

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

In the Matter of AT&T Seeks FCC Consent to the Assignment and Transfer of Control of WCS and AWS-1 Licenses	WT Docket No. 12-240
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COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”) files these comments in connection with the above-captioned applications by AT&T Mobility Spectrum LLC and New Cingular Wireless PCS, LLC, both indirect wholly-owned subsidiaries of AT&T Inc. (collectively, “AT&T”) for consent to assign or transfer control of a number of Wireless Communications Service (“WCS”) and Advanced Wireless Service (“AWS-1”)¹ licenses to AT&T pursuant to 47 USC § 310(d) and the Commission’s rules.² These transactions will increase the incentive of AT&T businesses, both wireless and wireline, to continue to discriminate anti-competitively against Level 3 and other third-party content/service providers and carriers of such content/services to AT&T networks and customers. Accordingly, Level 3 respectfully requests that the Commission impose conditions on these spectrum transfers as set forth below.

¹ The applications are related to three separate transactions involving: (1) wholly-owned subsidiaries of Comcast Corporation (“Comcast”); (2) Horizon Wi-Com, LLC (“Horizon”); and (3) subsidiaries of NextWave Wireless, Inc. (“NextWave” and together with AT&T, Comcast, and Horizon, the “Applicants”).

² See *AT&T Seeks FCC Consent to the Assignment and Transfer of Control of WCS and AWS-1 Licenses*, Public Notice, (rel. August, 31, 2012) (“*Public Notice*”).

I. THE PROPOSED TRANSACTION HEIGHTENS AND CREATES ADDITIONAL RISKS OF ANTICOMPETITIVE AND DISCRIMINATORY CONDUCT BY AT&T

The proposed spectrum transfers would further the concentration of wireless spectrum into the hands of AT&T, and are another step towards a Verizon/AT&T duopoly in wireless communications.³ Wireless services will continue to grow as a key element of our economy as people rely more and more on wireless communications for access to information and to conduct business. This is evidenced by the enormous growth in smartphone sales—Apple reports, for example, that it sold over 5,000,000 iPhone 5 devices *in its first weekend of sales*.⁴ It is in the public best interest to ensure that end users can access all of the lawful content and services they request without their ISPs acting as gatekeepers attempting to unilaterally control the terms on which they will allow such content and/or services to flow.

As of the time it tried and failed to buy T-Mobile, AT&T already controlled the bulk of nationwide spectrum most suitable for mobile telephony/broadband services.⁵ The pending transaction would place AT&T in an even more dominant position with regard to this essential resource in the provision of wireless service. It will also further suppress the ability of others to compete in the wireless space and will increase the already powerful monopoly positions held by AT&T, including a monopoly over how backbone providers like Level 3 are allowed to deliver content and services to AT&T's wireless subscribers. Level 3 is concerned that by obtaining even more spectrum resources, AT&T will become even more empowered to act as a "unilateral gatekeeper" respecting how and under what conditions it will allow traffic, including traffic that competes with AT&T's own offerings, to flow from the Internet to the customers it controls the only access to.

³ The two firms already capture more than 80% of the wireless industry's profits.

⁴ <http://www.usatoday.com/tech/story/2012/09/24/first-week-of-iphone-5-sales/57834504/1>.

⁵ As Sprint noted in its Petition to Deny against the AT&T/T-Mobile transaction, at the time of that proposed transaction, AT&T already controlled an enormous volume of nationwide spectrum most suitable for mobile telephony/broadband services, given its extensive holdings in the 700 MHz, cellular, PCS, and AWS spectrum bands. *See* Petition to Deny of Sprint Nextel Corporation, WT Docket No. 11-65 (filed May 31, 2011) at 57-58. Sprint also noted that AT&T had 90 percent more spectrum than Sprint and T-Mobile each, and Verizon has approximately 75 percent more spectrum than each of those carriers." *Id* at 59.

This “unilateral gatekeeper” problem is illustrated by the continuing situation involving Level 3 and Comcast, which Level 3 has brought to the FCC’s attention on several prior occasions.⁶ It is further illustrated by AT&T’s own recent conduct. As discussed further below, in much the same way as Comcast has, AT&T is currently demanding “tolls” from Level 3 before it will augment interconnection capacity between the AT&T and Level 3 networks. Absent such payments, AT&T is intentionally allowing interconnection points to congest, degrading the quality of Internet content that AT&T’s Internet subscribers have requested. These same “gatekeeper” concerns were raised by Level 3 in connection with the recently approved Verizon/SpectrumCo transactions.⁷ Others have recently raised other similar but different network neutrality concerns about AT&T, particularly in the wireless space, over AT&T’s recent decision to block customers from using Apple’s Facetime application absent their purchase of more expensive AT&T data plans.⁸ There are simply too many instances of this sort of “unilateral gatekeeping” conduct by AT&T occurring, and they can no longer be ignored.

