

December 8, 2010

The Honorable Christine A. Varney  
Assistant Attorney General for the Antitrust  
Division

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Commissioner Meredith Attwell Baker

Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Assistant Attorney General Varney, Chairman Genachowski, and Commissioners:

Last week, a dispute between Comcast Corporation and Level 3 Communications generated significant discussion and commentary among journalists, policymakers, advocates, and engineers interested in Internet and broadband policy issues. The dispute highlights the critical role that commercial arrangements to transmit IP data play in the smooth functioning of the Internet. It also raises serious concerns about whether owners of networks should be permitted to leverage their unique position in the marketplace to the disadvantage of their commercial partners. Further, it raises questions about whether last-mile network owners may leverage their position in these interlocking networks to harm their competitors in other markets, such as the markets for Internet content, applications, and services, particularly in regards to reaching last-mile customers. We call on you to investigate both the facts of this particular dispute as well as interconnection agreements more generally. Because the Internet literally could not function in the absence of effective interconnection, we urge you, as expert federal regulators, to maintain active oversight of these critical negotiations, agreements, and practices.

## **Background**

The Internet is comprised of thousands of interconnected networks extending across the globe. In order for data to flow from one endpoint to another (e.g., from a server hosting Netflix content to a user requesting a Netflix movie), that data may traverse a number of networks. In broad terms, these networks fall into several categories: last-mile residential and business broadband networks, intermediate transit networks, and backbone networks. The operators of these various networks make agreements to carry each other's traffic so that data can be transmitted from one endpoint to the other.

These agreements typically fall into one of two categories: "peering" agreements and "transit" agreements. In a typical peering agreement, network operators agree simply to exchange traffic with one another. For example, one network operator might

deliver content in the form of applications or services to the other, in exchange for requests for those same applications or services generated on that peer's network. Historically, many peering arrangements were "settlement-free"; that is, the network operators did not charge each other for the traffic exchanged. Rather, each network operator recouped its costs from its own customers. These customers were typically either content creators or end-users.

By contrast, transit arrangements usually arise in situations exist in which one autonomous network operator agrees to carry the traffic that flows between two other networks. Thus, transit uses a third-party middleman to get from one network to another. As a result, transit arrangements typically are not "settlement-free"; a transit provider must recoup his costs from one of the other networks in the chain because he has no end-user customers in this scenario.

These types of agreements make up the fabric of a working and thriving Internet. However, left unchecked, this fabric can be torn by network providers that unfairly leverage their considerable market power to create disparities between networks, drive up the costs for rivals, and prevent consumers from accessing lawful Internet content and applications.

### **The Recent Dispute Between Comcast and Level 3 Illustrates Emerging Concerns Regarding Interconnection Practices and Highlights the Need for Federal Oversight of Interconnection**

Comcast's dispute with Level 3 arises from an abrupt change in a peering arrangement. According to accounts of the dispute appearing in the press and elsewhere, Comcast recently sought to renegotiate its contract with Level 3, demanding a recurring fee for carrying Level 3 traffic to and from Comcast broadband customers. According to many accounts, Comcast had never before requested such a fee. The demand came on the heels of news that Level 3 had signed an agreement to become the primary backbone delivery provider for Netflix's streaming video service.<sup>1</sup> Comcast claims a change in the proportion of traffic between the two networks changed the peering relationship while Level 3 claims they had little option but to accept unprecedented "take it or leave it" terms under protest in order to avoid interruptions of service for Level 3's customers.<sup>2</sup>

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<sup>1</sup> Cecilia Kang, *Level 3 Communications Calls Comcast Fees for Netflix Feeds Unfair*, WASH. POST, Nov. 29, 2010, <https://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112907024.html> (last visited Nov. 29, 2010).

<sup>2</sup> See *Comcast Letter to Sharron Gillett Re: Preserving the Open Internet, GN Docket No. 09-191*, Nov. 30, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020921811> (last visited Dec. 8, 2010); see also *Level 3 Issues Statement Concerning Comcast's Actions*, Nov. 29, 2010, <http://www.level3.com/index.cfm?pageID=491&PR=962> (last visited Dec. 3, 2010).

Although the facts of this dispute are not completely transparent to outside observers nor available from sources other than the disputants themselves, the situation clearly gives rise to three discrete and compelling concerns.

