UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CENTURYLINK, INC., and LEVEL 3 COMMUNICATIONS, INC. Defendants.	Civil Action No. 17-cv-2028

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant CenturyLink, Inc. and defendant Level 3 Communications, Inc. entered into an agreement, dated October 31, 2016, pursuant to which CenturyLink would acquire Level 3. The United States filed a civil antitrust Complaint on October 2, 2017, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be a substantial lessening of competition in the markets for: (1) the provision of fiber-based enterprise and wholesale telecommunications services providing local connectivity to customer premises in the Albuquerque, New Mexico; Boise, Idaho[1]; and Tucson, Arizona Metropolitan Statistical Areas[2] (the "Divestiture MSAs"), and (2) the sale of dark fiber connecting the endpoints specified in Appendix B of the proposed Final Judgment (the "Intercity Routes"), all in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. As a result of this loss of competition, prices for fiber-based enterprise and wholesale telecommunications services providing local connectivity to customer premises in the Divestiture MSAs would likely increase and quality of service would likely decrease, and prices for dark fiber on the Intercity Routes would likely increase and availability would likely decrease.

At the same time the Complaint was filed, the United States also filed an Asset Preservation Stipulation and Order and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required: (1) to divest to an acquirer (or acquirers) all the assets used by Level 3 exclusively or primarily to support provision of telecommunications services to enterprise and wholesale customer locations in Albuquerque, Boise, and Tucson (the "MSA Divestiture Assets"), and (2) to enter into indefeasible right of use ("IRU") agreements with an acquirer for twenty-four strands of dark fiber on the Intercity Routes as well as dark fiber necessary to connect those strands with certain other routes (the "Intercity

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[1] The full name of this MSA as defined by the Office of Management and Budget is Boise City-Nampa, Idaho.

[2] An MSA is a geographical region defined by the Office of Management and Budget for use by federal statistical agencies, such as the Census Bureau. It is based on the concept of a core urban area with a large concentrated population, plus adjacent communities having close economic and social ties to the core.

Dark Fiber Assets").

Under the terms of the Asset Preservation Stipulation and Order, defendants will take steps to ensure that the MSA Divestiture Assets are operated as ongoing, economically viable competitive assets and remain uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture. Subject to the approval of the United States, defendants shall appoint a person or persons to oversee the MSA Divestiture Assets. This person shall have complete, independent managerial responsibility for the MSA Divestiture Assets. Defendants will also preserve, maintain and take all actions necessary to be able to effectuate the sale of the Intercity Dark Fiber Assets.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Defendant CenturyLink is a Louisiana corporation headquartered in Monroe, Louisiana. It is the third-largest wireline telecommunications company in the United States and the incumbent Local Exchange Carrier ("ILEC")[3] in portions of 37 states. CenturyLink also has one of the most extensive physical fiber networks in the United States, including considerable

[3] An incumbent local exchange carrier (ILEC) is the telephone company that was the sole provider of local exchange service (local phone service) in a given local area prior to passage of the 1996 Telecommunications Act, which allowed for competitive local exchange carriers (CLECs) to compete for this local service.

intercity fiber infrastructure. As of December 31, 2016, CenturyLink owned and operated a 360,000 route-mile global network, including a 265,000-route-mile U.S. fiber network, and generated 2016 operating revenues of $17.47 billion.

Defendant Level 3 is a Delaware corporation headquartered in Broomfield, Colorado. It is one of the largest wireline telecommunications companies in the United States and owns significant local network assets, comprised of metropolitan area network components and direct fiber connections to numerous commercial buildings throughout the United States, including within portions of CenturyLink's ILEC territory. Level 3 also operates one of the most extensive physical fiber networks in the United States, including sizeable intercity fiber infrastructure. Level 3 owns and operates 200,000 route-miles of global fiber and generated $8.17 billion of operating revenue in 2016.

On October 31, 2016, CenturyLink and Level 3 entered into an Agreement and Plan of Merger whereby CenturyLink will acquire Level 3 for approximately $34 billion.

