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Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25*

Dear Ms. Dortch:

This letter responds to Level 3's recent proposal that the Commission issue burdensome new requests seeking data that is irrelevant.[1] At the beginning of the current phase of this proceeding, the Commission asked special access providers and customers for information about the scope and reach of competitive special access networks. Although AT&T, USTA, and others have explained that these data requests are incomplete, they did at least cover relevant topics. If the Commission had obtained full responses from all relevant entities to those requests, it would have made considerable headway toward the collection of information that is critically important to any further evaluation of the structure of a special access marketplace that has long exhibited positive performance in the form of falling prices, rising output, competitive entry and expansion, and innovation. But most competitors – including those that continue to beat the drum for new regulation – refused to provide the requested data. Less than half of the CLECs responded, several major cable companies did not respond, and not a single fixed wireless provider responded. The appropriate Commission response is to make clear that it will suspend any further action in this proceeding unless and until these CLECs, cable companies, and fixed wireless providers provide the information that the Commission requested to fill this enormous data gap.

Level 3 urges the Commission instead to veer off onto a completely irrelevant path. It proposes litigation-style document requests targeted almost entirely at ILECs and which would be designed solely to "investigate" Level 3's theory that ILEC volume and term special access discounts "lock-in" customers and block competitive entry.[2] Economists, courts, and the Commission have repeatedly shown this "lock-in" theory to be invalid, and as explained below, it would be a complete waste of the Commission's and the parties' resources to pursue these burdensome requests.

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[1] Letter from Eric J. Branfman to Marlene H. Dortch, WC Docket No. 05-25 (Feb. 9, 2011) ("Level 3 2/9/11 Letter").

[2] Level 3 2/9/11 Letter, at 1-2.

First of all, the Commission should not even consider Level 3's proposal until it has obtained complete responses to the Commission's original data request. The lack of response has left gaping holes in the Commission's data sets that make it impossible to draw any meaningful conclusions about market structure on the current record. For example, the cable companies that did not respond clearly have extensive special access operations. Cablevision recently announced that its Optimum Lightpath subsidiary has a quarter million fiber miles serving "the business market in the greater New York metropolitan area," that it "saw steady growth throughout 2010," that it is "now capable of serving more than 650,000 small and medium business," and that it currently "provide[s] at least one level of service to over 25% of this universe."[3] Charter continues to increase capital expenditures to serve commercial customers, and already about a third of this commercial "addressable market" "is immediately serviceable or near [Charter's] network footprint."[4]

The lack of data from fixed wireless providers is another glaring omission. As the Commission recently found, mobile "carriers are increasingly relying on [fixed] wireless for their backhaul needs."[5] Sprint, for example, already uses wireless fixed wireless backhaul for more than 90 percent of its 4G backhaul needs,[6] and Clearwire, which serves most of Sprint's 4G backhaul, is in the process of increasing its total backhaul capacity "by 250% or more."[7] FiberTower "serv[es] six of the top eight wireless carriers"[8] and more than 6,200 customer cell sites, and it is targeting "100,000+ near-net sites" and "[r]esponding to RFPs outside of [its]

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[3] Cablevision 2010 10-K, at 3; Thomas Rutledge, Chief Operating Officer, Earnings Call (Feb. 16, 2011). *See also* Cablevision Press Release, Cablevision Systems Corporation Reports Fourth Quarter And Full Year 2010 Results (Feb. 16, 2011), *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9ODE3NjZ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1 (Cablevision experienced increased business Ethernet revenues of 30.8 percent in 2010).

[4] Charter Presentation, 3Q10 Earnings Results, at 6, (November 3, 2010), *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjgyOTR8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1.

[5] Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 10-153, FCC 10-146, ¶ 4 (rel. Aug. 5, 2010); *id.* n.6 (indicating that the percentage of backhaul traffic sent via fixed wireless increased to 12.3% in 2009 from 8.7% in 2005).

