



February 14, 2011

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

Re: *Preserving the Open Internet*, GN Docket No. 09-191

Dear Chairman Genachowski:

As the Commission's approach to Internet policy has evolved over the last eighteen months – from a proposed rulemaking on net neutrality, to an inquiry on reclassification, to a net neutrality order – it has consistently emphasized at each step along the way that it has no intention of regulating the highly competitive market for Internet peering and other Internet backbone services.<sup>1</sup> Despite the Commission's repeated and unequivocal pronouncements, Level 3 has been attempting to convince the Commission that its newly announced net neutrality rules do, in fact, apply to Level 3's dispute with Comcast over the terms of the parties' peering arrangement.<sup>2</sup>

The absence of a clear statement by the Commission rejecting Level 3's claims and disavowing any intent to regulate Internet peering and other Internet backbone services has emboldened others – including backbone operators like Global Crossing, Internet hosting companies like Voxel.net, and interest groups like Public Knowledge – to raise claims similar to those of Level 3.<sup>3</sup> The Commission's continued silence on this issue could send a troubling signal to the financial markets and the international community regarding the United States government's intentions to exercise control over Internet infrastructure, notwithstanding the clear boundaries established in the *Net Neutrality Order*. We therefore urge the Commission to swiftly, clearly and publicly affirm that arrangements for Internet peering and other Internet backbone services are *not* subject to the net neutrality rules, and that the agency will decline efforts to become involved in these commercial disputes. Such a statement is essential to further

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<sup>1</sup> See *Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, FCC 10-201, ¶ 47 (released Dec. 23, 2010) (*Net Neutrality Order*) (“broadband Internet access service” does not include “Internet backbone services”). See also *infra* at 3-4.

<sup>2</sup> See Letter from John Ryan, Level 3, to Marlene Dortch, FCC, GN Docket No. 09-191 (Jan. 14, 2011) (*Ryan January 14 Letter*); Letter from John Ryan, Level 3, to Marlene Dortch, FCC, GN Docket No. 09-191, Attachment at 7 (Dec. 3, 2010) (*Ryan December 3 Letter*) (“16. Q: Is the dispute part of the larger Net Neutrality Issue? A: “Of course it is . . .”).

<sup>3</sup> See Letter from Paul Kouroupas, Global Crossing, to Marlene Dortch, FCC, GN Docket No. 09-191 (Feb. 4, 2011); Letter from Adam Rothschild, Voxel dot Net, Inc., to Marlene Dortch, FCC, GN Docket No. 09-191 (Jan. 11, 2011); *Public Knowledge Calls Level 3 Charges Third Strike on Comcast*, Public Knowledge Press Release (Nov. 29, 2010) at <http://www.publicknowledge.org/public-knowledge-calls-level-3-charges-third-strike>. See also Cecilia Kang, Washington Post, *Net-neutrality complaints pile up* (Jan. 25, 2011) (“Level 3's charges against Comcast, for example, raised questions of whether net-neutrality rules apply to business relationships.”).

the agency's express objective of providing "clarity and certainty" for broadband providers, investors, consumers, and other interested parties.<sup>4</sup> Without such a statement, Level 3 and other parties will continue to seek to draw the Commission into what have always been and should remain private negotiations for the exchange and delivery of Internet traffic.

**The Net Neutrality Rules Do Not Apply to Arrangements for Internet Peering and Other Internet Backbone Services.** Ever since it first examined Internet peering and other Internet backbone services during the Clinton Administration, this Commission has stated that such services are distinct from retail, mass market broadband Internet access services like those at issue in the *Net Neutrality Order*.<sup>5</sup> The Commission also has found that the market for Internet backbone services is "vigorously" competitive and it has consistently eschewed the imposition of any regulations on such services.<sup>6</sup> In fact, Level 3 itself recently told the Commission that the market for Internet backbone services is "robustly competitive" and that "regulatory scrutiny" of such services is not necessary.<sup>7</sup> As Level 3 explained,

Like AT&T, Level 3 agrees with how the Commission characterized the Internet industry in the Stevens Report when it wrote, "the technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure." The FCC was right to go down that path because inherent in any government mandate is that government rate setting is not far behind. Level 3 moved from the drawing board to one of the world's largest Internet networks exactly because it was able to

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<sup>4</sup> *Net Neutrality Order* ¶¶ 1, 12, 42, Appendix D ¶ 54.

