

November 4, 2015

VIA ECFS

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

Re: *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247; Special Access 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, through its undersigned counsel, hereby requests that, pursuant to Section 1.3 of the Commission's rules,¹ the Bureau accept as timely filed the attached Opposition of Level 3 to Motion to Modify Protective Orders.² The Motion was filed *via* ECFS on October 23, 2015, but it did not become publicly available on ECFS until October 26, 2015. As a result, interested parties were effectively deprived of the 10 days to respond that would otherwise have been permitted under Section 1.45(b) of the Commission's rules.³ The attached pleading is being filed in less than 10 days from the date that the Motion appeared on ECFS. Accordingly, waiver of Section 1.45(b) of the Commission's rules is appropriate.

¹ 47 C.F.R. § 1.3.

² Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket Nos. 15-247 & 05-25 (filed Oct. 23, 2015) ("Motion").

³ *See* 47 C.F.R. § 1.45(b).

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Please do not hesitate to contact us if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Mia Guizzetti Hayes

Counsel for Level 3 Communications, LLC

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matters of |) | |
| |) | |
| Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; |) | WC Docket No. 15-247 |
| |) | |
| Special Access 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 |
| |) | |

**OPPOSITION OF LEVEL 3 TO
MOTION TO MODIFY PROTECTIVE ORDERS**

Level 3 Communications, LLC hereby opposes the motion of AT&T Inc., Verizon, CenturyLink, and Frontier (collectively, the “incumbent LECs”)¹ to modify the protective orders² in the special access rulemaking proceeding. The incumbent LECs ask the Bureau to permit parties in the above-captioned tariff investigation to use confidential data submitted in the

¹ Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket Nos. 15-247 & 05-25 (filed Oct. 23, 2015) (“Motion”).

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*, 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); *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); *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).

rulemaking proceeding,³ or, in the alternative, to “consider simply combining the two dockets . . . [to] allow parties to the tariff investigation to draw on the entire record in the rulemaking proceeding, including the data collection.”⁴ The Bureau should deny the incumbent LECs’ motion because the Bureau already appropriately defined the information necessary for the tariff review in the *Designation Order*, additional information from the rulemaking is unnecessary to the resolution of the tariff review proceeding, and adding that information to the record in the tariff review proceeding would be affirmatively harmful. Indeed, granting the incumbent LECs’ motion would no doubt increase the costs and burdens on other parties and the Commission, and it would risk delaying resolution of this important proceeding—consequences the incumbent LECs would no doubt welcome, but against which the Commission should guard.

The tariff review proceeding and the rulemaking proceeding address different issues. The tariff review proceeding is narrowly focused on addressing the unreasonable and anticompetitive terms and conditions of certain incumbent LEC pricing plans applicable to special access services⁵ for which the incumbent LECs are classified as dominant.⁶ In contrast, the rulemaking proceeding is focused on identifying the relevant special access markets in which incumbent LECs have market power, and adopting appropriate price regulation and pricing flexibility rules in light of that analysis.

³ Motion at 2.

⁴ *Id.* at 8 n.19.

⁵ See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Order Initiating Investigation and Designating Issues for Investigation, DA 15-1194, ¶ 1 (rel. Oct. 16, 2015) (“*Designation Order*”).

⁶ See *id.* ¶ 2 (“In their provision of TDM-based special access services, incumbent LECs remain subject to dominant carrier regulation[.]”).

The Bureau has already considered and properly defined the comprehensive data sets it needs to address the issues encompassed in each of these proceedings—and has already rejected the argument that the incumbents make here. In the *Designation Order*, the Bureau defined the comprehensive data it needs to assess the terms and conditions in the incumbent LEC lock-up plans. In the mandatory data request in the rulemaking proceeding, the Bureau comprehensively defined the data needed to assess incumbent LEC market power and adopt appropriate price regulations and pricing flexibility rules.

