

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

In the Matter of)	
)	
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)	

**REPLY COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC**

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EXECUTIVE SUMMARY

Level 3 agrees that facilities-based competition for special access services can play a role in precluding unjust and unreasonable pricing and practices on the part of an incumbent local exchange carrier (“ILEC”). But the record confirms that the pricing flexibility framework -- with its use of collocation-based tests to identify potential competition and grants of flexibility throughout a Metropolitan Statistical Area (“MSA”) -- has failed. The competition that the Federal Communications Commission (the “Commission”) predicted would flourish out of collocation sites has not taken root, and the time has come for a more granular assessment of where competition exists by examining loops or transport. In doing so, however, the Commission should not accept the invitation to swap one form of guesswork regarding competition for another. Under their new theory of “potential competition,” the ILECs contend that the presence of “nearby” competitively-owned transport facilities can provide the same kind of market pressures that collocation supposedly provided over the past eleven years. Yet the record proves that these competitive transport facilities -- in light of all of the legal, regulatory, economic, geographic, and operational impediments to reaching individual buildings -- have not precluded exclusionary behavior or excessive pricing. Thus, the Commission should focus its investigation on *actual competition* and the pressures that such competition can bring to bear, rather than making another “predictive judgment.”

The Commission should undertake this collection and analysis of market data as soon as possible, and should not be deterred by spurious (and contradictory) claims by the ILECs that: (a) special access reform will undermine broadband deployment; or (b) there is no need for special access reform because broadband services are migrating to higher-capacity services. As AT&T advocates in the National Broadband Plan proceeding, special access services are in high demand and have an important role in promoting widespread broadband access in the near-term,

especially for business customers. Thus, the Commission should proceed with its investigation immediately, to ensure that it can deploy as soon as possible a new framework that better measures the presence of competitive pressures in special access markets. The Commission should also take care to ensure that changes in the special access market will not supersede these efforts. In particular, the Commission should “freeze” special access rates for each customer at levels no higher than existing rates and refrain from issuing any new grants of pricing flexibility until this proceeding is complete.

Finally, the Commission should not be swayed by ILEC defenses of the terms and conditions contained within their contract tariffs and other long-term purchase plans. These defenses rest upon the faulty premise that the markets in which they arose are competitive, even as the record is clear that the ILECs hold monopoly positions with respect to the vast majority of buildings nationwide. Where a customer has no meaningful alternative, it cannot be seriously argued that the decision to opt for a lower price with more onerous terms and conditions was a “voluntary” choice. Moreover, certain of the terms and conditions require much closer attention, such as those that offer not transparent bulk rate discounts for a specified dollar amount but instead require customers to keep a certain number of circuits with the ILEC, or those that allow the ILEC to price lower to those buildings where competition actually *does* exist while maintaining higher prices elsewhere in an ostensibly competitive market. Thus, the Commission should undertake a more detailed examination of the terms and conditions contained within these contracts and tariffs, to ensure that ILECs are not able to use market power with respect to certain services or geographies or their ubiquitous coverage to “lock in” customers and exclude competitors.

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Level 3 Communications, LLC (“Level 3”) submits these Reply Comments to the Public Notice (the “Notice”) released on November 5, 2009.

I. INTRODUCTION

The latest round of comments confirms the need for a systematic approach to examine special access regulatory issues in lieu of solving at once every issue relating to the special access market. In particular, a primary focus on the pricing flexibility framework is warranted, given that this aspect of the special access regulatory regime remains the area of greatest concern and clearest error. The comments confirm that the existing collocation-based regime, with its sweeping grants of flexibility across entire Metropolitan Statistical Areas (“MSAs”) has failed and become indefensible. Even proponents of pricing flexibility offer other grounds to justify retaining the regime.¹ The fact that the rates charged by incumbent local exchange carriers (“ILECs”) in areas subject to pricing flexibility are often higher than the price cap regulated rates

¹ See, e.g., Comments of AT&T Inc., WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) (“AT&T Comments”), at 30-35; Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) (“Verizon Comments”), at 20-27; Comments of Qwest Communications International Inc., WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) (“Qwest Comments”), at 12-17 (justifying arguments regarding potential competition not by reference to collocations, but instead by reference to investor and analyst reports, press releases, and other summary statements regarding competitive facilities deployment).

offers compelling evidence of the shortcomings of the existing framework.² The ability of ILECs to impose onerous terms and conditions in their special access service arrangements and to tie together packages for “competitive” and “noncompetitive” special access services³ only further confirms that there is a need for the Federal Communications Commission (the “Commission”) to take a closer look at the regime.

