

REDACTED – FOR PUBLIC INSPECTION

April 21, 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***
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Dear Ms. Dortch:

On behalf of Level 3 Communications, LLC, I hereby submit the redacted version of the attached *ex parte* filing in the above-referenced proceedings. These redacted materials are being submitted pursuant to the terms of the *Modified Protective Order*,¹ *Second Protective Order*,² *Data Collection Protective Order*,³ *Business Data Services Data Collection Protective Order*,⁴

¹ *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).

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*, Second Protective Order, 25 FCC Rcd. 17725 (2010).

³ *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

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and *Tariff Investigation Protective Order*⁵ in effect in these proceedings. The Highly Confidential version of this submission has been filed with the Secretary's Office, and copies of the Highly Confidential version of this submission have been submitted to Messrs. Christopher Koves and Marvin Sacks in the Pricing Policy Division of the Wireline Competition Bureau under separate cover.

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

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones

Counsel for Level 3 Communications, LLC

Attachment

cc: Jon Sallet
Stephanie Weiner
Matt DelNero
Deena Shetler
Eric Ralph
Bill Dever
Nick Degani
Amy Bender
Travis Litman
Rebekah Goodheart
Marvin Sacks
Christopher Koves

(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).

⁴ *Investigation of Certain Price Cap Local Exchange Carrier Business 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, Order and Protective Orders*, 30 FCC Rcd. 13680, App. A (2015).

⁵ *Id.* at App. B.

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Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access
Services, RM-10593***

Dear Ms. Dortch:

On April 19, 2016 Joe Cavender of Level 3 Communications, LLC and the undersigned held meetings with (1) Jon Sallet, General Counsel of the FCC, Stephanie Weiner, legal advisor to Chairman Tom Wheeler, and Deena Shetler and Eric Ralph of the Wireline Competition Bureau; (2) Amy Bender, legal advisor to Commissioner Michael O’Rielly; (3) Nick Degani, legal advisor to Commissioner Ajit Pai, and (4) Travis Litman, legal advisor to Commissioner Jessica Rosenworcel. On April 20, 2016, Mr. Cavender and the undersigned (1) had a telephone call with Jon Sallet, Stephanie Weiner, Deena Shetler, Matt DelNero, Chief of the Wireline Competition Bureau, and Bill Dever of the General Counsel’s office and (2) met with Rebekah Goodheart, legal advisor to Commissioner Mignon Clyburn. During the meetings, we made the following points.

First, Level 3 expressed strong support for the Chairman’s proposal that purchasers of business data services (“BDS”) be given the ability to choose the size of the volume commitments they make under the incumbent LECs’ harmful volume and term plans (“lock-up plans”). We stated that this policy will lower barriers to competition much more quickly if customers are given “fresh look” rights under their existing plans and overlay agreements. This will enable customers to enter into new purchase arrangements with incumbent LECs so that they can increase the volume of BDS they purchase from competitive wholesalers. Specifically, we explained that the Commission should give

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customers the right to terminate an existing lock-up plan or overlay agreement¹ with an incumbent LEC for the purchase of BDS without incurring an early termination penalty. This approach is consistent with Commission precedent. For example, the Commission granted customers purchasing certain of AT&T's bundled service packages that included 800 service the right to terminate those packages within 90 days of implementation of 800 number portability without having to pay early termination penalties.²

The Commission should also give BDS customers the right to adjust their volume commitments under a lock-up plan without terminating the plan. BDS customers that take advantage of this right should be required to compensate incumbent LECs for the lesser of (1) the penalty under the relevant tariff for reducing the volume commitment and (2) the difference between the charges that the customer has paid under the lock-up plans and the charges (including early termination fees that would have applied in the absence of circuit portability) that the customer would have paid if the new volume chosen by the customer had applied since the beginning of the plan.

The Commission should establish a time period during which customers can exercise these rights that is sufficient to enable the customers to assess the costs and benefits of exercising the rights and to plan their businesses. One hundred and eighty days would appear to be reasonable.

Second, Level 3 expressed strong support for the Chairman's proposal that the shortfall and early termination penalties in the lock-up plans should be subject to reasonable limitations in order to ensure compliance with Section 201(b). In particular, 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 commitment. We also noted that, of the shortfall penalties and early termination penalties in the plans designated for investigation, the AT&T ACP shortfall penalty appears to be among the least onerous, and the early termination penalty in the Verizon DS1 TVP appears to be among the least onerous.³

¹ The fresh look should apply to any overlay agreement that contains (1) a TDM BDS purchase commitment or (2) a discount, credit, or other benefit that pertains to the purchase of TDM BDS. It is reasonable to permit a fresh look for overlay agreements for BDS because the terms of those agreements reflect the commitments required under the unlawful tariff plans. Indeed, in some cases, a purchaser might not have elected to agree to such an overlay agreement at all but for the unlawful terms in the tariff plans.

² See *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd. 5880, ¶ 151 (1991), *aff'd*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd. 2677, ¶ 25 (1992).

³ See Area Commitment Plan of the BellSouth Telephone Company Tariff F.C.C. No. 1 § 2.4.8(B)

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Third, we explained that the Commission should require that incumbent LECs enable customers to count their purchases of packet-based BDS, such as Ethernet, toward their volume commitments under the lock-up plans. The incumbent LECs should do this by enabling customers to count packet-based BDS to the same extent that TDM-based BDS services count toward those volume commitments today, while allowing for the differences in price and bandwidth of Ethernet services as opposed to TDM-based services.⁴

Fourth, we explained that 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 BDS 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.”⁵ 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 DS_n BDS 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 BDS. In response to a request from the staff, we have attached hereto relevant language from one of Level

(“AT&T ACP”) (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); DS1 Term Volume Plans of the Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.14(O) (“Verizon DS1 TVP”) (establishing the following early termination penalties: for a one-year plan, 50 percent of any remaining portion of the first year’s recurring charges; for a two-year plan, the one-year plan penalty plus 5 percent of the total monthly recurring charges remaining for the second year; for a three-year plan, the one-year plan penalty plus 10 percent of the total monthly recurring charges remaining for the second and third years; and for a five-year plan, the one-year plan penalty plus 15 percent of the total monthly recurring charges remaining for the second through fifth years).

⁴ 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).

⁵ 47 U.S.C. § 203(a).

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3's BDS overlay agreements that has not been filed as a tariff but that should have been filed pursuant to Section 203(a).⁶

Finally, we explained that the Commission should not tentatively conclude that it should presume that BDS of greater than 50 Mbps capacity is subject to effective competition. This tentative conclusion appears to be based in significant part on the assumption that when customers demand BDS at that capacity competitive carriers can justify deploying new loops to serve them if the competitive carrier does not already have a connection to the customer's location. That assumption is incorrect. The costs of deploying loops are distance sensitive, and per-foot costs vary substantially from area to area. Nevertheless, Level 3 could not typically justify deploying a new loop to a potential customer seeking to purchase dedicated capacity located even just 100 feet from a splice point on Level 3's fiber transport network unless the customer purchases a connection of a capacity that is significantly greater than 50 Mbps, such as 1 Gbps or more.

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

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Counsel for Level 3 Communications, LLC

Attachment

cc: Jon Sallet
Stephanie Weiner
Matt DelNero
Deena Shetler

⁶ [BEGIN HIGHLY CONFIDENTIAL]

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[END

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This attachment is Highly Confidential and has been redacted in its entirety.