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September 9, 2016

VIA ECFS

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 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

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*

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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 ex parte 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

Confidentiality Pursuant to Special Access Data Collection Protective Order, Public Notice, 30 FCC Rcd. 6421 (2015).

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, 31 FCC Rcd. 7104 (2016).

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VIA HAND DELIVERY

NOTICE OF EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
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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 Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593*

Dear Ms. Dortch:

On September 7, 2016, Joe Cavender of Level Communications, LLC (“Level 3”) and the undersigned met with Deena Shetler, David Zesiger, Joseph Price, Shane Taylor, Richard Benson, and Pam Arluk of the Wireline Competition Bureau, as well as Paul de Sa of the Office of Strategic Planning and Policy Analysis. During the meeting, we expressed Level 3’s support for the adoption of comprehensive reform in the above-referenced proceedings to prevent incumbent LECs from abusing their market power in the provision of circuit-based dedicated services (“CBDS”) and packet-based dedicated services (“PBDS”) (together, “business data services”). We explained that Level 3 supports the reforms jointly proposed by Verizon and INCOMPAS in their April 7, 2016 and June 27, 2016 ex parte letters. We also discussed the methodology for setting benchmark prices for PBDS proposed by Verizon and INCOMPAS in

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their August 9, 2016 ex parte letter.¹ We observed that, as TDS has shown,² the Verizon-INCOMPAS proposal would establish benchmark levels that differ substantially from incumbent LEC to incumbent LEC.

In addition, we responded to points made in reply comments recently filed in the above-referenced proceedings. We explained that, in pleadings filed jointly with other competitive LECs (“Joint CLECs”) and on its own, Level 3 has demonstrated that incumbent LECs have market power in the provision of most kinds of business data services in most customer locations in the country. In light of that market power, Level 3 has proposed that the Commission classify business data services of 100 Mbps and below (“Low-Bandwidth Services”) as non-competitive in all locations, that it classify business data services above 100 Mbps up to and including one Gbps (“Mid-Bandwidth Services”) as non-competitive except in census blocks where at least four service providers have connections, and that it classify business data services above one Gbps (“High-Bandwidth Services”) as competitive in all locations. Level 3 has also proposed that the Commission apply ex ante rate regulation to the prices charged by leading competitors (currently defined as the incumbent LEC) for services classified as non-competitive. Such ex ante rate regulation should take the form of price caps and tariffs for both CBDS and PBDS. In reply comments and declarations filed in support of those comments, opponents of reform have criticized the regulatory framework proposed by Level 3. As we explained in the meeting, those criticisms are without merit.

Average length of Level 3 connections. As Level 3 has explained, given the absence of actual competition in the provision of business data services in the overwhelming majority of locations, the Commission should assess the level of competition by determining the extent to which a reasonably efficient competitor can deploy a connection to a customer demanding a particular type of business data service.³ To assist the Commission in this assessment, Level 3 filed a declaration by John Merriman, Vice President of Finance for North America at Level 3, in which Mr. Merriman assessed the extent to which Level 3 can deploy connections to customers demanding different bandwidths of services both within central business districts and outside of

¹ See Letter from Kathleen Grillo, Senior Vice Pres., Pub. Policy & Gov’t Affairs, Verizon, and Chip Pickering, Chief Exec. Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 & 05-25, RM-10593, at 1-2 (filed Aug. 9, 2016).

² See Attachment to Letter from Tamar Finn, Counsel for TDS Metrocom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed Aug. 25, 2016).

³ See Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 19-20, 40-53 (filed June 28, 2016) (“Joint CLEC FNPRM Comments”); Reply Comments of Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 18-21 (filed Aug. 9, 2016) (“Level 3 FNPRM Reply Comments”).

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central business districts in the ten largest metropolitan statistical areas in the U.S. That analysis shows that it is rarely the case that Level 3 can deploy connections to serve customers demanding only business data services of 100 Mbps and below and that it is only sometimes the case that Level 3 can deploy connections to customers requiring only business data services above 100 Mbps up to and including one Gbps.⁴

In an attempt to challenge the credibility of Mr. Merriman’s analysis, AT&T’s and CenturyLink’s economic consultants (Drs. Israel, Rubinfeld, and Woroch (“IRW”)) studied the distance between locations served via Level 3’s connections and the locations of nodes reported by Level 3 in response to Question II.A.5 of the mandatory data request.⁵ IRW found that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

There is no merit to this argument because the mandatory data request did not require that Level 3 provide the location of its splice points from which it deployed laterals to serve customers. Question II.A.5 required that competitive providers provide “the locations of all

⁴ See Declaration of John Merriman on Behalf of Level 3 Communications, LLC, ¶ 6 (June 27, 2016), attached to Joint CLEC FNPRM Comments (“Merriman FNPRM Decl.”).

