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August 8, 2012

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By Hand Delivery

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

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

Dear Ms. Dortch:

On behalf of AT&T Corp. ("AT&T"), please find two redacted copies of an AT&T letter to be filed in the above captioned proceeding. The highly confidential version of the attached letter contains information that has been designated by other parties as "highly confidential" under the *Second Protective Order* in this proceeding.[1] Pursuant to the *Modified Protective Order*[2] and *Second Protective Order*, two copies of the highly confidential version of the attached letter will be delivered to Marvin Sacks of the Pricing Policy Division of the Wireline Competition Bureau, and one copy of the highly confidential version of the notice are being filed with the Secretary's Office under separate cover letter. Additionally, one machine-readable copy of the redacted version of the letter will be filed electronically via ECFS.

[1] *See* Second Protective Order, *Special Access for Price Cap Local Exchange Carriers*, 25 FCC Rcd. 17725 (2010) ("*Second Protective Order*").

[2] *See* Modified Protective Order, *Special Access for Price Cap Local Exchange Carriers*, 25 FCC Rcd. 15168 (2010) ("*Modified Protective Order*").

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Respectfully submitted,

/s/ David L. Lawson

Enclosure.

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Re:

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Dear Ms. Dortch:

AT&T submits this letter in response to recent *ex parte* presentations and letters submitted by certain special access competitors that are seeking to have the Commission impose radical forms of "interim relief," such as a freeze on any new pricing flexibility petitions, re-imposition of price caps on services that have been awarded Phase II relief, and strict regulation of the terms and conditions under which AT&T and other incumbent local exchange carriers offer discounted prices for special access services.[1] Proponents assert that such measures are necessary to address "market power" supposedly exercised by ILECs in the intensely competitive special access marketplace. But these same proponents have already failed on many occasions to provide the Commission with substantial, valid and verifiable evidence to support

[1] *See, e.g.*, Letter from Thomas Jones (tw telecom) to Marlene H. Dortch (FCC), WC Docket No. 05-25, Attachment 1 (June 4, 2012) ("tw telecom 6/4/12 Letter"); Letter from Erin Boone (Level 3) to Marlene H. Dortch (FCC), WC Docket No. 05-25, Attachment, at 13-14 (June 28, 2012) ("Level 3 6/28/12 Letter"); Letter from Thomas Cohen (XO) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 2 (June 26, 2012) ("XO 6/26/2012 Letter").

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their claims, leaving no possible basis on the current record to support any market power finding.[2] Again, "the Commission staff suggested" that these regulation proponents "put into the record" actual data "evidencing either the lack of competition in the special access market, the price-cap LECs' exercise of market power, or both."[3]

Rather than providing the data requested by the Commission, Level 3, XO and tw telecom purport to have developed various "proxies" that they assert support a finding that ILECs exercise market power in the provision of special access: (1) market share estimates; (2) comparisons of ILEC prices and competitors' prices; and (3) contract terms and conditions that allegedly "lock-up" demand. As explained below, these latest submissions, no less than previous ones, reflect inaccurate data and faulty logic. In fact, to the extent it can be credited at all, the information provided by the proponents in many instances confirms the *absence* of ILEC market power. Finally, there is no merit to Level 3's arguments that 47 U.S.C. § 201(b) grants the Commission legal authority to grant the requested "interim" relief in violation of 47 U.S.C. § 205 and other provisions of the Act.

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[2] The Commission has twice issued voluntary data requests to special access regulation proponents seeking data to support their claims that pricing flexibility relief has allowed ILECs to exercise market power, and they have either refused to respond or provided inadequate responses. *See, e.g.*, Letter from David L. Lawson (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 8-11 (March 28, 2012) ("AT&T 3/28/12 Letter"). As the Commission recently told the D.C. Circuit, these issues "cannot be adequately addressed until the Commission itself compiles an evidentiary record that is sufficient to evaluate current conditions in the special access market," but that its efforts to "build[] a sufficient evidentiary record . . . have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable." Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTEL, et al.*, D.C. Cir. No. 11-1262, at 1-2 (filed Oct. 6, 2011). The Commission argued that, because it "[l]ack[ed] sufficient data to resolve this fundamental dispute," it "appropriately recognized that it should make no decisions about revising its special access rules before it ha[d] compiled and analyzed an adequate evidentiary record." *Id.* at 15, 19.

