

December 29, 2010

The Honorable Julius Genachowski
Chairman
The Honorable Michael J. Copps
The Honorable Robert M. McDowell
The Honorable Mignon Clyburn
The Honorable Meredith Attwell Baker
Commissioners
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 10-56

Dear Chairman Genachowski and Commissioners:

Level 3 has recently complained that Comcast is charging unfair “access fees.” While historically, Level 3 has been paid to deliver traffic to Comcast customers, or has entered settlement-free arrangements, it is now Comcast’s position that when Comcast subscribers try to access content on the Internet, not only do *they* pay for the bandwidth required in the form of their monthly fees, but content providers that have the content they have requested, such as Level 3, must *also* pay.¹ Because there is no way to reach Comcast customers other than through Comcast’s network, Level 3 feels it has no choice but to pay these fees. However, Level 3 has argued to the FCC, the DOJ, the public, and members of Congress that Comcast is taking advantage of its “terminating access monopoly” over its customers, and of the limited competition in the residential broadband market, in order to charge supracompetitive fees.² As the New America Foundation *et al.* have recently argued, this dispute “raises questions about whether last-mile network owners may leverage their position ... to harm their competitors in other markets, such as the markets for Internet content, applications, and services, particularly in regards to reaching last-mile customers.” While the Commission should proceed to investigate these matters on an industry-wide basis, certain allegations in the present dispute raise issues that are relevant to the proposed merger between Comcast and NBC Universal. Because it has been widely reported that the Commission will issue its decision on the merger “sometime in January,”³ there is still time to ensure that Comcast does not leverage its

¹ This does not result in any net savings to consumers. Even if Comcast reduced its customers’ monthly bills in response to a new revenue stream (which seems unlikely), the companies it charges for access would have to raise *their* prices.

² Letter from Level 3 to DoJ and FCC, Dec. 16, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020924318>.

³ Tony Romm, *FCC Chairman Suggests OK to Comcast-NBC Merger*, POLITICO, Dec. 23, 2010, <http://www.politico.com/news/stories/1210/46755.html>.

control over its approximately 17 million broadband subscribers⁴ to behave anticompetitively, change broadband industry practices, and harm its competitors.

Comcast has maintained that Level 3 is not “forced” to pay in order for Comcast residential subscribers to access the traffic they have requested, because Comcast customers can access content over other routes.⁵ Residential ISPs such as Comcast have traditionally paid other networks to deliver traffic to their customers, and Comcast today pays providers such as TATA Communications to deliver traffic to its network.⁶ However, industry sources have reported that Comcast does not adequately maintain these links, keeping them congested in order to drive traffic to the links it is paid for.⁷ As a result of this poor network management, some kinds of content, such as streaming media, may be unusable over the traditional links. Consequently, the paid links are not a value-added “fast lane,” like those that content delivery networks like Limelight and Akamai have paid Comcast to access in the past. Instead, they are an essential path for any media company that wants to reach the customers of the nation’s largest ISP.

By discouraging the use of its traditional Internet links by streaming content companies, Comcast increases the revenue it collects from interconnection agreements, protects its incumbent cable business from competition from the new entertainment, educational, civic engagement, and cultural choices offered by online video, and degrades the experience of its customers. If the Commission allows the Comcast/NBCU merger to proceed, the combined company will have a further incentive to degrade the experience of its customers who want to access content from outside the vertically-integrated company’s umbrella.

Many commenters have suggested ways that the Commission can mitigate some of the ill effects of the merger, and address the structural problems caused by Comcast’s market power. For instance, the merger conditions suggested by a number of public interest commenters would reduce some of the competitive and public interest harms the merger will cause;⁸ Earthlink’s proposed wholesale broadband access condition would

⁴ Comcast Corp. Form 10-Q, filed 10/27/2010, at 27 (“As of September 30, 2010, our cable systems served approximately 22.9 million video customers, 16.7 million high-speed Internet customers and 8.4 million phone customers....”).

⁵ See, e.g., Joe Waz, *20 Q’s - with Accurate A’s - About Level 3’s Peering Dispute*, COMCAST VOICES, Dec. 7, 2010, <http://blog.comcast.com/2010/12/20-qs---with-accurate-as---about-level-3s-peering-dispute.html>.

⁶ In the past, residential networks like Comcast have paid other networks to deliver content to their customers—just as Comcast’s customers, for example, pay Comcast to deliver content to them. Since Comcast runs a residential, end-user network, and because it caps its customers’ upload speeds, it stands to reason that more traffic would flow into Comcast than out of it. With the rise of streaming video, it is to be expected that this asymmetry will increase. While Comcast has claimed that its recent demand for payment is based on a perceived “traffic imbalance,” it is germane to observe that according to Comcast’s own filings, see Letter from Comcast to FCC, Nov. 30, 2010, at 1 n.1, <http://www.comcast.com/MediaLibrary/1/1/About/PressRoom/Documents/Comcastexparte1130.pdf>, Level 3 has always sent about twice as much traffic to Comcast than Comcast has to Level 3.

⁷ Some truth about Comcast - WikiLeaks style, <http://www.merit.edu/mail.archives/nanog/msg15911.html>.

⁸ See Ex Parte filing of Free Press, Media Access Project, Consumers Union, and Public Knowledge, Dec. 17, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020924436>.

increase last-mile competition, reduce Comcast’s leverage in negotiations with companies like Level 3, and provide Comcast customers with viable alternatives to Comcast;⁹ and Level 3’s proposed conditions would start to address some of the abuses it has identified.¹⁰ Additionally, the Commission should follow recent precedent and require that Comcast improve its network infrastructure.

The Commission’s recent approval of the Verizon/Frontier transaction was conditioned on Frontier’s undertaking service and infrastructure improvements, to better serve the public interest.¹¹ For instance, Frontier agreed to offer 4 Mbps download speeds “to at least 85% of [covered] housing units by the end of 2015,”¹² and to “meet[] the broadband needs of the anchor institutions within the areas that are being transferred from Verizon.”¹³ By requiring these upgrades, the Commission helped ensure that the transaction *enhanced* the public interest, in accord with its legal requirement.

Similarly, if the Commission approves the Comcast/NBCU merger, it should require that Comcast undertake to improve its infrastructure by ensuring that the non-“pay for play” links it maintains with companies such as TATA are upgraded to adequate capacity. This will ensure that Comcast customers who choose to stream video online can choose companies that elect not to pay Comcast access fees, and will mitigate—though not eliminate—the anti-competitive and anti-consumer harms that are sure to result if this merger is approved.

Respectfully submitted,

Public Knowledge
New America Foundation

cc:

Rick Kaplan	Joshua Cinelli	Krista Witanowski
John Flynn	Dave Grimaldi	Rosemary C. Harold
Sharon Gillett	Angela Kronenberg	
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⁹ See Earthlink, *Reply to Opposition to Petition to Condition or Deny*, Aug. 19, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020709172>.

¹⁰ See Letter from Level 3 to DoJ and FCC, Dec. 16, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020924318>.

¹¹ Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, *Memorandum Opinion & Order*, WC Docket No. 09-95, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-87A1.pdf.

¹² *Id.* at 31.

¹³ *Id.* at 31.