EX PARTE

September 28, 2012

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

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

Dear Ms. Dortch:

Level 3 responds briefly to AT&T's recent ex parte[1] in this docket to correct a few errors. One is a typographical error made by Level 3, others are math errors made by AT&T, and the last is Level 3's effort to again correct a repeated AT&T recreation of history.

The Typo

In its June 28, 2012 ex parte, Level 3 stated the rates it receives from AT&T for special access services purchased to a specific building in Dearborn Michigan, and then compared those rates to the rates quoted to Level 3 for the same service to the same building from CLECs.[2] The AT&T rates are materially higher. This is so even though the terms and conditions offered by AT&T are more onerous and the length of the term commitments extracted from AT&T are longer than those offered by the CLECs. Level 3 noted the relevant address as "4401 *Decker* Street, Dearborn Michigan," while the actual address is "4401 *Stecker* Street, Dearborn Michigan." While Level 3 is confident that AT&T could have queried its systems to determine the actual address, this was clearly Level 3's error, and Level 3 hereby corrects it. The remaining information supplied by Level 3 is accurate, and provides an apples to apples comparison between what Level 3 must pay AT&T for a DS1 circuit to this address as compared to what it would pay a CLEC for the same DS1 circuit to this same address.

Level 3 also notes that despite AT&T's recent statements that 95% of special access circuits "are slow 1.5 megabits per second" services that "would not qualify for a single dollar of

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[1] *See* Letter from David Lawson, Sidley Austin, counsel to AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed August 8, 2012) ("AT&T August Letter").

[2] Level 3 did the same for the other price-cap LECs, with similar results.

Universal Service Fund (USF) support if they were deployed to homes [i.e. as broadband circuits] throughout rural America under the Commission's recent USF order,"[3] AT&T charges Level 3 **[BEGIN HIGHLY CONFIDENTIAL]**[redacted] **[END HIGHLY CONFIDENTIAL]** for a Dearborn, Michigan DS1 (1.544 Mbps) on a **[BEGIN HIGHLY CONFIDENTIAL]** [redacted],[4]**[END HIGHLY CONFIDENTIAL]** whereas it sells 3 Mbps broadband connections (AT&T (U-verse)) in Dearborn, Michigan for $14.95/month on a 12 month term.[5]

AT&T's Math Errors

Rather than simply looking objectively at the apples to apples data Level 3 has supplied showing the prices available from AT&T and CLECs for "identical services" provided to "identical addresses,"[6] AT&T claims, through a creative use of math, that it actually sells special access services more cheaply than alternative CLEC suppliers. This is simply not factually true, meaning AT&T's math is off. For example:

AT&T attempts to distort the true facts by backing into mathematical "average rates" which are not, in fact, actually charged by anyone anywhere. AT&T does this by calculating what it claims to be an "average per circuit monthly rate" by "divid[ing] Level 3's total monthly recurring charges [from CLECs] by the number of circuits" purchased.[7] The trouble is that doing so produces an entirely irrelevant number for a variety of reasons.

1. To calculate its average, AT&T uses charges to Level 3 which are not limited to the on-net rates charged by CLECs to buildings which are also on-net to AT&T—the relevant basis for comparing AT&Ts rates to CLECs rates. Rather, AT&T calculates its "CLEC average" using a combination of on-net rates *and* off-net rates,[8] then compares those "on net+off net" averages to the rate charged by AT&T at a single on-net building. This produces a patently inaccurate result from both a logical and a mathematical point of view:

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[3] Letter from Robert W. Quinn Jr. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 at 9 (filed June 19, 2012).

[4] Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, LLC to Ms. Marlene H. Dortch, Secretary, FCC at 5 (filed June 8, 2012) ("Level 3 June 8 Ex Parte").

[5] *See* http://www.attsavings.com/dearborn-att-michigan-internet-deal.html.

[6] Level 3 June 8 Ex Parte at 5.

[7] AT&T August Letter, fn 23.