⁵ Mark Israel et al., Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test, Third White Paper, at 34 (Aug. 9, 2016), attached to Letter from Glenn Woroch, Compass Lexecon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed Aug. 9, 2016) (“Third IRW White Paper”).

⁶ See *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 on Reconsideration, 29 FCC Rcd. 10899, App. A., at 3 (2014) (“Mandatory Data Request”).

⁷ Third IRW White Paper at 34.

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Nodes used to interconnect with third party networks, and the year that each *Node* went live.”⁸ Moreover, the instructions for Question II.A.5 reiterated this limitation:

Competitive Providers, not including cable companies operating within their LFAs, identify all *Nodes* on your network that are points of interconnection with the networks of other *Providers* and indicate the year that the *Node* was first used for interconnecting with another *Provider*. In lieu of identifying *Nodes* used for interconnection, you can submit to the Commission the interconnection data on file with the Central Location Online Entry System (CLONES) database for your operations.⁹

By limiting the data request to the subset of nodes used to interconnect with third-party networks, the Commission excluded virtually all splice points from the mandatory data request. More particularly, the Commission excluded virtually all of the splice points from which Level 3 would have actually deployed a fiber connection (i.e., a lateral) from its metro backbone to serve any particular customer. It follows that the IRW analysis of the distance between customer locations and nodes reported by Level 3 in response to Question II.A.5 provides no indication whatsoever as to the distance between splice points on Level 3’s network and locations served by Level 3’s network connections.

But even if this were not the case, the IRW analysis would be meaningless. As Dr. Baker has explained in response to a similar argument by IRW (i.e., their reliance on the average bandwidth of competitive LEC connections in an attempt to show that entry is easy), the presence of existing connections deployed in the past “largely reflect[s] entry conditions (or irrational exuberance) in an earlier era, not entry conditions today,” rendering the information “meaningless as an indicator of entry conditions as of 2013 (the date at which the observations in the FCC’s data were recorded) or today.”¹⁰ That is, the fact that a competitor deployed a connection in the past does not mean that doing so comports with the prudent business practices of efficient competitive LECs in the current market environment. It is therefore more appropriate for the Commission to rely on the forward-looking analysis of construction feasibility provided by Mr. Merriman as a means of assessing the extent of competition.

⁸ *Mandatory Data Request*, App. A, at 6.

⁹ *Id.*, App. B, at 14.

¹⁰ Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, ¶ 15, attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed Aug. 9, 2016) (“Baker FNPRM Reply Decl.”) (internal citations omitted).

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Finally, it is worth noting that the incumbent LECs could easily have provided their own deployment feasibility analyses in order to assist the Commission in its market analysis. The analyses could have assessed the circumstances in which the incumbent LECs can deploy connections of specified bandwidths in areas where they operate as competitive LECs (i.e., outside of their incumbent LEC territories). But the incumbent LECs have of course done no such thing. They have instead resorted to submitting spurious arguments designed to prevent the adoption of a regulatory framework that is rooted in actual marketplace conditions.

Low-Bandwidth Services. NCTA’s economic consultants (Drs. Katz and Keating) raise two objections to classifying Low-Bandwidth Services as non-competitive in all locations. *First*, Katz and Keating assert that the Joint CLECs have failed to explain how this approach to Low-Bandwidth Services is “consistent with the econometric findings of Professor Rysman and Commission staff that *potential* competition has a significant effect on DS1 and DS3 prices and, indeed, for DS3 has a larger impact on prices than does actual competition.”¹¹

