February 18, 2011

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

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

Dear Ms. Dortch:

The Chairman’s statement about the commercial dispute between Level 3 and Comcast at the February 16, 2011 hearing of the House Energy and Commerce Committee, Subcommittee on Communications and Technology, speaks for itself.1 So does the Commission’s Open Internet Order, which clearly and unequivocally states that the “rules [do not] affect existing arrangements for network interconnection, including existing paid peering arrangements.”2

By contrast to those clear statements, Level 3’s latest, Orwellian submission requires translation.3 In urging the Commission not to “prejudge” its arguments, Level 3’s letter is actually asking the Commission to reverse its own prior statements and the plain text of the Order, and to signal instead a willingness to vastly expand the Order’s reach, which would drag the Commission where it should not go: into the heart of the Internet marketplace. The arguments Level 3 advances are fundamentally, and consistently, misleading and nonsensical. We respond, in brief, as follows:

1. The “no peering arrangements” slogan is wrong and irrelevant: In a desperate effort to ignore the Order’s clear language, Level 3 now insists that “[t]here is no peering arrangement between Level 3 and Comcast.”4 This is wrong. As Comcast has repeatedly made clear, Level 3 in fact has two peering arrangements with Comcast. One is a pre-existing arrangement for network interconnection, which includes settlement-free interconnection provisions. The other is an incremental

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4 Id. at 1.
arrangement that Level 3 signed this past November under which Comcast agreed to supply additional interconnection ports to Level 3. Both agreements are in effect and enabling a satisfactory and growing exchange of traffic between the companies.

Under any common understanding of how the Internet works, each of these is a “peering arrangement.” But, even if that were not the case, the sweep of the relevant exclusion in the Order is appropriately broad; it exempts any “existing arrangements for network interconnection” – by whatever name – from the scope of the rules. Level 3 has explicitly conceded that this dispute concerns an “arrangement for network interconnection.” In its Frequently Asked Questions (“FAQs”) issued on December 3, 2010, Level 3 wrote: “This is a fundamental interconnection dispute between Level 3 and Comcast.”5 In the same document, it noted that the dispute arose from Level 3’s desire to “negotiate fair and equitable economic and technical terms to achieve a balanced interconnection arrangement, including offering to use the Level 3 fiber optic network to alleviate any potential congestion on Comcast’s network.”6

For its own, short-sighted reasons, Level 3 would like to distort the Open Internet Order into a basis for the Commission to regulate any interconnection between network providers that does not meet Level 3’s self-serving definition of “peering,” or that does not fall within its equally creative and self-serving definition of the Internet “backbone.” If the Open Internet Order means what Level 3 says it does, there would be no limiting principle that would shield any aspect of the Internet ecosystem from regulation – including Level 3’s own transit agreements with other networks and the CDNs that are its customers. The specter of that type of extreme overreach is precisely what led NCTA and AT&T to file their letter earlier this week, expressing concern about “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.”7

2. **Level 3’s effort to shoehorn this into a dispute about Broadband Internet Access Service would drag the entire Internet into a morass of regulation and uncertainty**: Level 3 alternatively suggests that this dispute is somehow about

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5 Letter from John Ryan, Level 3 Communications, to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, Attachment at 6 (Dec. 3, 2010) (FAQ No. 15).

6 Id. at 7 (FAQ No. 18); see also Letter from John Ryan, Level 3 Communications, to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, at 2 (Dec. 7, 2010) (noting that Level 3 could not agree to paid peering because “we believe that the investment and expense incurred by [two] interconnecting backbone network[s] ought to be equitably distributed between the two networks[,]” and because, in its view, “the level of investment required by both interconnecting networks is not related to the ratio of sent traffic to received traffic” (emphases added)).

Comcast’s provision of “Internet access service provided to consumers and small business.” That is wrong. Comcast neither blocks nor discriminates against traffic originating from Level 3’s network “in transmitting lawful network traffic over a consumer’s broadband Internet access service.” In whatever manner Level 3 would like to deliver traffic to Comcast’s network – through the existing arrangements, new ones negotiated in the marketplace or, as discussed below, a transit path, it will be delivered to Comcast’s customers with the same high quality as other Internet traffic. There is no blocking regardless of the arrangement that Level 3 chooses to use.

