



National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001
(202) 222-2300

www.ncta.com

Steven F. Morris
Vice President and Associate General Counsel

(202) 222-2454
(202) 222-2446 Fax

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Open Internet, GN Docket No. 14-28
Broadband Measurement, GN Docket No. 12-264**

Dear Ms. Dortch:

The National Cable & Telecommunications Association (NCTA) submits this response to the November 25, 2015 letter filed by Level 3 in the above-referenced proceeding.¹ In its letter, Level 3 proposes that the Commission require broadband providers to report new metrics purporting to represent actual performance of their retail service across interconnection points and it asks the Commission to add these new metrics to the safe harbor consumer disclosure recently recommended by the Consumer Advisory Committee (CAC). The Commission should reject Level 3’s proposals and expeditiously adopt the broadband consumer disclosure format as recommended by the CAC.

I. ADDITIONAL REGULATION OF BROADBAND PROVIDERS WITH RESPECT TO INTERCONNECTION IS UNWARRANTED AND ALREADY HAS BEEN REJECTED BY THE COMMISSION

The basic premise underlying Level 3’s proposal is that broadband providers are solely responsible for taking any steps necessary to avoid congestion on interconnection links and that additional reporting and disclosure is necessary to inform consumers whether such steps are being taken.² The fundamental error in this argument is that it places sole responsibility on one party to the interconnection arrangement, notwithstanding the indisputable fact that the conduct of both parties affects the performance experienced by the customer.³

¹ Letter from Joseph C. Cavender, Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Nov. 25, 2015) (Level 3 Letter).

² *Id.* at 1 (“Consumers should have access to data that tells them, for each provider, whether the provider offers consistent, high-speed performance to the Internet broadly, or whether the provider offers inconsistent performance, with better connectivity to some resources than to others.”).

³ *See, e.g.*, ISP INTERCONNECTION AND ITS IMPACT ON CONSUMER INTERNET PERFORMANCE, A Measurement Lab Consortium Technical Report (Oct. 28, 2014) (M-Lab Report) at 31 (“[T]hese issues cannot be laid at the feet of any one Access ISP, or any one Transit ISP; no Access ISP performs badly to all Transit ISPs, and no Transit

The Commission’s analysis in the *Open Internet Order* recognized that this issue is far more complex than suggested by Level 3. The Commission applied general Title II obligations to broadband providers but explicitly found that it “would be premature to adopt prescriptive rules to address any problems that have arisen or may arise” regarding traffic exchange disputes.⁴ It also found that any review of a broadband provider’s practices also would consider the “practices by edge providers (and their intermediaries).”⁵ Of particular note, the Commission considered – and rejected – proposals that broadband providers be subject to additional reporting obligations related to performance across interconnection links. Specifically, it declined to “require disclosure of the source, location, timing, or duration of network congestion, noting that *congestion may originate beyond the broadband provider’s network* and the limitations of a broadband provider’s knowledge of some of these performance characteristics.”⁶

Given the clarity with which the Commission rejected proposals to impose both prescriptive regulation on interconnection and traffic exchange arrangements and disclosure obligations resulting from congestion attributable to those arrangements, Level 3’s pretense that current law already requires disclosures about “the performance consumers can expect to access resources on other networks” is impossible to reconcile with the language of the *Open Internet Order* itself.⁷ At a minimum, Level 3’s plea for new reporting obligations on broadband providers should be rejected as an untimely and unwarranted petition for reconsideration. Moreover, because Level 3’s proposals are so clearly outside the scope of the disclosure obligations adopted by the Commission in the *Open Internet Order*, neither the Chief Technologist (pursuant to authority delegated in paragraph 166) nor the three Bureaus responsible for the consumer disclosure safe harbor (pursuant to authority delegated in paragraph 180) could conceivably adopt Level 3’s proposals pursuant to delegated authority.⁸

II. LEVEL 3’S CRITICISM OF THE MEASURING BROADBAND AMERICA PROGRAM IS BASELESS

Level 3 suggests that in the absence of the additional reporting it recommends, the performance measurements released by the Commission in its periodic Measuring Broadband America (MBA) reports are misleading and harmful to consumers.⁹ This allegation is complete nonsense.

ISP performs badly for all Access ISPs. Therefore, if the problem is not at one end, and not at the other, it must be in the middle around the interconnection between the two.”)

⁴ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5692, ¶ 202 (2015). In particular, the Commission specifically declined to adopt Level 3’s proposal to require broadband providers to “interconnect with content companies and backbone providers without charging them a toll.” *Id.* n.514.