But the results of the regressions show that competition from nearby competitors has a far weaker effect on incumbent LEC prices than does competition from competitors that have deployed connections to the building. As Dr. Baker has explained, “[t]he greater cumulative effect of in-building providers” in the regressions results “suggests that in-building providers provide a greater competitive constraint, on average, than nearby providers.”¹² In fact, “[i]n [Dr. Baker’s] primary specification, the cumulative effect of four or more in-building providers in lowering ILEC retail prices is more than triple the cumulative effect of four or more nearby providers.”¹³ It follows that “the limited competitive constraint on ILEC retail pricing from the potential entry of nearby CLECs does not substitute for competition from in-building providers, and is not sufficient to ensure that the ILECs set competitive retail prices.”¹⁴ Given the weak

¹¹ Reply Declaration of Michael L. Katz and Bryan G.M. Keating, ¶ 69, attached as Ex. A to Reply Comments of the National Cable & Telecommunications Association, WC Docket Nos. 16-143 & 05-25 (filed Aug. 9, 2016) (“Katz/Keating Decl.”).

¹² Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, ¶ 63 (Jan. 22, 2016), attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (originally filed Jan. 27, 2016) (refiled as revised Apr. 14, 2016) (“Baker Decl.”).

¹³ Reply Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, ¶ 10 (Feb. 17, 2016), attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (originally filed Feb. 19, 2016) (refiled as revised Apr. 14, 2016) (“Baker Reply Decl.”).

¹⁴ *Id.*

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effect of competitors with nearby fiber, it would be inappropriate to rely on such competition as a basis for classifying Low-Bandwidth Services as subject to competition.

Second, Katz and Keating assert that classifying Low-Bandwidth Services as non-competitive in all locations fails to account for locations where four or more competitors offer such services.¹⁵ As the Joint CLECs have explained, however, the proposed regulatory framework for business data services balances the need for accuracy with administrative efficiency.¹⁶ Given that, as of 2013, four or more competitors had deployed connections to fewer than one percent of locations with demand for business data services¹⁷ and there is little prospect that competitors would be able to deploy new connections for the purpose of providing Low-Bandwidth Services going forward, it is reasonable for the Commission to treat Low-Bandwidth Services as non-competitive in all locations. That is, the administrative costs associated with exempting fewer than one percent of customer locations from ex ante regulation applicable to Low-Bandwidth Services likely outweigh the benefits. It should be noted that the Joint CLECs' proposal to classify all High-Bandwidth Services as competitive is based on a similar calculation. While those services are almost certainly not competitive in a number of locations, the costs associated with applying ex ante rate regulation to those non-competitive locations likely outweigh the benefits.

Competition test for Mid-Bandwidth Services. Incumbent LECs and cable companies oppose requiring the presence of at least four competitors with connections in a census block to determine whether Mid-Bandwidth Services are competitive. *First*, Katz and Keating argue that the results of the regressions do not support the use of four competitors as the threshold in the test.¹⁸ Katz and Keating instead, at least implicitly, endorse the competition test proposed by IRW, under which markets would be classified as competitive where a single nearby competitor has deployed fiber.¹⁹ But the available information shows that the Joint CLECs' proposal to require four competitors with connections is the more appropriate test.

¹⁵ See Katz/Keating Decl. ¶ 68.

¹⁶ See Joint CLEC FNPRM Comments at 46-47.

¹⁷ See Marc Rysman, *Empirics of Business Data Services*, at 15, tbl. 7 (rev. June 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf.

¹⁸ See Katz/Keating Decl. ¶¶ 57-59, 73.

¹⁹ See Mark Israel et al., *Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test*, Second White Paper, at 27-40 (June 28, 2016), attached to Letter from Glenn Woroch, Compass Lexecon, to Marlene

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To begin with, the presence of a single competitor in the market is unlikely to discipline incumbent LEC prices. As Dr. Baker has explained:

As a general matter, the economics literature recognizes that markets with more than one significant firm do not necessarily perform competitively, and that firms will likely exercise market power in market with few market participants. That is the prediction of most common oligopoly models, and the common finding of within-industry studies is that greater concentration leads to higher prices.²⁰

Furthermore, the regressions confirm that the presence of just one nearby competitor does not discipline incumbent LEC prices to any significant degree. As Dr. Baker has explained, “rivalry from four or more in-building providers and four or more nearby providers has a cumulative effect in reducing ILEC prices that is more than ten times the effect of rivalry from one nearby provider alone.”²¹ Specifically, Dr. Baker described the results in his August 9, 2016 declaration as follows:

