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December 17, 2010

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street S.W.  
Washington, D.C. 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 Licensees*, MB Docket No. 10-56

Dear Ms. Dortch:

This letter reports an ex parte communication between the undersigned and Sharon Gillett, Chief of the Wireless Competition Bureau, on Thursday, December 16, 2010, regarding the letter filed by Level 3 on that same day in the Comcast-NBCU docket. It also responds briefly to the substance of that letter, which has no place in this proceeding.

In our conversation, I updated Ms. Gillett regarding the status of the parties' engineering negotiations, which were reported in ex partes regarding conversations with Ms. Gillett on Monday, December 13. Level 3's latest ex parte barely acknowledges these discussions, which had been ongoing from December 14 through early on December 16, and were designed to assess Level 3's proposal to exchange peering traffic deep in Comcast's network and to help both parties understand the engineering and other costs and requirements involved. In Comcast's experience, Level 3's new peering proposal is unprecedented, as is its insistence that Comcast and its customers bear 100 percent of the costs of this new design, regardless of traffic flows between the parties.

The proposal raises significant and complex technical and economic questions that could impact both parties' customers in uncertain ways, and represents a major and untested shift in interconnect architecture that presents feasibility, scalability, and other considerations. Comcast has nevertheless taken a constructive approach to addressing these questions.

In the context of the parties' discussions, Comcast engineers made an initial assessment of Level 3's request, outlined some of the required engineering steps, began to think through alternative architectures that might better serve both parties, and did an initial estimate of costs as best they can be understood at this stage. On December 16, after two days of in-person discussions with Level 3, 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; (2) be fair to both parties and respect Level 3's immediate business concerns; and (3) ensure that network performance and services were not degraded or artificially manipulated.

Specifically, Comcast presented Level 3 with the following oral proposal, which we proposed would be documented in a written agreement that would resolve remaining details:

- The parties' existing paid peering agreement, signed in November 2010, which provides for Comcast to provision up to twenty ports, would be implemented per the existing commitments, except that Comcast would waive monthly fees through the date that is 45 days after the start of the new Internet architecture trial described here (target trial turn-up in January, 2011).
- Comcast and Level 3 would trial metro interconnect solutions to understand the traffic patterns, routing, costs, and performance of this new approach. Both parties would fund their respective, modest capital costs for the trial, and the parties would agree on a reasonable duration for the trial (e.g., several months).
- In parallel, Comcast and Level 3 would continue developing long-term solutions for Internet traffic capacity, and discussions would continue in good faith to explore other architecture and technology solutions to improve overall economics.

Additional details, such as appropriate metrics for the assessment, an agreed-upon path for the existing peering agreement after the 45-day period, and possible next steps after the trial, were open for discussion. However, rather than engage in any discussion, 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.

Level 3's actions in this regard are in bad faith, and its insistence that this is not a peering dispute rings hollow, as we have previously explained in other submissions. Indeed, under Level 3's proposed regime, the FCC would, for the very first time, insert itself into regulating the interconnection of thousands of constituent IP networks, which have for over a decade worked out efficient and mutually beneficial means of interconnecting, in the U.S. and around the globe, *without* government intervention. Of course, Level 3 seeks to avoid this by insisting that government oversight would be appropriate only for those parts of the Internet that *Level 3* wants to define as being "off the backbone" – a definition designed solely to advantage Level 3 given its unique dual role as a Tier 1 provider and a CDN. For example, Level 3 conspicuously does not propose government oversight of *its* relationships with the smaller MSOs and rural telephone companies that *pay* Level 3 for "interconnection," *and that will be compelled to pay Level 3 for receipt of its new CDN traffic* – notwithstanding that each of those providers has, to use Level 3's inaccurate phrase, a supposed "terminating access monopoly," and notwithstanding Level 3's recovery of costs from its own content customers. Level 3 also conveniently ignores the role *it* plays as a last mile ISP for countless "eyeballs" that depend on its service for basic Internet connectivity, which gives it precisely the same alleged "terminating access monopoly" it ascribes to Comcast and other ISPs.

