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BINGHAM

**REDACTED VERSION -- FOR PUBLIC INSPECTION**

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FILED/ACCEPTED

JAN 19 2010

Federal Communications Commission
Office of the Secretary

January 19, 2010

***VIA HAND DELIVERY***

Ms. Marlene Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington, D.C. 20554

Re: **REDACTED VERSION** - Comments of Level 3 Communications, LLC in WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

In accordance with the Protective Order issued in WC Docket No. 05-25 and the Public Notice dated November 5, 2009 in the above-referenced proceedings, please find enclosed for filing an original and six (6) **REDACTED** copies of the Comments of Level 3 Communications, LLC.

Pursuant to the Protective Order, we are filing one (1) copy of the Confidential version of these Comments under separate cover, and providing two (2) copies of the Confidential version to Margaret Dailey of the Wireline Competition Bureau.

Thank you for your attention to this correspondence. If you have any questions, please do not hesitate to contact me. Please confirm receipt of this filing by date-stamping the additional enclosed copy of this cover letter.

Sincerely yours,

*/s/ signed*

Michael R. Romano

Enclosures

cc: Margaret Dailey, Pricing Policy Division (w/o enclosures)
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REDACTED - FOR PUBLIC INSPECTION ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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Federal Communications Commission
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| In the Matter of | ) | |
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| Special Access Rates for Price Cap Local Exchange Carriers | ) | WC Docket No. 05-25 |
| | ) | |
| AT&T Corp. Petition for Rulemaking to Reform Regulation of | ) | |
| Incumbent Local Exchange Carrier Rates for Interstate Special | ) | RM-10593 |
| Access Services | ) | |

# COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC


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Dated: January 19, 2010

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## EXECUTIVE SUMMARY

The use of collocation-based tests to identify potential competition and grant pricing flexibility throughout a Metropolitan Statistical Area ("MSA") has failed, as carriers like Level 3 Communications, LLC ("Level 3") -- those who have built out the most substantial competitive networks -- continue to rely on last mile special access services provided by incumbent local exchange carriers ("ILECs") to reach the majority of customer premises. Competitors therefore provide only limited competition for special access services, and the ILECs are well-positioned to leverage monopoly control over connections to specific buildings and on specific transport routes.

This is not to say that the Federal Communications Commission (the "Commission") should jettison pricing flexibility altogether. Instead, the Commission should undertake a more granular analysis to ensure that pricing flexibility is granted only for those locations where competition provides a meaningful check on the exercise of market power. To this end, the Commission should analyze the extent to which providers *own or control* facilities that: (i) extend to and terminate within each building (whether carrier office or customer premises); and (ii) are *currently capable* of providing DS1 and DS3 channel terminations and/or transport. By collecting such data, the Commission can gain better insight into the "sunk investment" that it attempted to approximate through collocation-based triggers a decade ago and better tailor its grants of pricing flexibility. The Commission should also take care, however, to ensure that its efforts to gather and analyze such data will not be eclipsed by changes in the special access market. To safeguard against such concerns and hold conditions constant, the Commission should "freeze" special access rates for each customer at no higher than their current levels and refrain from issuing any new grants of pricing flexibility until this proceeding is complete.

Finally, while gathering data with respect to the true state of competition in the special access market, the Commission should also examine terms and conditions in contract tariffs and other tariffed purchased vehicles that serve to "lock up" purchasers and/or tie purchases of competitive and non-competitive services. This examination will allow the Commission to determine the extent to which the ILECs have leveraged their market power with respect to special access services.

**Before the**
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**COMMENTS OF**
**LEVEL 3 COMMUNICATIONS, LLC**

Level 3 Communications, LLC ("Level 3") submits these Comments in response to the Public Notice (the "Notice") released on November 5, 2009.

## I. INTRODUCTION

Level 3 has a robust transport network that spans more than 50,000 miles as well as approximately 125 metropolitan networks that together comprise approximately 27,000 additional route miles. These networks connect more than 7,500 traffic aggregation points and buildings. Several incumbent local exchange carriers ("ILECs") have highlighted Level 3's efforts at building state-of-the-art networks as part of their claims that they face substantial competition for special access services.[1] But what the ILECs sidestep is that the presence of a competitive network *somewhere within* or *running through* a particular area does not translate into competition *throughout* that area. The buildings that Level 3's networks reach are but a

[1] *See, e.g.,* Ex Parte Presentation of Verizon, WC Docket No. 05-25 (filed Nov. 5, 2009), at Slides 4, 7; Ex Parte Presentation of Qwest, WC Docket No. 05-25 (filed Oct. 28, 2009), at Slide 9; Ex Parte Presentation of USTelecom, WC Docket No. 05-25 (filed Aug. 31, 2009), at 9.

small fraction of those served by the ILECs.[2] Level 3 is a significant purchaser of ILEC special access services and will remain so for the foreseeable future. The fact that carriers such as Level 3 must rely on ILEC-provided last-mile services -- "channel terminations" in special access terminology -- to reach most customer premises despite their own substantial network investments speaks volumes about the state of the special access market and the ways in which "predictive judgments" underpinning the pricing flexibility framework have missed the mark.

Because of this reliance on last mile special access, Level 3 has subscribed to a number of commitment discount plans, term volume plans, term payment plans, portability arrangements, pricing flexibility contracts, and other purchase vehicles that all affect the prices at which it can procure special access services from various ILECs. As if the overlapping nature of these purchase vehicles were not complicated enough (such that they required a dedicated team of employees to manage), a greater concern arises because, as described further in Section II.C herein, many negotiated contracts and other generally available ILEC purchase plans expire within the next few years, and others have already been grandfathered or withdrawn. (The expiration of the AT&T-BellSouth special access merger conditions in 2010[3] -- and the anticipatory price increases built into AT&T's tariffs as discussed further herein -- will further exacerbate matters.) Thus, the relative certainty that purchasers of special access may have obtained in prior years through careful management of ILEC tariff plans will come apart channel

2 As discussed further herein, for example, the approximate number of buildings that Level 3 reaches *nationwide* equals only 10% of the *total number of the largest commercial buildings located just in the Chicago Metropolitan Statistical Area ("MSA") alone.*

3 *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5811 (2007) ("*AT&T-BellSouth Merger Order*"), at App. F, Special Access Merger Commitments #5 and #6 (prohibiting AT&T from increasing tariffed interstate special access rates until December 2010 and requiring AT&T to reduce pricing flexibility rates to price cap rates).

termination-by-channel termination during the next several years. This seismic shift in the special access markets is not just of concern to individual competitors and customers -- it also threatens the integrity and accuracy of the investigation by the Federal Communications Commission (the "Commission"). For example, Verizon has claimed that reform is unnecessary because the "real" special access rates paid by its customers have decreased by 24% between 2002 and 2008.[4] Assuming *arguendo* that this is true, this calculation of the "real" rates paid by Verizon special access customers includes the effect of contract tariffs and purchase plans such as those described above. Yet as contract tariffs expire and with other tariff plans being withdrawn, these effective rates will rise again -- *just as or just after the Commission completes its investigation*. To ensure that its consideration of just and reasonable special access rates is not outpaced by ILEC-driven shifts in the underlying markets, the Commission should take interim steps to implement a "true freeze" and hold rates, terms, and conditions constant while it completes its investigation.