[8] To calculate its "average" of CLEC rates, AT&T relies on an exhibit Level 3 provided to show the length of the *term commitments* Level 3 has with CLECs, which also includes the *total* amount paid to the relevant CLEC for all circuits (both on-net and off net) which are subject to the stated term commitment. This enabled Level 3 to demonstrate the percentage of its overall revenue paid to each CLEC which is subject to the stated term obligation (and in doing so, to show that the vast majority of term commitments Level 3 is in with CLECs are far shorter than those made to price-cap LECs).

First, for "averaged" numbers to be even arguably relevant, the average would need to be compared to *another* average, and both must be averages of the same underlying thing.[9] So, for example, you could average the 1 year, DS-1 rates provided by AT&T to several specific on net locations (for instance, the 11 specific locations shown below (also shown in Exhibit A, Part 4 of Level 3's June 8th ex parte[10])), and compare that average to the average rate charged by CLECs for DS-1's on 1 year terms to these same on-net buildings. If you did that, the AT&T average rate would be **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** /month, and the CLEC average would be **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** /month: **[BEGIN HIGHLY CONFIDENTIAL]**

[redacted]

[END HIGHLY CONFIDENTIAL]

This would at least be an arguably relevant comparison of average numbers, and the CLEC average is **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** %

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9 So, for instance, you could not determine a grocer's average charge for apples and another grocer's average charge for oranges and, based on those averages, conclude which grocer charges more for fruit.

10 *See* Level 3 June 8 Ex parte at Exhibit A, Part 4.

less than the AT&T average. This is also consistent with Level 3's prior advocacy that even at the discounted rates charged by incumbents under their lock-ups, Level 3 routinely pays the incumbents double or more for the same circuits as compared to the rates charged by CLECs.

Second, CLECs rates will obviously be higher in "off-net" locations where the CLEC does not directly serve the relevant building, because in such cases, the rates it charges must include its own "base" rates *plus* the charges of another provider, often a price cap LEC like AT&T, from whom the CLEC must buy additional services to serve the "off-net" building. Taking an average of rates containing both on-net and off-net components (particularly when the off-net components are based on price-cap LEC exorbitant pricing) does not produce a relevant "average price" for a comparison between what a CLEC and a price cap LEC, like AT&T, charge to serve a building that is on-net to both the CLEC and AT&T (neither of which has an off-net component).

What AT&T did would be like comparing the *average* of what a grocer charges for different kinds of fruit baskets in stores across the nation to what a different grocer charges for apples in one store. Such a comparison is useless. For apples to apples pricing comparisons, the comparison must be made between the prices AT&T charges for special access to buildings it serves directly (which, as an incumbent, is nearly all of them in region) and the prices CLECs charge for the small subset of those same buildings which CLECs also serve directly. This comparison is what the pricing data shown in Level 3's June 8 Ex Parte shows. No math is required to decipher it.

2. Further compounding AT&T's math errors, CLECs do not charge for facilities and mileage, whereas AT&T does. What this means is that were Level 3 purchases, for example, an on-net DS1 from a CLEC, the CLEC will generally deliver the traffic on its network to remote locations in the same metro market as part of the same DS1 charge. AT&T will not. The on-net DS1 charges assessed by AT&T (which are already materially higher than those of CLECs) allow for the delivery of traffic to the specified on-net building only, and if a carrier needs to deliver traffic elsewhere in the same metro market, the carrier must pay AT&T additional facilities and mileage charges to do so.[11]

Level 3 has not focused on this issue previously, instead limiting its analysis to the simple fact that the price-cap LECs charge much more even for the very most basic—the amoeba—of on-net special access service elements, even before any "add-ons" charged by the incumbents and not charged by CLECs. Level 3 mentions it here, however, because not doing so allows AT&T to compound its math mistakes even further. Left unsaid, AT&T would, in addition to the other matters addressed above, be comparing: 1) CLEC "average charges" which are not only inaccurate and wrong but also artificially skewed *higher* since they include both "on-net" and more expensive "off-net" components; to 2) AT&T rates that appear artificially *lower* in that AT&T's "base rates" alone are rarely paid in reality, since there are regularly additional facilities and mileage charges on top of them (which are not charged by CLECs) to get traffic to its ultimate destination.