In the high-bandwidth price results reported in this declaration (Table 1, cols. 3 & 4), the first nearby provider did not lower prices by a statistically significant amount (and the largest negative point estimate was a price decline of 2.2%), while the cumulative effect of rivalry from all providers was to reduce prices by 25% or 43%. In the DS1 price results reported in this declaration (Table 2b, cols. 1 & 4), the first nearby provider lowered prices by 2.5% or 3.8%, while the cumulative effect of rivalry from all providers was to reduce prices by 42% or 51%. In the ILEC retail price results reported in my initial declaration, the first nearby provider accounted for a 1.4% price reduction while the cumulative effect of rivalry from all in-building and nearby providers was to reduce prices by more than 15%. *See* [Baker Decl.] ¶ 63 & tbl. 2, col. 1. Although estimates of the cumulative effects of rivalry are generally more reliable than estimates of the incremental effects in these regressions, it is reasonable to infer from the consistently large discrepancy between the incremental effect of the first nearby provider and the cumulative effect of all providers across the specifications

H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed June 28, 2016).

²⁰ Baker Decl. ¶ 48 (internal citations omitted).

²¹ Baker FNPRM Reply Decl. ¶ 13.

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discussed here that competition from a single nearby provider is insufficient to generate competitive prices.²²

The results of the regressions are unsurprising. As the Joint CLECs have explained, the presence of nearby fiber provides little indication as to whether a competitor can deploy a connection to a customer location.²³ The relevant inquiry is whether the service the customer demands produces enough revenue to cover the cost of deploying a connection from a splice point on the competitor's network to a customer's location.²⁴ Mr. Merriman has explained that this is frequently not the case, even for Mid-Bandwidth Services.²⁵ Knowing this, incumbent LECs are unlikely to lower prices for Mid-Bandwidth Services simply because the customer demanding the services is near fiber deployed by a competitor. It should therefore be beyond dispute that it would be inappropriate to classify Mid-Bandwidth Services as competitive in a location merely because a competitive carrier has deployed fiber near the customer location.

At the same time, it is entirely reasonable to require the presence of four competitors in a census block before classifying Mid-Bandwidth Services as subject to competition. The regressions show that incumbent LECs continue to reduce prices as more and more competitors enter. Dr. Baker has found that incumbent LECs continue to reduce prices at least up to the point where there are four in-building competitors (which, as explained, have by far the biggest effect on price), four nearby competitors, and even one competitor that uses unbundled network elements ("UNEs") to serve customers, and he has suggested that the price reductions may well increase with the addition of more competitors.²⁶ The Joint CLECs' proposal to use four competitors with a connection in a census block represents a reasonable proxy for the presence of multiple in-building and nearby competitors. A competitor with a connection in a census block will have either deployed a connection to the customer's location (or at least to another location in the customer's building) or to a building nearby to the customer's location (thus indicating that it might be able to deploy a connection to the customer's location in the future). Competitors that have deployed connections to the customer location will of course have some effect on the incumbent LEC's prices, and competitors that have deployed connections near the customer's location may have an effect on the incumbent LEC's price because the threat of future connection deployment is more credible than the mere presence of fiber in the area.

²² *Id.* ¶13 n.31.

²³ *See* Joint CLEC FNPRM Comments at 50-51.

²⁴ *See* Merriman FNPRM Decl. ¶ 6.

²⁵ *Id.*

²⁶ *See* Baker FNPRM Reply Decl. ¶ 13.

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Moreover, by using the threshold of four competitors, the proposed test stops well short of the number of competitors shown to cause additional price reductions by the incumbent LEC.

As the Joint CLECs have also explained, Commission precedent supports a test requiring the presence of four competitors to demonstrate that a market is competitive. The Commission has consistently required the presence of four competitors to classify markets as competitive for purposes of both merger review and non-dominance classification.²⁷

Second, Katz and Keating make a related argument that it is inappropriate to count only competitors that have deployed connections because business data services are subject to “bidding competition” in which nearby competitors influence incumbent LEC prices because the competitors can and do expand their network facilities to serve new customer locations.²⁸ But as Dr. Baker has explained, a bidding market does not result in competitive rates where, as here, “some or all actual or potential rivals pose a limited competitive constraint, as when rivals experience impediments to expanding output.”²⁹ Thus, “characterizing markets for dedicated services as bidding markets does not mean that ILEC prices are competitive wherever CLECs are present nearby.”³⁰

Third, the Mid-Size ILECs argue that the competition test should count competitors that use UNEs to provide business data services.³¹ But there is no evidence in the record that competitors can or do use UNEs to provide Mid-Bandwidth Services.³² The Mid-Size ILEC

²⁷ See Joint CLEC FNPRM Comments at 43-44.

