

Eric J. Branfman  
Direct Phone: 202.373.6553  
Direct Fax: 202.373.6001  
Eric.branfman@bingham.com

January 9, 2013

**VIA ELECTRONIC FILING**

**EX PARTE**

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

Re: *Special Access Rates for Price Cap Local Exchange  
Carriers, WC Docket No. 05-25; RM-10593*

Dear Ms. Dortch:

On January 7, 2013, the undersigned and Michael Mooney, General Counsel, Regulatory Policy, Level 3 Communications, LLC (“Level 3”) discussed the draft data requests included in the FCC’s December 18, 2012 Report and Order and Further Notice of Rulemaking with the following FCC personnel: Elizabeth McIntyre, Eric Ralph, Kenneth Lynch, William Layton, Luis Reyes and Laura Yu.

Level 3 suggested that the definition of “*Prior Purchase-Based Commitment*” be modified so as to include contract tariffs that contain language that is not expressly tied to the purchaser’s prior purchase volume but that, as a practical matter, do in fact contain provisions that require the initial purchaser with whom the contract tariff is negotiated to purchase a large percentage of its prior purchase volume from the ILEC. The following definition would accomplish this (new language underscored):

*Prior Purchase-Based Commitment* means a type of *Volume Commitment* where the commitment is based on either:

- (i) a certain percentage or number of the customer’s purchased in-service circuits or lines as measured at the time of making the *Volume Commitment* or measured during a period of time prior to making the *Volume Commitment*, e.g., based on the customer’s billing records for the current month or prior month(s); or

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Bingham McCutchen LLP  
2020 K Street NW  
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20006-1806

T +1.202.373.6000  
F +1.202.373.6001  
bingham.com

- (ii) a certain percentage or dollar amount of *Revenues* generated by the customer's purchases as measured at the time of making the *Volume Commitment* or during a period of time prior to making the *Volume Commitment*.

The "number" or "dollar amount" need not be explicitly tied to the customer's prior purchases, provided that the "number" or "dollar amount" is in fact more than 50% of the purchases of the initial purchaser under the tariff as measured at the time of making the *Volume Commitment* or during a period of time within one year prior to making the *Volume Commitment*.

Level 3 also suggested that the FCC serve data requests on ILECs seeking data concerning their rate of return on the sale of special access circuits. Level 3 noted that high rates of return are typically indicative of market power, and while Level 3 acknowledged that to compute rates of return it would be necessary to allocate shared and common costs, it pointed out that the FCC's TELRIC methodology requires the same allocation of costs for precisely the same facilities, and that the State PUCs, along with the FCC Staff (in the case of Virginia) had made such cost allocations in establishing prices for DS1 and DS3 loops and transport when sold as UNEs.

Level 3 further suggested that Data Request B.12 be revised to include contracts for PBDS, since some have argued that PBDS is part of the same market as DS1 and DS3 circuits. While we did not raise the point, the same argument applies to Data Request F.13, which should also be revised to include PBDS for the same reasons.

Level 3 also suggested there should be a question regarding ILEC waivers of Term Commitments or Volume Commitments if the purchaser converts from a DS1 or DS3 circuit subject to such a Commitment to a PBDS or other unregulated circuit, but only if the PBDS or other unregulated circuit is purchased from the ILEC. Staff pointed out that this information could be provided by Purchasers in response to Data Request F.8. Level 3 responded that some Purchasers might not understand Data Request F.8, as currently worded, to call for such information. Staff noted that it was important that Purchasers interpret Data Request F.8 broadly, to include all types of conditions that constrain their actions, whether or not separately identified in points (a) through (e) in the second paragraph of this Data Request.

In addition to the matters discussed on January 7, Level 3 offers the following suggestions for revisions to specific Data Requests:

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1. Data Request A.14 should be limited to billing codes reported in Data Request A.12.f, so as to clarify that in responding to Data Request A.14, it is not necessary to provide data with respect to billing codes not identified in response to Data Request A.12.f.
2. In Data Request A.19, Level 3 recommends that Staff change “agreement you offer” to “agreement currently in effect”. Level 3’s rationale is that if the agreement is in effect at the current time, it has an effect on the market whether or not the Provider is currently offering the arrangement to new customers.
3. In Data Request F.8, Level 3 recommends that the description of “relevant terms and conditions” include requiring purchases of different types of services to obtain maximum discounts (e.g. Purchaser must purchase Transport Service to obtain the maximum discount on End User Channel Termination or must purchase DS3 service to obtain the maximum discount on DS1 service).
4. In Data Request F.8, Level 3 recommends that the term “complaint” be clarified to include filings and comments in proceedings such as WC Docket 05-25.
5. In Data Request F.10, Level 3 suggests that the first sentence be revised to read “Describe any circumstances since January 1, 2010, in which you have purchased circuits pursuant to a *Tariff*, solely for the purpose of meeting a *Volume Commitment* required for a discount or *Non-Rate Benefit* from your *Provider* (i.e., you would not have purchased the circuit but for the requirement that you meet a *Volume Commitment* required for a discount or *Non-Rate Benefit* from your *Provider*).”
6. In Data Request F.11, Level 3 suggests adding at the end “and identify the two Providers”.

Sincerely ,

*/s/ electronically signed*

Eric J. Branfman  
Counsel for Level 3 Communications, LLC

cc: (by e-mail)  
Elizabeth McIntyre

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