Accordingly, there is no need to add information from the rulemaking to the tariff review proceeding or to combine the two proceedings. In fact, the Bureau has already considered and sensibly rejected Verizon’s assertion that the confidential data collected in the separate rulemaking proceeding are necessary to the evaluation of the issues under consideration in the investigation:

[T]he question of whether and how to modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility, currently under review in the pending rulemaking in WC Docket No. 05-25, is distinct from the questions about specific tariff plans designated for investigation in this Order and the effects those plans may or may not have on the IP transition. We accordingly disagree with Verizon’s recent suggestion that a review of these plans prior to a complete analysis of the special access data collection would “jump the gun” with respect to that separate rulemaking proceeding.⁷

In their motion, the incumbent LECs offer no basis to reconsider this conclusion. *First*, the incumbent LECs assert that the data filed in the rulemaking proceeding should be available in the tariff review proceeding so that parties can analyze the state of competition in the special access marketplace.⁸ As explained, however, the Bureau has already rejected precisely this

⁷ *Designation Order* ¶ 10 n.27.

⁸ *See* Motion at 5-6.

argument. And for good reason: the Bureau will not and should not address that issue in the tariff investigation. The decision reached in the tariff review proceeding will apply to the tariffs under review, and it will establish a precedent for tariffs in all special access markets in which the incumbent LECs are dominant. In the parallel rulemaking proceeding, the incumbent LECs will have more than an adequate opportunity to use the highly confidential data collected to make their best arguments about when and under what circumstances they should receive additional flexibility regarding how they offer these services. But the question in the investigation proceeding is what rules should apply where they should not receive such flexibility. Market data about markets where, by definition, there is inadequate competition to justify flexibility is irrelevant.

Second, the incumbent LECs assert that “the Commission itself has put the data collected in the rulemaking at issue here by relying on ‘preliminary analysis’ of the data,”⁹ but the preliminary analysis does no such thing. The Bureau’s description of the large demand for TDM services and the incumbent LECs’ dominant position in the provision of those services is simply contextual market information showing the importance of these services. The Bureau did not define the issues subject to the investigation to include the size of the demand for TDM special access services or whether the incumbent LECs are dominant in the provision of those services. Again, those issues are being addressed in the rulemaking.

Third, the incumbent LECs claim that the special access rulemaking includes information that is relevant to the tariff investigation in other ways.¹⁰ For example, the incumbent LECs assert that the terms of non-incumbent LEC wholesalers’ special access contracts are relevant.

⁹ *See id.* at 6-7.

¹⁰ *See id.* at 7.

But the non-incumbent LECs are non-dominant providers of special access services, and the incumbent LECs have themselves asserted that volume and term commitments in non-dominant providers' service agreements, by definition, are not harmful to competition.¹¹ It is therefore not true that this information is relevant to, let alone necessary for, an analysis of whether provisions in the dominant incumbent LECs' tariffs are reasonable.

The incumbent LECs also assert that there is information in the special access rulemaking that will enable the Bureau to address assertions made by the competitive carriers.¹² But the only issues to be addressed in the tariff review proceeding are those designated for investigation by the Bureau in the *Designation Order*. As discussed, the Bureau has already comprehensively defined the information it needs to address those issues; the incumbent LECs offer no basis for second-guessing its decision about the issues to be analyzed or the information necessary to analyze them.

For all of these reasons, granting the incumbent LECs' motion would do no good, but it would also do affirmative harm. Granting the incumbent LECs' motion would increase the costs parties incur to participate in the proceeding, increase the administrative resources the Commission must allocate to conduct the proceeding, and almost certainly unnecessarily delay the resolution of the proceeding—just as the incumbents have sought to do in the rulemaking

¹¹ See Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 48 (filed Mar. 12, 2013) (“[T]he economic literature widely recognizes that, because of the presumptively pro-competitive features, even true ‘loyalty’ arrangements should be condemned *only* when used by a firm that ‘holds substantial market power.’”) (emphasis in original) (quoting Damien Geradin, *Separating Pro-Competitive from Anti-Competitive Loyalty Rebates: A Conceptual Framework*, Paper for the Asia International Competitive Conference, at 9 (Sept. 4, 2008)).

¹² Motion at 7-8.

proceeding. The Bureau should therefore summarily deny the incumbent LECs' motion.

Respectfully submitted,

/s/ Thomas Jones

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November 4, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, I caused true and correct copies of the foregoing Opposition of Level 3 to Motion to Modify Protective Orders to be served electronically upon the following:

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