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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:

We listened with interest to your testimony yesterday before the House Communications and Internet Subcommittee, particularly as it related to the Open Internet Order. Unfortunately, some of the media has mischaracterized what you said about the Order and how it may relate to the dispute between Level 3 and Comcast. To set the record straight, your exchange with Congresswoman Blackburn was precisely as follows:

Representative Blackburn: Okay, let's talk about peering and interconnectivity. We know that these arrangements have never been regulated, and the FCC's net neutrality order says that the rules do not cover peering. So, Mr. Chairman, do you believe the Commission's new net neutrality order and its underlying rules govern the Level 3/Comcast dispute?

Chairman Genachowski: Well, as you said, the order says that it doesn't change anything with respect to existing peering arrangements. It applies to Internet access service provided to consumers and small businesses. You're referring to a dispute that's occurring outside the Commission, a commercial dispute. I hope those parties settle it and resolve it, but it's not something that we have facts and data on. I do think the order speaks for itself in the way that you suggest.

Notwithstanding incorrect press reports, you were correct in several regards:

- You correctly stated that the Open Internet Order sets forth that it does not change existing peering arrangements. There is no peering arrangement between Level 3 and Comcast.

- You correctly stated that the Open Internet Order applies to Internet access service provided to consumers and small business. This is exactly the service that Comcast provides, and this is the service platform which Comcast wants to charge Level 3 to access when Level 3 delivers content requested by Comcast's Internet access service customers.
- You correctly observed that the Comcast/Level 3 dispute is not directly before the Commission yet.
- You correctly stated that the Commission has not yet collected data or facts relating to the Comcast/Level 3 dispute.
- And we share your hope that Level 3 and Comcast can reach a resolution of the dispute.

As you know, while we have raised these issues as part of our advocacy prior to adoption of the Open Internet Order and in the context of the Comcast/NBCU transaction, we have not yet commenced a formal or informal complaint before the Commission under the Open Internet Order or the Comcast/NBCU approval order. As a result, the Commission has yet to receive or evaluate the facts surrounding our dispute, including a full review and understanding of (a) the terms and conditions of the agreements between Comcast and Level 3 prior to the November 2010 dispute, (b) the terms and conditions of the November 2010 agreement that Comcast compelled Level 3 to sign to obtain additional interconnection between our networks in order to continue to provide content requested by Comcast's subscribers, and (c) the impact that Comcast's charges have and will have on the delivery of content requested by Comcast's subscribers.

Notwithstanding the inaccurate press reports of your testimony, the Commission does not have facts that would permit it to conclude that the Comcast/Level 3 dispute implicates an "existing peering agreement." We must advise you that it does not. Rather, the dispute arises out of Comcast's insistence that Level 3 purchase services from Comcast in order to obtain access to Comcast's local distribution network (and thus obtain access to Comcast's subscribers). Level 3 has advised Comcast that it does not need or want to purchase those services, and Comcast has said that access to Comcast's subscribers will not be allowed without such a purchase.

We assume that it was not your intent to prejudge these issues, and that you will remain fair and impartial in the event that Level 3 finds it necessary to bring a formal or informal complaint against Comcast for violation of the NBCU merger conditions or the Open Internet Order.

We also assume that you did not intend to construe the Open Internet Order so as to render it essentially meaningless as a tool to assure continued subscriber access to

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independent content and applications. As we explained in our letter to you yesterday morning (which you may not have had the chance to read before your testimony), interpreting the Open Internet Order to eliminate Commission review if a dispute is over *any* service, simply because it is arbitrarily labeled a “backbone service,” creates a gaping hole in the Commission’s ability to preserve openness in the Internet. If an ISP is free to refuse to accept content requested by *its* subscribers in the metro area where the subscriber resides, but rather can insist that the same content will only be accepted at a point of interconnection 1 mile or 500 miles away where a fee will be charged for the “backbone service” to carry it to the subscriber’s home town, then the prohibition on charging content providers for delivery of content requested by subscribers is eviscerated.

The Commission can be assured that if this construct allows ISPs to evade scrutiny by regulators and policymakers, then anticompetitive interconnection schemes will proliferate and be justified simply by labeling the coerced payment a “backbone” service charge. And this outcome will be a direct result of the incentives ISPs have to discriminate against online content that competes with the ISPs’ own content – the same incentives the Commission explicitly outlined and warned against in the Open Internet Order.

As you know, fair and equitable interconnection has been the lynchpin of regulatory policy for the past 25 years. Effective government oversight of interconnection has spurred competition and led to the creation of the Internet as we know it today. Without mandated interconnection, consumers would have never enjoyed the benefits of the dial-up Internet that in time evolved into the broadband Internet services we enjoy today. Assuring fair and equitable interconnection will undoubtedly encourage competition and create a more robust and open Internet experience in the future. It would be ironic and unfortunate if, as we begin the era of growing broadband connectivity and use, the Commission effectively abdicated jurisdiction over broadband Internet services in a way that reduces choice and openness for the American consumer.

Sincerely yours,



Executive Vice President
& Chief Legal Officer

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