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[11] *See e.g.*, AT&T SBC Tariff No. 73. § 7.2.1 (B) and (C).

AT&Ts Repeated Misleading Mischaracterization

Finally, AT&T states that Level 3's assertions about standard portability-related commitments in ILEC contracts are incorrect. AT&T notes that "prior to acquiring Global Crossing, Level 3 ceased purchasing circuits under AT&T's portability options with volume commitments. Level 3 began purchasing circuits under AT&T's portability options only as a result of its purchase of Global Crossing . . . [and that] . . . Level 3 today still purchases more than 70 percent of its DS1 circuits *without* a portability option."[12] AT&T is correct that *Level 3* does not purchase the bulk of its DS1s from *AT&T* pursuant to the portability-related volume commitment clauses in question. This fact is the result of a one-off special agreement that Level 3 was able to extract out of AT&T, and that it has discussed numerous times within the Commission's record.[13]

In order to, yet again, reiterate—prior to AT&T's merger with BellSouth, Level 3's then recently acquired subsidiary Broadwing Communications, LLC ("Broadwing") was subject to a lock-up contract with AT&T that required it to purchase the vast majority of its circuits in AT&T territory from AT&T. After AT&T merged with BellSouth, a dispute arose between AT&T and Level 3 (Broadwing) over AT&T's compliance with the FCC merger conditions related to special access. Level 3 filed a formal complaint against AT&T at the Commission. The Complaint was dismissed as the result of a settlement.[14] As the result of a confidentiality agreement, Level 3 is not at liberty to summarize that settlement. However, AT&T publicly filed a contract tariff the same week as Level 3 dismissed its complaint. By availing itself of the contract tariff, Level 3 has been able to move some of its circuits off of AT&T's network, though it is still in a commitment large enough that it restricts Level 3's ability to freely purchase from competitors everywhere it wants. The circuits migrated away from Level 3 are now either on Level 3's own network or on networks of other CLECs. In either case, Level 3 is obtaining them at a lower price than it could from AT&T. However, the special arrangement Level 3 has availed itself of does not change the fact that the portability clauses do exist, that numerous CLECs are forced to purchase pursuant to them, and that their existence prevents competition from flourishing in AT&T's territory.

To Level 3's knowledge, no other purchaser of special access circuits from AT&T has the contractual capacity to reduce its use of AT&T special access services by such an amount. Therefore, while Level 3 is presently in a better position in its role as a *customer* of AT&T, it is

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[12] AT&T August Letter at 13.

[13] *See e.g.*., Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, LLC to Ms. Marlene H. Dortch, Secretary, FCC, at 22 (filed Feb. 22, 2012) ("Level 3 February 22 Ex Parte").

[14] In the Matter of Broadwing Communications, LLC, Complainant, v. AT&T, Inc. *et* al, Defendants, Order of Dismissal, File No. EB-07-MD-005(rel. April 2, 2009).

not in a better position in its role as a *competitor* of AT&T, because prospective purchasers from Level 3 continue to be saddled with restrictive lock-ups that preclude them from buying much of their needs in AT&T territory from any entity other than AT&T. For the same reasons, the competitive process in the AT&T territory continues to suffer significant harm by reason of AT&T's lock-up contracts.

Conclusion

There is abundant evidence in this docket that the price-cap LECs rates for special access are substantially higher than those of CLECs and that the price cap LECs are abusing their dominance through demand lock-up contracting arrangements that are designed to keep competition from emerging so that rates stay high. No amount of fancy or misleading math can change that. The recent and multiple CLEC filings showing the actual rates they are charged by the incumbents as compared to the rates they could get from CLECs but for the demand lock up arrangements only further proves this quite simple point. AT&T and the other price-cap LECs will continue their efforts, as AT&T has attempted to do here with mathematical gamesmanship, to make this look more complicated that it is in reality. We trust the Commission will see the forest, not the trees.

Sincerely,

/s/ electronically signed

Michael J. Mooney
General Counsel, Regulatory Policy
Level 3 Communications, LLC