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Federal Communications Commission
Bureau / Office

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December 2, 2013

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VIA COURIER & ETFS

FCC Office of the Secretary

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

Re: Petition of Cbeyond Communications, LLC, Integra Telecom, Inc., Level 3 Communications, LLC and tw telecom inc. to Suspend and Investigate AT&T Transmittal Nos. 1803, 71, 254, 498, 1061, and 3383

Dear Ms. Dortch:

On behalf of Cbeyond Communications, LLC (“Cbeyond”), Integra Telecom, Inc. (“Integra”), Level 3 Communications, LLC (“Level 3”) and tw telecom inc. (“tw telecom”) (collectively, the “Petitioners”), please find enclosed four copies of the redacted version of a Petition to Suspend and Investigate (“Petition”) the above-referenced transmittals filed by AT&T, Inc. (“AT&T”) on November 25, 2013. An original and three copies of the confidential version of the filing are being delivered to the Secretary’s Office under separate cover. As discussed below, the Petition and Appendices A and B of the Petition contain information eligible for confidential treatment. This information is contained between markings that state “[BEGIN CONFIDENTIAL]” and “[END CONFIDENTIAL].”

Pursuant to the procedures outlined in Section 1.773(a)(4) of the Commission’s Rules,¹ one copy of the confidential version and one copy of the redacted version of the filing are being delivered to Julie Veach, Chief of the Wireline Competition Bureau. In addition, one copy of the confidential version and one copy of the redacted version of the filing are being delivered to Kalpak Gude, Chief of the Pricing Policy Division of the Wireline Competition Bureau. One copy of the redacted version of the filing is being served upon AT&T via facsimile and first class mail, and one copy of the redacted version of the filing is being delivered to Best Copy & Printing, Inc. Finally, an electronic copy of the redacted version of the filing is being submitted via ETFS.

¹ 47 C.F.R. § 1.773(a)(4).

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Request for Confidentiality Under the Commission's Standard Protective Order for Tariff Review Proceedings and Under Sections 0.457 and 0.459 of the Commission's Rules

The Petitioners request confidential treatment of certain information contained in the text of the Petition and Appendices A and B of the Petition. Specifically, the text of the Petition contains information regarding the financial impact that AT&T's transmittals would have on Level 3 and tw telecom. The text of Appendix A contains information regarding the volumes of special access services that Level 3 purchases from AT&T; information regarding the financial impact of the transmittals on Level 3; and information regarding Level 3's pricing policies. The text of Appendix B contains information regarding the volumes of special access services that tw telecom purchases from AT&T; information regarding the financial impact of the transmittals on tw telecom; and information regarding tw telecom's business practices. For the reasons discussed below, this information should be afforded confidential treatment under the Commission's standard protective order for tariff review proceedings² and under Sections 0.457 and 0.459 of the Commission's rules.³

Request for Confidentiality Under the Commission's Standard Protective Order for Tariff Review Proceedings

The FCC originally adopted a standard protective order for use in review of LEC tariff filings submitted pursuant to Section 204(a)(3) of the Communications Act in the *Streamlined Tariff Order*.⁴ Therein, the Commission stated that it would "routinely employ the standard protective order in the pre-effective tariff review process to permit meaningful participation by interested parties, so long as the carrier has made a good faith showing in support of confidential treatment."⁵ Specifically, the Commission explained that carriers may satisfy this requirement by demonstrating that the information should be afforded confidential treatment under the Commission's rules regarding confidential treatment under the Freedom of Information Act ("FOIA").⁶ The FCC subsequently modified its standard protective order and expanded its use

² Pursuant to instruction by the Wireline Competition Bureau staff, the Petitioners are requesting confidential treatment of information in the Petition and Appendices A and B of the Petition in accordance with the procedures in the standard protective order for tariff review proceedings. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816, ¶ 40 (1998) ("*Standard Protective Order Report & Order*") ("[T]he protective order to be used in tariff review proceedings will be the one adopted in this proceeding, in place of the one adopted in [the *Streamlined Tariff Order*]."); *id.* Appendix C, Standard Protective Order and Declaration; *see also Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 2170, ¶¶ 91-95 & Appendix B (1997) ("*Streamlined Tariff Order*").