The record shows that the Commission should proceed with a more granular assessment of the state of competition in special access markets and use that data to craft a new framework for pricing flexibility. By doing so, the Commission can address the failures in the deregulation of special access services markets, and then turn to price cap reform to ensure that the underlying rates are just and reasonable. Of course, the Commission could proceed in parallel with respect to review and reform of the pricing flexibility and price cap frameworks, but such a course must not delay much-needed fixes to the pricing flexibility regime. Moreover, as the debate in this proceeding makes clear, much work remains to be done in determining what kinds of data are needed to assess special access markets, establishing the protection and use of such data, and adopting framework(s) based upon analysis of the data. Thus, even if the Commission addresses the pricing flexibility framework, narrow interim relief is necessary to hold conditions constant pending the collection and analysis of data and the adoption of reforms. The Commission should not be swayed by those who argue that DS1 and DS3 special access facilities are relics, and that investigation and reform of the markets for these services is unnecessary at a time of migration to higher-capacity fiber-based broadband networks. Such claims are belied by the intense lobbying

² See 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), at 27-29.

³ See Comments of Level 3 Communications, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) (“Level 3 Comments”), at 25-27 (listing a variety of terms and conditions of potential concern and worthy of further investigation in the AT&T and Verizon special access tariffs).

in this proceeding, by the size of the markets for these “legacy” services, and by the fact that, for the foreseeable future copper-based connections will remain the primary access portal to high-speed broadband services for a majority of customers.

II. NOTICE QUESTION 1: DO THE COMMISSION’S PRICING FLEXIBILITY RULES ENSURE JUST AND REASONABLE RATES?

A. The Commission Should Not Substitute One Form of Guesswork for Another Under the Theory of “Potential Competition.”

The pricing flexibility rules have failed to ensure just and reasonable rates, but not because the premise of the rules was wrong. Indeed, Level 3 agrees with AT&T and others that facilities-based competition plays a substantial role in constraining ILEC special access rates.⁴ But the *implementation* was flawed of the pricing flexibility framework. Although the Commission believed that collocation-based triggers and MSA-wide grants of authority represented the best means of identifying facilities-based competition in 1999, it is clear that the predictive judgment that competition would flourish throughout a MSA based upon the presence of a handful of collocation sites connecting interoffice fiber transport networks was an unrealized leap of faith. The “potential competition” arising out of such collocation sites has not come to pass (assuming those collocation sites even exist anymore),⁵ and it is time for a more granular look at where loops or transport exist rather than where the Commission – and the ILECs – hope facilities will be built.

Yet even as the ILECs offer lukewarm defenses of the existing regime, they urge the Commission to adopt a substitute version of “potential competition” that runs the same – if not

⁴ See, e.g., AT&T Comments at 22.

⁵ U.S. General Accountability Office, Report to the Chairman, Committee on Government Reform, U.S. 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 23-24 (observing a decline in competitive collocation in many MSAs since pricing flexibility was granted).

greater – risk of missing the mark in measuring where competition can have a real impact in constraining ILEC pricing and other practices. With potential competition from collocation sites having failed to manifest, the ILECs now want the Commission to trade collocation-based triggers for the nearby presence of a competitive network -- regardless of whether that network serves a given location or has even a reasonable possibility of serving that location in the near future. Singing from the same sheet of music, the ILECs claim that such an approach is “forward-looking,” taking account of dynamic market developments rather than a static view of special access service markets.⁶ But the Commission should decline this invitation to swap one form of guesswork for another, and should instead base the development of a new framework and its determinations of pricing flexibility on the hard data that Level 3 and others have suggested the Commission should collect. Claims about nascent competition can be addressed by updating periodically the data on actual competition that the Commission collects.

In light of the substantial (and variable) time, costs, legal wrangling, regulatory considerations, contractual issues, and other obstacles associated with the construction of laterals and building access,⁷ the ILECs’ substitution of “potential competition” may be no better than the present version in identifying where competitive pressure will constrain an ILEC’s ability to engage in unreasonable pricing and exclusionary practices. Indeed, given the potential for wide variation in these factors – such as the impacts of geography, topography, customer density, availability of capital (and competing demands on that capital for an individual network operator), and the cooperativeness of a building owner – it would be difficult, if not impossible, to derive a “formula” that would allow any kind of confident determination of when “near-net”

⁶ AT&T Comments at 18; Verizon Comments at 12.

