Global Crossing®

February 4, 2011

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

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

Dear Ms. Dortch:

On February 3, 2011, Mathew Sewell, Jonathan Aufderheide, David Siegel, and the undersigned met with Rebecca Goodheart, Deena Shetler, Eric Ralph, Richard Hovey, Jenny Prime, and Bill Dever of the Wireline Competition Bureau along with Paul de Sa of the Office of Strategic Policy to discuss the interconnection dispute between Level 3 Communications ("Level 3") and Comcast Corporation ("Comcast"). Pursuant to Section 1.1206 of the Commission's rules, this letter summarizes the issues discussed at this meeting.

We began by addressing Verizon's characterization of the Internet in its letter of January 13, 2011 to the Commission, noting that the Internet that Verizon describes is at least five years out of date. Verizon is correct that the Internet worked well up until recently precisely because it was comprised of a "network of networks," each functionally segregated with different carriers performing different functions that when taken together formed the Internet. Today, however, carriers have integrated last-mile access, content, backbone networks, and content distribution networks or some combination thereof. Since carriers are no longer of relatively equal size and now compete much more directly with each other, the historical cooperative practices that formed the Internet are breaking down and being replaced with more commercially driven tactics such as charging for access to last-mile facilities. This same phenomenon was observed in the telephony world when the advent of the competitive local exchange carriers ("CLECs") upset the historical "bill and keep" (or peering) relationships that existed between adjacent local exchange carriers. Carriers adopted commercially strategic pricing for access in an effort to gain a competitive advantage that ultimately resulted in the reciprocal compensation regime the Commission seeks to reform in CC Docket 01-92.

In today's Internet, broadband ISPs are distorting the economics of the historical peering relationships that existed between carriers, citing concerns about traffic "balance" in order to justify the creation of what amounts to a new access charge regime for the Internet.[1] If such practices continue unchecked, the Internet will experience significant disruption as carriers seek to leverage their respective positions in the Internet ecosystem in order to gain advantages over their competitors. The ultimate result would be to skew the development of broadband competition while undermining the interests of consumers in obtaining the Internet content that they want, when they want it.

To prevent such public interest harms, the Commission should intervene to resolve the instant dispute and ensure that similar disputes do not arise in the future. Critically, it can do so by applying well-established principles on which it has consistently relied to govern the exchange of traffic in the intercarrier compensation context. Fundamentally, while the Commission has recognized the need to permit some opportunity for cost recovery, it also has sought to guard against carriers' improperly shifting all of their costs to other carriers by charging them excessive rates for the use of their networks.[2] The Commission invoked that general principle in addressing the terminating access rates charged by CLECs, a scenario that is substantially similar to the one presented here. In that analogous context, the Commission observed that carriers seeking to deliver calls to a particular end user "have no choice but to purchase terminating access from the called party's LEC," which in turn has both the ability and the incentive to charge excessive terminating access rates regardless of whether it faces retail competition.[3] The Commission recognized that by leveraging this "terminating access monopoly," carriers could improperly shift a substantial portion of their costs onto other carriers, disrupting the development of competition.[4] Accordingly, the Commission determined that carriers should not be permitted unilaterally to impose terminating access charges without regulatory oversight.[5] The Commission later employed the same reasoning in limiting the access

[1] Global Crossing recognizes that Comcast has not attempted to impose tariff-based access charges in the traditional sense of how telephone companies have imposed access charges, but the assessment of a fee for the delivery of traffic over last-mile facilities is the functional equivalent of an access charge.

[2] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 4 (2001) ("*ISP Intercarrier Compensation Order*") ("[G]iven the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus carriers have every incentive to compete, not on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.").

[3] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 ¶ 24 (2005).

[4] *Access Charge Reform*, Seventh Report and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 ¶ 33 (2001) ("We are concerned that, in this environment, permitting CLECs to tariff any rate that they choose may allow some CLECs inappropriately to shift onto the long distance market in general a substantial portion of the CLECs' start-up and network build-out costs. Such cost shifting is inconsistent with the competitive market that we seek to encourage for access service. Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.").

[5] *See generally id.*

charges that CMRS carriers may impose, given their "market power with respect to termination of calls to their subscribers."[6] And, of course, the Commission addressed similar issues in response to the emergence of dial-up ISP businesses that distorted the economics of reciprocal compensation in the 1990s, by minimizing payments for ISP-bound traffic and declaring that carriers should seek to recover their costs from their end users and not other carriers in order to eliminate "opportunit[ies] for regulatory arbitrage" and thus prevent the ensuing "uneconomical results."[7]

The predicament faced by parties that send traffic to a broadband ISP's subscribers today is substantially similar to those which the Commission has not hesitated to remedy in the past. Like CLECs and wireless carriers before them, broadband ISPs enjoy a termination monopoly for their customers.[8] Thus, even if an end user has choices among retail broadband options in the first instance, once he or she has selected a particular option, other parties sending traffic to that end user have no alternative but to deliver it to the chosen broadband provider—which, just like CLECs in the terminating access context, can then take advantage of that situation by assessing discriminatory charges that have no relationship to their costs. The Commission has refused to tolerate such practices in the past; there is no reason for it to do so in the face of a comparable terminating access monopoly. This is especially true considering that the application of access charges without any regulatory oversight would thoroughly undermine all of the Commission's efforts in the instant docket to preserve an open Internet.[9]

The Commission can ameliorate the problems associated with terminating monopolies in today's Internet and preserve an open Internet without complex and extensive regulation. The Commission need only apply its existing, long-held principles of cost-recovery and safeguards for terminating monopolies in the context of the instant dispute.

[6] *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 ¶ 10 (2002).

[7] *ISP Intercarrier Compensation Order* ¶ 21.

[8] This is relatively unique to the broadband ISPs and their domains. Backbone operators such as Level 3 and Global Crossing do not have terminating monopolies because the overwhelming majority of backbone customers "dual-home" their service so that they have backbone connectivity with two or more providers. This opens up at least two routes to the customer for third parties to choose from. Conversely, retail broadband customers take service only from their broadband ISP and thus third parties have only one routing option for reaching each consumer.

[9] Indeed, based on the concerns the Commission has expressed with regards to preserving the Internet "as an open platform for innovation, investment, job creation, economic growth, competition, and free expression," it would be counter-intuitive to permit the imposition of access charges which would enable broadband ISPs to effect the harms the Commission recently sought to prevent.

Please contact me if you have any additional questions regarding these issues.

Sincerely,

/s/

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