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**EX PARTE**

March 1, 2012

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Data Requested in Special Access NPRM, WC Docket No. 05-25 and RM-10593**

Dear Ms. Dortch:

On February 28, 2012 Michael Mooney, General Counsel, Regulatory Policy, Gary Black, Vice President, Carrier Relations, and the undersigned, of Level 3 Communications, LLC ("Level 3") and Eric Branfman, of Bingham McCutchen, LLP, counsel for Level 3, met with Deena Shetler, Nick Alexander, Andrew Mulitz, Elizabeth McIntyre, Daniel Shiman, Jamie Susskind (via telephone), and Jonathan Reel of the Wireline Competition Bureau, to discuss Level 3's recent proposal concerning special access, filed in its February 22, 2012 ex parte letter.<sup>1</sup> During the meeting, Level 3 also discussed the points made in the attached PowerPoint presentation.

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<sup>1</sup> See Letter from Michael Mooney, General Counsel, Regulatory Policy, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 and RM-10593 (filed Feb. 22, 2012).

In response to requests from the Bureau, Level 3 also indicated that it would identify additional data to submit for the record, along with additional legal authority, that may be helpful in further demonstrating exclusionary special access demand lock-up contracting practices imposed by price-cap local exchange carriers.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding. Please direct any questions regarding this matter to the undersigned.

Sincerely,

/s/ Erin Boone

Erin Boone

cc: (via email)  
Deena Shetler  
Nick Alexander  
Elizabeth McIntyre  
Jamie Susskind  
Andrew Mulitz  
Daniel Shiman  
Jonathan Reel

# **Why the Special Access Market is Not Competitive, and How to Remedy It**

## **WC Docket No. 05-25 and RM-10593**

**February 28, 2012**

## Background

- Level 3 is a leading global provider of business communications services, offering a comprehensive portfolio of data, voice, video and managed services.
- Level 3 is also a CLEC—making it a huge proponent of robust competition.
- While the Commission envisioned a competitive special access marketplace in 1999 (when parts of the market were deregulated) the market is not competitive, leading many in the industry to argue for re-regulation.
- While Level 3 believes that price regulation is likely necessary, there is an easier, less drastic first step that the Commission can quickly take to ensure that the special access market is competitive—limit the use of “demand lock up” contracts.

## Special Access Market is Dominated by Price-Cap LECs

- Level 3 believes three price-cap LECs (T, VZ and CL) have dominant shares of the special access market, at or approaching 90%.
- Level 3 believes the price-cap LECs have been able to maintain these market shares through “demand lock-up” terms in their contracts—provisions requiring buyers of special access services to lock-in a high percentage (85-100%) of their prior year’s purchases in exchange for either significant price discounts to their “rack rates” or critical commercial terms.
- While it has not reviewed recently gathered FCC data, Level 3 and the entities it has acquired have been subjected to these practices extensively, as have many others in the industry based on their public comments.

## Lock-Up Provisions – Price-Cap Vehicle for Market Domination

- Special access purchasers (including Level 3) begrudgingly agree to such lock-ups because:
  - 1) it is uneconomic to refuse them when competitors receive substantial price breaks for agreeing to such terms;
  - 2) lock-ups are required for basic commercial terms (like portability) and;
  - 3) the price-cap LECs are the only special access service providers in significant portions of the geographic market (and paying the LECs “discounted” rates in these locations overwhelms the savings a purchaser could achieve by buying from competitive sources, where available).
  
- The lock-up terms make no commercial sense (other than to eliminate competition).

## Lock-Up Provisions Stifle Competition and Should be Limited

- Where lock-up contracts are in place, competition is stifled.
- Level 3 is impacted by lock-up contracts as a buyer, seller and facilities-based competitor of price-cap LEC special access services.
- A core tenet of the 1996 Act is to foster facilities based competition, which lock-up terms prevent.
- Lock-up arrangements, where used by entities with dominant market positions to maintain those positions, are unfair and unreasonable and as used currently, should be declared unlawful by the Commission under Section 201 of the Act.

## Lock-Up Provisions Stifle Competition and Should be Limited

- Level 3 believes eliminating lock-up provisions would unleash competition in the special access marketplace, driving innovation and leading to market-based prices.
  - Economists estimate that a price reduction of 60% would create over 176,000 American jobs and would increase US economic output by over \$37 billion.
- Level 3's suggested remedies, as stated in its February 22, 2012 Ex Parte letter, are summarized in the attached Appendix.



# Appendix

- 1. Immediately preclude any price-cap LEC from offering, directly or indirectly, in any new contract tariff or tariff discount plan: i) a discount, rebate or any other form of price concession, or ii) any other commercial term(s) or condition(s) in exchange for a customer's commitment to purchase more than 50% of the amount spent on special access services in the previous year.
- 2. With respect to existing contract tariffs and tariff discount plans containing commitments that would violate the prohibition above, such plans must be immediately amended to reflect commitments that are no greater than the maximum percentage permitted by the Commission.
- 3. Immediately preclude price-cap LECs from including any term or condition in a contract tariff or tariff discount plan that has the effect of preventing other customers that purchase a similar or greater volume of like services from obtaining the same price terms, such that pricing is available to similar or greater volume customers for a minimum period of one year from the effective date of the contract tariff or tariff discount terms.
- 4. Immediately preclude price-cap LECs from including (in any new contract tariff or tariff discount plan) any volume purchase commitment that extends for a period of more than one year (but permit terms that allow a customer to renew its service at the end of the year with a new volume commitment).
- 5. Immediately preclude price-cap LECs from requiring (in any new contract tariff or tariff discount plan) payment of termination penalties, respecting any commitment and/or respecting any circuit, that are in excess of the costs incurred by the LEC as the result of the early termination.
- 6. Immediately preclude price-cap LECs from imposing special access circuit migration charges that are in excess of cost.
- As a protective measure, the Commission should also require that price-cap LECs maintain current discount levels and other lockup term benefits contained in discount plans or contract tariffs, notwithstanding the expiration, elimination or revision of the demand lockup provisions contained in those tariffs.
- In addition to this requirement, the Commission should institute a speedy enforcement process for any price-cap LEC special access customer that demonstrates that, as a result of elimination of onerous purchase commitments, its effective rates for monopoly price-cap LEC special access services have increased in violation of the foregoing.