In the same vein, the Commission should take a systematic approach to analyzing the effectiveness of individual components of the regulatory framework. WC Docket No. 05-25 has been open for five years; AT&T was a competitive local exchange carrier eight years ago when it filed the petition initiating RM-10593. Taking matters one question at a time -- just as in the Notice itself -- the Commission should focus first on whether the pricing flexibility regime has succeeded in ensuring just and reasonable rates, terms, and conditions. Level 3 believes that failures in the special access market are most obvious in those areas in which the Bell Operating Companies have received pricing flexibility, as certain prices that were supposed to be

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[4] Ex Parte Presentation of Verizon, WC Docket No. 05-25 (filed Nov. 4, 2009), at Slide 6.

constrained by competition are now greater than the prices where the Commission's framework indicates there is limited (or no) competition.[5] The best indication of this dynamic comes from the soon-expiring restrictions of the *AT&T-BellSouth Merger Order*, which have kept AT&T's special access rates in pricing flexibility areas from being higher than the rates in areas where pricing flexibility is not available. The Commission should therefore (re)start its analytical and reform efforts by using fresh data and different measures to recalibrate the pricing flexibility framework. Following this review and resetting of the triggers, the Commission can turn to whether the underlying price cap regime produces just and reasonable rates. Alternatively, the Commission can evaluate the price cap regime at the same time, but in no event should that evaluation delay action on necessary pricing flexibility reforms.

## II. <u>NOTICE QUESTION 1</u>: DO THE COMMISSION'S PRICING FLEXIBILITY RULES ENSURE JUST AND REASONABLE RATES?

Because the record indicates that "standard" pricing flexibility rates for special access services can often be higher than those in areas that remain subject to price cap regulation,[6] the Commission's Notice starts in the right place by seeking input first on the pricing flexibility framework. The short answer to that question is that the rules do not ensure just and reasonable rates. This is because the underpinning of those rules -- the predictive judgment that ILEC special access prices would face downward pressure throughout an entire MSA because

[5] *See, e.g.*, Ex Parte Presentation of tw telecom inc., WC Docket No. 05-25 (filed July 9, 2009), at Attachment A; Peter Bluhm and Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets, Revised Edition*, 09-02 (Jan. 21, 2009) ("*NRRI Report*"), at 27-29 (summarizing the findings of the General Accountability Office with respect to the rate discrepancies between price cap, Phase I, and Phase II pricing flexibility areas).

[6] *See* footnote 5 above.



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competitors were collocated in certain wire centers in that MSA[7] -- is overly broad and fails to take accurate account of the ways in which carriers compete (and customers are served) in the loop and transport markets. The theory that competitive pressures can ensure that special access rates, terms, and conditions are just and reasonable may be true, but the current framework is flawed. These shortcomings can be remedied through an analytical framework that establishes meaningful pricing flexibility triggers and by reassessment of the relevant special access markets in light of those triggers.

### A. The Current Collocation-Based Pricing Flexibility Triggers are Not an Accurate Proxy for the Kind of Competitive Sunk Investment Sufficient to Constrain ILEC Prices.

The use of collocation as a proxy for sunk investment by competitors has yielded a wave of "false positives" in three respects. First, the current rules provide pricing flexibility in an entire MSA based upon the presence of collocators in what might be only a handful of wire centers. This is true where the ILEC obtains pricing flexibility based upon collocators in wire centers representing a specified percentage of the ILEC's revenues from the particular special access service;[8] only a few wire centers might account for 30% to 85% of the ILEC's applicable revenues, and yet the ILEC would receive flexibility throughout the entire MSA. Under such circumstances, competition *might* at most (subject to further limitations spelled out below) help to discourage exclusionary pricing behavior *only* in those wire centers that formed the basis of

[7] *See Access Charge Reform*, CC Dockets Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14297-98 (1999) ("*Pricing Flexibility Order*"), at ¶ 144.

[8] According to a November 2006 report of the General Accountability Office, *all* of the applications for pricing flexibility through that date had relied upon the revenue-based triggers, rather than the percentage of total wire centers in the MSA with collocators. U.S. General Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives - Telecommunications, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) ("*GAO Report*"), at 16.

the pricing flexibility grant, leaving the ILEC unconstrained in the remaining wire centers within that MSA.[9]

The second "false positive" arises *even within the wire centers where competition purportedly exists.* This is because collocation in a wire center is a poor indicator of competition with respect to any given location served out of that wire center. As an initial matter, it is possible that certain collocation sites used to justify grants were never activated by the competitive local exchange carriers ("CLECs") in question, especially during the 2001-2002 industry downturn when many pricing flexibility grants were made. Moreover, it is worth noting that the vast majority of pricing flexibility grants were awarded prior to the AT&T-SBC and Verizon-MCI mergers, meaning that the competitive collocator upon which AT&T and Verizon relied to obtain pricing flexibility may now be part of the recipient of pricing flexibility relief (or part of another ILEC that is more focused on core in-region growth than out-of-region competition). In fact, the *GAO Report* observed more than three years ago that competitive collocation had *declined* in many MSAs since pricing flexibility was granted.[10]

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9 See Lee L. Selwyn, Susan M. Gately, Helen E. Golding, and Colin B. Weir, Economics & Technology, Inc., *The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition* (Mar. 2009) ("*ETI Report*"), at Table 2 (finding that 53% of wire centers in 10 major MSAs had no competitive provider serving any buildings within those wire centers), provided as Attachment B to Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Docket No. 09-223 (filed Nov. 16, 2009); see also *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2619 (2005), at ¶ 155 (rejecting use of a MSA-wide impairment analysis because it resulted in "an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate").

10 *GAO Report,* at 23-24. Any decline in collocation further undermines the theory that collocation alone somehow represents an *irreversible, sunk investment* that could stand as a reasonable proxy for facilities-based competition.

Finally, and most importantly, collocation does not equal competition in buildings where customers are located or on transport routes between all offices in the MSA. Just because one unaffiliated CLEC may have deployed transport to its collocation in a wire center does not mean that *all* interoffice transport routes out of that wire center are competitively served. Moreover, as the Commission recognized when establishing the triggers, the presence of a collocator bears limited correlation, at best, to deployment of *last-mile loop* facilities from the wire center to a customer premises.[11] As the GAO Report notes, a variety of factors could limit the construction of channel terminations/loops by collocators, including the high sunk costs of constructing local networks, the burden of local governmental regulations, and limits on access to particular buildings.[12] Indeed, collocation is more likely used by a CLEC for the purpose of connecting to ILEC-provided unbundled loops or channel terminations and/or interconnection and aggregation of switched traffic within that wire center.