⁵ *Id.* at 5694, ¶ 205, n.525.

⁶ *Id.* at 5675-76, ¶ 168 (emphasis added).

⁷ Level 3 Letter at 1. Notably, Level 3 provides no citation supporting this assertion.

⁸ *Open Internet Order*, 30 FCC Rcd at 5675, 5681, ¶¶ 166, 180.

⁹ Level 3 Letter at 4.

As an initial matter, even if one were to accept Level 3's erroneous position that a broadband provider is wholly responsible for the performance of interconnection links, the concern raised by Level 3 that MBA results will mislead consumers is purely speculative. While Level 3 hypothesizes that a customer could be misled into choosing the "wrong" broadband provider because the MBA report does not reflect degraded performance due to congested interconnection links, it does not provide a shred of evidence attempting to show that this occurs in the real world. For example, Level 3 offers no information that would suggest the companies exhibiting superior performance in the MBA testing are not also doing a better job in managing congestion on interconnection links.

Level 3's criticism of the MBA program is particularly inappropriate given the structure of the program and the significant role Level 3 has played in the program over the last few years. Through the program, broadband providers voluntarily submit to a measurement process that is overseen by a government agency (the Commission), administered by the Commission's contractor (SamKnows), and run on facilities provided by third-parties whose advocacy is consistently hostile to broadband providers (M-Lab and Level 3).¹⁰ Given the rigorous nature of the testing, the Commission appropriately has found that disclosure of MBA results constitutes a safe harbor with respect to the requirement to report the actual performance of broadband service.¹¹ Moreover, the program has been developed through a collaborative process which is open to all parties and which Level 3 has participated in for years. Level 3 has never even raised such concerns during this collaborative process, let alone suggested any changes to address them. For Level 3 now to suggest that a program developed and run in this manner is somehow harming consumers for the benefit of broadband providers strains all credulity.

III. LEVEL 3'S PROPOSALS FOR ADDITIONAL REPORTING ARE ILL-CONCEIVED AND UNNECESSARY

For the reasons explained above, there is no need for the Commission to adopt any new reporting or disclosure obligations on broadband providers related to the performance of interconnection links. Moreover, as NCTA explained previously, performance measurement in the interconnection context is inherently more complex than measuring a single network and consequently any exploration of that topic by the Commission should be conducted in the same open, collaborative process that the Commission used in developing the MBA program, rather than mandates of the type suggested by Level 3.¹²

¹⁰ Moreover, as NCTA has explained, to the extent there have been inaccuracies in the measurement process, they are routinely attributable to issues under the control of M-Lab and Level 3, not the participating broadband providers. *See* Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Nov. 25, 2015).

¹¹ *Open Internet Order*, 30 FCC Rcd at 5674, ¶ 166 n.411 ("Participation in the Measuring Broadband America program continues to be a safe harbor for fixed broadband providers in meeting the requirement to disclose actual network performance.").

¹² *See* Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Jan. 21, 2015) at 4 ("[T]he Cable Representatives suggested that the best way for the Commission to gather and distribute data regarding performance across multiple networks is through a collaborative process involving a broad cross-section of participants, similar to the Measuring

But even if the Commission had reason to consider new reporting or disclosure obligations related to interconnection performance, the two specific proposals advanced by Level 3 should not be adopted. Specifically, Level 3 proposes that broadband providers with the capability to do so should measure performance across their top 20 interconnection points and report the slowest, median, and best average performance.¹³ Level 3 goes on to suggest that all broadband providers report a color-coded “Connectivity Rating” with green, yellow, and red indicators based on the number of days in a month with “interconnection capacity above 80% utilization with a top-20 interconnecting partner for 3 or more hours.”¹⁴

There are significant legal and practical problems with both of Level 3’s proposals. As an initial matter, as noted above, these proposals go well beyond what is contemplated by the *Open Internet Order* and therefore adopting these proposals is not within the delegated authority of the Chief Technologist or any bureau of the Commission. Nor is there any open proceeding in which these proposals could be adopted by the Commission.

