

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

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
)	

**REPLY OF AT&T INC., VERIZON, CENTURYLINK, AND FRONTIER
IN SUPPORT OF MOTION TO MODIFY PROTECTIVE ORDERS**

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AT&T Inc. (“AT&T”), Verizon, CenturyLink, and Frontier (the “ILECs”) submit this reply in support of their motion to modify the protective orders in the pending special access rulemaking proceeding¹ to permit the parties to use the confidential data collected in that proceeding in the above-captioned tariff investigation.

The Commission would commit reversible error under any standard of review if it prevented the ILECs from using the special access data collection in defense of their tariffs or otherwise challenging the Commission’s reliance on those data. Level 3 strains to avoid this conclusion by attempting to argue that the data the Commission has collected in the special access proceeding concerning competition is not *relevant* to the issues designated for

¹ Order and Data Collection Protective Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 14-1424 (rel. Oct. 1, 2014) (“*Data Collection Protective Order*”); Second Protective Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2419 (rel. Dec. 27, 2010) (“*Second Protective Order*”); Modified Protective Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2075 (rel. Oct. 28, 2010) (“*Modified Protective Order*”).

investigation in the tariff proceeding.² But the relevance of the data is obvious. The tariff proceeding is based “on the record generated in the Commission’s special access proceeding,”³ including the CLECs’ allegations that the ILECs’ special access tariffs contain provisions that prevent CLECs from purchasing special access services from competing, non-ILEC providers. Accordingly, the facts concerning the overall competitive context in the special access marketplace and the extent to which CLECs do or could purchase such alternatives are central to the issues raised in the *Designation Order*.⁴ The ILECs do not have those data solely within their possession. Indeed, that is why the Commission conducted the broader, mandatory data collection in the special access proceeding that forced the CLECs to submit information concerning their own operations and purchases, including purchases made pursuant to the terms and conditions that are the subject of the tariff investigation. That data collection is *already* complete, and the Commission has made data available for review. Accordingly, there is no logical or lawful basis to deny the ILECs’ motion. Level 3’s opposition demonstrates yet again that, although the CLECs continue to hurl accusations about the supposed effects of ILEC tariff provisions on competition, they do not want those accusations tested against the actual marketplace data.

² Opposition of Level 3 to Motion to Modify Protective Orders, WC Docket Nos. 15-247 & 05-25 & RM-10593 (filed Nov. 4, 2015) (“Opp.”). Ironically, in light of Level 3’s evident desire to rush this proceeding to conclusion without even considering all of the relevant data, Level 3’s opposition is out of time. See Letter from Thomas Jones, counsel for Level 3, to Marlene H. Dortch, FCC, WC Docket Nos. 15-247 & 05-25 & RM-10593, at 1 (filed Nov. 4, 2015). The Commission can and should decline to consider Level 3’s arguments on that ground alone.

³ Order Initiating Investigation and Designating Issues for Investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, ¶ 2 (rel. Oct. 16, 2015) (“*Designation Order*”).

⁴ *Id.*

Level 3's specific arguments that the data collection is irrelevant are wrong. *First*, Level 3 argues (Opp. at 3-4) that the Commission "will not and should not" address the state of competition in the special access marketplace in the tariff investigation. The CLECs' arguments *inherently* implicate the overall state of competition, and the *Designation Order* itself repeatedly states that the Commission will evaluate the ILECs' tariffs based on their effect on the overall marketplace.⁵ It would be reversible error for the Commission to blind itself to a set of data it has already collected for the purpose of addressing that very question.⁶ In that regard, contrary to Level 3's contention (Opp. at 3-4), the *Designation Order* states only that the data collected in the rulemaking proceeding is not "sufficient" to resolve the issues raised in the tariff investigation.⁷ That order never suggested, nor could it, that those data are not relevant.⁸

⁵ *See, e.g., id.* ¶¶ 3-6, 9-10, 12-14, 19 n.54, 20, 23, 25, 31-33, 42, 44-45, 46-47, 55; *see also id.* ¶ 20 ("the ultimate question is . . . whether there is harm to competition").

⁶ *AT&T v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006) (judicial review of order resolving tariff investigation includes inquiry into whether the Commission "failed to consider relevant factors") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)); *AT&T v. FCC*, 572 F.2d 17, 23 (2d Cir. 1978) (Commission's prescription findings under section 205 "must be supported by substantial evidence and based on a reasoned consideration of that evidence") (internal quotation omitted); *see also Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made") (internal quotation omitted).

⁷ *Designation Order* ¶ 24.