[3] Letter from Michael J. Mooney (Level 3) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 2 (June 8, 2012) ("Level 3 6/8/2012 Letter").

1. Market Share. Level 3, XO and tw telecom assert that the Commission can simply assume that ILECs have market power because only the ILECs serve the "vast majority" of customer locations.[4] Even if this were true (and, as demonstrated below, it is not), static market shares reflect only historic purchasing choices.[5] The Commission has repeatedly recognized that where, as here, there are already many competing facilities-based providers and the market is dynamically changing, it should not base forward-looking rules on static data from prior periods, but on an assessment of the competitive forces that will shape future market development.[6] Likewise, the Department of Justice has explained that "[i]n any industry subject to significant technological change, it is important that the evaluation of competition be forward-looking rather than based on static definitions of products and services."[7] Here, it is undisputed that the special access marketplace is dynamically changing, with a massive shift to Ethernet services that compete directly with traditional TDM-based DSn services, and with numerous competitors offering these services. The last thing the Commission should do is to distort and disrupt this trend by creating regulation-imposed disincentives for customers to purchase, and for providers to invest in, next generation Ethernet services – which is exactly what would result from artificially reducing prices for legacy TDM-based DSn services based on historical market share.

In any event, the market share figures relied on by the regulation proponents are wrong. They vastly understate the number of buildings where competitors have fiber (the numerator in

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[4] *See, e.g.*, XO 6/26/2012 Letter, at 2; Level 3 6/28/2012 Letter, Attachment, at 4; Letter from Thomas Jones (tw telecom) to Marlene H. Dortch (FCC), WC Docket No. 05-25, Appendix A, at 1 (June 18, 2012) ("tw telecom 6/18/2012 Letter").

[5] *See, e.g.*, Declaration of Dennis W. Carlton and Hal S. Sider, WC Docket No. 05-25, ¶¶ 60-63 (Jan. 19, 2010), attached to Comments of AT&T Inc., WC Docket No. 05-25 (Jan. 19, 2010).

[6] *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 50 (2005); Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd. 19415, ¶ 62 (2005).

[7] Ex Parte Submission of the United States Department of Justice, *Economic Issues in Broadband Competition, National Broadband Plan for Our Future*, GN Docket No. 09-51, at 6 (Jan. 4, 2010).

the market share computation) and vastly overstate the number of buildings where there is demand for special access (the denominator).

XO, for example, asserts without support that competitive providers offer connections to only **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** buildings in the entire San Francisco MSA, which, they claim, has "100,000 buildings."[8] XO's data is clearly wrong, as tw telecom alone reports that it connects to **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** buildings in that MSA.[9] In addition, Zayo and SunStream report on their websites that they connect to more than 230 and 130 buildings, respectively, in the San Francisco area. And the limited information Geotel has collected regarding competitor building connections shows that competitive providers connect to more than 1,000 buildings in the San Francisco MSA.

Nor are there anywhere near 100,000 buildings in San Francisco where there is demand for special access services. XO does not identify how it determined this number, but it appears to count *all* buildings in the San Francisco MSA, rather than only the buildings with special access demand. tw telecom at least recognizes this point and relies instead on commercial buildings in the San Francisco MSA, which it says number about **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**.[10] But even tw telecom's estimate is wrong, because not all commercial buildings have demand for special access, and demand is typically concentrated in a small number of buildings. The vast majority of AT&T's DSn special access demand (about three quarters) in the San Francisco MSA is located in slightly more than 1,000 buildings, which, as noted, is about the same number of known building connections that competitors have according to available public data sources (which clearly understate the actual number of connections by competitors).[11]

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[8] XO 6/26/2012 Letter, at 2.

[9] tw telecom 6/18/2012 Letter, Appendix A, at 1.

[10] *Id.*, Appendix 1, at 1.