⁶ Ex Parte Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Nov. 30, 2010); Ex Parte Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Dec. 3, 2010); Ex Parte Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Dec. 7, 2010); Ex Parte Letter from Bob Yates, Assistant Chief legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Dec. 10, 2010); Ex Parte Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Dec. 14, 2010); Ex Parte Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Jan. 14, 2011); Ex Parte Letter from John M. Ryan, Executive Vice President and Chief Legal Officer, Level 3 Communications, Inc. to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Feb. 17, 2011); Ex Parte Letter from John M. Ryan, Chief Legal Officer, Level 3 Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191; WC Docket No. 07-52; 10-127 (Feb. 22, 2011).

⁷ See Reply Comments of Level 3 Communications, LLC, WT Docket No. 12-4 (filed March 26, 2012) at 2-7.

⁸ See Howard Buskirk “FaceTime Complaint Could Be First Major Test of FCC Net Neutrality Rules,” Communications Daily (September 19, 2012).

As a real time example, as of this filing, the interconnection capacity between Level 3's network and that of AT&T is reaching capacity daily in almost all locations. When this happens, random Internet packets are delayed (so that they can try to squeeze through the congested interconnection point later) or, when congestion is more severe, packets are dropped entirely. This can affect all of the services that are trying to pass through the congested location.

[BEGIN CONFIDENTIAL TREATMENT]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

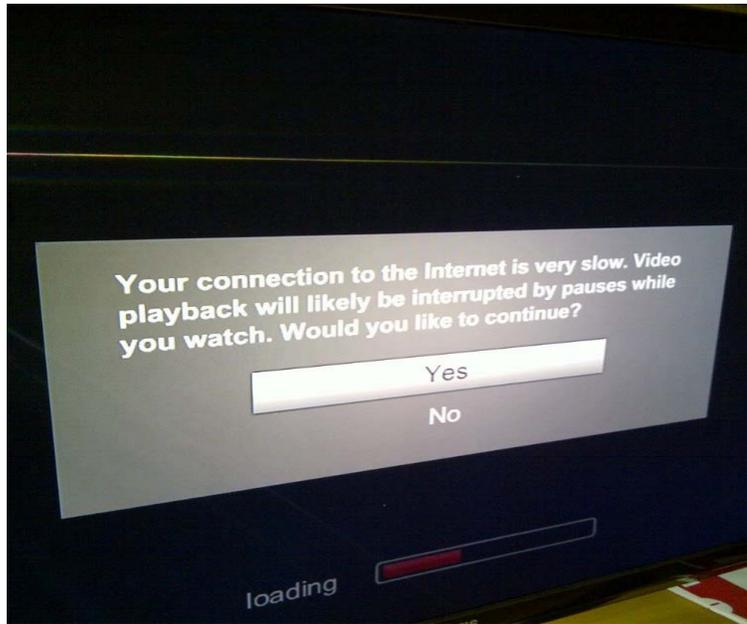
[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]

[REDACTED] . [END
CONFIDENTIAL TREATMET] Subscribers may receive messages like the one
below when this is occurring:



[BEGIN CONFIDENTIAL TREATMENT]

- [REDACTED]
- [REDACTED]. [END CONFIDENTIAL TREATMENT]

Congested Internet networks also have an additional, follow on impact which is negative for both network operators and consumers. This is best explained through an example. Say Internet traffic on the Level 3 network is destined for AT&T customers in New York City, but interconnection capacity between the AT&T and Level 3 networks is congesting in New York. In this case, the Level 3 network may look for other interconnection locations with AT&T which are not congesting at the time, say in Dallas, and deliver the traffic to AT&T there. This is bad for Level 3, as it must incur the network cost to haul the traffic on its network from New York to Dallas, and it is bad for AT&T, as AT&T would then need to incur the network cost to haul the

traffic on the AT&T network from Dallas back to New York. In other words, the traffic is run in a useless and expensive circle, for no reason. This circuitous traffic routing is also bad for Internet consumers, because every mile of distance Internet packets travel between their source and their destination adds what is known as “latency” to the traffic delivery, and increased latency on Internet traffic negatively impacts the quality of the content. Not only is this added latency hard to justify from an Internet subscriber perspective, but it is difficult to understand why AT&T would intentionally add to its own network costs in this way unnecessarily.

AT&T is currently demanding onerous payments from Level 3, and possibly others, that deliver content bound for AT&T’s Internet service customers before it will agree to add interconnection capacity to its network in areas that routinely congest. As shown above, AT&T has allowed the interconnection points between Level 3 and AT&T to become congested, degrading quality. AT&T has, in essence, taken the Internet hostage in an effort to force Level 3 into paying its tolls as ransom. AT&T has the power to do this because it controls the exclusive means of access to millions of Internet customers and the corresponding ability to act as a gatekeeper with respect to any Internet content they request. AT&T has an increased incentive to do this because such content competes with other content that AT&T itself provides, including content offered over its U-Verse television service and via its CDN offerings. And AT&T is taking such action despite the fact that AT&T’s own customers have requested the content and have paid AT&T for the ability to receive it.