In other dockets following the adoption of the pricing flexibility triggers, the Commission noted that competitive facilities were available in only 3 to 5% of commercial buildings.[13] The records here and in other Commission dockets further confirm that CLEC penetration in the

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[11] *Pricing Flexibility Order*, 14 FCC Rcd at 14279, ¶ 103. ("[C]ollocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises. We recognize, therefore, the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises, but it appears to be the best option available to us at this time.") The collocation trigger also potentially undercounts competition because it misses loops built from a carrier's point of presence to a building without passing through a collocation.

[12] *GAO Report*, at 26-27.

[13] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Dockets Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17155 (2003), at n. 856. Of course, given the date of this order, this estimate would have reflected AT&T and MCI as competitive carriers in the then-SBC and Verizon regions, respectively.

channel termination market is limited at best,[14] and circumstances in the interoffice market appear only somewhat better.[15] Level 3 has estimated that it uses ILEC special access services to support over **[***CONFIDENTIAL INFORMATION REDACTED***]** of the DSI and DS3 loops that it provisions to customer locations today.[16] Furthermore, based on an analysis performed using information provided by **[***CONFIDENTIAL INFORMATION REDACTED***]**, Level 3 estimates that today there are just under 28,000 significant commercial addresses within the Boston MSA.[17] Yet Level 3 can use non-ILEC alternatives to offer a DS3 capable service to customers in **[***CONFIDENTIAL INFORMATION**

[14] *See, e.g., ETI Report*, at Table 1 (showing that CLEC last-mile facilities serve only 0.24% of the total number of commercial buildings in 10 major metropolitan areas) and Table 3 (showing that even in the wire centers with the highest levels of CLEC penetration in the same 10 metropolitan areas, CLECs serve only 1.48% of those buildings); Ex Parte Presentation of TelePacific Communications, WC Docket No. 05-25, GN Dockets Nos. 09-47, 09-51, 09-137, RM-10593, RM-11358 (filed Dec. 7, 2009) (reporting that the vast majority of its existing customers could be served only via ILEC last-mile facilities); Ex Parte Presentation of XO Communications, LLC, GN Dockets Nos. 09-29, 09-47, 09-51; RM-11358 (filed Oct. 26, 2009), at Slide 6 (stating that despite billions of dollars in investment, XO remains dependent on ILEC facilities for 96% of its last-mile access requirements); Ex Parte Presentation of tw telecom inc., WC Docket No. 05-25 (filed July 9, 2009), at 14 (reporting that tw telecom, notwithstanding its "prolific" efforts at deploying end-user connections, continues to rely on ILEC facilities for most connections to commercial buildings); Comments of PAETEC Communications, Inc., WC Docket No. 05-25, RM-10593 (filed Aug. 8, 2007), at 5-7 (indicating that it continues to purchase 98% of speeial access services from ILECs in pricing flexibility MSAs despite "vigorous and concerted" efforts to locate competitive alternatives); *GAO Report*, at 19-20 (finding that fewer than 6% of buildings where customer demand was limited to DS-1 services had competitive alternatives for such services, and that only 15% of buildings with demand for DS-3 services had fiber-based competitors).

[15] *See, e.g.*, Comments of New Edge Network, Inc., *et al.*, WC Docket No. 05-25, GN Dockets Nos. 09-47, 09-51, 09-137, RM-10593, RM-11358 (filed Nov. 4, 2009), at 29 (reporting analyses performed by two CLECs finding that: (a) 82% of the wire centers served by the first CLEC could be reached only by ILEC transport; and (b) in only 37% of the markets served by the second CLEC were there competitive alternatives to the ILEC for transport to more than 50% of the wire centers in those LATAs).

[16] To be clear, this is not to say that competitive alternatives are available to nearly **[***CONFIDENTIAL INFORMATION REDACTED***]** of all commercial buildings. This figure refers only to reliance on ILEC facilities *within the base of circuits that Level 3 sells to customers today*; as the other data discussed in this section show, the actual percentage of total buildings for which a facility can be self-provided and/or obtained from a provider other than the ILEC appears to be far smaller.

[17] The use of the term "significant" here arises out of Level 3's analysis of the third party data to identify only those commercial buildings where there is a substantial amount of potential telecom spend by owners and tenants. Thus, the estimates provided herein are rather conservative, in that they reflect only these "significant" customer premises as filtered by Level 3 and do not take account of every commercial building in a given MSA.

**REDACTED*****] of those 28,000 locations. Similarly, Level 3 estimates that there are about 27,000 significant commercial addresses within the Denver MSA, and it has identified **[***CONFIDENTIAL INFORMATION REDACTED***]** buildings to which it could self-provide and/or obtain a DS3 from a carrier other than the ILEC. For the Chicago MSA, the same estimates are about 71,000 total significant commercial buildings, of which **[***CONFIDENTIAL INFORMATION REDACTED***]** are competitively served. Thus, just under **[***CONFIDENTIAL INFORMATION REDACTED***]** of the significant commercial addresses in the Boston MSA, just over **[***CONFIDENTIAL INFORMATION REDACTED***]** of the significant commercial addresses in the Denver MSA, and just under **[***CONFIDENTIAL INFORMATION REDACTED***]** of the significant commercial addresses in the Chicago MSA appear to be competitively served at the DS3 level.

Level 3 acknowledges that this limited data set may not include all potential competitive providers. But since most providers build where the greatest "addressable market" is (to maximize the opportunity for return on investment ("ROI")), it is reasonable to expect that other unidentified competitive providers will overlap to a significant degree in those buildings identified as competitively served in this data set. Moreover, these estimates highlight the disparity between buildings served by the ILEC and competitors. The ILEC serves all or nearly all of the commercial addresses in its serving area. In sharp contrast, one must aggregate multiple competitors to reach **[***CONFIDENTIAL INFORMATION REDACTED***]** of the largest commercial buildings the ILEC serves. Finally, while these estimates are focused on DS3s, they show that "potential competition" is not as imminent as some might argue. In Level 3's experience, there are few (if any) builds that can be justified for less than a DS3 of total capacity. The number of competitively served buildings is unlikely to increase substantially by adding those buildings that are competitively served at the DS1 level. Thus, the Commission should focus on fleshing out this picture by obtaining comprehensive data that shows where competitive carriers may be able to apply meaningful pressure on the ILEC's special access prices. Armed with such data, the Commission can revise and adopt new pricing flexibility triggers that ensure just and reasonable rates through a real check on ILEC market power, while keeping ILECs under the price cap regime where competitive pressures are limited or non-existent.