[11] San Francisco is not an anomaly in this regard. For example, according to the limited connected building data submitted by the few competitors that responded to the Commission data request and Geotel data, competitors connect to more than 1,500 buildings each in Chicago

But even this analysis greatly understates the extent of competition in the San Francisco MSA. The relevant issue here is contestability. That is, the question is not whether competitors are *already* serving all of the buildings with special access demand, but rather the extent to which competitors are *able* to serve demand, and the extent to which they will do so in the future in this dynamically evolving marketplace. And it is undisputed that demand for TDM-based services is in decline, with the marketplace rapidly transitioning to Ethernet and other IP-based services that are offered by a broad array of competitors, with CLECs and cable companies being among the leading providers and rapidly expanding their footprints.

Unfortunately, competitors have chosen not to submit information about their future deployment plans, or their current ability to serve locations to which they do not have existing connections. Absent such data, the Commission cannot draw any non-arbitrary conclusions as to which buildings and customers are or are not contested. tw telecom's recent history vividly illustrates the arbitrariness of using static market shares as a proxy for special access market power. In 2007, a static examination of tw telecom's fiber-connected buildings would have shown about 8,355 total building connections.[12] But we now know that such an analysis would have greatly understated the true extent to which tw telecom could compete for customers in other buildings using its own facilities. Since 2007, tw telecom has nearly doubled the number of U.S. buildings to which it has deployed connections.[13] Likewise, just a few short years ago large wireless providers, such as Sprint and T-Mobile, relied primarily on TDM-based circuits purchased from ILECs for their cell tower backhaul needs. But today, both companies have shifted to Ethernet circuits to handle most of their backhaul requirements, and these Ethernet circuits were purchased from a wide array of non-ILEC providers. In short, history confirms the dramatic potential for error from relying on static market shares to assess competition in the special access marketplace. (And here, of course, the Commission lacks the competitor data even to estimate static market shares.)

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and Atlanta, whereas the vast majority (three quarters) of AT&T's demand in each of these cities is located in fewer than 1,500 buildings.

[12] *See* tw telecom 2011 Annual Report, at 33, *available at* http://www.twtelecom.com/investor-guide/financial-reporting/.

[13] *See id.*

Level 3, XO, and tw telecom make a similar mistake when they assert that AT&T must be exercising market power because, according to these CLECs, the vast majority of the TDM-based DSn circuits they purchase are from ILECs.[14] The problem here is that ILEC-provided TDM-based services are just one of many competitive alternatives available to customers today. Basing a claim of ILEC market power on such static, legacy data carries no more validity than arguing that Dell has market power because 90 percent of the legacy inventory of computers used in a corporation may be Dell computers. In fact, there are many competitive alternatives to Dell computers, just as there are many competitive alternatives to ILEC TDM-based DSn-level circuits.

Sprint's recent purchasing patterns illustrate why the existence of ILEC market power cannot be inferred from the fact that a particular customer may purchase the majority of its TDM-based DSn-level services from ILECs. In 2010, Sprint asserted that it purchased more than 90 percent of its TDM-based DSn level backhaul services from ILECs. But during the next two years, Sprint systematically migrated its backhaul facilities to Ethernet, and has stated that when it is done, it will have Ethernet backhaul to 40,000 out of its approximately 45,000 cell sites,[15] and that it will eventually use "25 to 30 significant backhaul providers that will be a mix of incumbent LECs, cable MSOs, and alternative carriers."[16] Notably, Sprint recently asserted that it has almost completed backhaul contracts for all of its sites, "all cable operators are involved," "Verizon [was] not a significant competitor," and microwave will be used at roughly 10 percent of the sites.[17] Clearly, even though Sprint may have purchased most of its DSn level services from ILECs in 2010, this did not mean that those services lacked competitive

[14] *See, e.g.,* XO 6/26/2012 Letter, at 1-2; Level 3 6/8/2012 Letter, at 2.