Finally, both Level 3 and AT&T have peering policies which, while structured differently, both contemplate that the parties will work together cooperatively to, in the words of AT&T’s policy “balance transport costs.” Using the “balanced bit mile” mechanisms from the Level 3 peering policy¹⁰ and data available to Level 3 to measure the amount of traffic each of Level 3 and AT&T carry,¹¹ Level 3 believes that it is incurring more transport costs than AT&T in connection

¹⁰ At a high level, “balanced bit miles” compares the *amount* of traffic carried by a party’s network and the *distance* it is carried before it is handed to the other party, and compares that total to the same calculation on the other party’s network. If the numbers are roughly equal, each party is incurring roughly the same costs on its network with respect to traffic exchanged with the other.

¹¹ The AT&T peering policy does not state a mechanism for determining or balancing transport costs.

with traffic exchanged with AT&T, or that, at worst there is an equitable balance between the traffic carried by each network, meaning each parties' transport costs are about the same. Level 3 could more accurately calculate the balance of bit miles, but that would require information from AT&T which it has so far been unwilling to share with Level 3. Regardless, Level 3 believes that any inequity ultimately determined to exist (either favoring Level 3 or favoring AT&T) could be easily corrected with simple routing adjustments. Despite this, AT&T has and continues to demand its unilateral "toll" from Level 3 before it will agree to augment its network capacity, which is true regardless of *where* Level 3 delivers traffic to AT&T. Respecting the latter, even though Level 3 believes that it is already incurring more transport costs than AT&T under a bit mile analysis, AT&T has made clear in its recent proposals to Level 3 that even if Level 3 were to agree to carry traffic destined to AT&T's subscribers on Level 3's own Internet backbone all the way to the local market (e.g. New York City) to which it is destined before handing it to AT&T—meaning that AT&T's backbone transport costs for this traffic would be *zero or nearly zero*—that AT&T will continue to insist on its toll before it will augment interconnection capacity.

Given AT&T's historic and continuing conduct in acting in a discriminatory fashion as a gatekeeper when it controls access to its end users, the proposed transaction is troublesome. The proposed transaction will provide AT&T with increased power through a substantial increase in spectrum holdings and eventually, more customers (or at least the prevention of competitors using that spectrum to serve customers) and an increased incentive to act as a gatekeeper. No one should think that if AT&T acts, as it has, as a unilateral gatekeeper when it comes to wireline Internet access that things will be any different on the wireless side as AT&T Mobility Spectrum LLC and New Cingular Wireless PCS, LLC gather increasing stockpiles of wireless spectrum and more and more wireless customers.

Accordingly, Level 3 asks the Commission to impose the following conditions on AT&T in connection with its acquisition of more spectrum in connection with this transaction:

For a period of five years following the transfers of control and/or assignments from Comcast, Horizon and NextWave to AT&T:

- AT&T must interconnect with requesting Internet backbone carriers on reasonable and nondiscriminatory terms that are no less advantageous than the terms effectively provided to its affiliates. AT&T may not charge a requesting Internet backbone

carrier for interconnection with its local wireless network infrastructure, local wireless core network facilities or local mobile switching locations for the exchange of traffic to and from subscribers served by these local network facilities.

- AT&T may not deny interconnection with any Internet backbone carrier or otherwise discriminate against such Internet backbone carrier based on the type of traffic exchanged, its source, its destination, the volume of traffic, the ratio of traffic that is sent or received or the technology used in its delivery. The location and technical configuration of interconnection points for the exchange of traffic between AT&T and requesting Internet backbone carriers must be technically, operationally and economically reasonable and nondiscriminatory, and in any event no less advantageous than as offered or provided to its affiliates.
- AT&T will take the appropriate steps to (i) maintain the interconnection capacity of the links between its wireless end users and any requesting Internet backbone provider so that interconnection capacity is adequate to handle traffic flowing over each interconnection point in existence as of the closing date, (ii) expeditiously augment such capacity as appropriate to exchange traffic without congestion over the interconnection points so as to assure delivery of Internet content to and from its subscribers over each interconnection point with a service quality no less advantageous than that offered or provided to its affiliates , and (iii) allow interconnecting parties to alter the location of or add interconnection points in a technically feasible and reasonable manner that will permit the efficient exchange of Internet traffic.

II. REQUESTED RELIEF

Pursuant to the Commission's authority to review, deny, and condition license agreements, Level 3 requests that the Commission condition the approval of the assignment/transfer of control of Comcast, Horizon and NextWave's WCS and AWS-1 wireless licenses to AT&T on the relief set forth above.

Respectfully submitted,

/s/

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Dated: October 1, 2012