

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Applications to Transfer Control of WilTel
Communications, LLC, and Vyvx, LLC, from
Leucadia National Corporation to Level 3
Communications, LLC

IB Docket No. 05-318

REPLY COMMENTS

The Commission should reject as frivolous and lacking any merit the last-minute request of XO Communications, Inc. (“XO”), that the Commission impose conditions on the acquisition of WilTel Communications Group (“WCG”) by Level 3 Communications, LLC (“Level 3”).¹ In making its filing, XO has abused the Commission’s transaction approval process, seeking to create leverage and retaliate against Level 3 during negotiations between the companies to resolve a commercial dispute. This thinly-veiled “opposition” to the transfer of the international Section 214 authorizations, joint interest in the China-U.S. cable landing license, and satellite earth station authorizations held by WCG’s subsidiaries, WilTel Communications, LLC (“WilTel”), and Vyvx, LLC (“Vyvx”), is therefore inconsistent with the Commission’s longstanding policy against intervention in private contractual disputes, not to mention the Commission’s prior consent to transfer of Vyvx’s terrestrial wireless licenses and WilTel’s domestic common-carrier lines to Level 3. XO has also failed to present any substantive basis

¹ See Comments of XO Communications, Inc., IB Docket No. 05-318 (filed Dec. 14, 2005) (“XO Comments”).

for denying or conditioning the grant of these applications. The Commission should therefore reject XO's last-minute tactics and proceed to approve the remaining authorization transfers.

I. THE COMMISSION SHOULD DISREGARD XO'S IMPROPER ATTEMPT TO USE THE COMMISSION'S PROCESSES TO GAIN LEVERAGE IN A COMMERCIAL DISPUTE

The Commission should disregard XO's improper attempt to use the Commission's transaction review process to gain leverage in a commercial dispute. As the Commission reiterated earlier this year with respect to its transaction review processes, "It is longstanding Commission policy not to involve itself with private contract disputes."²

XO has sought Commission conditions on Level 3's acquisition of WCG as part of a last-minute effort to "greenmail" Level 3 after commercial negotiations on a months-old contractual dispute with Level 3 failed to produce a new agreement. As the affidavit of Randy Nicklaus, XO's vice president of engineering, demonstrates, Level 3 and XO have, during the past few months, engaged in negotiations regarding modifications that XO has sought to agreements under which XO purchases dark fiber from Level 3, and under which XO committed to purchase wavelengths from Level 3.³ In recent weeks, the negotiations between Level 3 and XO reached an impasse. During those negotiations, XO threatened Glenn Russo, Level 3's Senior Vice President, Network and Internet Services, that in the absence of an agreement resolving the contractual disputes, XO would file comments with the Commission with respect to the WCG acquisition. In making such threats, XO candidly admitted to Russo that, while XO did not

² *Actions Taken Under the Cable Landing License Act, Public Notice*, 20 FCC Rcd. 8557, 8560 n.12 (2005) (rejecting efforts by Polargrid to interject a commercial dispute into the Commission's review of Tyco International Ltd.'s sale of the Tyco Global Network to Videsh Sanchar Nigam Ltd.). See also *Applications of Verestar, Inc. (Debtor-in-Possession) for Consent to Assignment of Licenses to SES Americom, Inc., Memorandum, Opinion, Order and Authorization*, 19 FCC Rcd. 22,750, 22,756 ¶ 16 (Int'l Bur. & Wireless Tele. Bur. 2004).

³ See XO Comments at 9.

believe that it could block the transaction, it could delay the FCC's approval process, thereby resulting in an economic loss to Level 3. After commercial negotiations failed, XO followed through on its threats by filing its reply comments in the above-captioned docket—the only open Commission proceeding relating to Level 3's proposed acquisition of WilTel.

By the time the Level 3-XO commercial negotiations broke down, leading XO to file its reply comments, the Commission's Wireline Competition and Wireless Bureaus had already approved—following the requisite public comment periods—the transfer of control of WilTel's domestic common-carrier transmission lines and Vvix's terrestrial wireless licenses.⁴ The Wireline Competition and Wireless Bureaus found that the transfer would serve the public interest, convenience and necessity. XO did not bother to comment in those proceedings. It is now telling that XO's proposed remedy in no way relates to the International Bureau authorizations under consideration in IB Docket No. 05-318.

XO's efforts to extract concessions from, or punish, Level 3 violate the Commission's longstanding policy to refrain from intervening in private contractual disputes. If Level 3 and XO fail to settle their contractual dispute, that dispute will be resolved pursuant to the dispute resolution provisions of the underlying contracts. The Commission should allow this private contractual dispute to play out in the appropriate dispute resolution forum and reject XO's efforts to involve the Commission in those disputes.

