildings where both parties to the merger currently have facilities, we consider that any potential harm that could result from a loss of competition is small relative to the overall competitive benefits of the transaction.

18. Notably, no commenter asserts that the combined entity will hold market power or potentially threaten competition. We also acknowledge Applicants' statements that the merged company's greater scale and geographic presence will enhance its ability to compete more aggressively for enterprise customers.⁶⁰ Consistent with the Commission's prior conclusions, we find that these factors mitigate our concerns about any potential harm.

b. Other Issues

19. *TWT and Level 3 Business Practices.* In comments filed in response to the Public Notice, Proximiti, a Level 3 customer, states that it has experienced service outages in violation of its service agreement with Level 3 and argues that the Commission should suspend consideration of the proposed transaction until Level 3 can show substantial service improvement over a prolonged period of time.⁶¹ CenturyLink and FairPoint request that the Commission direct Level 3 to stop its practice of unreasonably withholding disputed payments for wholesale telecom services.⁶² FSF, a TWT customer, states that it filed an informal complaint against TWT with the Commission's Enforcement Bureau that it will soon convert to a formal complaint under section 208 of the Act,⁶³ arguing that TWT has engaged in illegal practices regarding toll fraud and its customers' ability to block international calls.⁶⁴ It states that TWT does not have the character qualifications to hold its current authorizations and should not be permitted to transfer those assets.⁶⁵ FSF argues that the Commission should deny the transaction or, at a minimum, condition a grant on TWT reforming its operating practices and recompensing parties harmed by its violation of customer agreements.⁶⁶

20. As the Commission has repeatedly held, we will generally not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction at issue.⁶⁷ We find that

⁵⁸ Domestic 214 Application at 10-11; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 1-2 and Attach. at para. 8.

⁵⁹ Domestic 214 Application at 10-11; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 2-3.

⁶⁰ Domestic 214 Application at 8-10; Level 3 Sept. 12, 2014 *Ex Parte* Letter at 1-2.

⁶¹ Proximiti Comments at 1-2.

⁶² CenturyLink Comments at 1, 3-5; FairPoint Reply at 2, 4-5; Letter from Jeffrey S. Lanning, Vice President-Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-104 at 1 (filed Oct. 23, 2014) (CenturyLink Oct. 23, 2014 *Ex Parte* Letter)

⁶³ FSF Opposition at 2. FSF filed its formal complaint on Sept. 11, 2014. *See Foreman Seeley Fountain Inc. v. TW Telecom Holdings, Inc.*, File No. EB-14-MD-010, Formal Complaint Against tw telecom inc. (filed Sept. 11, 2014).

⁶⁴ FSF Opposition at 2-16.

⁶⁵ *Id.* at 1-2, 8.

⁶⁶ *Id.* at 4-16.

⁶⁷ *See Verizon Communications, Inc. and America Móvil, S.A. de C.V., Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico*, WT Docket No. 07-43, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195, 6206-07, para. 25 (2007) (rejecting assertions that a transfer of control should be denied or conditioned based on non-merger-specific issues and finding that applicants were subject to existing requirements). *See Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13929, para. 30, 13974-75, para. 150 (2009) (stating that the Commission will not impose conditions in a merger proceeding to remedy pre-existing harms).

CenturyLink's and FairPoint's arguments regarding disputed payments, FSF's asserted arguments and remedies for its toll fraud issue, and Proximiti's pre-existing quality of service dispute are unrelated to the proposed transaction, are based on arguments about prior conduct, do not rise to the level of calling Applicants' character into question, and are more appropriately resolved through contractual provisions between the parties or through the Commission's complaint process under section 208 of the Act.⁶⁸

21. *Access to Level 3 Conduit*: CenturyLink argues that the merged Level 3/TWT may control a larger share of the Ethernet services market than CenturyLink, and that, overall, the incumbent LECs are no longer monopoly providers for enterprise services and should have access to the facilities of competitive LECs in order to compete for customers.⁶⁹ CenturyLink argues that Level 3 should have a post-merger duty to provide CenturyLink and other incumbent LECs with access to entrance conduit at Level 3's on-net buildings in the same manner that the incumbent LECs are required to provide access to their facilities under section 251(b)(4) of the Act.⁷⁰ It also argues that Level 3's strengthened competitive ability makes it critical for the Commission to quickly grant CenturyLink's pending forbearance petition regarding dominant carrier regulation for enterprise services.⁷¹

