

July 15, 2005

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: WC Docket No. 05-65

Dear Ms. Dortch:

SBC and AT&T (“Applicants”) respectfully respond to the June 17, 2005 *ex parte* filing made by Level 3 in the above-captioned proceeding. In this filing, Level 3 first asserts that the SBC-AT&T merger would substantially lessen competition in wholesale “local and intermediate distance transport” services in SBC’s region. Level 3 then advocates a “Network Divestiture/Customer Retention Plan.”

As detailed below, Level 3’s contentions that the merger would eliminate substantial local transport competition rest on the same pervasive misstatements of the local operations of AT&T and other CLECs that Applicants have corrected in previous filings in this docket. Because the actual facts establish that the merger cannot adversely affect competition in local transport services, there is no competitive problem to remedy, and Level 3’s discussion of its proposed “network only” divestiture remedy is beside the point. In any event, Level 3’s proposed “remedy” would introduce cost and inefficiency into the system and interfere with the very customer rights and interests that Level 3 correctly recognizes must be protected.

1. As a threshold matter, no condition, including the type of divestiture and other conditions proposed by Level 3 should even be considered unless the “loss” of AT&T’s local network would materially diminish competition for wholesale dedicated local transport services. Absent proof of such a competitive problem, and no such proof exists, there is no basis for any remedy at all. However, Level 3 has made no attempt to introduce evidence of any genuine problem. Rather, it merely repeats the same conclusory and erroneous allegations that other merger opponents have advanced in the past and that Applicants have thoroughly refuted in their reply comments and subsequent *ex parte* filings. In particular, Level 3 baldly asserts that “only a few companies” own physical local networks, that AT&T (and MCI) have more extensive networks than other CLECs, and that AT&T is one of the “largest” suppliers of wholesale transport services to other CLECs.¹ As Applicants have previously demonstrated in detail, each of these unsupported allegations is simply false.

First, it is not the case that “only a few companies” own alternative local network facilities. Applicants have demonstrated that there are scores of other CLECs that own and operate local transport facilities in SBC’s states.²

¹ See 6/17/05 Level 3 Ex Parte, Att. at 1.

² See generally, e.g., 6/24/05 SBC-AT&T Joint Ex Parte.

Second, contrary to Level 3’s assertions, it is not the case that AT&T possesses a unique ability to construct alternative facilities (due to “high traffic volumes” or otherwise) or that AT&T has a local network that is far more extensive than other wholesale carriers’ networks.³ Applicants have provided hard evidence that AT&T’s local networks are limited, that multiple other CLECs have facilities in the same metropolitan areas AT&T serves, and that the buildings served by AT&T currently are, or economically can be, served by numerous other carriers. Of AT&T’s approximately 1700 “on net” buildings with commercial customers in SBC territory, at least [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] are already served by other competitive carriers.⁴ At least two competitive carriers in the SBC region have more on-net buildings than AT&T, and competitive carriers in the SBC region collectively serve many times more buildings than AT&T. Indeed, these facts significantly understate the competitive alternatives in the dense commercial areas in which AT&T has deployed local facilities, because the AT&T data base of CLEC-served buildings from which the foregoing data are derived generally only lists buildings served by two to three CLECs in each MSA.

Further, even where competitive carriers have not deployed fiber to a building served by AT&T, they generally have the clear economic ability to do so. Like other competitive carriers, AT&T targets relatively “high demand” locations that have sufficient demand to justify the fixed and sunk costs of local loops.⁵ And, the very fact that AT&T was able to connect its network directly to these buildings means that the customers are willing to purchase local services from a competitive carrier, that the landlords are willing to grant building access, and that conduits and municipal rights-of-way are available. These facts make Level 3’s assertions about the costs of underground construction and of establishing rights of ways irrelevant at these specific locations.

