

March 18, 2016

VIA ECFS

NOTICE OF EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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 Rates for Price Cap
Local 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 March 17th, Joe Cavender of Level 3 Communications, LLC and the undersigned met with Deena Shetler, Eric Ralph, David Zesiger, Pam Arluk, Marvin Sacks, and Belinda Nixon of the Wireline Competition Bureau.¹ During the meeting, we explained that the Commission can promote both competition in the provision of special access services and the technology transition by immediately addressing the most egregiously harmful provisions of the special access volume and term plans subject to investigation (“lock-up plans”). The Commission can do this while still retaining the discretion to address other aspects of the lock-up plans in the future and without prejudging any of the issues in the rulemaking proceeding.

First, the Commission should require that customers purchasing special access services under the lock-up plans have the ability to choose the size of the volume commitments they make under the plans. This would mean that provisions in the lock-up plans under which a customer must set its volume commitment as a percentage of its past purchases would be unlawful. In contrast, the volume provisions under which a customer chooses its volume

¹ See Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, WC Docket No. 15-247 (filed Feb. 5, 2016) (describing the numerous ways in which the lock-up plans violate the requirements of Sections 201(b) and 202(a)) (“Joint CLEC Opposition”).

commitment (*e.g.*, as in the AT&T ACP²) would be lawful. Moreover, incumbent LECs would be permitted to establish different discount levels for different volume commitments under a plan as long as the customer is free to choose the level of its volume commitment (as is the case under the Verizon TVPs³) and the discounts offered bear a reasonable relationship to the cost savings experienced by the incumbent LEC as a result of selling the volumes at issue. Finally, given that the effectiveness of this reform could be undermined if incumbent LECs impose unreasonably long terms on plan customers, the Commission should not allow incumbent LECs to set the term of a volume commitment longer than two years (as is currently available under the AT&T ACP,⁴ for example).

This reform is consistent with the requirements of Sections 201(b) and 202(a). Tariff provisions that dictate the size of a customer's volume commitment are unjust and unreasonable in violation of Section 201(b). Such provisions deprive customers of the flexibility to set their volume commitments at appropriate levels given market conditions. For example, customers are often unable to meet volume commitments for DS1 circuits that are set based on past purchase levels because the demand for such circuits is steadily declining.⁵ In addition, customers that purchase DS1 services under the lock-up plans are unable to set their volume commitments at levels that account for their need and ability to switch circuits to competitive wholesale providers during the life of a plan.⁶ This in turn suppresses wholesale competition.

Tariff provisions that dictate the size of a customer's volume commitment are also unjustly and unreasonably discriminatory in violation of Section 202(a).⁷ This is because they discriminate against customers that would prefer to commit a smaller volume of purchases to the

² Area Commitment Plan of the BellSouth Telephone Company Tariff F.C.C. No. 1 § 2.4.8(B) (“AT&T ACP”).

³ *See* DS1 Term Volume Plan of the Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.14(D); DS3 Term Volume Plan of the Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.19(C) (collectively, “Verizon TVPs”).

⁴ *See* AT&T ACP § 2.4.8(B) (establishing the ACP A commitment period, which is between 24 and 48 months).

⁵ *See* Declaration of Mark Jeary, EarthLink, ¶ 23 (*attached as* App. B, Joint CLEC Opposition).

⁶ *See id.* ¶ 22; Declaration of Douglas Denney, Integra, ¶ 13 (*attached as* App. C, Joint CLEC Opposition).

⁷ *See, e.g.*, Term Payment Plan of the Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E)(1); Term Payment Plan of the Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(E)(1) (collectively, “AT&T TPPs”).

plan than is required by the incumbent LEC. For example, consider the case of two customers: (1) customer A purchased 1,000 DS1 circuits at the time it signed up for a circuit portability plan but would only like circuit portability for 100 DS1 circuits, and (2) customer B purchased 100 DS1 circuits at the time it signed up for the same plan and would like circuit portability for all 100 circuits. Assume that the plan sets a customer's volume commitment based on a high percentage (say, 90 percent) of the volume the customer purchased at the time it signs up for the plan (this is true of several of the plans subject to the investigation). In this case, customer A would be required to commit to purchase 900 DS1 circuits even though it only wants circuit portability for 100 circuits, whereas customer B need only purchase 90 DS1 circuits in order to receive the same benefit. This is unreasonably discriminatory because it imposes an extra burden on customer A solely because A had purchased a larger volume of DS1 circuits in the past.