[15] *See* Credit Suisse, *Sprint, Network Sharing Deals Imminent* (rel. Apr. 5, 2011) (noting that Sprint has 45,000 base stations), available at: http://doc.research-and-analytics.csfb.com/docView?language=ENG&format=PDF&source=em&document_id=873359241&serialid=7Dhw8bPqCoevFhjAWEcScrHE9GzS9jAR0cZLXo%2fqz%2bE%3d.

[16] Carol Wilson, *Sprint to Reveal Backhaul Contract Winners Friday*, Light Reading (Oct. 5, 2011), *available at* http://www.lightreading.com/document.asp?doc_id=213050.

[17] *See* Letter from Donna Epps (Verizon) to Marlene H. Dortch (FCC) at 2, WC Docket No. 05-25, dated July 24, 2012 ("Verizon 7/24/12 Letter"), and attached *Takeaways from Meetings with Management: Sprint Nextel Corp.*, Nomura Equity Research, at 2 (June 21, 2012).

alternatives. T-Mobile also once relied largely on ILEC TDM-based DSn services for its backhaul, but it "began an aggressive rollout of enhanced backhaul in 2007" by replacing TDM-based backhaul with fiber-based or other advanced backhaul facilities.[18] Today, T-Mobile has "enhanced backhaul covering 100% of [its] 4G network, 95% of which is fiber backhaul at its cell towers."[19]

2. ILEC-to-CLEC Price Comparisons. Level 3 and XO assert that ILEC market power can be inferred from alleged differences in prices charged by ILECs and competitive providers.[20] But, again, these claims are based on unsupported assertions that are clearly wrong. Level 3 and XO assert that they know of some competitors (whom they do not disclose) that supposedly offer lower prices than AT&T at some locations. The Commission clearly cannot credit these assertions. Without even the names of the competitors that supposedly offer these lower-priced services, it is not possible to verify the alleged price difference, or to determine whether the services offered by these phantom competitors are equivalent to those offered by AT&T or other ILECs. For example, the phantom competitors' rates could be for services offered with lower service levels, or they could be for much shorter circuits, or they could involve any number of other critical differences that would explain lower rates. There is no way to know, because Level 3 and XO have not provided the basic information. Moreover, neither Level 3 nor XO suggest that they have actually purchased services at the rates they claim. They merely state that they have seen these rates in price lists (again not disclosed) that were supposedly provided to them.[21] Commission reliance on such unverifiable price assertions would be arbitrary in the extreme.

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[18] Dave Mayo (T-Mobile Senior Vice President of Technology Strategy, Finance & Development), *T-Mobile Issues & Insights Blog*, The Official Blog of T-Mobile USA (Aug. 1, 2012), *available* at http://blog.t-mobile.com/2012/08/01/t-mobiles-backhaul-strategy-key-to-a-competitive-4g-experience.

[19] *Id.*

[20] *See* XO 6/26/2012 Letter, at 2; Level 3 6/8/12 Letter, at 4-8; Level 3 6/28/2012 Letter, Attachment, at 7-8.

[21] **[Begin Highly Confidential]** [redacted]

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More fundamentally, however, these carriers' reliance on unsupported rate comparisons raises the common-sense question of why they have not simply reported the rates that *they* actually charge for DSn services, and the rates under which they actually purchase these services from other CLECs. XO and Level 3 are large sellers and purchasers of DSn services. Surely, if the prices they charge or pay for such services are significantly lower than AT&T's on an apples-to-apples basis, they would have said so. But they are conspicuously silent on these facts, choosing instead to rely on anonymous price lists from phantom CLECs.

A recent submission by Level 3 confirms the clear inference to be drawn from its unwillingness to make direct price comparisons: it shows that the prices that Level 3 pays to **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** are in many instances *higher* than the prices it pays to AT&T. Level 3 complains that AT&T's monthly recurring charge for a DS1 circuit purchased for a five-year term is about $98.[22] But Level 3's own data **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** for DS1 circuits purchased for the same term.[23] Similarly, Level 3 states that AT&T's monthly recurring charge for a DS1 circuit purchased for a 1-year term is about $200. But Level 3's data show that it pays **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** a monthly recurring charge of more than **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** for DS1 circuits purchased

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[redacted] **[End Highly Confidential]** But this address does not appear to exist. It does not appear in AT&T's systems, in the CLEC fiber deployment data maintained by Geotel, in the postal address database, or on Google Maps.