The Commission is therefore presented with a record in which carriers such as Level 3, tw telecom, PAETEC, and TelePacific -- carriers who have built out the largest competitive networks and are therefore best situated to make do *without* ILEC special access -- concur that: (i) choice among providers in the special access market remains limited; (ii) the percentage of commercial buildings they could serve without any use of ILEC last-mile facilities is minimal; and (iii) they continue to rely in overwhelming part upon ILEC facilities to reach customers.[18] Accordingly, the Commission should reassess and recalibrate the collocation-based pricing flexibility framework as described in Section II.B to obtain a complete picture of both competition in the relevant special access markets and the pressure that such competition can bring to ensure just and reasonable rates in that market.

The ILECs now offer little specific defense of the collocation-based triggers -- but their alternative bases for claiming that competition exists in each market are no better. Instead of debating how to get a better view of the competitive presence in specific geographic and product

[18] These figures are further borne out by the approximate market share of interstate special access lines held by ILECs. *See* Ex Parte Presentation of Sprint, WC Docket Nos. 05-25, *et al.* (filed Aug. 31, 2007), at 2-3 (showing that, based upon reported revenues on Forms 499-A, ILECs retain over 94% of the special access market).

markets and what to adopt as new triggers, the ILECs tend in recent filings to toss out nationwide statistics, press releases taken out of context, and anecdotal marketing tales of facilities deployment to argue that pricing flexibility remains justified. For example, Verizon's "evidence" of competition consists of excerpts from press releases, news clippings, and statements at investor conferences.[19] The high-capacity services report prepared by USTelecom takes the same approach. USTelecom purports, for example, to present "data" relating to intermodal competition.[20] But this discussion contains no meaningful data relating to the penetration or presence of intermodal competitors in any specific product or geographic market. Instead, the report cites analyst reports and press releases from cable companies and wireless providers discussing aggregate industry-wide statistics or company-specific nationwide figures relating to network investments and/or customers gained.[21]

USTelecom's snapshot with respect to competitive fiber providers is misleading and misplaced. As just one example, the report indicates (at page 25) that Level 3 has a fiber presence in 46 of the top 50 MSAs, more than 26,000 metropolitan network route miles, and

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[19] Ex Parte Presentation of Verizon, WC Docket No. 05-25 (filed Nov. 5, 2009), at Slides 4-7.

[20] USTelecom, *High Capacity Services: Abundant, Affordable, and Evolving* (July 2009) ("*USTelecom Report*"), at 8, attached to Ex Parte Presentation of USTelecom, WC Docket No. 05-25, GN Docket No. 09-51 (filed July 16, 2009). Nor are generic claims about a substantial portion of "access lines" being subject to competition meaningful absent further information. *See, e.g.*, Ex Parte Presentation of CenturyLink, GN Docket No. 09-51, WC Docket No. 05-25 (filed Nov. 4, 2009), at Attachment, p. 2 (claiming that "77% of access lines in legacy Embarq areas" have either a CLEC or cable option"). As an initial matter, the term "access lines" could very well include DS0s, which are irrelevant for special access purposes. Moreover, stating that a certain amount of access lines have an "option" does not mean that those options are facilities-based in nature; they may very well (and almost certainly do, in the case of non-cable competitors) rely in many cases upon legacy ILEC facilities for access to specific customer premises.

[21] *US Telecom Report*, at 8-22. The one exception is that the USTelecom Report includes (at 12) a map prepared by Comcast that shows businesses "within proximity" of its cable network in a single market, but does not show the buildings actually served by Comcast. For a variety of economic and practieal reasons discussed further in Section II.B, the fact that a competitor might have facilities *near* any given building cannot be taken as a competitive presence with respect to that building.

more than 7,500 on-net lit buildings.[22] But even Level 3's substantial network build-out, which is among the largest of any competitive carrier according to the USTelecom report, represents "a drop in the bucket" when compared to the ubiquity of the ILEC networks. The cited metropolitan network miles reflect *nationwide* totals, as do the buildings served -- and the buildings served by Level 3 include not only customer premises, but also ILEC central offices, Level 3 locations, and other carrier hotels in which Level 3 has terminated fiber. By contrast, from lists on its website,[23] Verizon appears to have more than *1,300 central offices alone* in a handful of the states it serves (Delaware, Maryland, Massachusetts, New Jersey, Pennsylvania, Rhode Island, Virginia, and Washington, DC); this figure, of course, does not include: (1) any of the residential and commercial customer premises served out of those 1,300 offices; or (2) the Verizon central offices and associated customer premises in other jurisdictions where Verizon is an ILEC. To help put such "competitive buildings served" estimates in further context, as noted above, the Chicago MSA appears to have approximately 71,000 significant commercial buildings -- *this means that the **nationwide** total attributed by USTelecom to Level 3 in the estimate above equals about 10% of the largest commercial addresses **in the Chicago MSA alone***. The Commission should therefore reject the ILEC claims of competition and defenses of the pricing flexibility framework as little more than puffery, and should engage in a more detailed analysis of that pricing flexibility framework as described in the following section.

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22 *Id.* at Table 7.

23 *See* http://www22.verizon.com/wholesale/local/collocation/detail/1,,info_space,00.html. Statements by Verizon on this website indicate that these lists may not comprise the entirety of its central offices in these states.

### B. To Evaluate the Current Pricing Flexibility Framework and to Develop a More Effective Framework Going Forward, the Commission Should Analyze the Presence of Competitive Facilities Reaching to Specific Buildings and on Specific Routes.

The Commission can best address the "false positives" -- and thereby ensure that pricing flexibility is granted where competition can in fact exert pressure on exclusionary pricing -- by undertaking and utilizing a more granular analysis of competition. Specifically, in addition to rejecting a collocation-based approach for the reasons described above, the Commission should discard the MSA-wide view of competition. Carriers do not compete and offer services by MSAs -- but for knowing where they can/must buy services under pricing flexibility, most carriers would have no reason to know where MSA boundaries begin and end. Likewise, customers do not care about (and are not "protected" by) the theoretical presence of a competitor who may serve a handful of locations miles away in the same MSA.

Thus, Level 3 proposes that the Commission "zoom inward" on the geographic market, and use a building-by-building analysis to evaluate the extent of competition and provide data to inform the adoption of improved pricing flexibility triggers. The Commission should consider the extent to which carriers own or control (as described further herein) facilities that: (i) extend to and terminate within each building (whether central office or customer premises); and (ii) are *currently capable* of providing DS1 and DS3 channel terminations and/or transport in competition with the price cap ILEC. Such an approach to assessing the geographic market is consistent with well-established antitrust principles. The *Horizontal Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission indicate that geographic markets should be defined by reference to the smallest area within which a hypothetical monopolist could profitably impose a price increase.[24] The Commission has found that the relevant geographic market for special access services is "a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a 'small but significant and nontransitory' increase in the price of special access service."[25]

Some protest that gathering data on a building-by-building basis would prove too complicated or onerous.[26] But unsubstantiated cries of burden do not justify departing from well-established practices in defining geographic markets. To the contrary, while collecting building data will involve some work, it should be manageable. Each carrier certainly must know or be capable of identifying in relatively short order where its "on-net" buildings are located. In addition to calculating the "lit buildings served" figures that some facilities-based carriers publish,[27] carriers must also have identified their on-net end user locations to prepare and file their Forms 477 with the Commission.[28] Moreover, carriers often know to some degree *who*

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[24] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, §1.21; *see also* United States' Reply Submission in Response to the Court's Minute Order of July 25, 2006, Civ. Action Nos. 1:05CV02102 (EGS) and 1:05CV02103 (EGS) (filed Sept. 21, 2006), at 6.

