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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: ***Special Access for Price Cap Local Exchange Carriers*, WC Dkt. 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") submits this letter to urge the Commission to address the harmful effects of incumbent LECs' demand lock-up plans for DSn-based special access services. As discussed below, marketplace evidence demonstrates that these lock-up plans stifle competition, slow the deployment of fiber to business locations, and inhibit the transition from DSn-based services to more-efficient Ethernet services.

I. Incumbents' Tariff Provisions Serve as the Cornerstone of Their Strategy to Lock Up Demand for Special Access.

Level 3 and others have explained in detail how the incumbents use a combination of devices to lock up the market for special access services, shrinking the addressable market for any carrier that wishes to provide service in competition with the incumbent LECs.[1] The incumbent LECs' lock-up plans vary in their details but share the same general structure. The

[1] *See, e.g.*, Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Feb. 22, 2012); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed June 8, 2012); Comments of BT Americas *et al.*, WC Docket No. 05-25, RM-10593, at 20-30 (filed Feb. 11, 2013); Letter from Angie Kronenberg and Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Sept. 10, 2014).

incumbents have set their undiscounted rates for DSn-based special access services at levels that are unreasonably high and cost-prohibitive for wholesale buyers like Level 3 that wish to serve retail business customers. In order to obtain discounts off of the incumbents' rates, buyers must commit to purchasing the incumbents' services for long periods of time (often 5-7 years). Large early termination fees ("ETFs") apply if a buyer stops purchasing a service prior to the end of the commitment term. Incumbent LECs waive these fees (i.e., offer "circuit portability") only if purchasers agree to buy a large percentage of their historic purchase volumes from the incumbent LEC for several years. The incumbents enforce these volume commitments through the use of substantial shortfall penalties imposed on buyers that miss their volume commitments and "ratcheting" provisions that compel buyers to increase their volume commitments if their purchase volume exceeds their commitment level by a certain margin.

As an example, Level 3 purchases DS1 special access services under the AT&T Term Payment Plan ("TPP") in legacy Pacific Bell and Southwestern Bell territories.[2] To avoid paying unreasonable and cost-prohibitive rates for service on a month-to-month or one-year-term basis, Level 3 purchases most of its circuits from AT&T on longer-term plans. In order to obtain the circuit portability needed to at least partially mitigate the ETFs that Level 3 would incur when managing a large base of customers served by circuits purchased under these longer terms, Level 3 must meet the terms of the TPP's portability commitments, under which Level 3 must maintain 80 percent of its DS1 purchase volume in service with AT&T for a period of three years.[3] If Level 3's DS1 purchase volume falls below this level, AT&T imposes a penalty for each circuit by which Level 3 misses the commitment in each month that the shortfall exists.[4] The monthly, per-circuit penalties are exorbitant—$900 in California, for example—creating a potential shortfall exposure of millions of dollars for a company like Level 3.[5] As Level 3's customers increasingly demand Ethernet services, including as a result of the technology transition, Level 3 must purchase more Ethernet (rather than DS1s) from AT&T. However, AT&T's TPP does not permit Level 3 (or any other customer) to count Ethernet purchases toward its TPP volume commitments in these territories.[6] Thus, AT&T's TPP by its terms imposes a massive

[2] *See* Pacific Bell Tariff FCC No. 1 § 7.4.18; Southwestern Bell Tariff FCC No. 73 § 7.2.22.

[3] Pacific Bell Tariff FCC No. 1 § 7.4.18(E); Southwestern Bell Tariff FCC No. 73 § 7.2.22(E).

[4] Pacific Bell Tariff FCC No. 1 § 7.4.18(E)(4)(b); Southwestern Bell Tariff FCC No. 73 § 7.2.22(E)(4)(b).

[5] The monthly per-circuit shortfall penalties are far higher than the monthly cost of a typical circuit, whether purchased from a competitive LEC or even an incumbent LEC.

[6] AT&T maintains this position even while telling the FCC that the special access marketplace is "undergoing rapid and fundamental change," that customers are "systematically" switching to Ethernet services, and that "the decline in TDM-based DSn-level special access services has become irreversible." Comments of AT&T, WC Docket No. 05-25, RM-10593, at 29 (Feb. 11, 2013) ("AT&T Feb. 11, 2013 Comments"). The TPPs contain provisions that allow a customer to upgrade a DS1 to a "higher speed service" without incurring early termination liability on the upgraded circuits, but these provisions do not allow customers to count the "higher speed

"technology transitions tax," creating enormous liabilities for any provider that seeks to drive the technology transition by shifting to more efficient technology, or even one that merely responds to customer demand for upgraded services.