[22] *See* Level 3 6/8/2012 Letter, at 4.

[23] *See* Level 3 6/8/2012 Letter, at Exhibit A, Part 1. **[Begin Highly Confidential** [redacted] **[End Highly Confidential]**

for a 1-year term.[24] Similarly, XO complains that AT&T's five-year term monthly recurring charge for DS3 circuits is between $740 and $970,[25] yet according to Level 3's figures, **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** monthly recurring charge for a DS3 circuit for the same term is more than **[Begin Highly Confidential]** [redacted] **[End Highly Confidential].**

Real-world experience also refutes the notion that AT&T's prices are higher than its competitors. For example, the President of Network Operations and Wholesale for Sprint recently confirmed that in seeking bids for upgrading backhaul connections to 38,000 of Sprint's cell sites, "AT&T was most competitive in many regions."[27]

In any event, even if Level 3 and XO had submitted verifiable, accurate, apples-to-apples comparisons demonstrating that ILEC prices were higher than CLEC prices (which they did not), the mere existence of price differentials hardly suggests any market failure, much less the clear and substantial market failure necessary to justify the onerous, investment-chilling regulation that Level 3 and XO advocate. Significant rate differences among established and subsequent entrants are commonplace in competitive markets. Moreover, ILEC rates reflect that ILECs must serve all comers, including those located in remote areas that are often the most expensive to serve. By contrast, CLECs have generally adopted a cherry-picking approach under which they have concentrated their facilities in the areas where special access demand is concentrated and have thus avoided the additional costs of serving remote and higher-cost customers.

3. Alleged "Lock-In" Contracts. Level 3 and tw telecom are no more successful in their attempts to demonstrate that ILECs exercise market power through the imposition of

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[24] *Id.* In addition, Level 3 overstates the DS1 rates it pays to AT&T. **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

[25] XO 6/26/2012 Letter, at 2.

[26] Level 3 6/8/2012 Letter, at Exhibit A, Part 1.

[27] *See* Verizon 7/24/12 Letter, Attachment at 2.

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contract terms and conditions that allegedly "lock-up" customers. In some instances, they simply mischaracterize the contract terms that they purport to rely on, and in other instances they refer to provisions that are often more flexible than the provisions under which they offer service.

Level 3 and tw telecom first repeat their claim that AT&T's SBC Tariff F.C.C. No. 73 "locks in" customer demand by requiring customers to commit large portions of their DSn purchases to AT&T in order to qualify for AT&T's largest discounts for TDM-based DSn circuits.[28] AT&T has previously shown that this claim is false,[29] and AT&T is beginning to wonder how many times it must refute it. *This tariff contains no volume discounts at all*. Customers can obtain the maximum discounts under this tariff no matter how many circuits they choose to purchase. The discounts in this tariff are entirely *term-based* discounts (1, 2, 3, 5, and 7 years), such that larger discounts for any particular circuit are available to customers who commit to purchase it for longer periods of time. Customers need not commit minimum circuit volume to AT&T to qualify for these discounts.

Neither tw telecom nor Level 3 contends that *term-based* discounts are evidence of market power, and for good reason. Term-based discounts are common in the marketplace, including among CLECs. **[Begin Highly Confidential]** [redacted] **[End**

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[28] Letter from Michael J. Mooney (Level 3) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 12 (June 27, 2012) ("Level 3 6/27/2012 Letter") ("AT&T's discounts are available only to customers that [agree to purchase the same number of circuits that they] previously purchased" and that "an AT&T discount for buying 1000 circuits is not available to a customer that previously purchased 1500 circuits."); Letter from Thomas Jones (tw telecom) to Marlene H. Dortch (FCC) WC Docket No. 05-25, at 7 (June 5, 2012) (tw telecom 6/5/12 Letter) (asserting that AT&T's tariffs include discounts available only if the customer purchases a number of circuits equal to 90 percent or more of its prior purchases.).