22. In the *Local Competition Order*, the Commission stated that section 251(b)(4) of the Act, which obligates a LEC to afford access to rights-of-way "on rates, terms, and conditions that are consistent with section 224" does not grant incumbent LECs the reciprocal right to gain access to the facilities of a competitive LEC.⁷² Consistent with Commission precedent, CenturyLink's request to revisit this determination is an industry-wide issue better addressed in a separate proceeding.⁷³ Further, the Commission is actively undertaking a review of CenturyLink's pending forbearance petition and that

⁶⁸ 47 U.S.C. § 208. With regard to FSF's pending formal complaint described above, the Commission has found that the most appropriate forum to address an alleged violation is in the enforcement proceeding in which the allegations were raised. Post-divestiture, TWT will continue to be subject to action regarding the resolution of pending complaints, and it is thus unnecessary to address FSF's claims here because they are not specific to this transaction. See *Assignment and/or Transfer of Control of Licenses of Time Warner Inc. to Time Warner Cable, Inc.*, MB Docket No. 08-120, WC Docket No. 08-157, Memorandum Opinion and Order, 24 FCC Rcd 879, 891, para. 23 (Media Bur., Wireline Comp. Bur., Wireless Telecom. Bur. 2009) (citing *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 607, para. 309 (2004) (denying arguments that the Commission should delay or condition a transaction based on pending complaints and stating that the applicants continue to be subject to Commission action). We note here that a grant of the Applications is without prejudice to any enforcement action by the Commission for non-compliance with the Act or the Commission's rules. See, e.g., *Applications Granted for the Acquisition of Certain Assets of MexTel Corporation, LLC d/b/a LifeTel*, WC Docket Nos. 13-154 and 13-155, Public Notice, 29 FCC Rcd 5032 (Wireline Comp. Bur. 2014).

⁶⁹ CenturyLink Comments at 7; CenturyLink Oct. 23, 2014 *Ex Parte* Letter at 1.

⁷⁰ CenturyLink Comments at 2, 5-6.

⁷¹ *Id.* at 7; CenturyLink Oct. 23, 2014 *Ex Parte* Letter at 1.

⁷² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15506, 16103, para.1231 (1996) (finding that that section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities of a competitive LEC, and giving "deference to the specific denial of access under section 224 to the more general access provisions of section 251(b)(4)").

⁷³ See, e.g., *Qwest/CenturyLink Order*, 26 FCC Rcd at 4201, para. 18 and n.62 (finding that rate issues related to special access, intercarrier compensation, and pole attachments are better addressed in rulemakings of general applicability or are not specific to the transaction); *Applications of Nextel Partners and Nextel WIP Corp and Sprint Nextel Corporation for Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0002444650 0002444656 0002456809, 21 FCC Rcd 7358, 7364, para. 15 (2006).

review is separate and distinct from the applications we are addressing in this order.⁷⁴ Therefore, these issues are not appropriate for review as part of this transaction.

D. Reclassification of Level 3 International Carriers on the U.S.-Singapore Route

23. At the same time that the Applicants filed their Applications, four subsidiaries of Level 3 – Level 3 Communications, LLC, Level 3 International, Inc., Global Crossing Americas Solutions, Inc., and Global Crossing North America, Inc. (Level 3 International Carriers) – filed petitions pursuant to section 63.13 of the Commission’s rules,⁷⁵ requesting that they be reclassified as non-dominant carriers on the U.S.-Singapore route.⁷⁶ The Level 3 International Carriers are classified as dominant on the U.S.-Singapore route under section 63.10 of the Commission’s rules⁷⁷ due to their affiliation with Singapore Telecommunications LTD (SingTel), a foreign carrier presumed to have market power in Singapore,⁷⁸ and through Temasek, which holds an indirect, controlling interest in SingTel.⁷⁹ According to Applicants, upon consummation of the proposed merger with TWT Parent, Temasek’s indirect interest in Level 3 and the Level 3 International Carriers will decrease to approximately 16.3 percent,⁸⁰ below the Commission’s threshold for affiliation.⁸¹ The Level 3 International Carriers thus request that the Commission reclassify them as non-dominant on the U.S.-Singapore route effective upon consummation of the proposed merger.⁸² No commenter addressed this request.