⁷ See Comments of tw telecom inc., WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) (“tw telecom Comments”), at 16-17; see also Level 3 Comments at 17-18.

should be transformed into “on-net.”⁸ The ILECs, however, give this concern short shrift, arguing about vigorous competition “for the right to build” direct connections to a location,⁹ without any acknowledgment of the substantial hurdles to doing so as discussed above or the startling infrequency with which such deployments have occurred.¹⁰

Thus, rather than substituting a new form of guesswork, the focus should be on identifying *actual competition*. Specifically, the Commission should gather standardized street address-level information from each service provider who files a Form 477 for *each building in which that service provider as of a date certain owns or controls and has lit facilities in place*

⁸ In fact, if the Commission wants to go forward with some form of “potential competition” analysis based upon the proximity of transport routes to individual buildings, it should also consider the age of those routes in doing so. For example, if a transport route has run past the same building for 5 years or more without any lateral into that building, it is hard to fathom that the transport facility provides any meaningful threat to ILEC control of that building or presents any deterrent to high prices or exclusionary behavior.

⁹ AT&T Comments at 24; *see also* Verizon Comments at 17. Interestingly, even as the ILECs breeze past the substantial obstacles to network deployment and make it seem that fiber builds can occur overnight, at least one ILEC cries foul regarding the amount of time it would take to get pricing flexibility if compelled to do so on a more granular basis. AT&T Comments at 46 (“[B]y the time the ILEC could get pricing flexibility for the building, the competitor would likely already be serving the customer. Customers do not want to wait for a regulatory process when they need service.”) This reasoning defies logic -- a customer will not await a different price quote from the ILEC (for existing facilities) pending a rather straightforward regulatory determination, but the same customer would be just fine waiting several months for planning and completion of a fiber build by a new carrier who may never have served them before?

¹⁰ *See, e.g.,* 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), 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 special 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).

that are currently capable of serving that location. Only by collecting such data can the Commission eliminate the haze surrounding past high-level claims and anecdotes regarding the state of facilities-based competition, and move away from guesswork about where competitors can bring pressure to bear on ILEC special access pricing and practices. Moreover, Level 3's proposal is "forward-looking" in that it takes into account intermodal competition (by collecting data from every Form 477 filer) and in that it uses current data as a baseline, thereby supporting further reviews if and when an ILEC believes that changed competitive circumstances (*e.g.*, a substantial network expansion by a competitor) warrant a renewed look by the Commission. Finally, it should be noted that if the Commission adopts a "roll-up" approach that combines multiple buildings in an area into a single geographic market rather than treating each building as its own market,¹¹ this would introduce "potential competition" into the calculus. By granting pricing flexibility on a "rolled-up" basis, based upon a certain percentage of buildings being competitively served in that area, the Commission would be presuming that the reasonably robust presence of competitive facilities to buildings in that neighborhood would place pressure on the ILECs even for those nearby buildings that do not have competitive facilities built into them today. The Commission would therefore overstate potential competition by taking into account "near-net" buildings (*i.e.*, buildings where competitors have transport within a certain vicinity) and then also "rolling up" to grant pricing flexibility across a broader area.

B. Immediate Action and Interim Relief are Needed.

Some would deter the Commission from action under the theory that any activity here could have a detrimental impact on the effort to develop and implement a National Broadband

¹¹ See, *e.g.*, tw telecom Comments at 26-29; Comments of XO Communications, Inc., WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010), at 8; Comments of Sprint Nextel Corp., WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010) ("Sprint Nextel Comments"), at 11; Verizon Comments at 31-32.

Plan.¹² They claim that reforming (and presumably reducing) the rates for DS1 and DS3 special access services will hinder the deployment of broadband infrastructure. Such claims are just another predictive judgment and without merit, and ignore the crucial role that DS1 and DS3 services have in ensuring far-reaching, near-term access to high-speed data services consistent with the objectives of the plan.