[25] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18307 (2005) ("*SBC-AT&T Merger Order*"), at ¶ 28; *Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18449 (2005), at ¶ 28; *see also Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16321 (2007), at ¶ 35 and n. 102 (citing to the repeated instances in which the Commission has used a "building-specific approach to analyzing competition in special access services" and noting that "the evidence in the record indicates that the availability of competitive facilities varies from building to building").

[26] *See, e.g.*, Ex Parte Presentation of Verizon, WC Docket No. 05-25 (filed Nov. 5, 2009), at Slide 10.

[27] *See, e.g.*, *USTelecom Report*, at Table 7 and Appendix C (identifying the lit buildings reported by many of the largest facilities-based competitive carriers).

[28] Among other things, facilities-based providers were required to report on Form 477 with respect to "Other Wireline" services -- "all copper-wire based technologies other than xDSL: Ethernet over copper and T-1 are

*else* has facilities terminating into particular buildings based upon "points of presence" lists that are exchanged (typically on a confidential basis) for commercial purposes or even through word-of-mouth discussions with customers. Level 3 acknowledges that "in order to simplify its analysis . . ., the Commission has traditionally aggregated or grouped customers facing similar competitive choices . . . ."[29] But just because the Commission simplifies its *analysis* and/or the pricing flexibility framework it ultimately adopts, this does not mean that the Commission should refrain from *collecting all of the data* required for a meaningful analysis. Only by knowing first whether "customers fac[e] similar competitive choices" can the Commission confirm the appropriate ways in which it might aggregate those customers in the form of new pricing flexibility triggers.

Level 3 recommends that the Commission proceed as follows in revisiting the framework for grants of pricing flexibility. The Commission should start by seeking standardized street address-level information from each service provider who files a Form 477 for each building[30] *in which that service provider as of a date certain owns or controls and has lit facilities in place that are currently capable of serving that location.* Such data collection should be limited to owned or controlled facilities because such "on-net" arrangements (as compared to monthly

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examples" -- that connect "to end user locations." FCC Form 477, Instructions for September 1, 2009 Filing (of data as of 6/30/2009), at 7.

29 *SBC-AT&T Merger Order*, 20 FCC Rcd at 18307, ¶ 28.

30 To address both the channel termination and interoffice transport product markets, the list of buildings should include both retail and wholesale customer locations (including businesses, residences, wireless towers, carrier hotels, and other points of presence), as well as ILEC and competitive carrier offices from which channel termination facilities may be deployed.

collocation rentals) reflect the kind of "sunk investment" that the Commission was looking to approximate through its collocation-based triggers ten years ago.[31]

Although certain parties have asserted that buildings "passed" (*i.e.*, within a certain proximity of transport routes) should also be included within a potential competition calculus,[32] such claims are misplaced. Instead, data collection should be limited to <u>lit "on-net" buildings</u> because the cost, time, and investment involved in constructing laterals and/or receiving permissions to terminate facilities and install and activate equipment in specific buildings represent a substantial burden on entry. For example, Verizon has claimed in this docket that it can construct "in most cases" a lateral channel termination of up to a quarter mile for less than $100,000.[33] But Verizon's own calculations show the substantial committed purchases from customers in that building needed to justify such an investment. Consider that Verizon appears to charge approximately $167 for its least expensive DS-1 under a 2-year purchase plan commitment.[34] Assuming that a competitor would be constrained by Verizon's price (*i.e.*, no

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[31] For purposes of clarification, a "controlled" facility would be a facility over which a provider has physical/logistical control even if it does not hold titled ownership of that facility. For example, under infeasible right of use arrangements and even some long-term and short-term fiber leases, providers may be able to provision their own equipment at defined demarcation points and thereby "light" the facility. In such cases, the provider's physical/logistical control over the facility and its deployment of equipment at the terminating end in a particular building reasonably represent a "sunk investment" toward competition on that route. But if a provider is simply leasing a finished or "lit" service from a third party and has no right of access or control with respect to the underlying facility, then the provider should not be considered to "control" such that facility for purposes of this data gathering.

[32] *See, e.g., USTelecom Report*, at 27, 29. The Commission's Notice also asks (at page 4) about the effect of "potential competition."

[33] Reply Comments of Verizon, WC Docket No. 05-25 and RM-10593 (filed Aug. 15, 2007), at 29 (stating that with an assumed deployment cost of $72,000, a competitive carrier could recoup a lateral investment in 2 years through purchases of "only" $3,000 per month from all customers in the building, or in 7 years if customers in that building purchased $860 per month in services).

[34] *See* Ex Parte Presentation of tw telecom inc., WC Docket No. 05-25 (filed July 9, 2009), at Attachment A, p. 5.

customer would buy services from the competitor for more than $167 per DS-1 under a 2-year commitment), Verizon's claim with respect to a 2-year payback period on a $72,000 lateral *assumes that the competitor would sell at least 18 DS-1 circuits to customers starting the very first day that the facilities to the building are lit.* In an era of capital constraints and in light of the reluctance (or inability) of many customers to commit to substantial long-term purchases of telecommunications capacity months in advance of service activation, this is a substantial barrier to entry into many buildings. Moreover, in Level 3's experience, it would take many times the kind of customer commitment described above (as well as a quicker payback period than 2 years) to justify most builds.

Moreover, the costs of deployment in any given area and the resulting build-buy analysis with respect to any given building vary widely due to factors such as geography, topography, customer density (both within and near the building in question), a given competitor's available capital (and other demands for that capital),[35] building access issues,[36] and local legal and regulatory requirements.[37] Such a wide variation in potential conditions and the legal,

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[35] The "relativity of ROI" cannot be ignored -- even if a build-buy analysis might show a reasonable return on investment in the abstract to justify deployment for a "typical provider," each provider in fact faces multiple competing demands for limited capital resources. Thus, a project that might appear justified on the basis of a formulaic build-buy analysis (and thus might present potential competition to ILEC special access services in a perfect world) may be months or years away from construction, if ever built at all, because other demands for that capital take priority.

[36] Building access issues significantly complicate any "potential competition" analysis. The termination of facilities into a building can often present a "chicken and egg" problem -- a building owner may be reluctant to permit a new provider to terminate facilities into the premises unless and until that provider has a committed tenant customer, but many customers have little interest in committing months in advance to purchase services pending construction of a lateral into their building.