[6] Sprint's 4G network relies on Clearwire's Wi-Max service. And, "90% of Clearwire cell sites use microwave backhaul." Yankee Group 4G Network Backhaul Summit, *PowerPoint Presentation of John Saw, CTO Clearwire* (Sept. 15, 2009). *See also, e.g.*, Comments of U.S. Cellular, *Request of Alcatel-Lucent, et al. For Interpretation of 47 C.F.R. § 101.141(a)(3) To Permit The Use Of Adaptive Modulation Systems*, WT Docket No. 09-106, at 1 (filed Jul. 27, 2009) (US Cellular uses microwave backhaul to connect to more than 40% of its cell sites).

[7] Press Release, *Clearwire Extends 4G Leadership in the United States*, Clearwire, Mar. 23, 2010, http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1404906. Today, Clearwire operates one of largest microwave backhaul networks in the world. Case Study, *Clearwire Builds North America's Largest Microwave Backhaul Network for its Nationwide 4G Network*, Dragonwave, http://www.dragonwaveinc.com/docs/cases/Clearwire%20Case%20Study.pdf (PDF).

[8] FiberTower website, http://www.fibertower.com/corp/index.php.

current markets."[9] Towerstream has increased its customer base in 2010 by 44%,[10] and Telecom Transport Management has achieved significant gains in the microwave backhaul market, including its recent partnership with Verizon Wireless to prepare its 4G LTE network.[11]

Many important CLECs also declined to respond to the Commission's data request, including, for example, Fibertech, Abovenet, Zayo, Southern Light Fiber, Lightower, Sidera Networks, Easytel, and many others, all of which compete aggressively against ILEC special access services in MSAs throughout the country and together serve tens of thousands of connections.[12] For example, in the New York MSA, 22 alternative providers report to GeoTel that they offer alternative special access services, but only 4 of them submitted data to the Commission, with large providers like Level 3, Cablevision/Optimum Lightpath, Abovenet, Cogent, Fiberlight, NextG, and numerous others reporting nothing. And, even this comparison to Geotel data likely understates the number of CLECs that failed respond to the Commission's requests insofar as not all CLECs report their alternatives to Geotel.

On this record, it is clear that alternative suppliers and customers have failed to respond to the Commission's original request and provide the Commission the information it needs to evaluate these parties' claims regarding the purported need for reform of the Commission's long-standing pricing flexibility framework. As a consequence, the data submitted so far cannot rationally be used to draw any conclusions about competitive alternatives, because any perceived lack of alternatives is far more likely due to the non-reporting and under-reporting than any real insufficiency. Additional data regarding such alternatives is critical to any further evaluation of the special access marketplace, because, as the Commission and courts have recognized, the harms from regulation of special access services would quite clearly outweigh the benefits where customers have facilities-based alternatives.[13]

By contrast, Level 3's attempt to re-direct this proceeding to an inquest on "lock-in" theories should be summarily rejected. The economic testimony and other data submitted in this proceeding establish that the special access volume and term discounts offered by ILECs are

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[9] FiberTower Corporation Investor Presentation (October 14, 2010), *available at* http://www.fibertower.com/corp/downloads/investors/Houlihan%20Lokey%20Conference%20Deck%20October%202010.pdf.

[10] Press Release, *Towerstream Reports Strong Sequential Growth in Adjusted EBITDA Profitability*, Towerstream, Nov. 4, 2010, http://ir.towerstream.com/releasedetail.cfm?ReleaseID=527248.

[11] Press Release, *Telecom Transport Management, Inc. (TTM) Helps Verizon Wireless Prepare Parts of Minnesota as it Builds the Nation's First 4G LTE Network*, TTM, Mar. 24, 2010, http://www.ttmi.info/press/TTM-Verizon.htm.