Indeed, the record here and in the National Broadband Plan proceeding is replete with contradictory arguments by the ILECs on this point. For example, AT&T claims there is widespread agreement that “there should be a wholesale shift away from TDM-based DS_n facilities to fiber and microwave special access in the immediate future.”¹³ Yet Verizon reports that demand for special access services has “continued to grow,”¹⁴ and Qwest concurs that “*demand* for special access services has recently skyrocketed with the explosive popularity of 3G wireless broadband and other high-bandwidth data services.”¹⁵ It is clear then that the claims of obsolescence are overstated; regardless of price, consumers presumably would not demand such services if they were not up to the task required. Moreover, the arguments around the waning usefulness of DS1 and DS3 facilities in the context of national broadband objectives relate to wireless backhaul.¹⁶ Although it could be true that *some cell sites* need higher capacity network facilities over time to accommodate anticipated increases in demand for wireless data traffic (and it is not clear to what degree this will be true for *all* cell sites), the same claim does not apply

¹² See, e.g., AT&T Comments at 13-17.

¹³ AT&T Comments at 14.

¹⁴ Verizon Comments at 9.

¹⁵ Qwest Comments at 10 (emphasis in original). Of course, several pages later, Qwest then predicts that DS_n-level special access services will be unable to accommodate the explosion of wireless data traffic. *Id.* at 19.

¹⁶ AT&T Comments at 13-14; Verizon Comments at 14-16.

with respect to individual office buildings or individual customers within them. As the demand assertions by Verizon and Qwest indicate, ILEC DS1 and DS3 facilities will remain an essential means of connecting enterprise customers and the Internet for a significant time to come. If anything, demand may increase as businesses seek to move “up the stack” from DSL or cable modem services, but do not want to wait for a provider to deploy competitive fiber to their premises. Thus, assuming *arguendo* that it were true that “wireless operators are abandoning T1s today,”¹⁷ other customers continue to demand DS1 and DS3 services, and these services can play a valuable role in the National Broadband Plan by providing a readily available means of delivering data services to consumers.

In the end, there may be no better analysis than that provided by AT&T just several months ago in the National Broadband Plan proceeding, as it tried to convince the Commission that DS1 and DS3 special access services are essential components of “broadband”:

It makes no sense to embrace a national strategy that has no relation to actual user needs or marketplace demand. Many consumers do not need – or want – the fastest connections possible, nor can they afford them. [FN 51 – This is also true for business services. Faster connections are not always preferable to slower connections, as evidenced by the massive purchases of DS1 and DS3 lines by businesses even when higher speed OC-level services are available.]¹⁸

Level 3 could not agree more with AT&T. DS1 and DS3 special access services offer efficient means of data transmission over existing facilities, business customers demand them (to the tune of “massive purchases”), and they will play a substantial and essential role in achieving the objectives of the National Broadband Plan. Thus, the Commission should view its work here as

¹⁷ AT&T Comments at 14 (quoting Taylor Salman, *Solutions Marketing Director at Ciena, Roundtable Discussion at Light Reading’s The Future of Cable Business Services 2009* (Dec. 3, 2009)).

¹⁸ Comments of AT&T Inc., GN Docket No. 09-51 (filed June 8, 2009), at 18 (emphasis added).

being in support of the broadband initiative, and should not delay further in undertaking investigation and reform of these important markets.

At the same time, even if the effort should begin immediately, investigation of the special access service markets and adoption of a new framework will take a substantial amount of time. Even Verizon advocates staggering data collection and analysis given the effort involved.¹⁹ The Commission should therefore adopt the “freeze” proposal and preclude further pricing flexibility filings as recommended by Level 3 in its initial comments.²⁰ With the impending expiration of many contract tariffs and the grandfathering and/or withdrawal of tariff discount plans, it is important that the Commission hold conditions in the special access services markets constant pending completion of its work, so that the information gathered to support consideration of a new framework does not become outdated even before that new framework is implemented.

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

In defense of the terms and conditions contained in their special access tariffs and contracts, the ILECs make lofty claims regarding the market efficiencies, economic benefits, and pro-competitive nature of volume and term discounts.²¹ They further contend that these terms and conditions must be just and reasonable because they have arisen in the context of “a fight

¹⁹ Verizon Comments at 42.