<sup>5</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶¶ 62-63 (1998) (distinguishing services offered by Internet backbone providers and Internet access providers); Jason Oxman, *The FCC and the Unregulation of the Internet*, FCC Office of Plans and Policy, Working Paper No. 31 (July 1999) (*FCC Whitepaper - Unregulation of the Internet*); Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC Office of Plans and Policy, Working Paper No. 32 (Sept. 2000) (*FCC Whitepaper - Digital Handshake*); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, ¶¶ 125, 133 (released March 26, 2007) (*AT&T-BellSouth Merger Order*) (distinguishing Internet backbone services from mass market Internet access services).

<sup>6</sup> *FCC White Paper - Digital Handshake* at 1, 2 ("in the absence of a dominant backbone, market forces encourage interconnection between backbones and thereby protect consumers from any anti-competitive behavior on the part of backbone providers;" "there are no domestic or international industry-specific regulations that govern how Internet backbone providers interconnect to exchange traffic"); *FCC White Paper - Unregulation of the Internet* at 23 ("the Internet backbone is treated as an unregulated information service"); *AT&T-BellSouth Merger Order* ¶ 127 (observing that eight Tier 1 Internet backbone providers "compete vigorously" to offer "the lowest price, highest quality, and broadest geographic reach"). See also Letter from Ian Dillner, Verizon, to Marlene Dortch, FCC, GN Docket No. 09-191, at 3 (January 13, 2011) (describing competition in market for Internet backbone services).

<sup>7</sup> Letter from John Nakahata, Counsel for Level 3, to Marlene Dortch, FCC, GN Docket No. 09-191, Attachment at 2 (Nov. 10, 2009).

respond to market and technology dynamics without having to meet any government imposed mandates.<sup>8</sup>

Similarly, Global Crossing has cautioned the Commission that regulation of Internet backbone providers would be “counterproductive” because the market for backbone services “developed in the absence of regulation” and “has served the public well for years.”<sup>9</sup> As Global Crossing aptly put it, “[r]egulating this market now would serve only to distort its natural development, and could undermine the public interest benefits that the Internet has delivered to date, and is expected to deliver in the future.”<sup>10</sup>

Consistent with these marketplace realities, this Commission has steadfastly maintained throughout the Internet policy debate over the last eighteen months that it has no intention of subjecting Internet peering and other Internet backbone services to net neutrality rules or any other type of prescriptive regulations. In the *Net Neutrality NPRM*, the Commission stated that the rules it was proposing “address user’s ability to *access* the Internet,” but they “are not intended to regulate the Internet itself.”<sup>11</sup> When the debate subsequently turned to reclassification, the Commission assured all stakeholders that it did not intend “to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to end users in the retail market, including, for example, Internet backbone connectivity arrangements.”<sup>12</sup> And when the debate returned to net neutrality late last year, the Commission adopted rules that by their own terms apply only to “broadband Internet access service,” which is a “mass-market retail service” that enables consumers to communicate with “all or substantially all Internet endpoints.”<sup>13</sup> The Commission emphasized that “broadband Internet access service” does *not* include “Internet backbone services,” such as “peering” or other Internet “interconnection arrangements” because such services “typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.”<sup>14</sup>

Despite the Commission’s guidance on this point, Level 3 insists that its dispute with Comcast over the terms of the parties’ agreement for Internet backbone services is covered by the net neutrality rules and it has urged the Commission to find that Comcast is violating those rules.<sup>15</sup> In particular, Level 3 is demanding that Comcast carry traffic from Level 3’s network –

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<sup>8</sup> Level 3 Reply Comments, GN Docket No. 10-127, at 10-11 (Aug. 12, 2010) (expressing concern about impact of FCC reclassification proposal on Internet backbone services).

<sup>9</sup> Global Crossing Comments, GN Docket No. 09-191, at 7 (Jan. 14, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> *Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, FCC 09-93, ¶ 14 (released Oct. 22, 2009) (*Net Neutrality NPRM*) (emphasis in original). See also Prepared Remarks of FCC Chairman Julius Genachowski, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Brookings Institution (Sept. 21, 2009) (“This is not about government regulation of the Internet. It’s about fair rules of the road for companies that control *access* to the Internet.”) (emphasis added).

<sup>12</sup> *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114, ¶ 107 (released June 17, 2010).

<sup>13</sup> *Net Neutrality Order* ¶ 44.