[29] *See, e.g.,* Letter from David L. Lawson (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 5-6 (March 28, 2012).

[30] Letter from Erin Boone (Level 3) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (Dec. 5, 2011), Response to Level 3 Communications LLC To Competition Data Requested In Special

Highly Confidential] Moreover, CLECs typically offer discounts for the same 1, 3 and 5 year terms as AT&T.[31]

Level 3 and tw telecom criticize AT&T and other ILECs for enforcing these term commitments with early termination charges, notwithstanding that such charges are necessary to enable term-based discounts and are commonplace. Indeed, the CLECs themselves have early termination penalties.[32] And, if anything, AT&T's early termination charges appear to be both lower and more flexible than those imposed by at least some CLECs. For example, **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** early termination charge equals 50 percent of the total payments remaining on the term commitment,[33] whereas AT&T's charge under SBC Tariff F.C.C. No. 73, § 7.2.22(G) is only 40 percent of the total payments remaining on the term. Moreover, whereas **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** enforces early termination charges when customers seek to upgrade to a higher

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Access NPRM, at 1 ("Level 3 Response To First Data Request"). *See also* Level 3 6/8/2012 Letter, at Exhibit A, Part 1.

[31] **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

[32] **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

[33] **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

speed service (*e.g.*, Ethernet)[34] – thus discouraging upgrades to more advanced services – AT&T often does not.[35]

Level 3 and tw telecom claim that SBC Tariff F.C.C. No. 73, § 7.2.22(E) also has a volume commitment upon which discounts are contingent. Again, Level 3 and tw telecom misread the tariff provision, which merely provides customers who purchase under that term plan with an extra *optional* benefit that allows them to avoid early termination fees if they cancel a circuit before the term has ended. Under this provision, if a customer agrees to maintain a certain number of circuits during the term of the commitment, the customer is allowed to cancel up to 20 percent of those circuits without incurring any early termination fees. This provision is referred to as a "portability option" because it provides customers with the ability to add and remove circuits subject to term discounts without incurring any early termination fees. Critically, contrary to the assertions of Level 3 and tw telecom, customers who opt into the portability plan do not receive additional discounts. Their discounts still depend solely on the term period (1, 2, 3, 5, 7 years) chosen by the customer. And far from "locking in" customers, the optional commitment provides them with the flexibility to migrate up to 20 percent of their circuits to another provider prior to the end of the committed term without incurring early termination penalties.

These types of portability options are also offered by CLECs, and no party has alleged that any CLEC has market power. For example, in the public portion of XO's response to the Commission's first data request, it confirms that some of its "customers have circuit portability capabilities structured into their contracts" and that "[f]requently, it is the overall size of the

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[34] **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

[35] *See, e.g.*, SBC Tariff F.C.C. No. 73, § 7.2.22(B) ("During a customer's DS1 TPP term, conversion may be made to a new DS1 TPP term of the same or different length or an upgrade may be made to a higher speed service, if the expiration date for the new DS1 TPP term or for the new higher speed service is beyond the end of the original DS1 TPP term. . . . When all conditions described above are met, termination liability for the remaining months on the original DS1 TPP will not apply.").

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contract which will allow for portability."[36] Similarly, **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]** states that it "will generally negotiate a portability clause in commercial negotiations where requested by a customer."[37]

Level 3 and tw telecom attempt to distinguish the ILEC portability requirements by asserting that CLECs are effectively forced to select the portability options that include volume commitments.[38] But actual marketplace evidence refutes that assertion. For example, **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**.

There is likewise no merit to Level 3's assertions that AT&T has engaged in "unilateral conduct" that is "disadvantageous to customers."[39] Level 3's sole allegation of such "unilateral conduct" is AT&T's discontinuance (in 2007) of two out of its dozens of tariffs, the SBC "Managed Value Plan" and the BellSouth "Transport Advantage Plan." The termination of the Managed Value Plan did not disadvantage any customers, however, because the cancellation was due to the fact that "no new customers have entered into, or expressed interest in, the Plan in the last 4-5 years."[40] Moreover, customers who did subscribe to the plan were grandfathered and

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[36] Letter from Randall W. Siffers (XO) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 3 (Dec. 7, 2011) ("XO Response To First Data Request").