²⁰ See Level 3 Comments at 20-23. Again, the “freeze” does not preclude an ILEC from entering into new pricing flexibility contracts with customers, nor does it compel a customer to continue to purchase services pursuant to a contract tariff if it no longer wishes to do so. All that the “freeze” does is to ensure that customers can continue to enjoy the same *effective rates* for special access services pending completion of work in this proceeding.

²¹ See, e.g., Verizon Comments at Attachment A (Topper Decl. at ¶¶ 62-70)); AT&T Comments at 75-76.

with competitors for the business of special access customers.”²² AT&T asserts that each plan reflects commitments that “individual customers voluntarily *chose* to make” and that these choices were made “in a competitive context” where an ILEC has been granted pricing flexibility.²³ Similarly, Verizon’s circular reasoning is that volume, term, and annual expenditure discounts cannot be anticompetitive because they “are a common practice in a number of industries that display *vigorous competition*.”²⁴

These arguments proceed from the unsupported premise that the terms were negotiated voluntarily or that the purchaser selected these tariff purchase plan conditions in the face of competitive alternatives. Indeed, it is telling that the ILECs sidestep any detailed analysis of *the competitive circumstances under which volume and term commitments arise*, and focus upon the theoretical impact of those commitments *on competition that is presumed to exist already*.²⁵ These arguments proceed from the unproven premise that there are rivals that could be harmed (but are not) by discounting practices -- overlooking the fundamental concern that there may be no meaningful rivals in the vast majority of locations to be served, which would give the incumbent the ability to lock up markets prior to competitive entry and also exercise leverage in markets where rivals do exist.

This skipped step is a fatal flaw in the ILEC arguments. As discussed in Level 3’s initial Comments and by others over the several years of this proceeding, there is substantial evidence that there is often little, if any, competition to place pressure on ILEC pricing and practices or to

²² AT&T Comments at 76; *see also* Verizon Comments at Attachment A (Topper Decl. at ¶ 66).

²³ AT&T Comments at 77 (emphasis in original).

²⁴ Verizon Comments at Attachment A (Topper Decl. at ¶ 66) (emphasis added).

²⁵ *See, e.g.*, AT&T Comments at Exhibit A (Carlton-Sider Decl. at ¶¶ 95-99) (claiming that discounting practices generally benefit competition); Verizon Comments at Attachment A (Topper Decl. at ¶ 69) (noting the efficiency benefits that volume and term discounts generate).

ward off exclusionary behavior in the special access market -- even in those areas where pricing flexibility has been granted.²⁶ It follows then that the ILECs' terms and conditions did *not* arise out of the competitive circumstances that the ILECs claim ensure their just and reasonable nature. Where a carrier such as Verizon is the only provider of the service (or where terms and conditions tie together Verizon services that are subject to competition and those that are not), it is disingenuous to assert that a customer's acquiescence to such terms and conditions is "voluntary" or that "[c]ustomers are not forced to accept the terms of a discount plan or contract tariff."²⁷ In practice, if customers want pricing better than the "rack rate," they must agree to other anticompetitive terms and conditions that the ILECs impose in exchange for further rate reductions. Thus, the Commission should not limit its examination to the framework by which special access markets are deemed competitive (and thus subject to pricing flexibility) and/or collection of the data needed to make more accurate and granular determinations of the state of competition. Rather, the Commission should also consider the extent to which unjust and unreasonable terms and conditions have arisen due to a lack of competition or have precluded competitive entry in special access markets.²⁸

Indeed, it is difficult to envision a number of the terms and conditions contained in ILEC contracts and tariffs developing in competitive markets. For example, some ILEC commitments go beyond volume. They do not just require purchases of \$X to receive a transparent discount of Y%; instead these plans compel the customer to purchase a baseline amount of special access circuit-level equivalents from period to period (based upon existing purchases at the time of

²⁶ See, e.g., footnote 2, *supra*.

²⁷ Verizon Comments at Attachment A (Topper Decl. at ¶ 67).