1. **The dispute raises concerns about whether and how last-mile providers might leverage their relationship with broadband consumers to act in an anticompetitive manner.** In any relationship between Comcast and Level 3, Comcast enjoys a unique position. In order to reach Comcast's millions of ISP customers, content providers like Level 3's customers must go through Comcast. In that sense, Comcast has a terminating access monopoly; no other provider can directly provide transmission to Comcast's subscribers. By contrast, if Level 3's customers have significant choice among backbone providers — data can flow among multiple backbone paths to get from the content creator to Comcast's network. Thus, whatever the character and operation of any agreements between the two entities, Comcast's position gives it substantial negotiating leverage with respect to Level 3. As Professor Susan Crawford suggests, "If [Level 3] wanted to reach Comcast's 25 million subscribers, it had to do the deal on Comcast's terms."<sup>3</sup>

Moreover, if Level 3's characterizations are accurate, Comcast's behavior is particularly remarkable because it represents one of the first times that a residential Internet service provider apparently has succeeded in trying to charge transit fees to *terminate* traffic, rather than charging such fees to transmit traffic from one network to another. As a result, Comcast would be effectively double charging for the transmission of the same traffic — it gets one fee from Level 3 and an additional fee from its end-user customers.

Yet, the problem is much broader than this particular dispute: the nature of the dispute suggests that every residential broadband network owner has the incentive to drive down its own costs in this way, and this incentive is not unique to Comcast. Furthermore, the means to act upon such an incentive are present because of the lack of competition in the market for residential broadband service. According to the National Broadband Plan 96% of American consumers have at most one or two choices among wireline providers,<sup>4</sup> meaning that there is really no hope that consumers can discipline Comcast's behavior.

2. **The dispute raises particular questions about whether last-mile providers can leverage their market power to harm their competitors in the market for Internet content. Policymakers should view these risks**

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<sup>3</sup> Susan Crawford, *Bad Timing: Comcast, Netflix, NN, Cable Modems, and NBCU*, Nov. 29, 2010, <http://scrawford.net/blog/inside-job/1419/> (last visited Nov. 30, 2010).

<sup>4</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan*, exhibit 4-A.

**with heightened concern in the context of the proposed Comcast/NBC Universal merger.** Because this dispute arose shortly after Level 3 signed a deal with Netflix to transmit Netflix content, regulators should examine Comcast's motives closely. Netflix competes directly with Comcast's cable programming offerings. In fact, over the past two quarters, cable has lost an increasing number of subscribers, and a number of those consumers have substituted Netflix streaming video service for the cable service they have eliminated.<sup>5</sup> It requires little imagination to view Comcast's behavior as an attempt to raise the distribution costs for Netflix and thus force that competitor to pass these new expenses onto consumers in the form of higher prices.

Both the Federal Communications Commission (FCC) and the Department of Justice should investigate Comcast's actions in connection with their respective reviews of Comcast's proposed merger with NBC Universal. That investigation should include obtaining the relevant agreements here, and then making those documents available to parties under the terms of the protective order in the Comcast/NBCU merger review proceedings. As you are already aware, the merger raises numerous anticompetitive concerns with respect to over-the-top Internet video. For example, the merger presents concerns regarding the ability of competitive video providers to access and offer Comcast/NBC content. It also raises the specter that Comcast may leverage its market power as the nation's largest provider of residential broadband access to restrict content owners' and distributors' access to its customers. This recent move by Comcast with respect to Level 3 substantially heightens these concerns: it suggests yet another method by which Comcast may be able to use its position as a broadband provider to privilege its own content. The incentive to do so — while already significant — will only become more acute if the merger is consummated.

- 3. Interconnection disputes represent an increasingly high-stakes game of chicken<sup>6</sup> and could lead to disruptive outages that cripple the functioning of our communications infrastructure.** As last-mile operators increasingly attempt to leverage their position to extract more money out of their business partners, we can expect these disputes to occur more frequently. If parties fail to resolve these disputes, Americans could face massive transmission failures as providers re-route traffic through a few alternative peering points. In the worst case, millions of consumers, businesses, and government users could lose access to the Internet. These types of outages will have much more severe consequences for the public

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<sup>5</sup> Ryan Lawler, *Big Cable Is Bleeding: 500K+ Subscribers Lost In Q3*, GigaOm, Nov. 4, 2010, <http://gigaom.com/video/big-cable-is-bleeding-500k-subscribers-lost-last-quarter/> (last visited Nov. 30, 2010).

