UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CENTURYLINK, INC. and LEVEL 3 COMMUNICATIONS, INC., Defendants.	CASE NO.: 1:17-cv-02028 JUDGE: Ketanji Brown Jackson

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION TO MODIFY FINAL JUDGMENT AND ENTER AMENDED FINAL JUDGMENT

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I. INTRODUCTION

Defendant CenturyLink, Inc. ("CenturyLink") has repeatedly and over at least eighteen months violated this Court's March 6, 2018, Final Judgment (ECF No. 11). That Final Judgment permitted CenturyLink to acquire Level 3 Communications, Inc. ("Level 3"), but required in three Metropolitan Statistical Areas ("MSAs") where the merger would have harmed competition divestiture of Level 3's local fiber-optic networks and a release of Level 3 customers in those MSAs from their contractual obligations for any otherwise applicable termination fees. The Final Judgment also prohibited CenturyLink from contacting former Level 3 customers in those MSAs who elected to switch to the Acquirer of the Level 3 assets under the terms of the Final Judgment.

While Defendants promptly consummated their merger and divested the assets in accordance with the Final Judgment, Defendant CenturyLink failed to comply with the Final Judgment's provision prohibiting it from initiating contact with the former Level 3 customers who elected to switch to the Acquirer in the Boise City-Nampa, Idaho MSA ("Boise MSA"). CenturyLink does not deny the United States' allegations, has agreed to modify the Final Judgment as set forth in the concurrently filed proposed Amended Final Judgment ("proposed AFJ"), and does not oppose the United States' Motion. For the Court's convenience, a redline comparison of the March 6, 2018, Final Judgment and the proposed AFJ is attached hereto as Exhibit 1.

II. THE 2018 FINAL JUDGMENT

In 2016, CenturyLink and Level 3 were two of the largest wireline telecommunications service providers in the United States. They competed to provide telecommunications services to enterprise and wholesale customers, and they competed to provide intercity dark fiber.

On October 31, 2016, CenturyLink and Level 3 entered into an agreement whereby CenturyLink would acquire Level 3. The United States conducted an investigation into the proposed merger and ultimately concluded that, without divestitures and other relief, the proposed merger would likely harm competition in the markets for fiber-based enterprise and wholesale telecommunications providing local connectivity in three MSAs, including the Boise MSA, and for Intercity Dark Fiber connecting thirty city pairs within the United States.

On October 2, 2017, the United States filed a civil antitrust Complaint in this Court seeking to enjoin the proposed merger of CenturyLink and Level 3. At the same time, the parties agreed to a proposed Final Judgment designed to eliminate the acquisition's anticompetitive effects. That proposed Final Judgment contained a variety of terms and commitments negotiated between the United States and Defendants. Both CenturyLink and Level 3 agreed that the Court could enter the Final Judgment and committed to comply with its terms.

In the proposed Final Judgment, CenturyLink and Level 3 agreed to divest Level 3's local fiber-optic networks in the three MSAs of concern, to divest certain intercity dark fiber facilities, and to abide by several other provisions intended to ensure that the purchasers of the divested assets would be able to compete in the relevant markets. In addition, Defendants agreed in Section IV of the Final Judgment to:

1. Release the MSA customers from their contractual obligations for any otherwise applicable termination fees for telecommunications services provided by Level 3 at locations within the applicable Divestiture MSAs;[1] and

2. For a period of two years following the entry of the Final Judgment not to initiate customer-specific communications to solicit any MSA customer or Majority MSA customer to provide any telecommunications services to locations for which such customers have elected to use an Acquirer as its provider of telecommunications services.[2]

[1] Proposed Final Judgment, § IV.K(1), ECF No. 2-2 (Oct. 2, 2017).

[2] Proposed Final Judgment § IV.L, ECF No. 2-2 (Oct. 2, 2017).

On March 6, 2018, this Court entered the Final Judgment. In entering the Final Judgment, the Court found "the essence of this Final Judgment is . . . the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened."[3] The Court also retained "jurisdiction to enable any party to this Final Judgment to apply to Court at any time for further orders and directions as may be necessary or appropriate . . . to modify any of its provisions, to enforce compliance, and to punish violations of its provisions."[4]

III. CENTURYLINK'S VIOLATIONS OF THE FINAL JUDGMENT

In violation of the non-solicitation provision of Paragraph IV.L of the Final Judgment, CenturyLink's employees initiated customer-specific communications to customers in the Boise MSA who chose to switch from Level 3 to Syringa, the acquirer of the Boise MSA Divestiture Assets. Specifically, on over 70 separate occasions, CenturyLink employees working for the company's "Inside Sales Channel" contacted former customers of Level 3 in the Boise MSA in an attempt to solicit their business. These violations began as early as May 2018 and recurred for more than a year, with the most recent violation occurring as recently as January 27, 2020.