³ 47 C.F.R. §§ 0.457, 0.459.

⁴ *See Streamlined Tariff Order* ¶¶ 91-95 & Appendix B.

⁵ *Id.* ¶ 91.

⁶ *Id.*; *see also* 47 C.F.R. §§ 0.457, 0.459.

in the *Standard Protective Order Report & Order*.⁷ However, the Commission retained the standard it adopted in the *Streamlined Tariff Order* for determining when information is eligible for protection under the standard protection order.⁸

As set forth below, the information in the Petition and Appendices A and B of the Petition described above is eligible for confidential treatment under the Commission's rules regarding confidential treatment under FOIA. Accordingly, the Bureau should afford this information protection under the standard protective order.⁹

Request for Confidentiality Pursuant to Section 0.457 of the Commission's Rules

The information for which the Petitioners seek confidential treatment is proprietary and confidential to Level 3 and tw telecom. This information is "commercial" and "financial" information and is "not routinely available for public inspection."¹⁰ It also constitutes "privileged or confidential commercial, financial, or technical data," and Level 3 and tw telecom consider this information to be confidential "trade secrets."¹¹ Accordingly, this information should be considered materials "not routinely available for public inspection."¹²

Request for Confidentiality Pursuant to Section 0.459 of the Commission's Rules

The information for which the Petitioners seek confidential treatment also qualifies for protection under Section 0.459 of the Commission's rules.¹³ Pursuant to Section 0.459(b), the Petitioners provide the following statement of the reasons for withholding the materials from public inspection:

(1) Identification of the specific information for which confidential treatment is sought.

As explained above, the text of the Petition contains information regarding the financial impact that AT&T's transmittals would have on Level 3 and tw telecom. The text of Appendix A contains information regarding the volumes of DS1 and DS3 special access services that Level

⁷ See *Standard Protective Order Report & Order* ¶¶ 35-42 & Appendix C.

⁸ *Id.* ¶ 37.

⁹ See *Standard Protective Order Report & Order* ¶ 40. To the extent that the requirement in the second sentence of paragraph 40 of the *Standard Protective Order Report & Order* applies here, the Petitioners hereby state that they will make the confidential information at issue available to those signing a nondisclosure agreement.

¹⁰ 47 C.F.R. § 0.457(d).

¹¹ *Id.* § 0.457(d)(2).

¹² *Id.*

¹³ 47 C.F.R. § 0.459.

3 purchases from AT&T both in and outside of the nine-state former BellSouth territory; information regarding the financial impact of the transmittals on Level 3, including the increased costs Level 3 would incur; and information regarding Level 3's pricing policies. The text of Appendix B contains information regarding the volumes of DS1 and DS3 special access services that tw telecom purchases from AT&T (more specifically, the percentage of DS1 and DS3 special access services purchased from AT&T that tw telecom uses to provide TDM-based services to tw telecom retail customers and the percentage of DS1 and DS3 special access services purchased from AT&T that tw telecom uses to provide Ethernet services to tw telecom retail customers); information regarding the financial impact of the transmittals on tw telecom, including the increased costs tw telecom would incur; and information regarding tw telecom's business practices.

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.

This information is being submitted in connection with the Petition to Suspend and Investigate Transmittal Nos. 1803, 71, 254, 498, 1061, and 3383 filed by AT&T on November 25, 2013. This proceeding has not yet been docketed.

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged; (4) Explanation of the degree to which the information concerns a service that is subject to competition; (5) Explanation of how disclosure of information could result in competitive harm.

The information for which the Petitioners request confidential treatment is commercial and financial information that Level 3 and tw telecom consider to be privileged trade secrets. Level 3 and tw telecom purchase AT&T's special access services in order to provide downstream broadband services to retail business customers in AT&T's incumbent LEC territory. Level 3 and tw telecom face competition from incumbent LECs and other competitive LECs in retail markets for business broadband services.