B. Anticompetitive Effects of the Proposed Transaction

Wireline telecommunications infrastructure is critical in transporting the data that individuals, businesses, and other entities transmit. Among the key components of this infrastructure are: the fiber strands connecting an individual building to a metropolitan area network (often referred to as the last-mile connection); the fiber strands and related equipment comprising a metropolitan area network that serve an entire city or MSA; and the intercity fiber strands connecting cities to one another.

1) Fiber-Based Enterprise and Wholesale Telecommunications Services Providing Local Connectivity to Customer Premises in the Divestiture MSAs

Enterprise and wholesale customers[4] of all sizes rely on last-mile connections to link their premises to a larger metropolitan area network and to all points beyond. In the Divestiture MSAs, defendants have two of the three largest fiber-based metropolitan area networks and own among the largest number of last-mile connections of any telecommunications providers.

CenturyLink has the largest number of last-mile connections in each of the Divestiture MSAs, serving the majority of buildings that require high-bandwidth, high-reliability telecommunications services. In each of the Divestiture MSAs, CenturyLink owns fiber connections to more than a thousand buildings. Level 3 has fiber connections to several hundred buildings in each of the Divestiture MSAs, making it one of the three largest fiber-based networks in each of the Divestiture MSAs. In many buildings in the Divestiture MSAs, CenturyLink and Level 3 control the only last-mile fiber connections and are the only available choices for customers in those buildings. In other buildings in the Divestiture MSAs, CenturyLink and Level 3 are two of only three significant providers, making them two of only three available choices. And even where CenturyLink and Level 3 do not presently have fiber connections, they still may be the best alternative for a substantial number of buildings because they are the only two providers with metropolitan area network fiber located close enough to connect economically.

Some customers within the Divestiture MSAs have multiple locations throughout an

[4] Enterprise customers are broadly defined here to include businesses of varying sizes and institutional customers such as community colleges, hospitals and government agencies. Wholesale customers are, typically, telecommunications carriers seeking to reach customer locations in areas where they do not have wireline infrastructure.

individual MSA. These multi-location customers often prefer to buy telecommunications services for all of their locations within the MSA from a single provider. Defendants CenturyLink and Level 3 both have an extensive fiber footprint in each of the Divestiture MSAs. As a result, CenturyLink and Level 3 are often each other's closest competitors for these multi-location customers.

Currently, CenturyLink and Level 3 compete head-to-head to provide these last-mile fiber-based telecommunications services to single and multi-location customers in the Divestiture MSAs. Customers benefit from this competition through lower prices and higher quality service. CenturyLink's acquisition of Level 3 likely would result in a loss of this competition, leading to increased prices and decreased service quality for such last-mile connections.

2) Intercity Dark Fiber

CenturyLink and Level 3 both own substantial networks of fiber-optic cable connecting cities throughout the United States. By placing electronic equipment on either end of the fiber, fiber owners can "light" the fiber and use it to transmit large volumes of data between cities. Fiber owners who light the cable can then charge customers to transport data over the fiber (a product called lit services). Customers who purchase lit services typically buy a certain amount of data capacity between two specified endpoints, pay on a monthly basis, and rely on the fiber provider to manage their data traffic.

Fiber owners can also sell dark fiber, where customers purchase rights to the underlying fibers, provide their own electronic equipment to light the fiber, and manage their own networks. Dark fiber is generally sold through IRUs – a type of long-term lease – which allow the customer to arrange for its own equipment to be placed on the fiber, but permits the grantor to retain responsibility for maintaining the fiber and dealing with outages or cuts. Customers who buy intercity dark fiber using IRUs, such as webscale companies[5] and financial institutions, require dark fiber's scalability, capacity, flexibility, and security.

CenturyLink and Level 3 are two of only a handful of companies with robust nationwide intercity fiber networks, and two of only a few companies in the United States that sell intercity dark fiber. On many of the Intercity Routes, CenturyLink and Level 3 are the only two, or two of only three, providers who sell intercity dark fiber. In addition, customers typically require dark fiber across multiple routes and prefer dark fiber providers who can provide them with contiguous routes, including those spanning from coast to coast. CenturyLink and Level 3 are two of only three intercity dark fiber providers with at least one contiguous route connecting the West Coast to the East Coast.

