WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

REDACTED – FOR PUBLIC INSPECTION

July 27, 2016

VIA ECFS

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

Re: ***Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access Rates for Price Cap Local Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593**

Dear Ms. Dortch:

On behalf of Level 3 Communications, LLC, I hereby submit the redacted version of the attached *ex parte* filing in the above-referenced proceedings pursuant to the terms of the *Modified Protective Order*,[1] *Second Protective Order*,[2] *Data Collection Protective Order*,[3]

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[1] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Modified Protective Order, 25 FCC Rcd. 15168 (2010).

[2] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, 25 FCC Rcd. 17725 (2010).

[3] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, 29 FCC Rcd. 11657 (2014); *see also Wireline Competition Bureau Now Receiving Acknowledgments of Confidentiality Pursuant to Special Access Data Collection Protective Order*, Public Notice, 30 FCC Rcd. 6421 (2015).

Business Data Services Data Collection Protective Order,[4] and the *Tariff Investigation Protective Order*,[5] as well as the *Protective Order Extension Order*.[6]

The Highly Confidential version of this submission has been filed with the Secretary's Office.

Please contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones

Counsel for Level 3 Communications, LLC

Attachment

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[4] *Investigation of Certain Price Cap Local Exchange Carrier Business Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Protective Orders, 30 FCC Rcd. 13680, App. A (2015).

[5] *Id.* at App. B.

[6] *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, DA 16-722 (rel. June 24, 2016).

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1875 K Street, N.W.
Washington, DC 20006-1238

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Fax: 202 303 2000

REDACTED – FOR PUBLIC INSPECTION

July 27, 2016

VIA ECFS ***NOTICE OF EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593**

Dear Ms. Dortch:

On July 25, 2016, on behalf of Level 3 Communications, LLC ("Level 3"), I spoke by phone with David Zesiger of the Wireline Competition Bureau about the need for the Commission to adopt further rules governing incumbent LEC lock-up plans for Business Data Services. During the discussion, I made the following points.

First, the Commission should limit incumbent LECs' opportunities to use circuit portability plans to lock up demand for Business Data Services by prohibiting incumbent LECs from setting the terms of circuit-specific plans in non-competitive areas at longer than two years. In addition, after the expiration of any initial term on a Business Data Services circuit provided by an incumbent LEC in a non-competitive area, the customer should be permitted to continue to pay the same price that applied under the term plan but on a month-to-month basis. The Commission should also prohibit incumbent LECs from establishing terms for volume commitment plans in excess of one year in non-competitive areas.

There is ample basis for these requirements. **[BEGIN HIGHLY CONFIDENTIAL]**

[1]

[END HIGHLY CONFIDENTIAL] In addition, once the incumbent LEC has recovered the customer-specific sunk costs associated with a Business Data Services circuit, there is no reasonable basis for requiring that customers sign up for a new circuit-specific term. Nor is there any basis for increasing the price of circuits that transition to month-to-month after the expiration of a term. If anything, the customer should pay a lower price after the expiration of a term to the extent that the term price was set at a level to recover the customer-specific costs that would have been fully recovered during the initial term. Finally, in all events, the incumbents run little risk of failing to recover their costs in non-competitive areas because they can be confident that they can lease Business Data Services circuits to customers for the foreseeable future in such areas.

The limit on the duration of volume commitments is also reasonable. As the Joint CLECs explained in their comments, there is no economic justification for setting long durations for volume commitments, especially as part of circuit portability plans.[2] In addition, long durations in such plans harm competition by delaying customers' ability to switch from incumbent LECs to more efficient competitive alternative providers.[3]

Second, the Commission should apply the tariff-filing requirements of Section 203 of the Communications Act to incumbent LEC commercial agreements for the provision of circuit-based dedicated services ("CBDS") and packet-based dedicated services ("PBDS") in non-competitive areas.[4] Section 203 states that, "[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges for itself and its connecting carriers . . . whether such charges are joint or separate, and showing the classifications, practices, and regulations *affecting* such charges."[5] The term "affecting" is extremely broad. For example, it encompasses any commercial agreement under which an incumbent LEC provides a credit against shortfall penalties incurred under a CBDS tariffed pricing plan in exchange for a commitment to purchase

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[1] **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

[2] *See* Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 101-03 (filed June 28, 2016) ("Joint CLEC Comments").

[3] *See, e.g.*, *id.* at 100-01.

[4] *See id.* at 75-84.

[5] 47 U.S.C. § 203(a) (emphasis added).

a certain volume of other services (e.g., PBDS). As the Joint CLECs have explained, at least some of the incumbent LECs have not filed agreements containing provisions such as these that unquestionably "affect" charges for tariffed CBDS services.[6] In so doing, the incumbent LECs have prevented the Commission and customers from determining the extent to which incumbent LECs are engaging in unreasonable discrimination in violation of Section 202(a) of the Communications Act. Going forward, the Commission must ensure that incumbent LECs are not able to evade the requirements of Section 202(a) for CBDS or PBDS. In addition, the Commission should investigate incumbent LECs' failure to comply with the requirements of Sections 203 and 202(a) for CBDS in the past and, where appropriate, impose penalties for past violations that will deter similar conduct in the future.