IV. THE UNITED STATES AND CENTURYLINK HAVE AGREED TO MODIFY THE FINAL JUDGMENT TO ADDRESS THE UNITED STATES' CONCERNS

As set forth in the proposed AFJ, CenturyLink has agreed to undertake certain steps to ensure that it does not commit additional violations of the Final Judgment.

[3] Final Judgment at 1, ECF No. 11 (Mar. 6, 2018).

[4] Final Judgment § XIII, ECF No. 11 (Mar. 6, 2018).

CenturyLink has agreed to modify Paragraph IV.L, as it relates to the Boise MSA, by extending up to two years the prohibition against initiating contact with former Level 3 customers and by clarifying permissible contacts by CenturyLink's employees and contractors. These modifications will ensure that the acquirer of the Boise MSA Divestiture Assets will be free from CenturyLink's' prior tactics and will enable the acquirer to become a more established competitor while allowing CenturyLink to serve its customers efficiently.

CenturyLink has also agreed, in Section XVI of the proposed AFJ, to the appointment of an independent Monitoring Trustee charged with "the power and authority to monitor CenturyLink's compliance with the terms of" the proposed AFJ, as well as "other powers as the Court deems appropriate." To that end, the Monitoring Trustee's responsibilities include investigating and reporting on CenturyLink's compliance with the proposed AFJ, including by providing periodic reports to the United States, and recommending appropriate remedies should violations occur. The Monitoring Trustee will be selected by the United States after consultation with CenturyLink.

CenturyLink has further agreed, in Section XVII of the proposed AFJ, to incorporate four new procedural provisions designed to promote compliance and make the enforcement of the proposed AFJ as effective as possible. The United States now includes these provisions in all new proposed Final Judgments in antitrust matters, and it has included them by agreement with parties in its recent civil merger and civil non-merger settlements.[5] In these four new procedural provisions:

[5] *See, e.g., United States v. ZF Friedrichshafen AG*, No. 1:20-cv-00182, 2020 WL 3047519 (D.D.C. Apr. 27, 2020); *United States v. Nat'l Ass'n for Coll. Admission Counseling*, No. 1:19-cv-03706, 2020 WL 3044153 (D.D.C. Apr. 17, 2020); *United States v. Deutsche Telekom AG*, No. 1:19-cv-02232, 2020 WL 2481785 (D.D.C. Apr. 1, 2020); *United States v. Symrise AG*, No. 1:19-cv-03263, 2020 WL 3047480 (D.D.C. Mar. 12, 2020); *United States, v. Nexstar Media Grp.*, No. 1:19-cv-2295, 2020 WL 1809727 (D.D.C. Feb. 10, 2020); *United States v. Ticketmaster Entm't, Inc.*, No. 1:10-cv-00139, 2020 WL 1061445 (D.D.C. Jan. 28, 2020); *United States v. Harris Corp.*, No. 1:19-cv-01809, 2019 WL 6043787 (D.D.C. Oct. 10, 2019); *United States v. Canon Inc.*, No. 1:19-cv-1680, 2019

- CenturyLink has agreed that in any future civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Amended Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence;
- The parties affirm that the proposed AFJ was drafted to restore competition that would otherwise have been harmed by the underlying merger between CenturyLink and Level 3. CenturyLink agrees that it may be held in contempt if it fails to comply with any provision of the proposed AFJ that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose;
- In any enforcement proceeding in which the Court finds that CenturyLink has violated this Amended Final Judgment, CenturyLink has agreed that the United States may apply to the Court for a one-time extension of this Amended Final Judgment, together with other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Amended Final Judgment against CenturyLink, whether litigated or resolved before litigation, CenturyLink agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation; and
- CenturyLink has agreed that the United States may file an action against CenturyLink for violating the Amended Final Judgment for up to four years after the proposed AFJ has expired or terminated. This provision is meant to address, *inter alia*, instances where

WL 5389987 (D.D.C. Oct. 8, 2019); *United States v. Amcor Ltd.*, No. 1:19-cv-1592, 2019 WL 4595184 (D.D.C. Sept. 11, 2019).

evidence that a violation of the proposed AFJ occurred during the term of the proposed AFJ is not discovered until after the proposed AFJ has expired or been terminated, or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the proposed AFJ has expired or been terminated. This provision, therefore, makes clear that the United States may still challenge a violation that occurred during the term of the proposed AFJ for four years after the proposed AFJ has expired or been terminated.