[12] *See, e.g.,* Telecom Ramblings, Metro Fiber and On-Net Buildings List, as of Feb. 17, 2011, *available at* http://www.telecomramblings.com/metro-fiber-provider-list (providing numbers of lit buildings).

[13] *See, e.g., WorldCom, Inc.* v. *FCC*, 238 F.3d 449 (D.C. Cir. 2001); Fifth Report And Order And Further Notice Of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd. 14221, (1999).

legitimate pro-competitive responses to competition that benefit both providers and customers,[14] as the Commission has recognized for nearly 30 years.[15] Indeed, such discounts are commonplace in markets that are unquestionably competitive, and they are no different than the agreements that CLECs themselves form with their own special access customers.[16] As the D.C. Circuit has explained, this type of discount plans is "most naturally viewed as a bargain containing terms that both benefit and burden its subscribers." That court admonished the

[14] *See, e.g.*, Carlton-Shampine-Sider Reply Decl. ¶¶ 75-83 (attached to AT&T Reply, WC Docket No. 05-25 (Feb. 24, 2010) ("AT&T Reply") (special access term and volume "discounts are commonplace and can benefit consumers and enhance economic efficiency in a variety of ways" and "there are only limited circumstances in which such discounts may harm competition, and opponents do not show that such circumstances apply here"). Carlton-Sider Decl., ¶¶ 87-99 (attached to AT&T Comments, WC Docket No. 05-25 (Jan. 19, 2010) ("AT&T Comments")) (same); Topper Decl., ¶ 62 (attached to Verizon Comments, WC Docket No. 05-25 (filed Jan. 19, 2010)) ("economic analysis suggests that the volume and term discounts and other provisions contained in some ILEC special access discount plans and contract tariffs are mutually beneficial, reflect an attempt by incumbent providers to differentiate their service offerings in response to customer demand and competitive pressure, and can enhance economic efficiency by reducing the costs of customer churn"); *id.* ¶ 67 (describing economic benefits for special access term and volume discounts for competition and consumers); *see also* AT&T Comments, at 72-82; AT&T Reply, at 59-72; Verizon Reply, WC Docket No. 05-25, at 49-54 (filed Feb. 24, 2010).

[15] *See, e.g.*, Report and Order, *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C. 2d 923, ¶ 40 (1984) ("[g]reater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory."); Fourth Memorandum Opinion And Order On Reconsideration, *Transport Rate Structure and Pricing*, 10 FCC Rcd. 12979, ¶ 13 (1995) (*citing Expanded Interconnection Order*, 7 FCC Rcd. 7369, ¶ 199 (1992)) ("both volume and term discounts are generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships"); Third Report and Order, *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 187 (1997). (volume and term "discounts should be permitted . . . because they encourage efficiency and full competition.").

[16] Topper Decl. ¶ 66 ("The claim that discounts based on volume, term, and annual expenditure commitments are anticompetitive is difficult to square with the fact that such discounts are common practice in a number of industries that display vigorous competition, which suggests that such agreements are not generally harmful" and providing examples); Carlton-Sider Decl. ¶ 90 ("Volume, term and loyalty discounts are prevalent in many industries. In the telecommunications industry, for example, wireless subscribers typically receive handset discounts in exchange for committing to new contracts. Similarly, wireless subscribers receive volume discounts in the form of lower per-minute rates when they purchase larger "buckets" of minutes. Consumers also receive bundled discounts when purchasing multiple communications services from LECs or cable operators. Typically, a "triple-play" bundle of telephone, Internet and video services can be purchased at a significant discount to "a la carte" prices. Similarly, discount programs such as frequent flyer programs which reward repeat customers are commonplace."). *See also, e.g.,* AT&T Jan. 19 Comments at 77-78 (describing many competitive industries where term and volume discounts are commonplace).