[37] *See, e.g.*, *GAO Report*, at 26-27 (discussing the factors affecting the ability of competitors to deploy channel termination/loop facilities); Ex Parte Presentation of tw telecom inc., WC Docket No. 05-25 (filed July 9, 2009), at 15-17 (discussing the fundamental "build-buy" analysis and other factors that affect the timing, cost, and ultimate decision to deploy facilities to any given building); *NRRI Report*, at 54 ("A landline competitor that builds fiber or

regulatory, and practical hurdles that apply on a case-by-case basis make it difficult to identify a fixed "formula" by which one could take account of potential competition in the form of laterals. Thus, the data collection effort should focus on lit "on-net" buildings, rather than those that are "passed" by competitive networks.[38]

Each carrier considers the list of buildings to which it connects competitively sensitive in nature, and adequate protections must be established for any and all such data submitted. Just as it has been unnecessary to publish the individual identities of collocators and their respective collocation sites under the current pricing flexibility framework, there is no need or good reason for company-specific data of the kind described in the preceding discussion to be made available to any entities other than Commission staff and contractors. The Commission can use this confidential data to make its decisions with respect to pricing flexibility under the new framework (as discussed further below), but then publish only the aggregate findings arising out of its analysis (*e.g.*, only X percent of commercial buildings within a given wire center have a single competitive carrier presence) for public review and possible comment.[39]

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copper distribution systems can seldom generate enough revenue to justify the incremental investment in new cables or new light fibers often needed to serve a new customer.").

38 Of course, if an ILEC determines that competitors are running amok with laterals into buildings in an area previously deemed lacking in facilities-based competition, nothing precludes the ILEC from requesting pricing flexibility with respect to that area based upon the more robust facilities-based competitive presence. But in light of the prior shortcomings of predictive judgments with respect to potential competition in the special access markets and given the impossibility of arriving at a "one-size-fits-all" formula to determine when laterals are likely to be built, it would be far better to rely in the first instance upon concrete data showing competitive facilities deployment than guesswork as to when and where such facilities might be deployed.

39 *See also* Ex Parte Presentation of Computer and Communications Industry Association, *et al.*, WC Docket No. 05-25 (filed June 3, 2009), at 3 (discussing the need for appropriate confidential treatment and handling of company-specific data); Ex Parte Presentation of Sprint Nextel, WC Docket No. 05-25 (filed June 22, 2009), at 2-4 (discussing the Commission's authority to devise an appropriate confidentiality regime to ensure the protection of raw data, such as the practice with respect to Form 477 reports).

Level 3 recognizes that, for administrative reasons, the Commission may want to continue to "roll up" the data and grant pricing flexibility on a more aggregated level than a building-by-building or route-by-route basis. Level 3 does not express any position on whether such a "roll-up" is appropriate -- other than to state once again that the Commission should reject continued use of MSAs as the basis for grants of pricing flexibility. Level 3 also recognizes that the Commission may wish to manage the data collection process over time, gathering information on a piecemeal basis for individual areas in lieu of receiving data all at once from a nationwide production. Although it is difficult to comment upon such a process in the abstract, Level 3 believes that it might be reasonable to begin by collecting such information for some of the smallest of the areas in which pricing flexibility has been granted, and then working upward over the course of several months (and in any event, no longer than one year) through the entire list of MSAs in which an ILEC has secured pricing flexibility.[40]

This exercise should lead to a more informed assessment of "the existence of competitive pressures that would discipline interstate special access rates,"[41] with the ultimate objective being to determine whether a grant of pricing flexibility is (or remains) warranted. Level 3 has observed, for example, an inverse correlation between the number of on-net buildings which facilities-based competitors have in a wire center and the price that the ILEC tends to offer for DS-1 and DS-3 circuits in the same wire center. The higher the level of competition in a wire center (measured by the number of on-net competitively served buildings), the lower the ILEC

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[40] The Commission should recognize again, however, that carriers typically do not maintain information on a MSA-by-MSA basis, so subdividing the work in this manner could in fact lead to more work for carriers than simply asking them to provide "lit building" lists in their entirety.

[41] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2002 (2005) ("*NPRM*"), at ¶ 18.

prices that have been quoted to Level 3 for special access services in that wire center. With an evidentiary foundation to confirm and/or refine such observations as necessary, the Commission can discard once and for all the MSA-wide, collocation-based percentage triggers and use a more granular and data-driven analysis to develop and implement new and more effective pricing flexibility triggers.

### C. Narrow Interim Relief is Needed in Addition to and in Advance of Any Other Relief.

Gathering and analyzing all of the data as discussed in the preceding section, reaching a determination on what a new pricing flexibility framework should look like, and then implementing that framework could take a significant amount of time -- particularly if the Commission decides to stagger the collection and assessment of the data. Moreover, the foregoing steps would not begin to address any additional investigation into whether the underlying *price cap* rules ensure just and reasonable rates. Given that it has already taken five years to reach this point and the likelihood that it will take more time to complete all work in this docket, the Commission should take interim steps to ensure that its work is not rendered moot or irrelevant by shifts in the special access market.[42]

As noted earlier, Verizon and others have claimed that the effective rates paid by customers have declined (or at least not increased) under the pricing flexibility regime.[43] Although the bases for these claims are not always disclosed, it is clear that some of the plans

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[42] The need for some "interim plan," including possible adoption of a productivity factor "and other reasonable interim alternatives" has been teed up for consideration in this proceeding since AT&T first filed its petition for rulemaking. *See NPRM*, 20 FCC Rcd at 2035-36, ¶¶ 128-131.

[43] *See, e.g.*, Ex Parte Presentation of Verizon, WC Docket No. 05-25 (filed Nov. 4, 2009), at Slide 6; Ex Parte Presentation of Qwest, WC Docket No. 05-25 (filed Oct. 28, 2009), at Slide 16.

that have had a substantial downward impact on ILEC special access pricing are being eliminated altogether or grandfathered as a prelude to elimination. For example, in the past few years, AT&T has grandfathered many of its tariff discount plans, such as MVP, TAP, and Fast Packet Savings, thereby driving purchasers of transport services toward higher standard rates.[44] Moreover, the pricing flexibility contract tariffs that might be used to obtain the best possible discounts and credits have limited terms; for example, a brief review of Verizon Telephone Companies' Tariff F.C.C. No. 1 indicates that a number of the contract offers will expire in two to three years. The same appears to be the case with AT&T's Southwestern Bell Tariff F.C.C. No. 73; a brief review indicates that the contract terms of many offers are likely to expire within the next two to three years (if not sooner) and are not renewable. Similarly, a sizeable portion of the contract offers contained within Qwest Corporation's Tariff F.C.C. No. 1 look to expire in three to four years. Finally, the expiration of the AT&T-BellSouth special access merger conditions next year -- and the price increases that are already built into AT&T's tariffs in anticipation of the moment that occurs -- will exacerbate matters by increasing rates for special access services in some pricing flexibility areas between 17% and 25% as of July 1, 2010.[45]

Thus, the special access markets that are subject to examination today and in the near future are likely to be quite different from the markets that will exist once the Commission reaches any final conclusions. To ensure that its consideration of just and reasonable special access rates is not outpaced by ILEC-driven shifts in rates, terms, and conditions during the pendency of this proceeding, the Commission should take interim steps to hold those rates,

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[44] *See, e.g.*, Southwestern Bell Tel. Co. Tariff F.C.C. No. 73 at § 38.1; BellSouth Telecomms., Inc. Tariff F.C.C. No. 1 at § 2.4.8(F) and (H).