Competition between CenturyLink and Level 3 has led to lower prices for and increased availability of intercity dark fiber. This acquisition will eliminate that competition, likely resulting in increased prices and decreased availability.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will eliminate the anticipated anticompetitive effects of the acquisition in the markets for: (1) the provision of fiber-based enterprise and wholesale telecommunications services providing local connectivity to customer premises in the Divestiture MSAs, and (2) the sale of dark fiber on the Intercity Routes, by

[5] Webscale companies are those primarily engaged in the business of providing large amounts of data to end users through web-based services; they require facilities and infrastructure to create, store, and then transport that data across long distances.

establishing independent and economically viable competitors in each of these markets. The proposed Final Judgment requires defendants, within 120 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to:

(1) divest the MSA Divestiture Assets to a single acquirer in each Divestiture MSA (while each MSA network may not have more than one acquirer, each of the MSAs may have a different acquirer), on terms acceptable to the United States, and

(2) sell the Intercity Dark Fiber Assets to a single acquirer on terms acceptable to the United States.

Both the MSA Divestiture Assets and the Intercity Dark Fiber Assets are attractive assets that should draw suitable acquirers with sufficient expertise to accomplish the divestitures expeditiously. Prompt divestitures are important both to minimize customer uncertainty and to maintain the pre-merger competitiveness of the markets in question. Although the United States expects the divestitures to be completed within the 120-day period, in order to preserve flexibility to address unanticipated circumstances the United States may, in its sole discretion, agree to one or more extensions of this time period not to exceed sixty calendar days in total, and shall notify the Court in such circumstances.

The divestitures shall be made to an acquirer (or acquirers) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the provision of the relevant telecommunications services in the Divestiture MSAs or the sale of intercity dark fiber.

A. MSA Divestiture Assets

With regard to the Divestiture MSAs, the United States is requiring the divestiture of

Level 3's entire fiber-based metropolitan area network, including all its last-mile connections. This will encompass all assets, tangible and intangible, used exclusively or primarily to support Level 3's provision of fiber-based telecommunications services to customer locations in the Divestiture MSAs, including, but not limited to, assets such as metropolitan fiber switching and routing equipment, building laterals, ownership interests in and access rights to all conduits, duets and other containing and supporting structures, and repair and performance records.

The MSA Divestiture Assets shall also include other assets used by Level 3 for its provision of telecommunications services to customer locations in each Divestiture MSA, including, but not limited to, all licenses, permits and authorizations related to the MSA Divestiture Assets issued by any governmental organization to the extent that such licenses, permits and authorizations are transferrable and such transfer would not prevent Level 3 from providing telecommunications services in the three Divestiture MSAs; all contracts (except as otherwise excluded by the terms of this Final Judgment), teaming arrangements, agreements, leases, commitments, certifications, and understandings, including supply agreements; customer lists and addresses; all repair and performance records relating to the MSA Divestiture Assets; and all other records relating to the MSA Divestiture Assets reasonably required to permit the Acquirer to conduct a thorough due diligence review of and to operate the MSA Divestiture Assets. The MSA Divestiture Assets shall not include assets, wherever located, used exclusively or primarily in or in support of Level 3's provision of telecommunications services outside the Divestiture MSAs, including the provision of telecommunications services between MSAs.

Based on its investigation of the proposed transaction, the United States believes that the divestiture of the entirety of Level 3's telecommunications networks in each of the Divestiture

MSAs will effectively replace the competition that will be lost through this acquisition. Selling the MSA Divestiture Assets as an ongoing competitive business in each Divestiture MSA will provide the acquirer(s) with the ability and incentive to continue to invest in and expand the acquired business, replicating as closely as possible the competitive conditions in each of the Divestiture MSAs prior to the merger. The particular nature of the competitive problem – including a potential substantial lessening of competition for last-mile services in a large number of commercial buildings throughout each of the Divestiture MSAs – was such that a divestiture of fiber only to certain buildings would be insufficient to remedy the competitive problem and re-create a viable competitor; rather, a divestiture of the network assets throughout each MSA was appropriate in these circumstances.