<sup>14</sup> *Net Neutrality Order* ¶ 47, ¶ 67 note 209.

<sup>15</sup> See *supra* note 2.

without charge – to the subset of Internet endpoints served by Comcast’s network.<sup>16</sup> The *Net Neutrality Order* requires no such thing. Indeed, irrespective of whether the service Level 3 desires from Comcast is labeled as an “interconnection arrangement” as Level 3 contends, or “peering” as Comcast asserts, this service clearly is not “broadband Internet access service” under the Commission’s rules because Level 3 does not want, and is not asking Comcast to provide, the capability to communicate with “*all or substantially all* Internet endpoints.”<sup>17</sup> The same is true with respect to the services described in the recent letters to the Commission from Global Crossing and Voxel.net.

Beyond that, neither Level 3 nor the other companies advocating for regulatory intervention are seeking a “mass-market retail” broadband Internet access service sold “on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.”<sup>18</sup> Quite the contrary. As Level 3’s own filings show, for example, its President and Chief Operating Officer has personally engaged with the President of Comcast Cable to negotiate an individualized “interconnection arrangement” between the two companies, which are, respectively, one of the largest backbone providers in the world and the largest cable broadband provider in the U.S.<sup>19</sup> Thus, by Level 3’s own admission, its dispute with Comcast does not involve retail, mass market “broadband Internet access service” and therefore cannot be subject to the Commission’s net neutrality rules.<sup>20</sup>

**The Commission Should Expediently Confirm that the Net Neutrality Rules Do Not Apply to Internet Peering and other Internet Backbone Services.** At the outset of the

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<sup>16</sup> See Letter from John Ryan, Level 3, to Marlene Dortch, FCC, MB Docket No. 10-56, Attachment at 2-3 (Dec. 18, 2010) (attaching letter from Jeff Storey, Level 3, to Neil Smit, Comcast (Dec. 17, 2010) (*Storey December 17 Letter*)). Ironically, at the same time Level 3 asserts it has the right to demand that Comcast deliver Level 3’s traffic without charge (and without regard to traffic ratios or volumes between their networks), Level 3 also asserts that no other network operator has the right to make such a demand on Level 3. Specifically, according to the “IP Traffic Exchange Principles” posted on Level 3’s website, Level 3 claims it has sole discretion to determine if, and on what terms, it will enter into interconnection arrangements with other networks, including whether such peering arrangements will be paid or settlement-free. See <http://www.level3.com/index.cfm?pageID=415>.

<sup>17</sup> *Net Neutrality Order* ¶ 44 (emphasis added). See *Ryan December 3 Letter* at 7; Letter from Lynn Charytan, Comcast, to Marlene Dortch, FCC, GN Docket No. 09-191, Attachment at 3-4 (Dec. 7, 2010). Level 3’s insistence that the parties’ arrangement is not “peering” is both implausible and irrelevant under the *Net Neutrality Order*. “Peering” involves a bilateral agreement between networks to exchange traffic bound for each other’s endpoints (and not the endpoints of other networks), see *supra* *FCC White Paper - Digital Handshake*, which is precisely what Level 3 appears to be seeking from Comcast. Moreover, the *Net Neutrality Order* excludes both “interconnection” and “peering” arrangements (as well as “Internet backbone services”) from the scope of the rules. *Net Neutrality Order* ¶ 47, ¶ 67 note 209. Thus, even if Level 3 were correct about the label that applies, the arrangement is still not subject to the rules.

<sup>18</sup> *Net Neutrality Order* ¶ 45.

<sup>19</sup> *Storey December 17 Letter*.

<sup>20</sup> Level 3 claims that, under the *Net Neutrality Order*, Internet backbone services like those at issue in its dispute with Comcast are only excluded from the net neutrality rules “if those services are separate from broadband Internet access service.” *Ryan January 14 Letter* at 4. But the excerpt from the *Order* quoted by Level 3 is inapt because the Internet backbone service that Level 3 seeks from Comcast is, in fact, separate from Comcast’s retail, mass market broadband Internet access service, which Level 3 does not want and is not seeking from Comcast, as demonstrated above.