24. Under our rules applicable to U.S.-international common carriers, a carrier is affiliated with a foreign carrier “if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one.”⁸³ According to the Applicants,

⁷⁴ *Pleading Cycle Established for Comments on CenturyLink Petitions for Forbearance From or Interim Waiver of Dominant Carrier and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, Public Notice 29 FCC Rcd 254 (Wireline Comp. Bur. 2014); *Wireline Competition Bureau Seeks Comment on Appropriate Market Analysis for CenturyLink Forbearance Petition*, WC Docket No. 14-9, Public Notice, DA 14-845 (rel. June 20, 2014).

⁷⁵ 47 C.F.R. § 63.13.

⁷⁶ See *Level 3 Communications, LLC, Level 3 International, Inc., Global Crossing Americas Solutions, Inc., and Global Crossing North America, Inc.*, Joint Petition for Declaratory Ruling to be Reclassified as Non-Dominant on the U.S.-Singapore Route, ISP-PDR-20140707-00005 (Level 3 Communications, LLC), ISP-PDR-20140707-00006 (Global Crossing Americas Solutions, Inc.), ISP-PDR-20140707-00007 (Level 3 International, Inc.), and ISP-PDR-20140707-00008 (Global Crossing North America, Inc.) (filed July 7, 2014) (collectively, Joint Petition).

⁷⁷ 47 C.F.R. § 63.10. Any carrier that is classified as dominant on a U.S.-international route must comply with the requirements set out in section 63.10, including maintaining separate books of account from its affiliated foreign carrier, and filing quarterly reports summarizing the provisioning and maintenance of all basic network services procured from its foreign affiliate. See 47 C.F.R. 63.10 (c), (d), (e).

⁷⁸ See *International Bureau Revises and Reissues the Commission’s List of Foreign Telecommunications Carriers That Are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, 22 FCC Rcd 945, 947 (Int’l Bur. 2007).

⁷⁹ Joint Petition at 1-2. See FCN-NEW-20120615-00006 (Level 3 Communications, LLC); FCN-NEW-20120615-00007 (Global Crossing North America, Inc.); FCN-NEW-20120615-00008 (Global Crossing Americas Solutions, Inc.); and, FCN-NEW-20120615-00010 (Level 3 International, Inc.), *Foreign Carrier Affiliation Notification*, Public Notice, Rep. No. FCN-00111, 27 FCC Rcd 15196 (Int’l Bur. 2012).

⁸⁰ International 214 Applications at 18-19; Joint Petition at 2-3.

⁸¹ Joint Petition at 2-3.

⁸² *Id.* at 3.

⁸³ See 47 C.F.R. § 63.09(e) (“Two entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one. Also, a U.S. carrier is *affiliated* with two or more foreign carriers if the foreign carriers, or entities that control them, together directly or indirectly own more than 25 percent of the capital stock of, or control, the U.S. carrier and those

(continued...)

upon consummation of the proposed merger, Temasek's ownership interest in Level 3 will decrease to 16.3 percent due to Level 3's issuance of common stock as part of the merger.⁸⁴ When Temasek's ownership interest in Level 3 falls below 25 percent, Level 3 will no longer be affiliated with SingTel under our rules. We thus grant the request of the Level 3 International carriers to be reclassified as non-dominant on the U.S.-Singapore route upon consummation of the proposed merger. We note, however, that should Temasek's ownership interest in Level 3 exceed 25 percent, the Level 3 International Carriers are required to notify the Commission.⁸⁵

E. National Security, Law Enforcement, Foreign Policy, and Trade Concerns

25. When analyzing a transfer of control or assignment application that involves foreign ownership, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch.⁸⁶ Applicants note that Level 3 entered into an agreement with the Executive Branch Agencies on September 26, 2011 regarding national security, law enforcement, and public safety issues (September 26, 2011 Agreement) and that the Commission conditioned grant of Level 3's applications to acquire Global Crossing Ltd. on compliance with the agreement.⁸⁷ Applicants state that Level 3 commits to extend the commitments it made in the September 26, 2011 Agreement to TWT and request that the Commission condition grant of the pending applications on Level 3's continued compliance with the September 26, 2011 Agreement.⁸⁸ On October 22, 2014, the Executive Branch Agencies filed a letter stating that, based on Level 3's commitment, information provided to the Executive Branch Agencies by the Applicants, and their analysis of potential national security, law enforcement, and public safety issues, the Executive Branch Agencies have no objection to the grant of the applications provided that it is conditioned on continuing compliance by Level 3 with the September 26, 2011 Agreement.⁸⁹

26. 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.⁹⁰ 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.⁹¹ In accordance with the request of Level 3 and the Executive Branch Agencies, we condition our grant of the applications on Applicants' continuing compliance with the commitments set forth in the September 26, 2011 Agreement.⁹² The October 22, 2014 letter from the Executive Branch

(Continued from previous page) _____

foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of international basic telecommunications services in the United States.”)).