⁴ See *Notice of Streamlined Domestic 214 Application Granted, Public Notice, DA 05-3173* (rel. Dec. 12, 2005); *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications Action, Public Notice, Report No. 2332* (rel. Dec. 7, 2005) (approving as of Nov. 28, 2005, the transfer of control of Vvix's terrestrial wireless licenses from Leucadia National Corp. to Level 3).

II. XO HAS FAILED TO ALLEGE ANY BASIS FOR FURTHER PUBLIC INTEREST INQUIRY OR DELAY

Demonstrating the unfounded nature of XO's filing, XO has failed to present any facts to support its assertion that Level 3 has the ability and incentive to foreclose competition.⁵ But XO presents no facts, market studies, or even cognizable arguments to support its claims, and the Commission should disregard XO's comments.

First, XO ignores the fact that the U.S. Department of Justice terminated early its review of Level 3's acquisition of WCG under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, finding that there were no competition issues that would merit further scrutiny. Similarly, XO ignores the fact that both the Wireless Telecommunications Bureau and the Wireline Competition Bureau have already approved applications with respect to this transaction under the same public interest standard applicable to the instant applications.

Second, XO omits any explanation of how Level 3's acquisition of WilTel would materially limit XO's choices in the international transport market, which has many other players. XO acknowledges that there are many significant players in this market other than Level 3 and WilTel.⁶ In addition to AT&T and MCI/Verizon (which XO attempts to exclude from consideration on the grounds that they are ILECs, without explaining any relevance of that distinction), XO names Global Crossing, Broadwing, and Qwest (and, of course, there is also Sprint, along with many other providers). The fact that XO may have a commercial dispute with Level 3 over the terms of mutually negotiated contracts in no way serves to prove any form of merger-specific anticompetitive impact from this transaction.

⁵ XO Comments at 4.

⁶ For the purposes of analysis here, Level 3 does not contest the market definition, but does not concede that this is an appropriate market definition.

Third, XO does not allege that this transaction will lead to any “anticompetitive effects either through unilateral action by the merged entity or possible tipping of the Tier 1 Internet backbone market to a monopoly or duopoly.”⁷ XO does not even allege that Level 3 would have market power in the Tier 1 Internet backbone market as a result of this transaction. The Commission has previously examined this market, finding that there are likely six to eight Tier 1 Internet backbone providers, including Level 3 but excluding WilTel.⁸ There is therefore no basis for the peering relief XO seeks, as the acquisition would have no discernable impact on the Internet backbone market. Moreover, XO’s only apparent claim—regarding the potential for occasional service disruption that can result from commercial disagreements in the competitive backbone market—is not even remotely related to the proposed transaction and in any event is not a basis for any public interest intervention.

Finally, XO fails to allege that any anticompetitive vertical effects would result from the Level 3/Wiltel transaction. Nor is there a basis for such an allegation. Level 3 does not serve retail end users, but serves ISPs and IP-enabled service providers. Level 3 is not plausibly in a position to deny consumers the ability to access lawful content, run applications of their choosing or attach lawful devices.⁹ Thus, there is no basis for XO’s requested relief based on the Commission’s *Broadband Internet Policy Statement*.

⁷ *Id.* at ¶ 116.

⁸ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, FCC 05-183, at ¶115 (rel. Nov. 17, 2005). *See also Verizon Communications Inc. and MCI Inc. Application for Approval of Transfer of Control, Memorandum Opinion and Order*, FCC 05-184, ¶ 109 (rel. Nov. 17, 2005).

⁹ *Appropriate Framework for Broadband; Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Policy Statement*, 20 FCC Rcd. 14,986 (2005) (“*Broadband Internet Policy Statement*”).

XO's public interest challenges lack any good-faith basis and seek only to cause delay for, and economic harm to, Level 3. The Commission should therefore summarily dismiss them.

CONCLUSION

For the foregoing reasons, Level 3 respectfully requests that the Commission reject XO's request for conditions as "greenmail" and otherwise lacking in merit. For the reasons stated in the underlying application, the Commission should proceed expeditiously to grant consent for the transfer of control to Level 3 of the international Section 214 authorizations, join interest in the China-U.S. cable landing license, and the satellite earth station authorizations of WilTel and Vyvx.

Respectfully submitted,

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16 December 2005

Attachment

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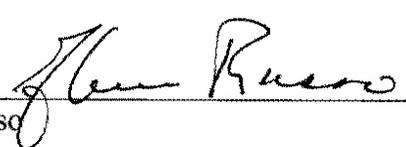
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**DECLARATION OF GLENN RUSSO
ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC**

I, Glenn Russo, declare as follows:

1. My name is Glenn Russo. I am the Senior Vice President of Network and Internet Services at Level 3 Communications, LLC ("Level 3").
2. I have reviewed the attached Reply Comments of Level 3, filed in IB Docket No. 05-318, and declare under penalty of perjury that, to the best of my knowledge, the factual statements contained therein are true and correct.



Glenn Russo

Dated: 12/15/05