net neutrality proceeding, AT&T and NCTA both cautioned the Commission that its proposed rules, as initially drafted, were so overbroad that they could be read to encompass certain types of Internet backbone services even though that was not the Commission's intent.<sup>21</sup> Nonetheless, based on the Commission's repeated statements that the scope of its approach to Internet regulation was more limited than we feared, we worked cooperatively and in good faith with the Commission and other stakeholders in the broadband industry, the public interest community, the Administration, and Congress,<sup>22</sup> in an effort to reach a workable resolution of the net neutrality debate. When the Commission adopted its net neutrality rules at the end of that process, we expressed optimism that the final rules – which, as discussed, apply only to broadband Internet access service – would, we hoped, avoid “a raft of unintended consequences” and provide the regulatory certainty needed for the massive private-sector investment necessary to achieve the nation's aggressive broadband goals.<sup>23</sup>

Almost immediately, that regulatory certainty has been put at risk. The Commission must move promptly to correct Level 3's erroneous assertion that Internet backbone services are covered by the Commission's net neutrality rules in order to provide the “certainty and clarity” intended by the *Net Neutrality Order*. While the Commission's silence to date about Level 3's arguments may reflect the correct view that commercial peering disputes should play out without government involvement, an unequivocal statement of this intent has clearly become necessary. Level 3's assertion has led other providers, including Global Crossing and Voxel.net, to make similar claims, which, in turn, have caused certain media outlets to suggest that there are open questions about whether the scope of the net neutrality rules extends to Internet peering and other Internet backbone services.<sup>24</sup> More broadly, even some pro-net neutrality advocates have raised concerns that the *Order* could be a prelude to the Commission asserting “boundless authority to regulate the Internet for whatever it sees fit.”<sup>25</sup> In fact, the Commission itself has long recognized that government intervention in the Internet space, no matter how well intentioned, sends a cautionary message to investors while simultaneously emboldening foreign nations to exercise stricter control over the Internet for their own purposes.<sup>26</sup>

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<sup>21</sup> AT&T Comments at 111; NCTA Reply Comments at 14-15.

<sup>22</sup> We note that in compromise legislation proposed by Representative Waxman in his former role as Chairman of the House Committee on Energy and Commerce, “Internet backbone services” were expressly excluded from the term “broadband Internet access service.” Letter from Henry Waxman, U.S. House Committee on Energy and Commerce, to Julius Genachowski, FCC, GN Docket No. 09-191, Attachment at 8 (Dec. 1, 2010).

<sup>23</sup> See NCTA Statement Regarding FCC Approval of the Open Internet Item (Dec. 21, 2010), at <http://www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-Regarding-FCC-Approval-of-the-Open-Internet-Item.aspx>; A Few Thoughts on Today's FCC Vote (Dec. 21, 2010), at <http://attpublicpolicy.com/government-policy/a-few-thoughts-on-todays-fcc-vote/>.

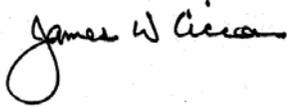
<sup>24</sup> See *supra* note 3.

<sup>25</sup> See Electronic Frontier Foundation, Deeplinks Blog, *Part I: FCC “Ancillary” Authority to Regulate their Internet? Don't Count on It*, at <http://www.eff.org/deeplinks/2011/02/part-i-fcc-ancillary-authority-regulate-internet>.

<sup>26</sup> See Federal Communications Commission, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community* (1999) (“The Internet has evolved at an unprecedented pace, in large part due to the absence of government regulation. Consistent with the tradition of promoting innovation in new communications services, regulatory agencies should refrain from taking actions that could stifle the growth of the Internet. . . . Attracting private sector investment is the most effective way

Thus, consistent with the Commission's commitment that its net neutrality rules would "increase certainty for all Internet stakeholders,"<sup>27</sup> we urge the Commission to promptly and publicly affirm that Internet peering and other Internet backbone services, including the backbone arrangements described by Level 3 and Comcast, are not subject to those rules.

Sincerely,



James W. Cicconi  
AT&T Inc.



Kyle E. McSarrow  
National Cable &  
Telecommunications Association

cc: Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Commissioner Meredith Attwell Baker

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for countries to build the physical infrastructure necessary for a robust Internet network. To attract private sector investment, policymakers must remove barriers and establish favorable investment incentives.”). *See also* Global Crossing Comments, GN Docket No. 09-191, at 10-11 (“the Internet is a global network” and “the Commission’s actions could provide a basis (or excuse) for other countries to take action themselves,” “potentially in a manner unfriendly to U.S. interests.”).

<sup>27</sup> *Net Neutrality Order* ¶ 12.