*REDACTED - FOR PUBLIC INSPECTION*

Level(3)
COMMUNICATIONS

FILED/ACCEPTED

FEB 11 2013

Federal Communications Commission
Office of the Secretary

February 11, 2013

**Via ECFS and Hand Delivery**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

**Re:** ***In the Matter of Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593**

Dear Secretary Dortch,

On behalf of Level 3 Communications, LLC ("Level 3"), enclosed for filing are two (2) copies of the public version of Comments of Level 3 Communications for association with the above referenced proceeding, in accordance with the procedures outlined in the Second Protective Order.[1]

In accordance with the Second Protective Order, all pages of this filing are marked "REDACTED - FOR PUBLIC INSPECTION".

Please date-stamp and return the enclosed extra copy of this filing. Any questions relating to this submission should be directed to the undersigned.

Sincerely,

*/s/ Michael J. Mooney*
Michael J. Mooney

Enclosure

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

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| Special Access Rates for Price Cap Local Exchange Carriers | ) | WC Docket No. 05-25 |
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**COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC**

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

Dated: February 11, 2013

## COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

In addition to joining Comments filed by other facilities based CLECs, Level 3 Communications, LLC ("Level 3") files these Comments regarding the issues in Section IV.C of the Commission's December 18, 2012 Report and Order and Further Notice of Proposed Rulemaking ("FNRPM") to stress the need for near term action by the FCC limiting the price cap LECs use of "demand lock up" arrangements. As Level 3 has noted in prior filings, current demand lock-up practices employed by the price cap LECs, in which they extract commitments of up to 90% or more of a customer's special access demand, impact both the industry (including Level 3) and ordinary Americans in a variety of ways. These include:

1) ***A dearth of facilities based competition.*** Because the vast majority of large special access buyers are locked up with the price cap LECs, it is difficult for Level 3 or other competitive facilities based special access suppliers to justify construction of facilities. Because their potential large buyers are already locked in to buying from the price cap LECs (and therefore could not freely purchase services provided over newly constructed facilities) facilities based investments become hard to cost justify. Enabling facilities based competition is a core tenet of the Telecom Act.[1]

2) ***Excessive pricing.*** Because it is not free to buy from competitive suppliers given the lock up arrangements it has had no choice but to enter, Level 3 *grossly overpays* for the special access services it requires. Level 3 alone estimates that if it could freely buy 50% of its demand from competitive suppliers instead of the incumbents, it would save **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY**

[1] *See* 47 U.S.C. § 157 (directing the Commission to take steps to increase the deployment of advanced communications networks including through the use of "regulating methods that remove barriers to infrastructure investment").

**CONFIDENTIAL]** Further, because they are also locked up with the incumbents, Level 3's large potential customers cannot freely buy from Level 3 (or other CLECs) at their substantially discounted rates. As such, they are similarlypaying far too much (in many cases multiple times more than they would pay competitive suppliers for their special access needs.

3) ***Negative consumer impact.*** The lack of competitively provided, facilities based special access connections, including connections to cell towers, causes wired networks and wireless devices to perform poorly (or not as well as they could) and data to cost far more than it should. A single, unchallenged provider of special access has little incentive to improve service quality, increase capacity or hold prices down.

4) ***Job creation.*** Economists estimate that special access cost reductions of 60%, which are a real possibility were competition permitted to flourish, would create approximately 176,000 U.S. jobs.[2]

Because Level 3 has previously made numerous filings on these issues,[3] these Comments merely summarize the reasons why such relief should be promptly granted.

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[2] Letter from Daniel Hesse, CEO, Sprint Nextel to the Honorable Julius Genachowski, Chairman, FCC, WC Docket No. 05-25 (filed March 15, 2011) ("Sprint Nextel 3/15/11 letter").