Commission that complaints about such plans must be measured against the "critical fact" that ILECs have "no obligation to offer a discount plan at all" and thus that such plans, on their face, necessarily offer more benefits to consumers.[17]

Indeed, the entire premise of Level 3's lock-in theory – that customers are somehow forced to purchase ILEC special access service under volume and term discount plans – is clearly specious. ILEC special access plans with term and volume commitments are just one of many *options* ILECs provide to customers. Other options include monthly plans with no discounts, plans that have only volume but no term commitment (and vice versa), and various other discounts plans.[18] Moreover, many customers that choose plans with both volume and term commitments also choose to commit only a fraction of their volumes to the plan, allowing them to use other providers for the rest,[19] and of course all of their volumes are up for grabs at the contract's end. In other words, customers choose whether and the extent to which they will purchase services under ILEC volume and term plans, and the customers that choose these plans are typically large sophisticated purchasers of telecommunications services who *negotiated* or otherwise voluntarily made particular commitments following intense competitive bidding in which CLECs and others have made competing offers for all or some of the customer's business.[20] Taking away such discounts would harm those that chose them and those that offered them.

That ILEC term and volume discounts do not block entry is confirmed by real world facts. If there were any merit to Level 3's lock-in theory, one would expect to see decreased entry and a contraction of competitive offerings during the past decade during which such

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[17] *BellSouth* v. *FCC*, 4689 F.3d 1052, 1060 (D.C. Cir. 2006).

[18] *See, e.g.,* AT&T Jan. 9 Comments, at 80-81 (Jan. 9, 2010).

[19] *See, e.g.*, AT&T Reply, at 65 ("[T]he revenue-based discount programs that AT&T typically negotiates have modest requirements. For example, AT&T recently negotiated a contract with one of the nation's largest competitive suppliers of wireline and wireless services that provides very significant discounts on special access purchases in return for the customer agreeing to continue purchasing from AT&T an amount of special access services that is at least 50 percent of the amount the customer spent on such services with AT&T in the prior period. Since this customer already makes very significant purchases from CLECs and wireless providers (and likely cable companies) and has announced that it expects to continue to significantly expand its network, this arrangements covers far less than 50 percent of this customer's total demand."). A review of Level 3's special access purchases from AT&T, for example, confirms that AT&T's contracts provide Level 3 flexibility to shift a very large percentage of its demand to alternatives, and thus do not "lock-in" Level 3 to obtaining special access only from AT&T.

[20] *See* Topper Decl. ¶¶ 67, 68 ("[M]any purchasers of high-capacity services are large, sophisticated buyers. . . . They exert their substantial bargaining power by obtaining multiple bids from competing suppliers, switching providers to obtain lower prices and better non-price terms, and using the service of systems integrators." "Economists generally find that the voluntary mutually beneficial nature of such agreements makes the prospect of competitive harm unlikely. Customers are not forced to accept the terms of a discount plan or contract tariff; customers and suppliers alike enter these agreements voluntarily, hence both parties benefit"); *see also* AT&T Comments, at 80-82.

offerings were available. But the opposite has occurred. CLECs, cable companies, and wireless providers have invested (and continue to invest) billions of dollars developing and expanding alternative special access offerings. Moreover, far from locking in their customers, AT&T, Verizon and Qwest have all documented the intense and increasing competition from alternative suppliers, that ILECs' have responded to such competition with reduced prices and increased quality, and that customers can and do migrate to competitive offerings.[21] These facts definitively refute any claim that ILEC discount plans operate as a substantial entry barrier.