Other incumbent LECs sell special access services under plans that contain similar provisions. Under Verizon's Commitment Discount Plan ("CDP") in legacy Bell Atlantic and NYNEX territories, customers must maintain 90 percent of their purchase volume in service with Verizon for a period of two to seven years.[7] If a customer misses its commitment level, Verizon imposes a substantial shortfall penalty.[8] Verizon purports to allow customers to upgrade DSn-based special access services to Ethernet services without penalty, but its tariff provisions governing Ethernet adoption contain such stringent conditions that competitors and businesses are rarely able to use them.[9]

Similarly, under CenturyLink's Regional Commitment Plan ("RCP") in legacy Qwest territory, customers must maintain 95 percent of their purchase volume in service with CenturyLink for four years.[10] If a customer misses its commitment level, the customer must still pay for its entire committed volume despite the fact that it has received a lower volume of services.[11] Like Verizon, CenturyLink claims to allow customers to upgrade to Ethernet without penalty but places strict limitations on the instances in which customers can do so.[12]

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service" toward their volume commitments. *See* Pacific Bell Tariff FCC No. 1 § 7.4.18(B); Southwestern Bell Tariff FCC No. 73 § 7.2.22(B).

[7] Verizon Tariff FCC No. 1 § 25.1; Verizon Tariff FCC No. 11 § 25.1.

[8] The penalty is equal to the customer's average CDP rate per DS0 equivalent multiplied by the difference between the average minimum commitment and the average number of in-service DS0 equivalents, multiplied by six months. Verizon Tariff FCC No. 1 § 25.1.7(B); Verizon Tariff FCC No. 11 § 25.1.7(B).

[9] Among other things, a customer must demonstrate that the new service would be provided to the same address as the legacy service, that the commitment term for the new service would be longer than the remaining commitment term for the legacy service, and that the new service agreement would provide Verizon with more revenue than the legacy agreement. Verizon Tariff FCC No. 1 § 2.9.6; Verizon Tariff FCC No. 11 § 2.10.5. As to the last condition, the customer must show either (1) that the monthly recurring charges ("MRCs") for the new service would be greater than the MRCs for the legacy service or (2) that the overall value of the new service contract would be greater than the overall value of the remainder of the existing service contract. Verizon Tariff FCC No. 1 § 2.9.6(C); Verizon Tariff FCC No. 11 § 2.10.5(C).

[10] CenturyLink Tariff FCC No. 11 § 7.1.3(B).

[11] CenturyLink Tariff FCC No. 11 § 7.1.3(B)(3)(c).

[12] Among other things, a customer must first satisfy a minimum service period for the legacy service and must demonstrate that the new service will cost at least 115 percent of price of the legacy service. *Id.* §§ 7.1.3(B)(5)(C), 7.1.8(C).

Tariff provisions like these are the cornerstone of the incumbents' lock-up strategies, which are further bolstered by "overlay agreements"—additional commercial agreements that are the subject of non-disclosure provisions. While those overlay agreements should be the subject of Commission action, the crucial first step to unleashing the power of competition is to take aim at tariff lock-up terms, on which the lock-up structure is built.

II. Marketplace Evidence Demonstrates How the Incumbents' Lock-Up Plans Harm Competition, Fiber Deployment, and the Technology Transition.

The harms of the incumbent LECs' lock-up plans are readily apparent in the marketplace. By way of example, Level 3 conducted an analysis of the DS1 special access services that it purchases from one incumbent LEC.[13] Level 3 determined that the incumbent's lock-up plans currently prevent Level 3 from purchasing a large volume of circuits from competitive carriers in locations where Level 3 currently purchases the circuits from the incumbent LEC. Level 3 pays the incumbent LEC approximately $103 million per year for the circuits in question, but it would only pay competitive carriers approximately $86 million per year for those same circuits. Level 3 is therefore foregoing a savings of approximately $17 million per year because of the incumbent LEC's lock-up plans.

Freeing Level 3 from these lock-up plans and permitting it to purchase from these lower-cost suppliers would benefit Level 3 individually and the marketplace as a whole. The savings Level 3 would realize would be available for reinvestment in network plant and other aspects of its business. Level 3 would also benefit by obtaining terms and conditions from the competitive carriers that do not expose Level 3 to excessive early termination and shortfall penalties, providing greater certainty and flexibility for Level 3 to continue to invest and grow. Perhaps even more significantly from the perspective of the broader marketplace, however, would be the additional $86 million in annual revenues that other competitive providers in this single incumbent's territory would obtain from providing services to Level 3. These revenues would strengthen these providers' own ability to compete and invest in their own networks, including by accelerating the deployment of fiber to compete for more business from Level 3 and others. In this regard, Commission action to end lock-ups would spur a virtuous cycle of investment and competition, benefiting not just carriers like Level 3 and its suppliers, but end-user customers who would have more and better service options as a result.