The proposals also have major substantive flaws. For example, the proposal for ISPs to monitor performance across the top 20 interconnection points and report on three of these measurements adds significant complexity to the measurement process. As a threshold matter, Level 3 offers no insight into how the Commission will determine things like: (1) which providers have the capability to perform such measurements; (2) which interconnection points qualify as the top 20 for any given provider; and (3) what proxy to use for providers that do not have the necessary measurement capability. Furthermore, in contrast with the MBA testing regime, there is no industry standard for measuring performance across interconnection points. And even if there was some basis for imposing a standard for measuring performance across interconnection points, which there is not, that is precisely the type of issue that should be negotiated among the interested parties through a collaborative process.¹⁵

The 80% utilization factor proposed for use in developing the Connectivity Rating also is problematic. As with Level 3’s proposal generally, characterizing a broadband provider’s performance based on the utilization of the interconnection link is a flawed approach because it ignores the critical role played by the other party to the interconnection arrangement. A transit provider like Level 3 (or a CDN or an edge provider) has control over which interconnection links it uses to send traffic from its customers to an ISP’s customers and it easily can distribute

Broadband America program. The Commission consistently has recognized the value that such a collaborative approach brings to its work in measuring broadband performance.”).

¹³ Level 3 Letter at 6.

¹⁴ *Id.* at 7.

¹⁵ Indeed, just last week the MBA collaborative heard a presentation from CAIDA regarding the potential use of the MBA testing infrastructure to run an experiment designed to gather information on a possible mechanism for identifying and measuring degraded performance on interconnection links. The CAIDA presentation made clear that significant challenges still remain in the development of a reliable and accurate method for measuring the performance of interconnection links.

that traffic in a manner that causes the utilization of a facility to increase significantly.¹⁶ Accordingly, it is wholly inappropriate for the Commission to adopt the proposed 80% figure (or any other arbitrary figure) as the basis for a reporting requirement because doing so would enable other parties to manipulate their traffic delivery so as to create the false impression that an ISP is not delivering the performance it should.

IV. THE COMMISSION SHOULD ADOPT THE BROADBAND DISCLOSURE RECOMMENDATION SUBMITTED BY THE CONSUMER ADVISORY COMMITTEE

Pursuant to authority delegated by the Commission in the *Open Internet Order*, the Consumer Advisory Committee submitted a recommendation on October 26, 2015 for a broadband consumer disclosure format that would serve as a safe harbor for broadband providers.¹⁷ Level 3 suggests that its proposed additional reporting obligations should be a required element of the safe harbor disclosure format.¹⁸

As a participant in the CAC process that resulted in the October recommendation, NCTA strongly opposes Level 3's proposal. As described in the CAC recommendation, a task force of the CAC had more than 20 meetings to develop a format that complied with the Commission's request for an appropriate balance between a consumer's need for critical information about broadband services and a provider's concern about the expense and difficulty of compliance.¹⁹ The task force recommendation was adopted unanimously by the full CAC, which includes dozens of consumer advocates. Level 3's suggestion that it somehow understands the needs of consumers better than the consumer advocates that voted for the CAC recommendation is not credible and its proposal to add significant new obligations would completely upset the balance the Commission required the CAC to attain in its recommendation. Accordingly, the Level 3 proposal should be rejected and the Commission expeditiously should adopt the recommendation of the CAC.

¹⁶ See, e.g., Dan Rayburn, Streamingmedia.com, *New Data Questions Netflix's Assertion That ISPs Are At Fault For Poor Quality* (June 10, 2014) ("In some cases I was told by ISPs that traffic levels increased by 500% in only a few months where normal Internet growth with these same peers was less than 20-30% across an entire year. These ISPs' customers did not request traffic to be served from poorly performing paths. Netflix chose to create, and use, paths that they knew were congested, simply because they were cheaper than using paths that were less congested."), at <http://blog.streamingmedia.com/2014/06/netflix-isp-newdata.html>.

¹⁷ See FCC Consumer Advisory Committee, Recommendation, Broadband Consumer Disclosures (Oct. 26, 2015) (CAC Recommendation), at https://apps.fcc.gov/edocs_public/attachmatch/DOC-336136A1.pdf.

¹⁸ Level 3 Letter at 2.

¹⁹ CAC Recommendation at 2.

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CONCLUSION

The old adage to “never look a gift horse in the mouth” appears to have been lost on Level 3. The company already is the beneficiary of a one-sided regulatory regime under the *Open Internet Order* in which it may file complaints against the interconnection practices of broadband providers, but never face the prospect of complaints against its own practices under those same rules. But filing a complaint is the only remedy the Commission provided to companies like Level 3 in the *Open Internet Order* and consequently its attempt to impose additional obligations on broadband providers beyond those identified by the Commission must be rejected.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: S. Jordan
J. Burnett
K. Fargotstein
C. Helzer
W. Johnston