Third, as the Commission acknowledges in the *Order and FNPRM*, a firm with market power in one relevant market can use tying arrangements to leverage that market power into a separate market.[7] As the Commission further observes, tying can take the form of conditioning either the sale or the price (i.e., the availability of a discounted price) in a non-competitive market on the sale of services in a competitive market.[8] Incumbent LECs are likely to have an especially strong incentive to engage in this conduct where it enables them to prevent competitive entry or to evade the effects of rate regulation. In the case of evading rate regulation, if rate regulation prevents an incumbent LEC from fully exploiting its market power in non-competitive Business Data Services markets, the incumbent LEC will have a strong incentive to tie the sale of other products to non-competitive Business Data Services so that the incumbent can reap the full value of its market power in the non-competitive market through the combined sale.

The Commission should therefore prohibit incumbent LECs from tying the sale of Business Data Services in non-competitive markets to the sale of other products.[9] To begin with, the Commission should clarify that common carrier duties preclude any Business Data Services provider from conditioning the sale of Business Data Services in one location on the sale of

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[6] Joint CLEC Comments at 83-84.

[7] *See Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, ¶ 448 (2016).

[8] *See id.*

[9] *See* Joint CLEC Comments at 98-100.

Business Data Services in another location or on the sale of non-Business Data Services. Furthermore, the Commission should prohibit leading competitors (i.e., those providers subject to *ex ante* rate regulation in non-competitive areas) from tying the availability of discounts in harmful ways. For example, the Commission should clarify that a leading competitor may not condition the availability of a discount on Business Data Services prices in non-competitive markets on a customer's agreement to purchase Business Data Services in other markets. The Commission should also prohibit leading competitors from conditioning the availability of a discount on Business Data Services prices in non-competitive markets on a customer's agreement to purchase non-Business Data Services, such as mobile wireless services or best efforts broadband.

These prohibitions should be subject to the important qualification that customers must have the right to choose how to account for the situation where a non-competitive area encompassed by a volume purchase plan for Business Data Services with the leading competitor is reclassified as competitive during the term of the plan. If the leading competitor were to prohibit a customer from counting Business Data Services purchased in the reclassified area toward the volume commitment in the plan, the customer might not be able to meet the volume commitment and, in that case, would be unreasonably exposed to shortfall penalties or higher prices due to the elimination of discounts. Accordingly, when an area encompassed by a leading competitor's Business Data Services volume plan (either in the form of a tariff or a commercial agreement) is reclassified from non-competitive to competitive, the customer should be given the right to (1) require the volume commitment under the plan to be reduced by the volume of Business Data Services purchased by the customer in the reclassified area, or (2) continue to count the Business Data Services purchased by the customer during the life of the plan in the reclassified area toward the volume commitment in the plan.

Fourth, it is important that the Commission ensure that the reforms adopted in the *Tariff Investigation Order* and that are proposed herein take effect as soon as possible so that business customers and consumers experience the benefits of increased competition and reduced barriers to the technology transition as soon as possible.[10]

To begin with, incumbent LECs should be required to modify their standard tariffs (i.e., tariffs other than contract tariffs) to comply with the new requirements. Those amendments, except for the prohibition on all-or-nothing provisions as explained below, should take effect for all existing and future customers upon approval of the tariff amendments. In addition, all future incumbent LEC contract tariffs and commercial agreements must comply with all of the new requirements to the extent that they govern incumbent LECs' sale of Business Data Services in non-competitive Business Data Services markets.

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[10] *See id.* at 104-06.

In addition, the Commission should grant customers currently purchasing CBDS pursuant to volume and term plans under standard tariffs and pursuant to contract tariffs the right to either reduce their volume commitments without incurring shortfall penalties or to terminate their plans or contract tariffs without incurring early termination penalties at any time during a 180-day period following the effective date of the new rules. This "fresh look" will give such customers the opportunity to take advantage of the prohibition on all-or-nothing provisions while maintaining their existing purchase arrangements or to terminate their existing arrangements and enter into entirely new purchase arrangements with incumbent LECs. The Commission should also allow customers currently purchasing PBDS pursuant to commercial agreements the right to terminate those agreements at any time without incurring early termination penalties during a 180-day period following the effective date of the new rules. And the Commission should similarly allow customers purchasing any Business Data Services pursuant to commercial agreements that affect, directly or indirectly, the price paid for any Business Data Service (such as discounting a non-Business Data Service by an amount related to a shortfall or similar penalty in any Business Data Services purchase arrangement) the right to terminate those agreements at any time without incurring early termination penalties during a 180-day period following the effective date of the new rules.

By enabling customers to enter into new purchase arrangements with incumbent LECs so that they can increase the volume of Business Data Services they purchase from competitive wholesalers, a fresh look opportunity will remove barriers to competition much more quickly than waiting for existing arrangements to expire.[11] The 180-day period proposed herein should provide customers with a reasonable amount of time in which to assess the costs and benefits of exercising their fresh look rights in a manner consistent with business needs.[12]

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[11] *See* Letter from Thomas Jones, Counsel for Level 3, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 15-247 & 05-25, RM-10593, at 1-2 (filed Apr. 21, 2016).

[12] *See id*. Granting customers a fresh look is consistent with Commission precedent. For example, the Commission granted customers purchasing certain of AT&T's bundled service packages that included 800 service the right to terminate those packages within 90 days of implementation of 800 number portability without having to pay early termination penalties. *Id*. at 2 (citing *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd. 5880, ¶ 151 (1991), *aff'd*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd. 2677, ¶ 25 (1992)). Identifying potential alternative suppliers and transitioning to new agreements with multiple providers in the Business Data Services context is likely to be more time consuming than the transition envisioned in the 800 number portability context; for that reason, a longer fresh look period of at least 180 days is appropriate in this context.

Please do not hesitate to contact me if you have any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones

Counsel for Level 3 Communications, LLC

cc: David Zesiger