²⁸ See Katz/Keating Decl. ¶ 75.

²⁹ Baker Reply Decl. ¶ 12.

³⁰ *Id.* ¶ 13.

³¹ See Joint Reply Comments of CenturyLink, Consolidated Communications, FairPoint Communications, and Frontier Communications, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 46-47 (filed August 9, 2016).

³² See Comments of Windstream Services, WC Docket Nos. 16-143 & 05-25, RM-10593, at 17 (filed June 28, 2016) (“Windstream FNPRM Comments”) (“[T]echnology limits the bandwidth achievable using Ethernet-over-Copper to at most 45 Mbps under ideal circumstances.”); Declaration of Chris McReynolds on Behalf of Level 3 Communications, LLC, ¶ 13 (Jan. 21, 2016), attached as Appendix A to Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (noting that when using UNEs to

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argument is therefore irrelevant to the competition test for Mid-Bandwidth Services. But even if competitors were able to use UNEs to provide Mid-Bandwidth Services, it would be inappropriate to count UNE-based connections. This is because incumbent LECs can limit the effectiveness of competitors relying on UNE-based connections by denying, delaying, and degrading UNEs when requested by competitors seeking to use them to provide business data services. Counting UNE-based connections would also increase the complexity of administering the test because such connections are established and later eliminated on a regular basis (e.g., because the competitor relies on a UNE copper loop that is later retired), which would cause a census block to qualify as competitive and later not qualify as competitive. Given the limited effect of UNEs on competition, it would not be worth adding this increased complexity.

Fourth, Katz and Keating argue that it is inappropriate to use census blocks in the competition test for Mid-Bandwidth Services. They argue that the majority of census blocks have only one business data services customer, which means that census blocks will frequently be classified as non-competitive solely because only one or two competitors have connections to the customer in the census block.³³ This argument ignores the fact that, as Dr. Baker has observed, each customer location is a relevant geographic market for business data services.³⁴ If only one or two competitors serve the geographic market, it is entirely reasonable to classify that geographic market as non-competitive.

Leading competitors. Katz and Keating criticize the Joint CLECs' proposal that ex ante rate regulation apply only to leading competitors in a market. They assert, without any explanation, that the Joint CLECs' proposal is "flawed" because it does not include a specific test for determining the leading competitors in a relevant market (e.g., a threshold based on connections, revenues, or some other measure).³⁵ Katz and Keating also state that the absence of a "monopoly power threshold" in the Joint CLECs' proposal for identifying leading competitors and triggering ex ante rate regulation is a "critical shortcoming" in the proposal.³⁶ In addition,

provide EoC services, "in most cases, EoC can only be used, as a practical matter, to provide dedicated services at relatively low capacities in the range of 1-20 Mbps").

³³ Katz/Keating Decl. ¶ 87.

³⁴ Baker Decl. ¶ 35.

³⁵ Katz/Keating Decl. ¶ 84.

³⁶ *Id.* ¶¶ 85-86.

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they seem to be concerned that the Commission would apply the test for identifying leading competitors on a census block-by-census block basis.³⁷

These concerns reflect a misunderstanding of the Joint CLECs' proposal and are, in all events, misplaced. Under the Joint CLECs' proposal, the Commission would assess which competitor is most likely to be able to exercise market power in the provision of services that are subject to ex ante rate regulation. That competitor would be named the leading competitor. The leading competitor would be subject to ex ante regulation in relevant markets that are classified as non-competitive. For example, under the Joint CLECs' proposal, ex ante rate regulation would apply to the Mid-Bandwidth Services provided by the leading competitor in census blocks in which fewer than four competitors have connections. Conversely, ex ante rate regulation would not apply to the Mid-Bandwidth Services provided by the leading competitor in census blocks in which four or more competitors have connections.