[37] **[Begin Highly Confidential]** [redacted] **[End Highly Confidential]**

[38] *See, e.g.*, Letter from Thomas Jones (tw telecom) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 5 (June 5, 2012) ("tw telecom 6/5/2012 Letter"); Level 3 6/27/2012 Letter, at 13.

[39] *See* Level 3 6/8/2012 Letter, at 13.

[40] Southwestern Bell Telephone Company, Description and Justification, Transmittal No. 3221 (July 27, 2007).

permitted to continue to purchase under the plan until their existing terms ended.[41] Similarly, AT&T's termination of the Transport Advantage Plan did not result in increased prices because existing subscribers were grandfathered under the plan, those who did not subscribe generally did not qualify to do so, and in all events, AT&T remained willing to negotiate flexible pricing arrangements with its customers.[42]

4. Level 3's Flawed Legal Analysis. Level 3's argument that the Commission could lawfully "prohibit the enforcement" of AT&T's pricing flexibility contracts is meritless.[43] Level 3 notes that the Commission prohibited *cable* exclusivity in 2007, and it asserts that Section 201(b), 47 U.S.C. § 201(b), gives the Commission the same authority to prohibit special access "lock-in" provisions by a simple rulemaking "without any requirement of a prior adjudicative process."[44] But the Commission's cable exclusivity rules were adopted under Section 628 of the Cable Act, and the D.C. Circuit affirmed that the unique language of that section permitted the Commission to adopt such rules in that factual context.[45] It has been settled for decades that Title II establishes a scheme of carrier-initiated rates embodied in tariffs that have the force of law, and the Commission cannot override or change the terms of such tariffs unless and until it satisfies the requirements of Section 205 of the Act. Section 205 provides that the Commission may order a carrier to offer its services on different rates or terms only *after* it has conducted a hearing and made definitive findings both that the carrier's existing charge or practice "is or will

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[41] *Id.*

[42] *See* Opposition To Comptel's Motion To Accept Late-Filed Petition and Reply To Comptel's Petition To Reject AT&T's Transmittal No. 1114, *BellSouth Telecommunications, Inc., Revisions to Tariff FCC No. 1,* Transmittal No. 1114, at 9 (Nov. 14, 2007).

[43] Level 3 6/27/12 Letter, at 13-14.

[44] *Id*. (citing Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235 (2007)).

[45] *Nat'l Cable & Telecom. Ass'n* v. *FCC*, 567 F.3d 659, 663-67 (D.C. Cir. 2009).

be in violation of any provisions of this Act" and of "what will be the just and reasonable" charge" or practice "to be thereafter followed."[46]

The Commission has repeatedly acknowledged that it does not currently have a record that would allow it to make any such determinations. Indeed, Level 3's proposal would be particularly unlawful here, because unlike the cable rules (which merely prohibit enforcement of easily severable exclusive dealing agreements), that proposal would require the Commission to selectively rewrite and upset the balance of Level 3's special access contracts by eliminating or recasting the terms that company does not like while leaving in place the beneficial terms that were the negotiated *quid pro quo* for the reformed terms. The Commission has no basis for determining that the careful balance of negotiated benefits in any of these marketplace contracts are unjust or unreasonable, and certainly no basis to make a blanket determination consistent with the stringent standards of Section 205 that *all* such marketplace contracts must be re-filed with Commission-dictated revisions.[47]

Respectfully submitted,

/s/ David L. Lawson

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[46] 47 U.S.C. § 205. *See also AT&T* v. *FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973) (a "full opportunity for hearing" and express Commission findings that the carrier-initiated rate is unjust and unreasonable and the prescribed rate is just and reasonable "are essential to any exercise by the Commission of its authority" to prescribe rates); *Southwestern Bell Corp.* v. *FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) (the "Commission is not free to circumvent or ignore th[e] balance [created by Congress in § 205]. Nor may the Commission rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation").

[47] *See AT&T*, 487 F.2d at 874.