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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:

Level 3 Communications, LLC ("Level 3"), through its undersigned counsel, hereby responds to the October 25, 2016 letter submitted by AT&T in the above-referenced proceedings.[1] AT&T criticizes the proposal announced in the Commission's Fact Sheet to apply price cap regulation to DS1 and DS3 services,[2] arguing that the Commission cannot apply price caps to markets in which there is *any* competition in the provision of those services. There is no basis for these assertions.

To begin with, AT&T's claim that the Commission cannot re-impose price cap regulation on DS1 and DS3 services not currently subject to price caps relies on a vast overstatement of the level of competition in the provision of DS1s and DS3s. The record in these proceedings is

[1] Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, & 16-143, RM-10593 (filed Oct. 25, 2016).

[2] *Fact Sheet: Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market* (rel. Oct. 7, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf ("Fact Sheet").

replete with evidence of incumbent LECs' substantial and persisting market power in the provision of TDM services.[3]

Moreover, that there may be pockets of competition in the provision of DS1 and DS3 services need not and should not prevent the Commission from applying price caps to those services. Indeed, when the Commission first adopted them, it noted that price caps were particularly well suited to markets in which competition is uneven or emerging. As the Commission found, price caps are appropriate in a competitive market, and "the relationship between price caps and competition is *complementary*."[4] Accordingly, in rejecting rate-of-return regulation as ill-suited to "an environment . . . in transition from monopoly to full competition,"[5] the Commission determined that "price cap regulation is a far better regulatory system to

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[3] *See, e.g.*, Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, ¶¶ 5, 13 n.31, 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) (reporting that "the cumulative effect of rivalry from all providers" reduced incumbent LEC DS1 prices by "51% according to one estimate and 42% according to another"); Marc Rysman, Empirics of Business Data Services, at 3 (rev. June 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf ("Regressions of ILEC rates for DS1 and DS3 lines show that competition in the building, and the census block, consistently lowers prices in economically and statistically significant ways."); *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, ¶ 241 & tbl. 6 (2016) (illustrating that the six largest price cap incumbent LECs' actual price indices are more than 99 percent of their price cap indices for DS1 and DS3 services, meaning they have virtually no headroom under the Commission's price caps); Declaration of John Merriman on Behalf of Level 3 Communications, LLC, at tbl. (June 27, 2016), attached to Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed June 28, 2016) (showing that Level 3 can virtually never deploy connections to customers demanding only DS1 and DS3 services).

[4] *Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, 3 FCC Rcd. 3195, ¶ 138 (1988) (emphasis added) ("*Price Cap Further Notice*").

[5] *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, ¶ 125 (1989) ("*AT&T Price Cap Order*"), *modified on reconsideration*, 6 FCC Rcd. 665 (1991), *vacated by AT&T Co. v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992), *on remand*, 7 FCC Rcd. 7305 (1992).

employ"[6] in such an environment. Importantly, the Commission found that price cap regulation can "alleviate[] . . . obstacles to the development of full competition."[7] In addition, the Commission determined that a price cap regime, in combination with an "emerging competitive environment," can be expected to "spur innovative offerings that will expand the range of consumer choice and lower costs."[8]

The Fact Sheet's proposal to afford Phase I pricing flexibility to all price cap LECs confirms that the application of price caps to DS1 and DS3 services is appropriate to constrain incumbent LEC prices in a market characterized by both incumbent LEC market power and pockets of competition. Under Phase I, dominant incumbent LECs have the flexibility to respond to competition by entering into contract tariffs with individual customers in which the incumbent LECs can charge prices lower than the prices they offer to other customers.[9] At the same time, "[i]n order to protect . . . customers that may lack competitive alternatives," the Commission determined that Phase I pricing flexibility should "limit the extent to which . . . incumbents [can] raise rates, because competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market may not yet have a sufficient market presence to constrain prices[.]"[10] Thus, it is clear that a price cap regime with Phase I pricing flexibility, like the one envisioned in the Fact Sheet, is expressly designed for circumstances in which the regulated firm faces competition in certain locations.

Finally, AT&T implies that it would be unduly difficult for the Commission to re-impose price caps. That is not the case. It is well established that "'the Commission has broad

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[6] *Id.* ¶ 129; *see also Price Cap Further Notice* ¶ 141 ("[A] very important advantage of this regulatory approach is its ability to promote the public interest more effectively than rate of return when applied in situations where some degree of competition exists.").

[7] *AT&T Price Cap Order* ¶ 129.

[8] *Id.* ¶ 129 n.239.

[9] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 128 (1999), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[10] *Id.* ¶ 77; *see also id.* ¶ 69 ("Phase I permits LECs to offer contract tariffs . . . while requiring them to maintain their generally available price cap-constrained tariffed rates, thus protecting those customers that lack competitive alternatives."); *id.* ¶ 169 ("We . . . have designed our Phase I relief to limit headroom by requiring price cap LECs to remove the demand associated with contract tariff offerings from price caps, so that price cap LECs cannot use that pricing flexibility to raise access rates for those customers . . . that lack competitive alternatives.").

discretion in selecting methods for the exercise of its powers to make and oversee rates,'"[11] including the adoption of price cap regulation. Moreover, the Commission's price cap regulations do not set individual rates and therefore do not constitute rate prescription.[12] Rather, the price cap rules simply establish a weighted average of prices for services in a given basket. Incumbent LECs that provide business data services pursuant to price caps will be free to select the individual rates for services within the business data services basket as long as the weighted average of those prices does not exceed the cap. Furthermore, the price cap regime exists today, and reliance on that regime would obviate the need to establish a new rate regulation regime. Far from being burdensome, reliance on price caps is the least burdensome mode of ex ante rate regulation available to the Commission.

Please contact the undersigned with any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
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[11] *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982) (citation omitted).

[12] *See AT&T Price Cap Order* ¶ 895 ("Because we are not prescribing rates, either explicitly or implicitly, we need not follow the procedural requirements of Section 205(a) of the Communications Act[.]") (citing *AT&T Co. v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973)) (internal citation omitted); *see also* Brief of Petitioners, *In re AT&T Corp.*, No. 03-1397, at 42 (D.C. Cir. Aug. 20, 2004) ("It is well-settled that the imposition of price caps is not a rate prescription, but only a 'safe harbor' of rates that are presumptively lawful.").