²⁸ See Sprint Nextel Comments at 38-39.

subscription), regardless of the dollar amount represented by those circuits. As one example, Verizon offers “Commitment Discount Plans” (“CDPs”) in its tariffs that provide for lower rates on special access (and other) services based upon a “Minimum Commitment” of channel terminations for each service.²⁹ For DS1 and DS3 special access services, the Minimum Commitment is 90% of all channel terminations (measured on a DS0-equivalent basis) that the customer has in service with Verizon at the time of subscription to the CDP.³⁰ The customer then elects a commitment period for the CDP, during which time it is eligible for the reduced rates.³¹ If at any time during the commitment period the customer fails to satisfy its Minimum Commitment (*i.e.*, fails to purchase enough DS0 equivalents) over a six-month period, the customer is subject to a “shortfall adjustment” equal to the difference between the total dollar amount associated with the service type over that six month period and the total dollar amount that would have been applied over the preceding six months had the Minimum Commitment been satisfied.³²

Other ILECs employ similar plans that provide discounts based not upon total volume of purchases, but rather upon meeting a specified requirement of circuits in-service throughout the term of the commitment.³³ Such “ratcheting” or “requirements” provisions penalize the customer for migrating circuits out of its “embedded base” to a competitive provider, even if the individual service terms of those circuits have expired and they would otherwise be ripe for

²⁹ See, *e.g.*, Verizon Telephone Cos. Tariff F.C.C. No. 1, § 25.1.

³⁰ See, *e.g.*, *id.* at §25.1.3(A)(5).

³¹ See, *e.g.*, *id.* at §25.1.4(A)-(D).

³² See, *e.g.*, *id.* at §25.1.7(B).

³³ See Qwest Corp., Tariff F.C.C. No. 1, § 7.1.3(B). Some of these plans go so far as to treat circuit shortfalls as service terminations and impose “termination liability” on the non-existent circuits. See Embarq Local Op. Cos., Tariff F.C.C. No. 1, § 7.4.11(B).

migration. At best, such terms allow the customer to purchase “growth” circuits (*i.e.*, incremental circuits that result from new demand) from a competitor, but even this assumes that there is no shortfall or cancellations for which the customer must “make up” against the baseline number of circuits it is required to buy. Where such terms and conditions are applied in noncompetitive markets, a lack of alternatives (rather than free will) prompts customers to sign up.

This is not to say, however, that concerns about unjust and unreasonable terms and conditions are limited to noncompetitive markets. In fact, terms and conditions in competitive markets may also be unjust and unreasonable due to a variety of factors such as the sophistication and bargaining power of the buyer, the ability of the ILEC to leverage network ubiquity and control of key building-to-building routes, and/or the ILEC’s ability and desire to tie together services offered in competitive and noncompetitive markets. Faced with arrangements that tie competitive and noncompetitive services and leverage the ILEC’s power in the latter market, customers know that if they want reasonable rates on routes controlled by the ILEC, they have little (or no) choice but to take the “best deal” offered by the only provider on those controlled routes and thereby sacrifice the ability to seek better rates, terms, and conditions on more competitive routes.³⁴

³⁴ As Level 3 recently experienced in dealing with a substantial potential customer, such ILEC plans also create artificial and inefficient barriers to the deployment of competitive facilities. A competitor such as Level 3 might offer better rates, terms, and conditions on new facilities that it would construct to a customer’s location(s). But if that customer is compelled by a “requirements” plan to maintain a baseline number of circuits with the ILEC, the customer will be reluctant to leave the ILEC’s service and suffer shortfall penalties for doing so even where that customer is no longer under any term obligation with respect to individual services on the relevant routes and could otherwise “re-bid” the services. In that event, the competitive facilities to the relevant premises might never be deployed (even if a rational “build-buy” analysis would otherwise justify them) because the customer faces a substantial disincentive to depart the ILEC’s service. Similarly, if a wholesale carrier customer is a party to such a “requirements” agreement with the ILEC, the carrier customer might feel compelled to buy services from the ILEC to avoid a potential shortfall rather than building to a new location. Of course, while the ILECs will undoubtedly claim that this dynamic results from a “choice” made by the wholesaler to subscribe to such a plan, such claims would once again rest upon the unproven supposition that the wholesale carrier customer had any meaningful alternative to the ILEC in the first instance.