⁸ Level 3's argument appears to assume that any order in the tariff investigation would not apply to the extent that the Commission determines in the rulemaking proceeding that there are markets in which the ILECs should receive flexibility. *See, e.g.,* Opp. at 4 ("[b]ut the question in the investigation proceeding is what rules should apply where [the ILECs] should not receive such flexibility"). That is incorrect as a procedural matter: the tariff investigation is a prescription proceeding in which the Commission is investigating whether to prescribe terms even for the ILEC tariffs that apply in Phase II pricing flexibility areas, and any such prescription would presumably govern over the general rules concerning the triggers for pricing flexibility. But although Level 3 is confused as to how the two proceedings interrelate, its argument is nonetheless a concession that the issues and the data in the two proceedings are inextricably related *substantively*.

Second, Level 3’s argument (Opp. at 4) that the data are irrelevant even though the *Designation Order* relies on a preliminary analysis of the data is also meritless. Contrary to Level 3’s contention (*id.*), “the size of demand for TDM special access services” and the extent to which ILECs have market power over such services are important issues in the tariff case, because they bear directly on the extent to which the ILECs’ tariffs could or do impact competition, and the Commission’s use of its preliminary analysis of the data collection in the *Designation Order* confirms that conclusion. Again, it would be reversible error to deny the ILECs access to that data and, in so doing, preclude any opportunity to rebut the Commission’s analysis or to show how these tariffs fit within the full context of the marketplace data.⁹

Third, Level 3’s claim that the Commission should not look at the terms and conditions of the CLECs’ own offers – which have the same types of provisions as the ILEC tariffs at issue – lays bare the basic illogic of its position. Level 3 argues that (1) the CLECs do not have market power, and (2) the ILECs have shown that even true loyalty contracts are pro-competitive when a firm does not hold “substantial market power.”¹⁰ But Level 3 concedes (Opp. at 2) that the special access proceeding “is focused on identifying the relevant special access markets in which incumbent LECs have market power.” If the data collection in the special access proceeding shows that the incumbent LECs do not have market power, then by Level 3’s own admission there would be no basis to find the ILECs’ tariffs unlawful. That is one of the principal reasons why the broader data collection is necessary to the tariff investigation. In

⁹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (agency must “disclose in detail” the data upon which proposed agency action is based so that there can be “an *exchange* of views, information, and criticism between interested persons and the agency”) (emphasis added); *Air Trans. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation”).

¹⁰ Level 3 Opp. at 5 & n.11 (citing Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 48 (filed Mar. 12, 2013) (citation omitted)).

addition, whether the types of terms and conditions in the ILEC tariffs are commonplace in contracts used by CLECs and other competitors when they sell competing services is itself relevant to whether those sorts of terms and conditions are just and reasonable.¹¹

Moreover, the data collection contains information on the total universe of services purchased by CLECs and other competitors, and thus can provide context as to the portion of those services that are actually purchased under the ILEC tariffs under this investigation. The ILECs do not independently have that information because ILECs know only how many circuits they sell to their customers and not the number of circuits purchased from competitors. Although Level 3 may want to hide that information, it cannot (and does not) dispute that it is contained in the data collection. Level 3 and other CLECs were expressly required to identify sales they make under term and volume commitments and to provide business justifications for those terms. II.A.19. CLECs were also required to identify the portion of their revenues that are derived from the use of circuits purchased from ILECs under portability and term plans. II.A.18. And there is an entire section in the data collection (Requests II.F.8-14) entitled “Terms and Conditions” that collects information from “purchasers” of dedicated services that collects a wide array of data relating to the sorts of volume and term commitments at issue in this proceeding.

In short, the ILECs are not asking the Commission to initiate a new data collection; they are merely asking that the Commission make the data collection that it has *already* conducted, and on which the Commission is already relying, available to the parties in this tariff proceeding. Level 3’s suggestion (Opp. at 5) that making the existing data collection available here would materially increase the costs or administrative resources needed to conduct the tariff proceeding

¹¹ *Mile Hi Cable Partners, LP v. Public Serv. Co. of Colorado*, 17 FCC Rcd. 6268, ¶ 8 (2002); *Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981).

or otherwise delay the resolution of that proceeding is insupportable. But even if that were not so, there would be no lawful grounds for denying the ILECs access to relevant data in the Commission's possession merely to prevent "delay" in the resolution of the proceeding. Level 3's suggestion to the contrary merely confirms that the CLECs' goal is to rush a prescription through as quickly as possible, in the name of promoting "competition," without even considering the data the Commission has collected on marketplace competition.

CONCLUSION

The Commission should modify the protective orders in the special access rulemaking proceeding as described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, I caused a true and correct copy of the foregoing Reply of AT&T Inc., Verizon, CenturyLink, and Frontier in Support of Motion to Modify Protective Orders to be served electronically upon the following:

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