[3] *See e.g.*, Reply Comments of Level 3, WC Docket No. 05-25, at 9-16 (filed Feb. 24, 2010); Letter from William P. Hunt, VP, Public Policy, Level 3, WC Docket 05-25 (filed July 21, 2010); Letter from John M. Ryan, Assistant Chief Legal Officer, Level 3, to Marlene H. Dortch, WC Docket No. 05-25 (filed Aug. 20, 2010) at 1; Letter from Andrew D. Lipman, Counsel to Level 3, to Marlene H. Dortch, WC Docket No. 05-25 (filed Oct. 25, 2010); Letter from Eric J. Branfman, Counsel to Level 3, to Marlene H. Dortch, WC Docket No. 05-25 (filed Feb. 9, 2011); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed Feb. 22, 2012) ("Level 3 2/22/12 letter"); Letter from Erin Boone, Senior Corporate Counsel , Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed March 1, 2012); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed June 8, 2012) ("Level 3 6/8/12 letter"); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed June 27, 2012) ("Level 3 6/27/12 letter"); Letter from Erin

## I. PRICE CAP LECs HAVE IMPOSED LOCK-UP CONTRACTS ON BUYERS OF SPECIAL ACCESS FOR YEARS

The record is replete with evidence that since pricing flexibility was granted in 1999, price cap LECs have maintained a monopolistic share[4] of the special access market by locking up buyers with long term contracts that force them to commit to purchasing a volume of special access that is equal or close to their prior purchase volume.[5] Buyers accept these contracts because they have no other reasonable choice. The lockups work through the combined effect of the following practices, among others:

- Very high "rack rates," *i.e.*, "list prices" — which customers rarely pay;[6]
- Commercially inexplicable "loyalty" discounts from these rack rates, conditioned on the customer committing 85% to 100% of its prior years purchases to the price-cap LEC. Because these discounts are applied to such a large overall percentage of the service, the discounted rates are effectively the "normal" price;[7]
- Heavy shortfall penalties if purchases fall below required levels;[8] and
- In contracts and tariffs that do not contain an express loyalty discount, lengthy circuit term commitments in which "portability" (the ability to disconnect one circuit if another of equal or greater value is purchased to replace it) is offered only if the customer agrees to a lockup.[9]

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(Continued...)
Boone, Senior Corporate Counsel, Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed June 28, 2012); Letter from Eric J. Branfman, Counsel to Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed June 28, 2012).

[4] *See* Level 3 6/8/12 letter at 2, 19-26; confidential attachment to letter from Thomas Jones, counsel for tw telecom holdings inc., to Marlene H. Dortch, WC Docket 05-25 (filed April 11, 2012) ("tw telecom 4/11/12 letter') at Appendix A; Declaration of Susan M. Gately, Attachment 2 to Petition of Ad Hoc Telecommunications Users Committee *et al.*, WC Docket No. 05-25 (filed Nov. 2, 2012).

[5] Level 3 2/22/12 letter at 9-12.

[6] Level 3 2/22/12 letter at 8-9; Attachment to letter from Erin Boone, Senior Corporate Counsel, Level 3, to Marlene H. Dortch, WC Docket 05-25 (filed Dec. 5, 2011) ("Level 3 12/5/11 letter") at 9.

[7] Level 3 2/22/12 letter at 9-12; Level 3 12/5/11 letter at 9-10.

[8] Level 3 2/22/12 letter at 12-13; Level 3 12/5/11letter at 10-11; tw telecom 4/11/12 letter at 9, 10.

[9] Level 3 2/22/12 letter at 11-12; *see* tw telecom 4/11/12 letter at 9; Letter from Thomas Jones, counsel for tw telecom holdings, inc., to Marlene H. Dortch (filed Sept. 14, 2012) at 4, 5 n.16.