Beyond this, Level 3 proposes mandatory settlement-free peering for even radically unbalanced traffic – not only 3:1 or 5:1, but also presumably even 100:1. In other words, to preserve its own business model which may be failing in the marketplace, Level 3 contends that it is perfectly fair to shift *all* the going-forward costs of sustaining exploding Internet growth onto *one* network in a two-network arrangement. Contrast this position with Level 3's own approach in its previous, still-current arrangement with Comcast that defines "Mutual Value" between our networks as a maximum 2:1 traffic ratio.

What Level 3's new position is all about is its view that broadband Internet customers – on Comcast's network but eventually on *all* ISP networks – should subsidize Level 3's business by shouldering massive new costs imposed by Level 3. And Level 3's proposal – which the company's *ex parte* makes clear it wants to impose throughout the Internet marketplace – also calls for pervasive FCC oversight of not only the economic terms of peering and transit relationships, but also the physical interconnection issues of the type that have created intractable disputes and regulatory morass on the PSTN for nearly a quarter of a century. Level 3's proposed cost shifting and hyper-regulatory solution would destroy a successful, nimble, well-established Internet marketplace and precipitate huge new levels of regulatory uncertainty, bringing the Internet squarely into the kind of telecommunications-type regulatory regime that failed for so long to promote competition and investment.

Finally, and in all events, Level 3's attempt to interject this dispute into the NBCU transaction review is grossly improper. A significant number of parties have already sought to use this particular transaction review process to advantage themselves in business dealings with Comcast or NBCU, but Level 3's approach represents an exceptional affront to the Commission – and to the Justice Department. Both agencies have been diligently reviewing the proposed transaction for nearly a year, and both are nearing the end of that prolonged and difficult process. Although many parties have raised extraneous issues, and have strained to find a transaction "hook" to justify their pursuit of regulatory leverage, not a single party raised Internet peering issues as a matter pertinent to Comcast's proposed joint venture with GE regarding NBC Universal (until Level 3 first made its allegations against Comcast a few weeks ago). Of the scores of questions that Comcast and NBCU have been asked to address in the Commission's information requests, not one pertained to Internet peering. In the six lengthy congressional hearings held in February, June, and July, and in all the follow-up questions sent by various Committees and individual legislators, not once did the issue of Internet peering arise.

Level 3's letter does not even pretend that there is a transaction-specific issue here. The letter repeatedly characterizes Level 3's concerns in industry-wide terms: referring variously to "a residential broadband Internet service provider *like Comcast*," "*Comcast and other residential broadband Internet service providers*" (twice), and "*Comcast and other last-mile providers*" (emphasis added). NBCU is mentioned only twice in the body of Level 3's letter – and in both cases the name appears only in the context of Level 3's proposal that conditions be imposed, *not* as part of a transaction-specific analysis that even attempts to show why Comcast's acquisition of an interest in NBC Universal would warrant such transaction-specific conditions. In fact, Level 3 admits its goal is to use the FCC and the Justice Department to "*send a clear message to all other residential broadband service providers . . .*" Of course, as Applicants discussed at

Ms. Marlene Dortch  
December 17, 2010  
Page 4 of 4

some length in their Opposition and Response (pp. 9-16), filed July 21, the proper function of a transaction review is neither to adjudicate non-transaction-specific disputes nor to resolve industry-wide issues.

The particulars of Comcast's dispute with Level 3 are susceptible to being worked out in business-to-business discussions (Comcast's preference), or in multi-stakeholder negotiations (which are likely international in scope), in the blogosphere, or elsewhere, but only if parties proceed in good faith. 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.

Please contact me should you have any questions regarding this matter.

Respectfully submitted,

/s/ Lynn Charytan

Lynn Charytan  
Vice President  
Legal Regulatory Affairs

cc: Sharon Gillett