The United States believes that having the acquirer operate as a completely separate competitive entity as quickly as possible is the most effective competitive outcome and expects that an acquirer with telecommunications experience will be able to do so within one year. However, in order to avoid unnecessary disruptions while the acquirer is setting up its business, at the option of the acquirer(s), defendants are also required to enter into a Transition Services Agreement for any services that are reasonably necessary for the acquirer(s) to maintain, operate, provision, monitor, or otherwise support the MSA Divestiture Assets, including any required back office and information technology services. This agreement will last for no more than twelve (12) months, although the United States may approve one or more extensions for a period of up to an additional twelve (12) months.

In addition, subject to certain conditions, upon closing of the divestiture sale in each of the Divestiture MSAs, defendants, for a period of two years or the expiration of the customer's contract (whichever is shorter), will release Level 3's customers with service locations in that MSA from their contractual obligations for those locations, including otherwise applicable termination fees, to enable the customers to select the acquirer as their telecommunications services provider. Each Level 3 customer who has locations in multiple MSAs will similarly be released from its contracts (including at its locations outside of the Divestiture MSAs) to allow it to switch to the acquirer, if the monthly recurring revenue Level 3 earns from that customer is greater within the Divestiture MSAs than from the aggregate of all locations outside those MSAs. Within fifteen business days of a divestiture in a Divestiture MSA, defendants will notify all MSA customers of the divestiture and of their options under the proposed Final Judgment. The acquirer will have the option to include its own customer notification with that of the defendants.

In requiring that customers be released from their contracts rather than requiring that customer contracts be divested along with the other assets, the United States is balancing the competitive benefits of the divestiture against the potential imposition of burdens on customers. For example, Level 3 service contracts in the Divestiture MSAs may include a combination of basic connectivity services and other value-added services, such as services that prioritize routing across a customer's network. The value-added services that an acquirer chooses to offer may differ somewhat from the value-added services offered by Level 3. Thus, divesting customer contracts in specific circumstances would either impose a burden on the customer to accept a different value-added service package than the one they initially bargained for, or would impose a burden on the acquirer to replicate the exact services in Level 3's customer contracts. Requiring that customers be released from their contracts for a defined period of time will, however, allow the acquirer to compete for all customers in each of the Divestiture MSAs immediately upon completion of the divestiture.

For a period of two years, defendants are also prohibited from initiating customer-specific communications to solicit any customers who have switched service to the acquirer(s), but can respond to inquiries from the customer or enter into negotiations with the customer at the customer's request. This strikes a balance between enabling an acquirer to establish its business while at the same time generally giving customers at least two meaningful alternatives. The provisions of the proposed Final Judgment allowing customers with locations in the Divestiture MSAs to switch their service to the acquirer(s) free of contractual penalties should, in these circumstances, be sufficient to provide the acquirer(s) with adequate business opportunities and revenue streams while at the same time maximizing customer choice and avoiding customer disruption.

Subject to the United States' approval, defendants may negotiate with each acquirer of MSA Divestiture Assets to lease back from that acquirer for a period of two years all lateral connections and metropolitan area network needed for defendants to support Level 3 customers that choose to remain customers of defendants. This will allow defendants to continue to provide service without interruption, at least until the defendants have time to transition those customers to its own facilities or make other arrangements.

B. Intercity Dark Fiber Assets

Under the proposed Final Judgment, defendants are also required to sell, to a single acquirer, IRUs for twenty-four strands of dark fiber on each of the Intercity Routes. The proposed Final Judgment requires that the Intercity Dark Fiber Assets be divested to a single acquirer because intercity dark fiber customers find it more efficient to deal with one fiber owner than to piece together networks from multiple owners. In addition, divesting all the Intercity Dark Fiber Assets to a single acquirer is most likely to result in the creation of a viable, competitive dark fiber provider, thereby replicating the pre-merger competitive market conditions. Twenty-four fiber strands will be sufficient to allow the acquirer to compete with the combined company on the overlap routes.