[45] *See, e.g.*, Pacific Bell Tel. Co. Tariff F.C.C. No. 1, § 31.5.2.7.1.

terms, and conditions constant while it completes its work. As an initial and immediate matter, the Commission should implement a *true freeze* on special access rates. Under such a freeze, any special access service customer would be permitted, until the Commission completes its investigations and reforms, to purchase interstate special access services at an *effective rate* that is no less favorable than the rate at which the customer purchases such services as of the date of an order adopting such interim relief. Such a freeze would apply to both standard "rack" rates and any and all discounts, credits, and other mechanisms and structures that affect the ultimate amount that a customer pays to the ILEC for interstate special access services. In practice, this would mean that customers should be given the right to renew until new rules take effect any expiring or grandfathered tariff purchase plans, contract tariffs, and any and all other purchasing arrangements regardless of whether there are any limitations on renewal or expiration specified currently in the tariffs. (Nor could any purchase plans be withdrawn during this period.) Of course, customers who wish to continue purchasing services at frozen rates would be required to comply with all tariffed conditions (such as volume purchase commitments) applicable to those rates -- and if a customer no longer wanted to abide by those conditions or to renew its expiring or grandfathered plan or contract tariff, the ILEC would then have no obligation to freeze that customer's rates. Furthermore, such a freeze would only limit *increases* of special access rates; an ILEC should be free to reduce its prices where it deems such reductions necessary or desirable (although the Commission will still need also to address the longer-term concern discussed in Section III below with respect to potential cross-subsidization).

The "true freeze" represents the minimum relief necessary to ensure that the integrity and accuracy of the Commission's efforts are not undermined and outpaced by ILEC-driven changes in the special access market. Indeed, the Commission has employed interim "freeze" mechanisms to hold certain conditions constant pending further regulatory review and deliberation in other matters.[46] Moreover, a "true freeze" of interstate special access rates represents a reasonable and non-intrusive remedy that puts ILEC claims to the ultimate test -- if it is true that the special access market is competitive in areas where pricing flexibility has been granted, and if it is true that rates have declined over the past eight years or so, then it should be unlikely that the ILECs would now increase their special access rates or eliminate discount plans for fear of losing market share to competitors. On the other hand, if ILEC pricing is not subject to the downward pressures of competition as predicted (and claimed), the "true freeze" only prevents matters from worsening and the markets from changing while the Commission completes its inquiries.

This is not to say, however, that a true freeze represents the only interim relief that may be necessary. For example, the Commission should also preclude any new grants of pricing flexibility during the pendency of this proceeding -- since it is now apparent that the collocation-based, MSA-wide pricing flexibility triggers provide little insight into the state of competition in the special access market, it makes little sense to continue to use them to justify new grants of pricing flexibility.[47] By taking such reasonable steps, the Commission can hold conditions

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[46] *See, e.g., Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11387-91 (2001), at ¶¶ 9-14 (adopting an interim freeze of certain allocation factors and relationships to last 5 years or until the Commission completed comprehensive reform of its Part 36 rules); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, MM Docket No. 92-266, 9 FCC Rcd 1299, 1299-1300 (1994), at ¶¶ 1-9 (extending an interim freeze of cable rates that was first adopted in April 1993 to avoid the risk of "potentially unreasonable" rate increases pending implementation and reconsideration of rate regulations).

[47] As an alternative, the Commission could continue to grant pricing flexibility applications as warranted under the current standard -- but in light of the obvious concerns with that standard, as a condition of any such grant, the Commission should then prohibit the ILEC from using its new-found pricing flexibility to *increase* the rates for interstate special access services in the subject MSA above price cap levels.

constant and ensure that its examination of the special access markets is not surpassed by changes in those markets.

## III. NOTICE QUESTION 3: DO THE COMMISSON'S PRICE CAP AND PRICING FLEXIBILITY RULES ENSURE THAT TERMS AND CONDITIONS IN SPECIAL ACCESS TARIFFS AND CONTRACTS ARE JUST AND REASONABLE?

The Commission's rules have not prevented ILECs from imposing onerous and unreasonable terms and conditions in connection with the establishment of pricing flexibility contract offers. Although ILECs often claim that the terms and conditions of pricing flexibility contract offers are freely negotiated at arm's length, this presumes the existence of a competitive market that affords purchasers the ability to seek services elsewhere if they do not like the ILECs' terms and conditions. As discussed above, however, this presumption is not borne out when one considers the lack of competitive penetration, particularly in the channel termination product markets. Thus, if purchasers want to avail themselves of the lower rates that ILECs have trumpeted in this proceeding, they have no choice but to accept these terms and conditions as part of the contract tariffs that offer such lower rates.

Assuming *arguendo* that ILEC-mandated term and volume commitments do *not* by themselves result in the kinds of "lock-ups" of which others have long complained,[48] there are numerous other examples of anticompetitive terms and conditions littered throughout ILEC pricing flexibility contract offers. For example, several contract tariffs require that a certain percentage of the customer's purchase commitment each year or a certain amount of DS-1 and DS-3 services bought from the ILEC be converted from services previously provided by other

[48] *See, e.g.*, Reply Comments of ATX, *et al.*, WC Docket No. 05-25 and RM-10593 (filed July 29, 2005), at 63; Ex Parte Presentation of tw telecom inc., WC Docket No. 05-25 (filed July 9, 2009), at 20.

carriers.[49] In a competitive market, a seller's ability to impose such requirements would be limited, at best -- and it bears further investigation as to whether these terms may also constitute evidence of an inappropriate tying or monopoly leveraging relationship, in which the customer agrees to convert services on those few routes or for those few buildings that *are* subject to competition in exchange for better rates, discounts, or credits where the customer has no alternative to the ILEC. [50]

Other examples of potentially anticompetitive terms and conditions in the AT&T contract tariffs include multiple region commitments (whereby customers must agree to buy services throughout several AT&T ILEC regions in addition to making a volume commitment and/or other commitments),[51] the imposition of access service ratios (which preclude competitors from taking advantage of lower-priced unbundled network elements),[52] and restrictions on

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[49] *See, e.g.,* Ameritech Tariff F.C.C. No. 2, §§ 22.20.3(C); 22.28.4(E)(1); 22.35.3(B)(2); 22.36.3(B)(2); 22.43.5(E)(3); 22.77.3(4); 22.81.3(B) and (D); 22.86.3(B) and (D); 22.89.2(C); and 22.111.4(E)(1)(a).