As the Joint CLECs have explained, the Commission should revisit its entire framework for regulating business data services on a periodic basis, e.g., every three years.³⁸ As part of that review, the Commission should assess whether a carrier other than the incumbent LEC should be classified as the leading competitor in any relevant market. The Joint CLECs have not attempted to propose a specific test for determining whether a competitor other than the incumbent LEC should be classified as the leading competitor because it is impossible to predict future market conditions or the best way to analyze those conditions. Nevertheless, the basic inquiry would be for the Commission to identify the carrier most likely to be able to exercise market power in a non-competitive market. The classification would likely apply to the service provider throughout the territory in which it has deployed ubiquitous or nearly-ubiquitous network facilities. As explained, the leading competitor would only be subject to ex ante rate regulation in the relevant markets within that territory that are classified as non-competitive. Thus, the classification of leading competitors would not be performed on a census block-by-census block basis, but application of ex ante rate regulation to the leading competitor would be performed on this basis (at least for Mid-Bandwidth Services, as proposed by the Joint CLECs).

While Katz and Keating express the concern that it would be inappropriate to apply ex ante rate regulation to a leading competitor in non-competitive areas in which one or two other competitors have established a presence, this concern is misplaced. In such circumstances, it is likely that prices would still be well above the competitive level. It would therefore be

³⁷ *Id.* ¶ 87.

³⁸ *See* Joint CLEC FNPRM Comments at 55-57.

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appropriate to apply ex ante regulation to the leading competitor, which would likely have the effect of preventing all competitors from charging supra-competitive prices.³⁹

Ex ante rate regulation. Under the Joint CLECs' proposal for setting leading competitors' PBDS rates for non-competitive services, the incumbent LECs would be required to derive PBDS rates by (1) calculating the weighted average of the PBDS prices they charge their five largest wholesale customers and five largest retail customers in non-competitive areas and (2) reducing those prices by the amount by which regression analyses have shown incumbent LECs reduce their business data services prices in response to competitive entry, namely 19.7 percent.

Katz and Keating have three criticisms of the Joint CLECs' proposal: (1) the cost of providing business data services to large customers may be lower than the cost of providing the services to other customers; (2) large customers may already have been receiving competitive prices in non-competitive areas, in which case the proposal might result in setting prices below competitive levels; and (3) it is inappropriate to reduce prices charged to large customers by the amount that incumbent LECs reduce rates charged to all customers.⁴⁰ These concerns are misplaced for several reasons.

First, as mentioned, the methodology for setting PBDS rates would be implemented in tariffs in compliance with price caps. In that regime, the Commission would require that incumbent LECs file tariffs setting rates in accordance with the Joint CLECs' proposal, unless such rates would set prices below an appropriate measure of an incumbent LEC's costs. In the unlikely event that an incumbent LEC could demonstrate that the proposed methodology would result in below-cost rates, it would be permitted to propose a different methodology to set rates.⁴¹

³⁹ Katz and Keating suggest that it would be inappropriate to apply ex ante rate regulation to any competitor in a situation where multiple competitors have similar market share, such as where two competitors have 33 percent market share and a third competitor has 34 percent market share. Katz/Keating Decl. ¶ 86. But if the Commission were to determine that the three competitors have the incentive to set prices at unreasonable or unreasonably discriminatory levels, it would have an obligation under Sections 201(b) and 202(a) of the Communications Act to prevent this from occurring. *See* 47 U.S.C. §§ 201(b), 202(a). Application of ex ante rate regulation to one of the competitors (assuming it has a ubiquitous or nearly-ubiquitous network and can therefore serve essentially any location) would achieve this objective.

⁴⁰ Katz/Keating Decl. ¶ 93.

⁴¹ Moreover, if the Joint CLECs' proposal were adopted as part of a benchmark regime in which the incumbent LECs do not file tariffs, the same level of flexibility could be adopted for setting the level of the benchmark. In that case, the incumbent LEC would be required to set the

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Second, it is highly unlikely that the Joint CLECs' proposed methodology would result in prices set below incumbent LEC costs (or below competitive levels). Notably, incumbent LECs have made no attempt to demonstrate that this is the case. This is unsurprising. As several parties have explained, incumbent LECs charge wholesale customers high prices for business data services as a means of limiting their rivals' ability to compete effectively in the provision of downstream retail services.⁴² Incumbent LECs have sustained these high wholesale prices in part by using lock-up plans that limit wholesale customers' ability to take advantage of competitive alternatives, where they exist. Thus, by specifying that five of the ten customers used to set prices under the proposal must be wholesale customers, the proposed methodology likely skews prices higher, not lower. In addition, because large customers are almost certainly multi-location customers, incumbent LECs are in a position to exploit the market power they derive from their ubiquitous networks to charge such customers prices above the level they might charge to customers with only one or a handful of locations.⁴³