Defendants are also required to include all the associated rights necessary for the acquirer to resell the dark fiber to end users and to permit the acquirer, or any of its assignees, to light the fiber and use it to provide telecommunications services. The IRUs will have a term of twenty-five years with two five-year renewal options, giving the acquirer the option to control the fiber for up to thirty-five years.[6] The conveyance of intercity dark fiber via a long-term IRU is typical industry practice. This structure ensures that the grantee can use the fiber as it sees fit, but the fiber grantor remains responsible for handling the complexities of ownership, such as maintaining rights-of-way and repairing fiber cuts. The twenty-five year terms is also consistent with the industry practice, as purchasers of intercity dark fiber typically seek IRUs in the range of 10-30 years. If, however, new technologies emerge or the market shifts, the acquirer will have the flexibility to end its lease after 25 years if it no longer sees value in keeping these IRUs.

Defendants are also required to provide a contiguous network of fiber by ensuring that fiber on all of the Intercity Routes sharing an endpoint connect with one another or, where they do not connect, by constructing a connection to link them. Connecting the fibers together into

[6] These extensions will be at a price not to exceed 20% of the initial IRU fee. This provision ensures that defendants will not be able to charge exorbitant fees to discourage the acquirer from renewing.

one network is important because it will provide the acquirer with more attractive inventory, and, importantly, will provide a cross-country route appealing to intercity dark fiber customers that demand a path to carry their data between the dense population areas on the coasts.

The proposed Final Judgment ensures that the Intercity Dark Fiber Assets include all of the rights necessary for the acquirer both to resell the fiber to end users and to allow those end users to be able to light the fiber themselves. Although the Division expects the acquirer to sell some of the Intercity Dark Fiber Assets as dark fiber to end users, the acquirer also may want to sell lit services in conjunction with the dark fiber or use some of the fiber strands to support its own telecommunications infrastructure. This is permissible under the proposed Final Judgment; because sellers of dark fiber frequently sell such fiber in conjunction with lit services, the ability to use the Intercity Dark Fiber Assets to provide both lit services and dark fiber should help ensure that the acquirer will be an effective, viable competitor on the Intercity Routes. The acquirer must, however, have the intention and experience necessary to ensure that the divestiture of the Intercity Dark Fiber Assets will replace competition in the market for intercity dark fiber lost through the acquisition.

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In the event that defendants do not accomplish the divestitures within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States and approved by the Court to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the United States and, as appropriate, the Court setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as it deems appropriate, in order to carry out the purpose of the Final Judgment, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in all of the markets discussed above.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

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Chief, Telecommunications and Broadband Section
Antitrust Division
United States Department of Justice
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The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against CenturyLink's acquisition of Level 3. The

United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the markets for: (1) the provision of fiber-based enterprise and wholesale telecommunications services providing local connectivity to customer premises in the Divestiture MSAs, and (2) the sale of dark fiber on the Intercity Routes, as identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the

defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad discretion as to the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable"); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[7]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other factors, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62; *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 151-52 (D.D.C. 2016) (considering the decree's clarity, sufficiency of compliance mechanisms, and third-party impact). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*,

[7] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

56 F.3d at 1460-62; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[8] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *Iron Mountain*, 217 F. Supp. 3d at 151 (noting that a court should not reject the proposed remedies because it believes others are preferable); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case.").

[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 75 ("[R]oom must be made for the government to grant concessions in the negotiation process for settlements." (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 15)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 ("[A] court must simply determine 'whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable.'" (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 15-16)); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 ("[A] court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act."). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[9] "A court can make

[9] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("The Tunney Act expressly allows the court to make its public interest determination on the basis of the

its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 14, 2017

Respectfully,

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competitive impact statement and response to comments alone."); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977 U.S. Dist. LEXIS 15858, at *22 (W.D. Mo. May 17, 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

CERTIFICATE OF SERVICE

I, Scott Reiter, hereby certify that on November 14, 2017, I caused copies of the foregoing Competitive Impact Statement to be served upon defendants CenturyLink, Inc. and Level 3 Communications, Inc. through the ECF system and by mailing the documents electronically to the duly authorized legal representatives of the defendants, as follows:

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