[50] Monopoly leveraging requires evaluating whether a firm that possesses monopoly power in one market is likely to succeed in using such power in an anticompetitive or exclusionary manner to achieve a competitive advantage in a second market. *See Verizon Comms., Inc. v. Trinko*, 540 U.S. 398, 415 (2004). Such leveraging can affect customers directly (*i.e.*, by compelling them to purchase services of a kind or in places where they are not needed or are less desirable), and also indirectly by excluding competitors who do not have the kind of ubiquitous reach of an ILEC network (and thus cannot offer the same kind of "package deals" combining services in competitive and monopoly markets). *See, e.g., Lepage's Inc. v. 3M*, 324 F.3d 141, 155 (3rd Cir. 2003) ("The principal anticompetitive effect of bundled rebates . . . is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."). Moreover, for carriers such as Level 3, potential tying or bundling practices also give rise to concerns about "full-line forcing," whereby wholesalers may face the prospect of being denied access to certain services offered by the ILEC unless they agree to purchase other services. *See, e.g., General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F.Supp.2d 1335, 1354 (S.D. Fla. 2002). The Commission has long considered the risks of anticompetitive bundling or tying in the context of communications and related products and services. *See, e.g., In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC2d 384 (1980), at ¶¶ 149-61.

[51] *See, e.g.,* Ameritech Tariff F.C.C. No. 2, §§ 22.20.1; 22.27.2(A)(3); 22.43.1; 22.47.1; 22.48.2(A)(4); 22.64.1; 22.73.1; 22.79.1; and 22.90.1.

[52] *See, e.g.,* Ameritech Tariff F.C.C. No. 2, §§ 22.27.3(B)(7); 22.33.4(B)(14); 22.43.2(D); 22.46.4(B)(13); 22.48.3(B)(8); 22.61.4(B); 22.64.2(A)(4); 22.73.4(A); 22.90.4(A). Although the prevalence of access service ratios

commingling of unbundled network elements and special access services (thereby precluding a competitor from taking advantage of lower-rated unbundled network elements where it might otherwise do so).[53] All of these terms and conditions may present an effect similar to those discussed above, in which AT&T leverages market power where it faces little if any competition to force customers to buy AT&T services in other markets where competitive alternatives exist.

Verizon's pricing flexibility contract tariffs give rise to similar concerns, imposing terms and conditions that range from multiple region commitments[54] and conversion of unbundled network elements[55] to at least one provision that ties the purchase of channel terminations (the least competitive product market) to mandatory purchases of interoffice transport (a more competitive product market).[56] As with AT&T's terms and conditions, these Verizon terms and conditions may reflect an exercise of market power where Verizon faces little or no competition to leverage favorable terms and conditions in markets where it faces more competition.

Thus, as part of its investigation in these dockets, the Commission should undertake a review of each contract tariff to identify such terms and conditions, and should inquire further

has decreased in more recent contract offers, this is simply a function of a soon-to-expire merger condition. *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5812, App. F, Special Access Merger Commitment # 8. If prior practice is any indication, the application of such ratios may once again become a common feature in AT&T special access contract offers upon expiration of the merger conditions.

[53] *See, e.g.*, Ameritech Tariff F.C.C. No. 2, §§ 22.76.3(B)(5); 22.77.4(B)(5); 22.79.3(D); 22.81.4(B)(5); 22.86.4(B)(5); 22.89.3(B)(3); 22.90.3(B)(14); 22.97.4(B)(4); 22.99.3(B)(16); 22.102.4(B)(4); 22.103.4(J); 22.106.4(N); 22.108.4(B)(5); 22.109.4(B)(5); 22.117.4(L); 22.118.4(N); 22.123.4(K); 22.124.4(O); 22.128.4(A)(4); 22.132.4(B)(5); 22.151.4(B)(9); 22.152.4(B)(5); 22.160.4(B)(4); 22.164.4(B)(1); 22.173.4(B)(4); 22,181.4(E); 22.183.4(B)(5); and 22.184.3(A)(6).

[54] *See, e.g.*, Verizon Tariff F.C.C. No. 1, §§ 21.30(A)(2); 21.48(C)(4); 21.49(J)(1); 21.50(R)(1); 21.51(L)(1); 21.57(C)(3); 21.58(C)(1)(d); and 21.60(A).

[55] *See, e.g.*, Verizon Tariff F.C.C. No. 1, §§ 21.24(E)(1)(f); 21.45(A) and (F)(1)(a); 21.51(I); and 21.60(A) and (F).

[56] *See* Verizon Tariff F.C.C. No. 1, §§ 21.49(B)(2).

with each ILEC with respect to the circumstances under which such terms and conditions arose. For example, the Commission could inquire as to the purposes of an access service ratio or commingling restriction, or what motivated a carrier to tie interoffice transport purchases to channel termination commitments. The Commission should also review carefully any new pricing flexibility contract tariffs submitted during this proceeding to identify such terms and conditions (or any new variations of similar concern), so that it can ensure a complete understanding of the terms and conditions that appear in such filings. In the end, the Commission's objective should be the *adoption and enforcement* of rules prohibiting: (1) anticompetitive arrangements that tie the purchase of a monopoly service to service offerings that are subject to more competition, and/or otherwise leverage an ILEC's monopoly presence in specific product and geographic markets to affect purchasing options in more competitive markets; and (2) any cross-subsidization in the form of reduced rates for competitive services that are offset by higher rates charged for services where the ILEC enjoys a monopoly position.[57]

## IV. CONCLUSION

Level 3 appreciates the systematic inquiry in the Public Notice and the goal of applying an analytical framework to reform of interstate special access regulation. To complete the task at hand, the Commission should gather data that will support an accurate and granular assessment of the effect that competition can have on pricing of special access services. Through such a data collection effort, an analysis of the data collected, and the application of pricing flexibility triggers that are more appropriately configured to how customers are served in the special access

[57] Indeed, once it is more clearly identified which special access services are or are not subject to competition through a more granular analysis as discussed earlier in these comments, all that should be required to prevent cross-subsidization is rigid application and enforcement of the pre-existing bar on any such practice set forth in Section 254(k) of the Communications Act of 1934, as amended. 47 U.S.C. § 254(k).

market, the Commission can address the most obvious shortcomings of the current pricing flexibility regime. In the wake of these targeted efforts on pricing flexibility, the Commission can undertake a broader review of the price cap regime and determine whether the underlying price cap special access rates remain just and reasonable.

But even as it takes these steps, the Commission should also adopt interim measures to ensure that the ground does not shift beneath it during this proceeding. Specifically, the Commission should impose a "true freeze" on an interim basis to ensure that conditions in the special access markets are held constant even as the Commission examines them, and it should preclude any further pricing flexibility grants until it completes its review of that regime.

Respectfully submitted,

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