Proof of the effectiveness of this anti-competitive scheme is found in the fact that despite the presence of well-capitalized and aggressive rivals (including Level 3), vocally dissatisfied customers, and the passage of 13 years since the Commission deregulated special access markets, each of the price-cap LECs has maintained an extraordinarily high market share for special access lines within its region,[10] and each has been able to price such service at levels that earn supra-competitive returns.[11]

The Commission itself has explained the lack of competitive entry. The Commission found (in this docket) that competitive deployment of last mile facilities has generally not occurred except in areas with a significant concentration of business demand.[12] The Commission has consistently found that all competitive carriers "face extensive economic barriers" to the deployment of competitive facilities where they lack existing facilities needed to serve the customer.[13] These barriers include significant sunk

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[10] *See* n. 3, *supra.*

[11] *See* Level 3 6/8/12 letter at 26-30; Sprint Nextel 3/15/11 letter; Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, at Attachment B at 6 & Appendix 1 (filed Jan. 19, 2010) (price-cap LEC earnings on special access are almost $10 billion higher than competitive level).

Further evidence of the impact of lock-up contracts is presented by Level 3's experience, set forth in Level 3 2/22/12 letter at 21-22, with being freed from AT&T's lock-up contracts through a unique, non-repeatable set of circumstances. The result of being freed from AT&T's lock-up contracts is that Level 3 was able to buy special access in AT&T territory at lower prices from competitive sources, something that it was not able to do previously in AT&T territory, continues to be unable to do in Verizon and Qwest territory, and that other buyers of special access are unable to do in AT&T territory. *Id.*

[12] *See Special Access for Price Cap Local Exchange Carriers,* WC Docket 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Report and Order, 27 FCC Rcd. 10557, 10582, ¶ 49 (rel. Aug. 22, 2012).

[13] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, 25 FCC Rcd 8622, 8670 ¶ 90 (2010) ("Qwest Phoenix Forbearance Order"), aff'd Qwest Corp. v. FCC, 689 F.3d 1214 (10th Cir. 2012).

costs along with substantial economies of scale and scope,[14] all of which make deployment of competitive last mile access facilities "costly and difficult."[15] Because of these high barriers, the Commission has correctly concluded that it is "unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment."[16] But by preventing purchasers of special access from switching more than a small fraction of their demand to competitive suppliers, lockup arrangements do exactly that--deprive potential facilities based entrants of revenue opportunities sufficient to assure an adequate return on the investment required to deploy last mile access facilities. These lock-up practices are unjust and unreasonable, and are therefore unlawful under Section 201(b) of the Act.[17]

## II. AUTHORITY FOR COMMISSION TO TAKE THE ACTION REQUESTED BY LEVEL 3

The Commission has the clear ability to impose the remedies suggested previously and below by Level 3. In evaluating exclusivity clauses in the cable industry in 2007, for example, the Commission "***prohibit[ed] the enforcement of existing exclusivity clauses and the execution of new ones*** [emphasis added]" by cable operators that were subject to the Commission rules, making it "unlawful for cable operators to engage in certain unfair acts and methods of competition."[18] The incumbent providers

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[14] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17036 ¶ 86 (2003) ("*Triennial Review Order*") ¶ 86.

[15] *Qwest Phoenix* Forbearance *Order*, 25 FCC Rcd at 8661 ¶ 73.

[16] Id.

[17] 47 U.S.C. § 201(b).

[18] Exclusive *Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of

using these types of arrangements in the special access market were vocal objectors to those exclusivity arrangements.[19]

The Commission rejected arguments that other rules (requiring an adjudicatory proceeding) limited the Commission's ability to prohibit specified conduct.[20] In doing so, the Commission noted that the statutory provisions at issue granted the Commission rulemaking authority to specify conduct that was prohibited, and therefore, an adjudicative process was not a prerequisite to doing so.[21] The Commission extended a virtually identical principle to telecommunications services, similarly prohibiting the enforcement of contracts that restrict the access of other carriers to provide telecommunications service in commercial and residential multi-tenant buildings.[22] Level 3 discussed this precedent at length in an October 31, 2012 ex parte letter.[23]

Likewise here, Section 201(b) of the Act specifies that "any . . . practice . . . that is unjust or unreasonable is hereby declared unlawful," and Section 201(b) further specifically provides that "the Commission may prescribe such rules and regulations as

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(Continued...)
Proposed Rulemaking, MB Docket 07-51, (Oct. 31, 2007), at ¶¶ 37, 4 ("*Exclusive Service Contracts Order*").