To the extent that Level 3 is really arguing that any charge to another network provider or traffic sender is the equivalent of a charge to an “edge provider” in violation of the Open Internet Order, the effect would be to bar ISPs from having any edge providers as customers for Internet access service – an outcome even Level 3 must concede is absurd. By this logic, Level 3’s own commercial arrangement with Netflix (as well as its many transit arrangements with countless other traffic senders) would violate the Order. After all, Netflix purchases from Level 3 the ability “to transmit data to . . . all or substantially all Internet endpoints.” But the Commission wisely drew lines designed precisely to confine the reach of its new rules, noting that the prohibition on paying for priority does not foreclose CDN arrangements – or “network interconnection” such as transit.

3. **Level 3 had, has, and will have, the choice of a variety of paths onto Comcast’s and every other ISP’s network, other than direct peering:** Level 3 repeats the canard that Comcast “compelled Level 3 to sign” the November agreement “in order to continue to provide content requested by Comcast’s subscribers.” In fact, Level 3 has many ports on Comcast’s network that it uses today to send its traffic to Comcast’s customers. Level 3 had, and has, the option of relying on those ports to send those large volumes of traffic directly to Comcast, while using alternative, third party “transit” paths to send any remaining traffic to Comcast. This is a common arrangement that many companies employ today – and one that would have allowed Level 3 to send traffic to Comcast’s network without paying Comcast for any type of interconnection, should it so choose.

Level 3 cannot deny that it has the transit option, since there are dozens of transit paths into Comcast’s network. But Level 3 does not want to use transit because this would be uncomfortably inconsistent with its long-held status as a Tier 1 provider. Of course, Level 3 is perfectly comfortable charging other providers for transit, especially smaller cable operators and telcos; this is a major source of revenue for its backbone business. It simply refuses ever to have to pay any other provider for transit. That is not an issue between Comcast and Level 3, but rather an issue between Level 3 and such other networks that might offer it transit paths through to Comcast’s network. And accommodating a particular provider’s preference for free

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8 *February 17 Level 3 Letter* at 2.
9 *Id.*
(compelled) peering over third party transit is certainly not among the purposes of the Open Internet Order.

4. **Content delivery is not and will not be affected by this dispute:** Finally, Level 3 asserts that this dispute will “impact . . . the delivery of content requested by Comcast’s customers.”10 It will not. As every rational observer has noted, this dispute relates solely to the terms for the delivery of the volumes of Level 3’s traffic – regardless of source or content – onto Comcast’s network. But, as noted above, if Level 3 determines that it would rather not engage in paid peering with Comcast, it can continue to deliver traffic directly to Comcast over the parties’ settlement-free ports, and indirectly through transit providers. What is even more important is that, either way, **Comcast customers will always be able to obtain access to the Internet content of their choice, subject only to their own terms of service.** Further, content providers that rely on Level 3 can themselves use many other paths to reach Comcast’s network. It is a simple fact that content providers routinely move their content through any of several CDNs, and they can easily and automatically move content around among alternative providers if Level 3 limits the capacity it sends to Comcast. This selection of alternate paths happens every hour of every day throughout the Internet.

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In short, there is only one problem with Level 3’s effort to tell the world what the Chairman and the Open Internet Order say about its dispute – it doesn’t match what the Chairman and the Order say. This has been, is, and will remain a dispute about the terms of an existing arrangement for network interconnection. It is not properly before this Commission. It is not within the bounds of the Open Internet Order. It is a dispute that can, and should be, resolved through commercial negotiations. We remain prepared to do just that.

Please let me know if you have further questions.

Sincerely,

/s/ Lynn R. Charytan

Lynn R. Charytan
Vice President, Legal Regulatory Affairs

cc: Chairman Julius Genachowski
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker

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10 *Id.*