<sup>6</sup> W. B. Norton, *The Art of Peering -- The Peering Playbook v1.2*, available at <http://www.gtnoise.net/papers/library/norton.pdf>.

than the recent spat over retransmission consent between Fox and Cablevision, which resulted in a two-week blackout of Fox programming for millions of Cablevision subscribers and other Internet-based content disruptions as well.<sup>7</sup> Additionally, the historical record of intercarrier compensation demonstrates the continued problems that disagreements over interconnection can create. The Internet constitutes nationwide mission-critical infrastructure. We cannot afford to ignore the risks posed by interconnection disputes any longer.

In sum, unreasonable and discriminatory peering and transit agreements can allow network providers to increase costs for independent content and applications. Some network operators can extract rents, or refuse interconnection with backbone providers or content distribution networks that carry content or applications that compete with the refusing network's own offerings. Comcast may or may not have acted reasonably in its negotiations with Level 3, but the dispute highlights both (1) the incentives that last-mile providers have to act anticompetitively in making interconnection agreements and (2) the need for increased oversight and transparency with respect to these practices.

We urge the FCC and the Department of Justice to launch an investigation of the Comcast/Level 3 dispute.<sup>8</sup> The details of peering agreements are rarely transparent and are often protected by non-disclosure agreements.<sup>9</sup> Absent a government investigation, policymakers will never know the facts behind this dispute or others like it that may arise. We urge the Commission and Department of Justice to investigate not just this recent event but also how peering agreements are negotiated and whether companies are acting in an anticompetitive manner.<sup>10</sup>

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<sup>7</sup> Brian Stelter & Bill Carter, *Fox Returns to Cablevision*, N.Y. TIMES, Oct. 30, 2010, <http://mediadecoder.blogs.nytimes.com/2010/10/30/fox-returns-to-cablevision/> (last visited Dec. 3, 2010).

<sup>8</sup> We are encouraged to hear that the FCC's Wireline Bureau has been in communication with Comcast. See, e.g., Letter from Joseph Waz, Senior Vice President, External Affairs and Public Policy Counsel, Comcast Corp., to Sharon Gillett, Chief, Wireline Bureau, *Preserving the Open Internet*, GN Docket No. 09-191 (Nov. 30, 2010).

<sup>9</sup> William B. Norton, *Internet Service Providers and Peering*, available at [www.nanog.org/papers/isp.peering.doc](http://www.nanog.org/papers/isp.peering.doc).

<sup>10</sup> The Open Technology Initiative has raised concerns about peering and transit arrangements several times in the past to the FCC. The Commission should investigate these arrangements not only because they present an opportunity for anticompetitive abuse, but also because they are critical to promoting broadband competition, rural deployment, and public safety goals. Most recently, the Open Technology Initiative raised these issues with the Commission in a pair of meetings on January 19, 2010, with the staff of the Omnibus Broadband Initiative and with the Commission's Wireline Competition Bureau. OTI raised these concerns again at a meeting with Edward Lazarus, Chief of Staff to Chairman Julius Genachowski, on July 26, 2010. See Letter from Sascha D. Meinrath, Director, Open Technology Initiative, New America Foundation, to Marlene Dortch, Secretary, FCC, *Framework for Broadband Internet Service*, GN Docket No. 10-127; *Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry*

Without oversight, this peering framework could become a new means by which dominant market players utilize their position to squelch both competition and innovation. Both the FCC and Department of Justice must act proactively to ensure that peering is conducted in a transparent and equitable manner, and to prevent peering from becoming a means to discriminate against legal services, applications, and content.

Sincerely,

Benjamin Lennett  
James Losey  
Sascha Meinrath  
Open Technology Initiative  
New America Foundation

Tyrone Brown  
Media Access Project

Derek Turner  
Free Press

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*Practices*, WC Docket No. 07-52 (Aug. 2, 2010); Letter from Matthew F. Wood, Associate Director, Media Access Project, to Marlene Dortch, Secretary, FCC, *Advanced Telecommunications Inquiry*, GN Docket No. 09-137; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Broadband Data Improvement Act*, GN Docket No. 09-47; *Consumer Information and Disclosure*, CG Docket No. 09-158; *Truth-in-Billing and Billing Format*, CC Docket No. 98-170 (Jan. 20, 2010).