Moreover, the Commission’s prior findings are dispositive on these scores. The majority of AT&T’s on-net buildings are currently served by OCn-level facilities (carrying 2 or more DS3s of traffic) for which the Commission has found that *nationally* there are “no barrier or barriers to entry, including operational and economic barriers, that are likely to make [self-deployment] uneconomic.”⁶ Further, many of AT&T’s other on-net commercial buildings are located in areas where the Commission has found there is no impairment even at the DS3 or DS1 level, because the area is in a dense business district and there are multiple suppliers that serve the area.⁷

Beyond that, as Applicants’ fiber maps show, competitive carriers have broadly deployed local metropolitan fiber networks in the same cities – and, indeed, largely on the very same routes – as AT&T.⁸ In addition to their ability to extend lateral connections to additional

³ 6/17/05 Level 3 Ex Parte, Att. at 1.

⁴ 6/24/05 SBC-AT&T Joint Ex Parte at 2.

⁵ SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶¶ 9, 27-30.

⁶ Order on Remand, *Unbundled Access to Network Elements*, WC Dkt. No. 04-313 *et seq.*, 2005 WL 289015, ¶ 21 (2005).

⁷ SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶37-42; 6/26/05 SBC-AT&T Joint Ex Parte at 9-10.

⁸ 6/24/05 SBC-AT&T Joint Ex Parte, Att 1.

buildings from their backbone rings, these carriers have the ability to reach every building currently served by AT&T by leasing local loop facilities from SBC (either as unbundled network elements or special access services) and using their local metro fiber to backhaul that traffic to either their own POP or the network locations of wholesale customers.

Finally, it is surprising that Level 3 would persist in asserting that AT&T is a large supplier of wholesale transport services to Level 3 and to CLECs generally.⁹ As AT&T has repeatedly demonstrated, it established its local facilities primarily to serve retail customers, and it provides wholesale service to other carriers only incidentally. AT&T provides only a miniscule fraction of the overall wholesale dedicated access market and, indeed, only a small fraction of the wholesale local transport services that CLECs provide nationally. In particular, AT&T supplies only [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] of the several billions of dollars in wholesale access purchased by carriers in the SBC region. But even this small number overstates AT&T's competitive significance, for only a fraction of this relatively small figure includes purchases by CLECs. Most of AT&T's local private line sales are *not* to competitive local carriers who are seeking commercial building access. Rather, the majority of AT&T's "wholesale" local private line sales are to wireless carriers, cable companies, RBOCs, ISPs and MCI and Sprint, often in the form of network-to-network connections. Moreover, Level 3 has its own local facilities; indeed, Level 3 touts that it has "constructed laterals to more than 350 buildings in the U.S."¹⁰ and that because of "our construction competence, Level 3 can also build laterals or loops that may be strategically important to our customers but which are not connected to the Level 3 network."¹¹ Level 3 also fails to disclose that it recently [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] Because there are multiple other CLECs in the MSAs that AT&T services, the merger cannot deprive Level 3 or any other CLEC of a critical supplier of wholesale transport services.

In short, there is no basis for the allegations that this merger could substantially lessen competition for wholesale access services.

2. Most of Level 3's *ex parte* filing is devoted to explaining a proposed remedy for the merger's purported reduction in wholesale access competition: Level 3's "Network Divestiture/Customer Retention Plan." However, because the merger will not result in a substantial diminution in access competition, there is no competitive problem to remedy, so

⁹ 6/17/05 Level 3 Ex Parte, Att. at 1.

¹⁰ See http://www.level3.com/userimages/DotCom/pdf/offnlateral_USEng_Global_Letter_forscreen.pdf.

¹¹ See http://www.level3.com/userimages/DotCom/pdf/offnlateral_USEng_Global_Letter_forscreen.pdf See also http://www.level3.com/userimages/DotCom/pdf/WhyL3forMetro_USEng_Global_Letter_forscreen.pdf ("Level 3 invested to help one of the top U.S. IXC's reduce network expenses by providing an alternative to buying fiber from the ILEC. We provided multiple metro dark fiber rings, covered eight markets, constructed 22 off-net laterals, and integrated over 20 existing on-net carrier hotels and ILEC COs. We're continuing to network to new on-net and off-net facilities.").

