

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Market Disputes Resolution Division
445 12th St., SW
Washington, DC 20554

Copies sent by Email

March 27, 2018

NOTICE OF FORMAL COMPLAINT

**THIS LETTER CONTAINS IMPORTANT INFORMATION REGARDING
FILING DEADLINES AND PROCEDURES. PLEASE REVIEW IT CAREFULLY.**

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Counsel for CenturyLink Communications, LLC
and Level 3 Communications, LLC

Re: Notice of Complaint, *CenturyLink Communications, LLC and Level 3 Communications, LLC v. Birch Communications, Inc.*, Proceeding No. 18-73, Bureau ID No. EB-18-MD-002

Counsel:

On March 23, 2018, Complainants CenturyLink Communications, LLC (CenturyLink) and Level 3 Communications, LLC (Level 3) (collectively, Complainants) filed with this Commission a formal complaint against Defendant Birch Communications, Inc. (Birch) under Section 208 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 208.¹ A copy of the Complaint was served on Birch by hand delivery and by email on March 23, 2018.

The Commission has promulgated comprehensive rules regarding formal complaints. *See* 47 CFR §§ 1.720-1.736. *See also Implementation of the Telecommunications Act of 1996, Amendment of*

¹ *CenturyLink Communications, LLC, and Level 3 Communications, LLC*, Formal Complaint, Proceeding No. 18-73, Bureau ID. No. EB-18-MD-002, (filed March 23, 2018) (Complaint).

Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers, Report and Order, 12 FCC Rcd 22497 (1997) (*Formal Complaints Order*), Order on Reconsideration, 16 FCC Rcd 5681 (2001) (*Formal Complaints Recon Order*). See also *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, Order, 29 FCC Rcd 14078 (2014) (*Formal Complaints Amendment Order*). We strongly encourage that the parties read the formal complaint rules, the *Formal Complaints Order*, the *Formal Complaints Recon Order*, and the *Formal Complaints Amendment Order* fully and carefully.

Pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3, 1.724, 1.726, and 1.733 of the Commission's rules, 47 CFR §§ 1.3, 1.724, 1.726, and 1.733, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 CFR §§ 0.111, 0.311, we modify and extend certain of the filing deadlines and other requirements set forth in the formal complaint rules. First, in a letter order issued on March 15, 2018, we waived the portions of Commission rules 1.721(a)(6), 1.724(c), and 1.726(c) that require a complaint, answer, and reply to include "proposed findings of fact" and "conclusions of law."² In addition, we waive the portion of section 1.726(a) of the Commission's rules that limits a complainant to addressing, in its reply, only the "specific factual allegations and legal arguments made by the defendant in support of its affirmative defenses." 47 CFR § 1.726(a). Instead, Complainants must file a reply, and the reply must address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. This waiver will expedite our consideration of this matter by accelerating the creation of a full record.

Both parties have represented to Commission Staff that they do not intend to seek discovery in this proceeding. Based on those representations, the following schedule will govern this proceeding:

- 1) Birch shall, on or before **April 23, 2018**, file and serve an Answer to the Complaint that complies with this Notice of Formal Complaint and 47 CFR § 1.724.³
- 2) Complainants shall, on or before **May 7, 2018**, file and serve a Reply to the Answer that complies with this Notice of Formal Complaint and 47 CFR § 1.726.
- 3) After receiving the Answer and the Reply, Staff will determine whether a Joint Statement and/or a Status Conference are appropriate in this matter, and if so, will promptly establish dates for them. See 47 CFR § 1.733.

The parties shall file a public version of all written submissions in this proceeding using the Commission's Electronic Comment Filing System (ECFS). All written submissions shall (a) prominently contain the Proceeding Number and Bureau ID Number referenced above (*see, e.g.*, 47 CFR § 1.7), and (b) be addressed to the Commission Secretary. If a party seeks to file both a public version and a confidential version of a submission, it must file the public (redacted) version on ECFS and file the

² See Letter from Lisa Saks, Assistant Division Chief, Market Disputes Resolution Division, to Chérie R. Kiser, counsel for Birch and Chuck Steese, counsel for CenturyLink, (March 15, 2018). See 47 CFR §§ 1.721(a)(6), 1.724(c) and 1.726(c). The waiver was issued in response to a request from the parties.

³ Except in rare circumstances, *motions to dismiss should not be filed*. *Formal Complaints Recon Order*, 16 FCC Rcd at 5696 ("We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases...[T]he Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint...[W]e remind defendants that the grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.").

confidential (unredacted) version in hard copy form with the Office of the Commission Secretary. *See* 47 CFR § 1.731. In addition to filing the unredacted version with the Office of the Secretary, please leave at that office three additional unredacted hard copies marked as “Courtesy Staff Copies. EB-MDRD, 202-418-7330.” *See* 47 U.S.C. § 154(i); 47 CFR § 1.735(e). The parties shall serve on one another all filings, together with a proof of all such service. *See* 47 CFR § 1.735(f). In addition, the parties shall email to the Commission staff identified below courtesy copies of all filings (both public versions and confidential versions) in a format that permits full text searching. *See* 47 U.S.C. § 154(i); 47 CFR § 1.735(e). *See Formal Complaints Amendment Order*, 29 FCC Rcd at 14081, para. 11 (requiring parties to provide hard copies of submissions to Commission staff upon request).

The parties should note that this proceeding is restricted for *ex parte* purposes pursuant to 47 CFR Part 1, Subpart H. Further, the parties shall retain all records that may be relevant to the Complaint, including electronic records, until the Commission’s decision in this proceeding is final and no longer subject to judicial review. *See* 47 U.S.C. §§ 154(i), 208(a); 47 CFR § 42.7.

Commission staff assigned to this matter are: Lisa Saks (counsel) (202) 418-7335, lisa.saks@fcc.gov; Erin Boone (counsel) (202) 418-0736, Erin.Boone@fcc.gov; Lia Royle (counsel), (202) 418-7391, lia.royle@fcc.gov; and Sandra Gray-Fields (administrative) (202) 418-0961, sandra.gray-fields@fcc.gov.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3 and 1.720-1.736 of the Commission’s rules, 47 CFR §§ 1.3, 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission’s rules, 47 CFR §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION



Lisa J. Saks, Assistant Division Chief,
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Enforcement Bureau