Finally, CenturyLink has also agreed to reimburse the United States $250,000 for its costs and attorney fees incurred in investigating and prosecuting this action.

V. MODIFICATION OF THE FINAL JUDGMENT IS IN THE PUBLIC INTEREST

A. Legal Standard

On March 6, 2018, this Court held that entry of the Final Judgment was in the public interest and entered its Order.[6] This Court has jurisdiction to modify the Final Judgment pursuant to Section XIII of the Final Judgment,[7] Federal Rule of Civil Procedure 60(b)(5), and the Court's inherent authority to enforce its lawful orders, including the "power to construe and interpret the language of the judgment"[8] and to modify a decree of injunctive relief.[9] Moreover, the Final Judgment expressly contemplates the Court's authority to grant an extension to all or

[6] Final Judgment § XV, ECF No. 11, (Mar. 6, 2018) ("Entry of this Final Judgment is in the public interest.").

[7] Section XIII of the Final Judgment states that the Court "retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions." Final Judgment § XIII, ECF No. 11 (Mar. 6, 2018).

[8] *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 12 (D.D.C. 2004).

[9] *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 167 (D.D.C. 2008) (finding that in addition to authority under a final judgment, "[t]he Court may also modify the Final Judgments under its power in 'equity to modify a decree of injunctive relief,' which the D.C. Circuit has described as 'long-established, broad, and flexible.'" (quoting *United States v. Western Elec. Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995)).

part of the decree, providing that the decree would expire ten years from the date of entry "[u]nless this Court grants an extension."[10]

Where, as in this case, the parties have consented to a proposed modification of an antitrust judgment, the issue before the Court is whether the modification is in the public interest. The court should "approve an uncontested modification so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today."[11] The "district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result – perhaps akin to the confidence that would justify a court in overturning the predictive judgment of an administrative agency."[12]

The public interest standard to be applied by the district court is the same one used to review an initial proposed final judgment in a government antitrust case.[13] It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition.[14]

The Court's role in determining whether the initial entry of a proposed final judgment is in the public interest is not to determine what settlement would best serve society, but only to determine whether entering the proposed final judgment would be in the public interest. It should so determine and enter the proposed final judgment unless it cannot find that the government's explanation of why the proposed final judgment would be in the public interest is reasonable, or finds that the government has abused its discretion or failed to discharge its duty

[10] Final Judgment § XIV, ECF No. 11 (Mar. 6, 2018).

[11] *United States v. Western Elec. Co.* (*Western Elec. I*), 900 F.2d 283, 307 (D.C. Cir. 1990).

[12] *United States v. Western Elec. Co.* (*Western Elec. II*), 993 F.2d 1572, 1577 (D.C. Cir. 1993).

[13] *See Western Elec. I*, 900 F.2d at 295; *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[14] *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest").

to the public in consenting to the proposed final judgment.[15] The Court's role is to "insur[e] that the government has not breached its duty to the public in consenting to the decree."[16]

As the public interest standard for reviewing a modification to a Final Judgment is identical to the standard for deciding whether to initially enter it, the Court should conclude that modifying the Final Judgment is in the public interest if the United States has offered a reasonable explanation of why the modification vindicates the public interest and there is no showing of abuse of discretion affecting the United States' recommendation.

B. The Proposed Modification Will Advance the Public Interest

CenturyLink's repeated violations of the Final Judgment's prohibition against initiating customer-specific communications to solicit any MSA/Majority MSA customers in the Boise MSA have undermined Section IV's purpose – to promote competition in the enterprise and wholesale telecommunications services market in the Boise MSA.

Extending the term of Paragraph IV.L. by up to two years from the date of entry of the proposed AFJ will give the Final Judgment a chance to work as intended by providing the acquirer of the Boise MSA assets a meaningful opportunity to compete for Level 3's former customers. Clarifying that CenturyLink's employees are permitted to contact former Level 3 customers if those customers also receive some telecommunications services from CenturyLink, and that CenturyLink's contractors are permitted to contact a limited, specific set of Level 3's former customers as part of routine upgrades or buildouts, will allow CenturyLink to continue to

[15] *See Microsoft*, 56 F.3d at 1460; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981).

