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<u>Ex Parte Submission – Filed Electronically Via ECFS</u>

Ms. Sharon Gillett
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses; MB Docket No. 10-56

Dear Ms. Gillett:

In Comcast's letter of December 17 summarizing discussions with you, Comcast maintains that the demand for payment that it has imposed on Level 3 has no relevance to its pending acquisition of NBC Universal. Comcast states, *"Level 3's own letter shows – unintentionally but unmistakably – that this dispute and the broader industry-wide questions it raises have nothing to do with the NBCU transaction, and provide no basis for further delay in the approval of this transaction."*

A review of the record created by Comcast shows that, contrary to Comcast's claim, Comcast's demand for payment is highly relevant to the evaluation of whether the transaction will have potential anticompetitive impacts. In its efforts to persuade Congress, the Commission and the Department of Justice that the transaction will not impede competition in the video market, Comcast repeatedly pointed to online video as a competitive alternative. Comcast claimed, over and over, that the *"barriers to entry"* in the online video market were low or nonexistent, and that as a result Comcast (notwithstanding its large subscriber base) faced rampant competition from nascent online video providers. Comcast repeatedly claimed that there were and are no *"gatekeepers"* standing between online video content providers and consumers. Statements from Comcast included:

<u>From Brian Roberts and Jeff Zucker Joint Statement to House Commerce Committee (Feb. 2010)</u>

- *"The companies' limited shares in all relevant markets, fierce competition at all levels of the distribution chain, and ease of entry for cable and online programming ensure that the risk of competitive harm is insignificant."*
- *"On the Internet, content providers essentially control their own destinies since there are many third-party portals as well as self-distribution options. Entry is easy. Thus, the transaction will not harm the marketplace for online video."*

From Roberts and Zucker Joint Statement to House Judiciary Committee (Feb. 2010)

- *"Comcast, a leading provider of cable television, high-speed Internet, digital voice and other communications services to millions of customers, is a pioneer in enabling consumers to watch what they want, when they want, where they want, and on the devices they want. Comcast is primarily a distributor, offering its customers multiple delivery platforms for content and services."*
- *"In addition, content producers increasingly have alternative outlets available to distribute their works, free from any 'gatekeeping' networks or distributors."*
- *"Consumers can also access high-quality video content from myriad other sources. . . . High-quality video content also is increasingly available from a rapidly growing number of online sources that include Amazon, Apple TV, Blinkx, Blip.tv, Boxee, Clicker.com, Crackle, Eclectus, Hulu, iReel, iTunes, Netflix, SlashControl, Sling, Vevo, Vimeo, VUDU, Vuze, Xbox, YouTube – and many more. . . . And there are no significant barriers to entry to online video distribution."*
- *"The video marketplace truly has no gatekeepers."*
- *"The companies' limited shares in all relevant markets, fierce competition at all levels of the distribution chain, and ease of entry for cable and online programming ensure that the risk of competitive harm is insignificant."*
- *"Third, the combination of Comcast's and NBCU's Internet properties similarly poses no threat to competition. There is abundant and growing competition for online video content."*
- *"On the Internet, content providers essentially control their own destinies since there are many third-party portals as well as self-distribution options. Entry is easy. Thus, the transaction will not harm the marketplace for online video."*

Comcast Voices Blog Statement (Attributed to David Cohen, EVP Public Policy, Feb. 2010)

- *"We're also expecting that there will be discussion of the impact of this transaction on the nascent video over the Internet market. That market is also highly competitive – with many players and very low barriers to entry – and access to content is plentiful. While NBC Universal (through its 32 percent, minority, non-controlling interest in Hulu) and Comcast (through its entertainment and video site Fancast) both participate in this market, our combined share of the market is miniscule (today, that market is dominated by Google/YouTube and populated by dozens of other sites). We don't view Hulu and Fancast as competitive – with each other or with our cable service – rather, they are both complementary services. And in any event, we play such a small role in this market (either as a content provider or as an Internet video competitor) that it just isn't credible to conclude that we have any capacity to get in the way of the development of video over the Internet."*

Comcast has repeatedly claimed that there is only one *"market"* for video consumption, and it includes over-the-air television, cable television and online video. The independent online video providers that Comcast listed above – Amazon, Apple TV, Blinkx, Blip.tv, Boxee, Clicker.com, Crackle, Eclectus, iReel, iTunes, Netflix, SlashControl, Sling, Vevo, Vimeo, VUDU, Vuze, Xbox and YouTube – all compete against not only Comcast's cable programming, but also the online video distributed by both Hulu and NBC. Prior to the closing of the proposed transaction, Comcast has an incentive to discriminate against these independent online video providers because they compete against Comcast's own cable programming. After the NBC Universal acquisition, Comcast's incentive to discriminate is increased because Comcast will have a direct ownership interest in NBC Universal content that is distributed by both its cable TV and high speed Internet access networks.

Even if the market for online video is separate from the market for cable programming, the transaction impacts competition. At present, NBC Universal and Hulu have no ability to impact their competitors' cost of access to online subscribers. After the transaction, NBC and Hulu will – through Comcast – have the ability and the incentive to increase the cost of access to Comcast subscribers.

Comcast's recent actions demonstrate that there is, in fact, a new *"gatekeeper"* standing in the way of, and assessing its own unilaterally-set toll against, competitive online video (and other) content. The gatekeeper is Comcast itself. Comcast cannot have it both ways – it cannot credibly claim that there are low entry barriers and no gatekeepers for the delivery of online video, yet at the same time maintain its right to establish a toll booth for the delivery of online video requested by its subscribers.

The balance of Comcast's letter contains a recital of a number of allegations, all of which Comcast has previously made in letters to the Commission and the Department of Justice, and in other public pronouncements, with one exception. Comcast alleges that, on a verbal basis, *"...Comcast presented Level 3 with a highly responsive, good faith offer to run a trial that would (1) provide a real world assessment of Level 3's proposal... "* and, *"that Level 3's response to this offer was to terminate the meeting and file its December 16 letter with the FCC and the Department of Justice -- with no reference to Comcast's good faith offer."* Comcast neglects to include any mention of two facts that provide context essential to judging the merit of Comcast's allegation. Level 3's letter to the FCC and the Department of Justice included no reference to Comcast's offer to run a trial because this offer, and and other matters discussed in the meeting Comcast refers to, were subject to a nondisclosure agreement ("NDA") binding on both parties. Now that Comcast has breached this agreement, Level 3 feels it is only fair to disclose the relevant contextual details of our "proposal." Both before and after the meeting that Comcast references, Level 3 noted to Neil Smit, president of Comcast Cable, "*We keep asking you to tell us the locations where we can interconnect with you with no payment from us and thus no revenue to you. If you choose to tell us those locations, we can make progress. If not, no amount of engineering work can resolve our differences."*

The full text of the December 17, 2010 letter to Mr. Smit from Jeff Storey, President and Chief Operating Officer of Level 3, is attached so that you can understand the context and full content of our position. As this letter makes clear, Level 3's position has been consistent and has been communicated repeatedly to Comcast since the date Comcast first demanded payment by Level 3 for access to its high speed Internet access subscribers.

Sincerely,

John Ryan

John M. Ryan
Assistant Chief Legal Officer
Level 3 Communications, Inc.

cc: Christi Shewman
Marcus Maher