Efforts by the ILECs to “lock up” demand exist for special access services even in areas where the Commission has concluded that “competition” is sufficient to reduce ILEC regulation. For example, in a number of Phase II pricing flexibility contract tariffs, AT&T has effectively “de-averaged” pricing on a *building-by-building* basis, based on whether competitive carriers are serving that building.³⁵ In these contract tariffs, AT&T extracts a commitment from the customer to purchase an initially-specified (but ratcheting upward based on actual purchases) volume of special access services in exchange for a specified discount or credit – but both the commitment and the credit apply only to special access services where the customer can prove that a competitive carrier is capable of delivering service. Thus, pricing in the rest of the MSA (all of which was deemed competitive based on the Commission’s predictive judgment) is not subject to these discounts; AT&T locks up the demand in “competitive” buildings through a volume discount and commitment structure that is targeted only at those buildings. Because AT&T serves *all* of the buildings in the MSA, and because no other individual competitor can offer the same services on-net across every building served by competitive fiber, AT&T forecloses or severely reduces competition in the entire MSA.

Level 3 cited numerous other examples of anticompetitive terms and conditions in its initial comments, including exclusive building service arrangements, access service ratios, and the tying of interoffice transport and channel termination purchases.³⁶ To the extent that such terms and conditions have arisen in fully competitive markets -- a point contradicted by the evidence presented thus far in this proceeding -- the experts retained by AT&T and Verizon *could be* correct in that these terms and conditions reflect the workings of an efficient market

³⁵ See, e.g., Ameritech Operating Cos. Tariff F.C.C. No. 2, §§ 22.77.3; 22.81.3; 22.86.3; and 22.89.2.; Southwestern Bell Tel. Co. Tariff F.C.C. No. 73, §§ 41.3.3; 41.57.2; and 41.80.4.

³⁶ See Level 3 Comments at 25-27.

where buyers and sellers have reached agreement *voluntarily*. But in lieu of sweeping assumptions, and rather than accept at face value the ILECs' theoretical claims that such terms and conditions reflect the exercise of free will in a competitive market, the Commission should engage in a more detailed examination of individual terms and conditions to confirm whether they are indeed just and reasonable. Moreover, to the extent that the Commission's collection and assessment of more granular data in this proceeding indicates that these terms and conditions arose: (a) in markets thought to be competitive that are in fact not; (b) through tying of competitive and noncompetitive services; or (c) via the leveraging of market power, such terms and conditions must be viewed with an even more skeptical eye.

Finally, even as it conducts such an investigation, the Commission should adopt certain *ex ante* prohibitions on unjust and unreasonable arrangements. Specifically, the Commission should adopt and enforce rules prohibiting: (1) any arrangement tying the purchase of a "noncompetitive" special access service in a price cap regulated market to the purchase of a "competitive" special service in a market in which pricing flexibility has been granted (including any contract tariffs or purchase plans that provide collective/aggregated discounts for a customer's purchase of noncompetitive and competitive services); (2) any arrangement that is otherwise found to result from an ILEC's leveraging of market power in a particular product and geographic special access market; (3) any cross-subsidization by the ILEC in the form of reduced rates for "competitive" special access services (*i.e.*, those offered in pricing flexibility areas) that are offset by higher rates charged for "noncompetitive" services (*i.e.*, those that remain subject to price cap regulation); and/or (4) arrangements where the ILEC uses its ubiquitous special access coverage to "lock up" all or a significant portion of the demand for competitive special access services.

The Commission's objective should be to permit and promote the beneficial impacts of "good" volume and term commitments -- those that are entered into in a competitive environment or that are subject to reasonable regulation in a price cap environment -- while precluding "bad" commitments, such as those that tie competitive market purchases to noncompetitive market purchases, or that create "lock-ups" through requirements or ratcheting levels of purchase obligations. Although it is true that some volume and term commitments can be efficient and mutually beneficial, the Commission should decline the ILECs' invitation to forego any examination and thereby presume that *all* contract and tariff terms and conditions are *per se* just and reasonable on the theory that they arose from a competitive environment. The record does not support such an outcome.

IV. CONCLUSION

The comments confirm the need for an accurate and granular assessment of the effect that "nearby" competition is *not having* on the rates, terms, and conditions applicable to special access services. By collecting and analyzing data, the Commission can tailor pricing flexibility triggers that reflect the true impact of competition and also undertake other reforms necessary to ensure that rates, terms, and conditions are just and reasonable. By contrast, retaining the current framework on the basis of anecdotal claims about "potential competition" and vague and unjustified concerns about the potential impact of this proceeding on broadband deployment would leave ILECs with the freedom to continue to raise rates and impose onerous terms and conditions in ostensibly "competitive" markets. It is therefore essential that the Commission take immediate action to revisit and reform the existing pricing flexibility framework, and 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 cannot deteriorate 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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