Nor is there reason to think that it is inappropriate to reduce the prices charged of the ten largest customers by the 19.7 percent rate reduction observed in the regressions. As Dr. Baker has explained, it is likely that the regressions significantly understate the level of rate reductions that actually occur.⁴⁴ In addition, while the 19.7 percent is derived from regressions observed for

benchmark in accordance with the guidelines proposed by the Joint CLECs. However, incumbent LECs would be given the right to demonstrate that the resulting benchmark prices are below the incumbent LECs' costs of providing the service. If an incumbent LEC were to prove that this is the case, it would be given the right to propose a different methodology for setting benchmark prices.

⁴² See, e.g., Comments of TDS Metrocom, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 19-20 (filed June 28, 2016); Windstream FNPRM Comments at 15-16.

⁴³ See Reply Comments of Comcast Corporation, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 20-21 (filed Aug. 9, 2016) (explaining limited ability to serve multi-location customers); Reply Comments of Charter Communications, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 6 (filed Aug. 9, 2016) (same); see also *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, ¶ 201 (2016) (“FNPRM”) (discussing unique challenges of serving multi-location customers and noting that providers capable of serving these customers “may be relatively rare”).

⁴⁴ Baker Decl. ¶ 68.

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all retail business data services (CBDS and PBDS) rather than all prices for PBDS subject to ex ante rate regulation (i.e., retail and wholesale PBDS up to and including one Gbps under the Joint CLECs' proposal), Katz and Keating offer no reason to think that this difference would cause the observed rate reductions to be inappropriately high as applied to PBDS.

Third, in all events, Katz and Keating overlook the substantial administrative advantages of the Joint CLECs' proposal. Given that the Commission does not have access to PBDS prices currently charged by incumbent LECs in non-competitive areas, it must find an administratively efficient means of obtaining those prices and reducing them to a level that protects customers (at least to some degree) from the abuse of market power. The Joint CLECs' proposal achieves this objective without, for example, requiring incumbent LECs to undertake the difficult task of determining the average price it charges for each PBDS service subject to ex ante rate regulation and in each non-competitive area. In addition, under price caps (and assuming all business data services are included in the same price cap basket as the Joint CLECs have recommended), incumbent LECs would have the flexibility to adjust the relative levels of their prices for different PBDS and CBDS going forward as long as the overall weighted average of their prices does not exceed the price cap index. If for some reason the incumbent LECs believe the index is unreasonably low, they are free to file tariffs proposing rates that would exceed the index. Finally, in all events, the Joint CLECs' proposed means of setting PBDS prices would only apply on an interim basis until such time as the Commission can establish a permanent means of doing so.

Price caps and tariffs. As Level 3 has explained at length in this proceeding, price caps and tariffs are the most appropriate means of enforcing ex ante rate regulation for both CBDS and PBDS. Price caps and tariffs are a less intrusive and more flexible, efficient, and administratively feasible form of ex ante regulation than a benchmark pricing regime.⁴⁵ It is also the existing regime used by the Commission to prevent incumbent LECs from harming competition and consumer welfare in those relevant business data services markets in which the Commission finds that such harms may occur absent ex ante rate regulation.

Notably, no party has offered a credible reason for replacing price caps and tariffs with benchmarks. Nor did the Commission offer such a basis in the *FNPRM*. As the Supreme Court has held, an administrative agency may not replace an existing regime with a different one unless it demonstrates that “there are good reasons” for doing so.⁴⁶ No such reasons exist here.

⁴⁵ See Joint CLEC FNPRM Comments at 62-66, 75-84; Level 3 FNPRM Reply Comments at 49-58.

⁴⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Moreover, to the extent that new rules for ex ante regulation of business data services “rest[] upon factual findings that

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

Respectfully submitted,

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contradict those which underlay its prior policy,” the Commission must offer “a more detailed justification than would suffice for a new policy created on a blank slate.” *Id.*