[16] *Bechtel*, 648 F.2d at 666; *see also Microsoft*, 56 F.3d at 1461 (examining whether "the remedies [obtained in the Final Judgment] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

serve its customers efficiently. These proposed modifications to the Final Judgment are, therefore, in the public interest.

The additional modifications are also in the public interest because they strengthen the penalties associated with non-compliance while simultaneously lowering the United States' burden to obtain relief for future violations. They also improve the United States' ability to monitor and enforce compliance with the proposed AFJ by instituting notice and investigation obligations and appointing an external monitor to oversee CenturyLink's conduct. Because of these modifications to the Final Judgment, the acquirer of the Boise MSA assets likely will be more successful in competing for enterprise and wholesale customers in the Boise MSA.

VI. A SECOND PUBLIC COMMENT PERIOD IS UNNECESSARY

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act") does not require a notice-and-comment period prior to the Court's entry of the proposed AFJ. The Tunney Act requires, among other things, that "any proposal for a consent judgment submitted by the United States" be filed with the Court and published in the *Federal Register*, as well as in newspapers of general circulation, at least 60 days prior to the effective date of such judgment.[17] The Tunney Act further requires that any written comments relating to the proposed Final Judgment, and any responses by the United States to those comments, be filed with the court and published in the *Federal Register* prior to entry of the proposed Final Judgment.[18] These procedures are designed to facilitate a public interest determination "[b]efore entering any consent judgment proposed by the United States."[19] The language of the Tunney Act does not

[17] 15 U.S.C. § 16(b)-(c).
[18] 15 U.S.C. § 16(d).
[19] 15 U.S.C. § 16(e).

require that a proposed Amended Final Judgment be subject to these same procedures. Accordingly, consistent with the recent practice of this Court,[20] the United States does not propose to publish the proposed AFJ for notice and public comment.

Prior to the entry of the original Final Judgment, the United States complied with the procedures of the Tunney Act and certified its compliance with the Court.[21] The proposed modifications do not alter the essence of the remedy contained in the original Final Judgment. Rather, the proposed modifications serve the purpose of the original Final Judgment by incentivizing CenturyLink to come into compliance with the agreed-upon remedy as quickly as possible. The new enforcement and monitoring provisions simply strengthen the United States' ability to monitor CenturyLink's conduct and to challenge that conduct in the future, discouraging future violations. Additionally, extending Section IV.L. of the Final Judgment by up to two years effectuates the parties' original agreement by making up for the time lost during the period that CenturyLink was violating the Final Judgment. Finally, the Court previously found the underlying Final Judgment to be in the public interest. Therefore, no notice or public comment period is necessary for a determination that the proposed modification is in the public interest.

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[20] Courts in this district have modified final judgments without requiring a public notice and comment period. *See, e.g.*, *Ticketmaster Entm't*, 2020 WL 1061445 (extending the term of the Final Judgment and adding language on retaliation conditioning); *United States v. Verizon Commc'ns, Inc.*, No. 1:08-cv-01878, 2011 WL 1882488 (D.D.C. Apr. 8, 2011) (extending the term of transition services agreements); *United States v. Cemex, S.A.B. de C.V.*, No. 1:07-cv-00640, 2007 WL 7315362 (D.D.C. Nov. 28, 2007) (substituting a 40-year lease of real property for a sale of that property); *United States v. Halliburton Co.*, No. 1:98-cv-2340, slip op. (D.D.C. Mar. 13, 2000) (substituting access to one test well for access to a different test well), *available at* https://www.justice.gov/atr/case-document/file/498246/download. Two courts outside of this district have further held that the Tunney Act is not applicable to judgment termination proceedings, suggesting that those courts would not view the Tunney Act as applicable to minor judgment modifications. *See, e.g.*, *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983); *United States v. General Motors Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,614, at ¶ 69,093 (N.D. Ill. 1983). *But see Western Elec. I*, 900 F.2d at 289 (in which the parties voluntarily agreed to apply Tunney Act procedures to the modification at issue).

[21] Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, ECF No. 10-3 (Feb 8, 2018).

VII. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court enter the proposed AFJ at this time without further proceedings.

Dated: August 14, 2020

Respectfully submitted,

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