[19] While the special access contracts are not fully exclusive, the record of this proceeding reflects that "less than fully exclusive contracts can . . . be exclusionary where they tie up sufficient volume to prevent smaller competitors from achieving minimum viable scale." Declaration of Michael D. Pelcovits on Behalf of WorldCom Inc., Attachment A to Reply Comments of WorldCom, Inc., RM-10593 (filed Jan. 23, 2003) at 7.

[20] *Exclusive Service* Contracts *Order.* at n. 156.

[21] *See id.*

[22] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 23052-53, ¶¶. 160-64 (2000); *Promotion of Competitive Networks in Local Telecommunications Markets, Report and Order*, WT Docket 99-217 (March 21, 2008); see 47 C.F.R. § 64-2500(b).

[23] Letter from Michael J. Mooney, General Counsel, Regulatory Policy, to Marlene H. Dortch, WC Docket 05-25 (filed Oct. 31, 2012) (" Level 3 10/31/12 letter") at 3-9

may be necessary in the public interest to carry out the provisions of this Act."[24] Section 403 of the Act also provides that "[t[he Commission shall have full authority and power to at any time institute an inquiry, on its own motion . . . relating to the enforcement of any provisions of this Act."[25]

Under the plain language of the Act, the Commission has full authority to institute an inquiry into the "justness" and/or "reasonableness" of the price-cap LECs' lock-up practices, and if the Commission finds them unreasonable, the Act itself declares them unlawful. Section 201(b) also expressly authorizes the Commission, with no requirement of a prior adjudicative process, to issue rules prohibiting such practices. Exactly as it did in the *Exclusive Service Contracts Order*,[26] the Commission has the authority to prohibit the enforcement of lock-up contracts by the price-cap LECs as they currently exist.

## III. MARKET POWER

To address the question, posed in ¶ 93 of the FNRPM, whether terms and conditions can be unjust and unreasonable absent market power, Level 3's answer is two-fold. First, the Commission could easily find that the incumbents have market power on the record before it (regardless of the answer to the question), but second, it does not need do so.

As summarized by Level 3 in prior filings, the current record clearly shows that price cap LECs have market power for special access.[27] The Commission does not need a further data gathering effort to know that in the vast majority of locations, the ILEC is

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[24] 47 U.S.C § 201(b).

[25] 47 U.S.C § 403.

[26] *See generally Exclusive Service Contracts Order.*

[27] *See* Level 3 6/8/12 letter at 15-32 (summarizing such evidence in detail); National Regulatory Research Institute "Competitive Issues in Special Access Markets," January 21, 2009, at 66 (concluding that the evidence suggests "that sellers are using market power" in areas of total pricing flexibility "to raise prices to their large wholesale customers").

the only company that has deployed facilities capable of providing special access service, giving it market power. The use of demand lock-up arrangements by such providers is unjust and unreasonable. By contrast, the use of term and volume contracts by non-ILEC wholesale providers has no anti-competitive effects, because there are no locations at which the non-ILEC is the only provider.[28]

Further, regardless of the ease with which a determination of market power could be made, the Commission has, in several instances, prohibited conduct absent a finding of market power, and can do so just as easily here.[29] By way of example, in the *Exclusive Service Contracts Order*, the Commission addressed the issue of the incumbents' market power, and *expressly declined* to limit its order to incumbent cable companies that had market power,[30] implicitly finding that a showing of market power was unnecessary. While the Commission would have no difficulty finding that the price-cap LECs have market power for special access services, the *Exclusive Service Contracts Order* further evidences that such a finding is not required.