Of course, CLECs and other customers also have ILEC alternatives to special access services. Both DS1 and DS3 loop facilities continue to be available as UNEs in most wire centers,[22] and customers undeniably continue to make extensive use of these facilities as special access alternatives. For example, Paetec has conceded in another Commission proceeding that it is actually "converting more facilities to cost-based Section 251(c)(3) Unbundled Network Elements ('UNEs')," and that it will "use more cost-based UNE facilities" if the Commission does not force ILECs to slash their special access rates.[23] Paetec is not alone. According to AT&T's records, one commenter in this proceeding is using UNEs for 74 percent of its more than 65,000 DS1/channel terminations; another commenter is using UNEs for 89 percent of its 55,000 DS1 loops/channel terminations; and yet another customer is using UNEs for 96 percent of its 100,000 DS1 loops/channel terminations. CLECs are extensively using UNEs to provide cutting edge next-generation alternatives to special access services. For example, they are purchasing large numbers of unbundled copper loops, attaching their own electronics, and providing a wide array of next generation services, including Ethernet and TDM services.[24]

In short, the lock-in theory espoused by Level 3 and others is meritless, and the Commission should therefore reject Level 3's proposal to waste resources to explore it. And the burdens that Level 3's discovery would impose on ILECs would be enormous. It would require ILECs to comb through employee files and computers and to review millions of paper and electronic documents to provide, among many other things, (1) all of their contracts, tariffs, amendments and modifications relating to ILEC sales and purchases of special access; (2) spreadsheets identifying all such discounts for all customers; (3) calculations of volumes of special services that are provided in under such discounts; (4) lists of customers and the volumes they purchase these discount arrangements; (5) internal ILEC documents addressing the reasons and impact of the volume and term discounts; (6) analyses of current and expected competitors

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[21] *See, e.g.*, Supplemental Reply Comments of AT&T Inc., WC Docket No. 05-25, at 8 & n. 5 (filed Aug. 15, 2007) (describing and citing record evidence of competitive losses submitted by AT&T, Verizon, Qwest and Embarq).

[22] AT&T is required to continue to make available DS1 loops as UNEs in all but 32 of 4,755 wire centers – or in approximately 99 percent of its wire centers. Likewise, AT&T is required to continue to make available DS3 loops as UNEs in all but 72 (about 98 percent) of wire centers.

[23] Paetec Comments, WC Docket No. 10-188, at 7 (filed October 15, 2010).

[24] XO, for example, describes the "existing ubiquitously deployed copper [loops]" as a "ready-made solution" for the delivery of high capacity services throughout the United States. XO Comments, WC Docket No. 10-188, at 3 (filed Oct. 15, 2010); *See* also Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Co. and tw telecom Inc., WC Docket No. 10-188 (filed Oct. 15, 2010).

by MSA; (7) internal documents addressing ILEC competitive assessments; and (8) estimates of the average prices under each sale or purchase contract containing term and volume discounts. In addition to the undue burden, these requests raise significant concerns about Customer Proprietary Network Information and ordinary customer privacy. Level 3 provides no explanation whatsoever as to how the data it seeks on specific customer names, locations, circuits purchased, amount paid for such services, and so on is at all relevant to its lock-in theory. Simply put, the burdens of Level 3's proposal far outweigh any potential gain.

Level 3's proposal should also be rejected because it is unduly one-sided – it places the burdens almost exclusively on ILECs. Any legitimate data request would have to require Level 3 and other alternatives suppliers (and customers) to respond to the same extent as ILECs. In this regard, it is plainly inappropriate to ask, as Level 3 does, that ILECs be required to produce information about their contracts as suppliers *and* information about their contracts as purchasers yet allow CLECs to shield the terms of their contracts as suppliers. Moreover, any such requests aimed at "lock-in" claims would obviously include the information needed to verify or refute claims that a purchaser buys a large percentage of its needs from ILECs, *e.g.*, contracts with non-ILEC suppliers and data relating to the purchasers growth, grooming, migration plans and forecasts.

In short, the Commission should reject Level 3's proposal for burdensome data requests in pursuit of its invalid lock-in theory. Rather, if this proceeding is to continue, the Commission should recognize that it was already on the right path and it should make clear to those that are arguing for reform that unless and until they actually produce the information that the Commission has already requested it will take no further action in this proceeding.

Sincerely,

/s/ Christopher M. Heimann