Level 3's current and prospective customers have directly experienced the harms of the incumbents' lock-up plans as well. For many reasons, including the incumbents' insistence that their customers sign nondisclosure agreements as discussed above, Level 3 does not always know when customers pay penalties to the incumbents in order to buy services from Level 3, or, alternatively, when customers do not buy services from Level 3 because they would incur penalties that make it uneconomic to purchase from Level 3. However, Level 3 does occasionally become aware of such instances. For example, one Level 3 wholesale customer, which had a consistent history of purchasing several million dollars worth of services (including

[13] Strictly speaking, this analysis covered one group of incumbent LECs under common ownership and control.

special access services) from Level 3 each year, recently dramatically reduced its purchases from Level 3, including special access service purchases. Although the customer was satisfied with Level 3's pricing and service quality, the Level 3 sales team learned that the customer had no choice but to move its purchases to an incumbent because of penalties the customer would otherwise face under the incumbent's lock-up agreement.

Another Level 3 customer recently expressed a similar concern in a different context. Rather than abruptly stopping purchases from Level 3, this customer observed that it wanted to, but could not, make new purchases of special access services from Level 3. The customer informed Level 3 that it had conducted an analysis of a sample of locations where it currently purchases services from incumbent LECs to determine the extent to which it would save money by purchasing the services from a competitive provider. The customer identified a large number of locations within the sample areas where it would like to purchase services from Level 3. The customer explained that, if it could do so, it would save approximately $65,000 per year. Unfortunately, the customer told Level 3 that it currently purchases special access services at the locations in question from incumbent LECs under lock-up plans that prevent it from replacing the incumbent LECs' special access services with Level 3 special access services.

Whether it is an existing customer that stops using Level 3 special access services or a prospective customer that would like to use Level 3 special access services but cannot, the fact that Level 3 is prevented from satisfying customer demand harms those customers and Level 3. Customers lose the savings and service quality that Level 3 offers, while Level 3 loses the opportunity to earn revenues and grow.

III. Competitive Wholesale Providers Cannot and Do Not Engage in This Conduct.

Incumbent LECs have argued that competitors include lock-up provisions in their customer contracts that are identical to or similar to those contained in the incumbent LECs' lock-up plans.[14] In Level 3's experience, however, this is simply not true.

Unlike incumbent LECs, competitive wholesale providers generally offer services at affordable rates on one-year terms. Moreover, any discounts they offer for longer terms are modest. As a result, competitive wholesale providers' rate structures do not force customers to commit to long terms, as the incumbents' rate structures do. To illustrate this point, Level 3 recently compared the rates that AT&T and a competitive wholesale provider would charge for a ten-mile DS1 circuit in legacy Southwestern Bell territory.[15] If Level 3 were to purchase the circuit from AT&T, Level 3 would have to commit to purchasing it for a term of five years in order to obtain a monthly rate of $302.50.[16] This rate includes a channel termination, as well as ten miles worth of transport between AT&T's end office and Level 3's point of presence. If

[14] *See, e.g.*, AT&T Feb. 11, 2013 Comments at 32-33.

[15] In this case, a "ten-mile circuit" refers to a circuit between a business customer location and a Level 3 point-of-presence that is ten miles from AT&T's end office.

[16] Depending on the facilities that Level 3 has in the area, Level 3 may also have to purchase a DS3 hub from AT&T, which would cost an additional $475.00.

Level 3 stopped purchasing the circuit prior to the expiration of the five-year term, it would be subject to an ETF equal to 40 percent of all MRCs remaining in the term, unless Level 3 also agreed to an 80 percent prior-purchase-based volume commitment (and the associated shortfall and overage penalties) for circuit portability in order to avoid these fees.

By contrast, if Level 3 were to purchase the same service from a competitive provider, the provider would charge Level 3 a flat fee of $120.00 per month for a one-year service term. This rate does not include transport charges because the provider does not impose them. Level 3 would be subject to an ETF if it stopped purchasing the service during the one-year term, but after that period, Level 3 could terminate the service at will without penalty. This would obviate the need for Level 3 to obtain circuit portability, and Level 3 would not have to make a volume commitment.

This is a typical example of the difference between the incumbents' rates, terms, and conditions and those of competitive providers. As a result of this difference, when Level 3 purchases services from competitive providers, it generally does so on one-year terms without volume commitments or the harmful shortfall and overage penalties the volume commitments generally include.

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These examples make clear that the incumbent's lock-up plans—plans that only the incumbents have the power to impose—are causing significant harm to the overall market for special access. Level 3's retail and wholesale customers pay more than they would in a truly competitive market, while Level 3 and other competitive providers are prevented from accessing hundreds of millions of dollars in potential revenue. These lost revenue opportunities directly implicate Level 3's ability to support further network deployment. Like the opposite of a Field of Dreams, Level 3 and other competitive providers cannot build it if they will not come.

The Commission should act promptly to address the harmful effects of the incumbents' lock-up plans. Please do not hesitate to contact me if you have any questions regarding this submission.

Respectfully submitted,

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