## IV. FURTHER DELAY WILL CAUSE SIGNIFICANT PUBLIC HARM

Level 3 anticipates that price cap LECs will argue that although these issues have been before the Commission since AT&T's petition in 2002 and although this docket has collected data since 2005, the FCC should further defer action with regard to lock-up contracts until it collects still more data. Delay is costly on a number of levels, as noted above. Realistically, by the time that the data requests are finalized and approved by OMB under the Paperwork Reduction Act, the responses are collected and analyzed by the Staff, parties that do not make timely responses are tracked down and required to

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[28] *See* letter from Thomas Jones, counsel for tw telecom holdings, Inc., to Marlene H. Dortch, WC Docket 05-25 (filed June 5, 2012) at 6.

[29] *See* Level 3 6/8/12 letter at 15 & n. 20.

[30] *Exclusive* Service *Contracts Order* at ¶ 38.

respond, and more rounds of public comment are taken and analyzed, another 18 months or more (quite possibly many more than 18 months) will have passed. In addition to Level 3's estimates cited above, the record already contains evidence as to the billions of dollars that customers are overpaying for special access.[31] These overpayments, while for the most part paid by in the first instance by businesses, including wireless carriers, IXCs, CLECs, and non-carriers, ultimately get passed on to the consuming public.

## V. SUGGESTED RELIEF AND REQUESTED COMMISSION ACTION

Pursuant to Section 201(b) of the 1996 Act, the Commission must ensure that prices, terms and conditions contained in filed tariffs are "just and reasonable."[32] The lock-up commitments discussed above violate Section 201(b), and the Commission can and should take steps to address these anticompetitive practices and to preserve the Commission's ability to fulfill the basic objectives of the *National Broadband Plan*.[33] Level 3 suggests three remedies the Commission should employ on an expedited basis to eliminate monopolistic lockup contract provisions:

1. Preclude any price cap LEC from including in any new contract tariff or tariff discount plan, a customer's commitment, in any future period, to purchase from the price cap LEC, either directly or indirectly, more than 50% of the amount i) spent on special access services with the price cap LEC in a previous, similar period or ii) then being spent with the price cap LEC for special access.[34]

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[31] Economics and Technology Inc, "Special Access Overpricing and the U.S. Economy," attached to Comments of the Ad Hoc Telecommunications Users Committee, WC -Docket 05-25 (filed Aug. 8, 2007) at 3, 14, 16; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (Oct. 15, 2002) at 8.

[32] 47 U.S.C. § 201(b).

[33] *See* Connecting America: The National Broadband Plan for Our Future *("National Broadband Plan"),* Chapter 2 at 7-12.

[34] While 50% is less than the traditional percentage required for a showing of monopoly power, Level 3 has cited numerous cases in which contracts imposing market foreclosure of less than 50% have been held to have violated the antitrust laws. *See* Level 3 6/8/12 letter at 18 & n. 31. It is the issue of market foreclosure, and not monopoly power, that is presented by the price cap LECs' lock-up contracts. Moreover,

2. With respect to existing contract tariffs and tariff discount plans containing commitments that would violate the prohibition above, the Commission should prohibit enforcement of such plans to the extent they are inconsistent.

3. The Commission should make clear that its actions do not impact other provisions of parties' contract tariffs or tariff discount plans. The effect of the Commission's actions on the remaining provisions of the applicable contract tariff or tariff discount plan would be governed by the contract tariffs or tariff discount plans themselves, or by state law, if applicable.

Level 3 also supports the additional remedies suggested by its CLEC coalition members.

While Level 3 fully supports the Commission's data gathering process towards full reform of the special access marketplace, we remain hopeful that the market does not have to wait until the end of that process before competition is allowed to materialize.

Sincerely,

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

Dated: February 11, 2013

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(Continued...)
AT&T cites with approval a deal it made with a major customer last year containing a lock-up of 50%, suggesting that even AT&T finds a lock-up of only 50% to be reasonable, from its perspective. Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, WC Docket 05-25 (filed March 28, 2012) at 2 n. 10. Finally, although Level 3 does not ask the Commission to go that far, as Level 3 has demonstrated previously, the Commission has the authority to reduce the price cap LECs' lock-up percentage to zero. *See* Level 3 10/31/12 letter at 3-9.