⁸⁴ Domestic 214 Application at 7-8. *See also* Joint Petition at 2-3.

⁸⁵ *See* 47 C.F.R. § 63.11.

⁸⁶ *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, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891, 23918-21, paras. 59-66 (1997) (*Foreign Participation Order*).

⁸⁷ International Application at 2-3 (citing *Level 3/Global Crossing Order*, 26 FCC Rcd at 14081, para. 68).

⁸⁸ International Application at 3, 28-29.

⁸⁹ DOJ Oct. 22, 2014 *Ex Parte* Letter.

⁹⁰ *See Foreign Participation Order*, 12 FCC Rcd at 23918-21, paras. 59-66.

⁹¹ *Id.* at 23919, para. 62.

⁹² 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 to meet a condition of the license may also result in monetary sanctions or other enforcement action by the Commission.

Agencies and the September 26, 2011 agreement are available as part of the public record in this proceeding.⁹³

IV. CONCLUSION

27. As discussed above, based on our review of the record, we find that the proposed transaction is likely to result in some public interest benefits and is unlikely to result in any significant public interest harms. The combined company's broader service footprint, complimentary networks, and greater scale and scope create a potentially stronger competitor to the incumbent LEC, especially in light of the combined company's ability to reach more customers with its network and to offer new services to TWT's customers. We find that these likely benefits outweigh any potential harm that could arise from eliminating TWT as a competitor in the limited area in which both companies compete. Accordingly, we conclude that granting the Applications serves the public interest.

V. ORDERING CLAUSES

28. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i)–(j), 5(c), and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)–(j), 155(c), 214, section 2 of the Cable Landing License Act, 47 U.S.C. § 35, Executive Order No. 10530, and sections 0.51, 0.91, 0.261, and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.51, 0.91, 0.261, 0.291, the Applications to transfer control of domestic and international section 214 authorizations and the cable landing license ARE GRANTED.

29. IT IS FURTHER ORDERED that, pursuant to sections 63.10 and 63.13 of the Commission's Rules, 47 C.F.R. §§ 63.10, 63.13, the petitions of Level 3 Communications, LLC, Level 3 International, Inc., Global Crossing Americas Solutions, Inc., and Global Crossing North America, Inc. to be reclassified as non-dominant carriers on the U.S-Singapore route ARE GRANTED to the extent discussed herein.

30. 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, grant of the applications IS CONDITIONED UPON compliance by Level 3 with the provisions of the Agreement between Level 3 and the Department of Justice, the Department of Defense, and the Department of Homeland Security, dated September 26, 2011, which is publicly available on the Commission's website.⁹⁴

⁹³ See DOJ Oct. 22, 2014 *Ex Parte* Letter; September 26, 2011 Security Agreement, WC Docket No. 14-104 (filed Oct. 24, 2014) (Sept. 26, 2011 Security Agreement).

⁹⁴ See Sept. 26, 2011 Security Agreement.

31. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this Memorandum Opinion and Order IS EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, may be filed within thirty days of the date of public notice of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief, Wireline Competition Bureau

Mindel De La Torre
Chief, International Bureau

APPENDIX

Section 214 Authorizations

A. International

<u>File Number</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
ITC-T/C-20140707-00193	tw telecom holdings inc.	ITC-214-20000927-00570

B. Domestic

The domestic section 214 application for consent to transfer control of TWT Subsidiaries to Level 3 is granted.

Cable Landing License

<u>File Number</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
SCL-T/C-20140707-00005	tw telecom of Hawaii l.p.	SCL-MOD-20001025-00036 SCL-MOD-20131114-00012

Petitions for Declaratory Ruling

<u>File Number</u>	<u>Petitioner</u>
ISP-PDR-20140707-00005	Level 3 Communications, LLC
ISP-PDR-20140707-00006	Global Crossing Americas Solutions, Inc.
ISP-PDR-20140707-00007	Level 3 International, Inc.
ISP-PDR-20140707-00008	Global Crossing North America, Inc.