Finally, this reform will increase competition and promote the technology transition. If customers can choose the size of their volume commitments, then they can identify circuits where they would like to use a competitor and not include those circuits in their volume commitment to the incumbent LEC. This will dramatically reduce the lock-up effect of the plans, allowing customers to purchase from non-incumbent LEC competitors. That will in turn increase competitors' investment in fiber facilities, which will promote the technology transition.

Second, the Commission should require that the purchase of Ethernet special access services counts toward the volume commitments in the lock-up plans. This should be accomplished in a manner that appropriately accounts for the differences in price and bandwidth of Ethernet services as opposed to TDM-based services.⁸

Tariff provisions that prohibit or restrict customers from counting their Ethernet purchases toward their volume commitments are unjust and unreasonable in violation of Section 201(b). Again, customers increasingly demand Ethernet dedicated services, but competitive carriers cannot count their Ethernet purchases from the incumbent LEC toward their volume commitments in either all or most cases, depending on the lock-up plan.⁹ As a result, competitive carriers cannot purchase the large volumes of Ethernet services demanded by retail customers without running the risk of failing to meet their volume commitments and incurring

⁸ See, e.g., Opposition of Windstream, WC Docket No. 15-247, at 19 (filed Feb. 5, 2016) (arguing that incumbent LECs should be required to translate commitments to purchase DS_n services under the lock-up plans into a total spend commitment to which purchases of Ethernet would apply).

⁹ See Joint CLEC Opposition at 22-23 (explaining that the AT&T TPPs prohibit Ethernet purchases from counting toward a volume commitment, while the Verizon CDPs and the CenturyLink RCP only allow customers to count Ethernet purchases toward a volume commitment in limited circumstances).

large shortfall penalties. This has the effect of undermining the technology transition to Ethernet. For example, some customers opt for DSn dedicated services when they would rather purchase Ethernet.¹⁰ Other customers have sought to avoid shortfall penalties by entering into overlay agreements in which they commit to purchasing a large volume of Ethernet services from the incumbent LEC.¹¹ This has the effect of locking up the Ethernet market, thereby further undermining the technology transition.

Accordingly, permitting customers to count Ethernet special access purchases toward the volume commitments under the lock-up plans promotes the technology transition. It would increase the extent to which customers that prefer to purchase Ethernet do so rather than settling for less efficient DSn services. In addition, it would reduce the extent to which competitive carriers must commit to purchasing large volumes of Ethernet services from an incumbent LEC solely to avoid shortfall penalties applicable under the lock-up plans.

Third, the Commission should require that all commercial agreements to which an incumbent LEC is a party and that include provisions affecting the prices incumbent LECs charge for DS1 and DS3 special access services be filed as tariffs. This outcome is mandated by Section 203 of the Act, which states that “[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.”¹² For example, under this requirement, an incumbent LEC must file as a tariff a commercial agreement that includes a credit against the price of Ethernet purchases where that credit is defined to equal a penalty that would otherwise apply under one of the lock-up plans. Such “classifications, practices, and regulations affecting” the charges for DSn special access services must be tariffed. This will ensure that incumbent LECs cannot use commercial agreements to evade the requirements of the Communications Act, including Sections 201(b) and 202(a), and will help level the playing field by providing better visibility into the manner in which incumbent LECs offer special access services.

Finally, in response to a question from the staff, we explained that shortfall and early termination penalties in the lock-up plans are also unjust and unreasonable in violation of Section 201(b). We stated that a shortfall penalty should not place an incumbent LEC in a better financial position than the incumbent LEC would have been in had a customer met its volume

¹⁰ *See id.* at 38.

¹¹ *See* Declaration of Gary Black, Level 3, ¶ 28 (*attached as* App. A, Joint CLEC Opposition).

¹² 47 U.S.C. § 203(a).

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commitment. We also noted that, of the shortfall penalties in the plans designated for investigation, the AT&T ACP shortfall penalty appears to be among the least onerous.¹³

Please contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

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¹³ See AT&T ACP § 2.4.8(B) (establishing a shortfall penalty equal to the difference in the commitment level and the in-service number, multiplied by 50 percent of the ACP rate).