Level 3's discussion of its proposed divestiture plan is utterly irrelevant to this proceeding. It is nonetheless useful to emphasize that Level 3's "Network Divestiture/Customer Retention" proposal fails by its own terms, for it would impose new costs and inefficiencies on customers and result in the very customer disruptions that Level 3 recognizes must be avoided.

In particular, Level 3 recognizes that AT&T's local facilities are overwhelmingly used to provide retail services to enterprise customers that have chosen AT&T over many other competing suppliers, and that it plainly "is not feasible" to "convey[]" these customers "involuntarily" to new suppliers.¹² As Level 3 concedes, any such customer divestiture requirement would frustrate the rights and legitimate interests of customers by forcing them to deal with suppliers they have not chosen and that may lack the ability to deliver the same levels of service and proprietary features for which the customers have contracted.¹³ Of course, any customers who wish to switch providers will remain able to do so in accordance with contract terms, but this is a very different matter from imposing an involuntary switch on those who have invested in customized networks and services using those networks.

Level 3 believes that these very serious problems would be avoided if the Commission were to order applicants to separate AT&T's network between its intercity "backbone" and its local facilities and to require divestiture of the local facilities alone.¹⁴ Level 3 speculates that customers would enjoy the full benefits of their bargains if AT&T continues to serve them, but is required to do so by purchasing access services from the new owners of the divested facilities. But Level 3's plan would create the very customer disruptions and inefficiencies that Level 3 recognizes are improper, and that many customers – including many who specifically wish to have an end-to-end solution and believe the proposed merger is in the public interest for precisely this reason, among others – would prefer to avoid.

If Level 3's flawed proposal were to be imposed on SBC/AT&T and its customers, those customers would be forced to rely upon a new facilities operator – perhaps, even one that they affirmatively chose not to deal with because of performance or other concerns. But even if there were no such concerns with the new facilities operator, introducing any additional carrier into the mix would increase costs and cause customers who specifically rely upon an end-to-end solution to suffer degraded service. Divestiture would require that the combined company pay the new carrier for services, with a margin that does not exist today, thus increasing the cost of providing the service. Moreover it would eliminate Applicants' ability to use their existing systems fully to provision, monitor, and restore services on an end-to-end basis. In short, it simply is not true that there is a divestiture "remedy" that could address the alleged but unproven anticompetitive effects of AT&T's independent local transport networks without subverting customer interests and creating other inefficiencies.

¹² 6/17/05 Level 3 Ex Parte, Att. at 2-3.

¹³ See *id.* at 3 ("many of the more sophisticated enterprise customers receive proprietary services or service level agreements from AT&T and MCI that would be difficult for a competitor to quickly replicate"); *id.* at 2 ("Customers will find th[e] compelled transfer of their agreements to be unattractive").

¹⁴ *Id.* at 1, 3.

Finally, Level 3 also contends that the Commission should impose an “access price regulation” condition to constrain alleged SBC market power “for the vast majority of buildings” in SBC’s region where no other provider “exists.”¹⁵ This proposed condition clearly has nothing to do with the merger – indeed, Level 3 concedes that AT&T’s local network touches on a small minority of buildings in SBC’s region. As Applicants have explained, such complaints are appropriately addressed in the Commission’s ongoing industry-wide special access rulemaking proceedings.

In sum, there is no merit to Level 3’s proposal. The evidence forecloses its claim that the merger would lessen competition in access services, and its proposed merger conditions are not only competitively unnecessary but also would affirmatively disserve the public interest by harming the interests of the very customers that Level 3 acknowledges must be protected.

Sincerely,

SBC Communications Inc.

AT&T Corp.

/s/ Christopher M. Heimann

/s/ Lawrence J. Lafaro

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¹⁵ *Id.* at 2.