The information at issue is competitively sensitive and its disclosure would have a negative competitive impact on Level 3 and tw telecom. More specifically, if made available to Level 3's and tw telecom's competitors, this information could be used to determine the costs that Level 3 and tw telecom incur in providing services to their retail customers in AT&T's incumbent LEC territory. This would allow such competitors to design competitive strategies based on that information and significantly disadvantage Level 3 and tw telecom in the marketplace. It should be noted that Level 3 has not shared the information for which it seeks confidential treatment with tw telecom or any of the other Petitioners and tw telecom has not shared the information for which it seeks confidential treatment with Level 3 or any of the other Petitioners.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

Level 3 and tw telecom have held and continue to hold the information for which the undersigned carriers request confidential treatment in the strictest confidence. Level 3 and tw telecom do not make this information available to the public and have not disclosed this information to any third parties. As stated above, Level 3 and tw telecom have not shared this information with each other or with any of the other Petitioners.

(8) *Justification of the period during which the submitting party asserts that material should not be available for public disclosure.*

At the present time, Level 3 and tw telecom cannot determine a date on which this information should not be considered confidential because, as discussed above, disclosure of such information would cause Level 3 and tw telecom significant competitive harm.

Respectfully submitted,



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Phillip Verveer (redacted version) (via email)
Jonathan Sallet (redacted version) (via email)
Daniel Alvarez (redacted version) (via email)
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Amy Bender (redacted version) (via email)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Ameritech Operating Companies	)	Transmittal No. 1803
Tariff F.C.C. No. 2)	
)	
BellSouth Telecommunications	)	Transmittal No. 71
Tariff F.C.C. No. 1)	
)	
Nevada Bell Telephone Company	)	Transmittal No. 254
Tariff F.C.C. No. 1)	
)	
Pacific Bell Telephone Company	)	Transmittal No. 498
Tariff F.C.C. No. 1)	
)	
Southern New England Telephone Company	)	Transmittal No. 1061
Tariff F.C.C. No. 39)	
)	
Southwestern Bell Telephone Company	)	Transmittal No. 3383
Tariff F.C.C. No. 73)	

**PETITION OF CBeyond, INTEGRA, LEVEL 3
AND TW TELECOM TO SUSPEND AND INVESTIGATE**

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December 2, 2013

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In the Matter of)	
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Ameritech Operating Companies Tariff F.C.C. No. 2)	Transmittal No. 1803
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BellSouth Telecommunications Tariff F.C.C. No. 1)	Transmittal No. 71
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Nevada Bell Telephone Company Tariff F.C.C. No. 1)	Transmittal No. 254
)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1)	Transmittal No. 498
)	
Southern New England Telephone Company Tariff F.C.C. No. 39	)	Transmittal No. 1061
)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3383

**PETITION OF CBeyond, INTEGRA, LEVEL 3
AND TW TELECOM TO SUSPEND AND INVESTIGATE**

Pursuant to Section 1.773(a) of the Commission's rules,¹ Cbeyond Communications, LLC ("Cbeyond"), Integra Telecom, Inc. ("Integra"), Level 3 Communications, LLC ("Level 3") and tw telecom inc. ("tw telecom"), through their undersigned counsel, hereby petition the FCC to suspend and investigate the above-referenced transmittals filed by AT&T, Inc. ("AT&T") on November 25, 2013. In the transmittals, AT&T proposes to revise its tariffs to eliminate term discount plans longer than three years for DS1 and DS3 special access services in the legacy Ameritech, BellSouth, Nevada Bell, Pacific Bell, SNET, and Southwestern Bell incumbent LEC

¹ 47 C.F.R. § 1.773(a).

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territories. As explained below, the Wireline Competition Bureau (“Bureau”) should suspend and investigate these proposed tariff revisions.

I. INTRODUCTION AND SUMMARY

AT&T is proposing to eliminate term discount plans that, in many cases, offer the only means of obtaining DS1 and DS3 special access services at prices low enough to support competition in downstream retail markets for business broadband services in the AT&T incumbent LEC territory. This proposal suffers from legal infirmities that require suspension and thorough investigation by the Bureau.

Specifically, AT&T’s proposed tariff revisions raise significant questions as to the lawfulness of the rates, terms and conditions on which AT&T offers DS1 and DS3 special access services. These questions apply both to such services that are not subject to price cap regulation (“non-price-cap services”) and those that are subject to price cap regulation (“price-cap services”). For each category of services, there are significant questions as to whether AT&T’s withdrawal of its widely-relied-upon discounts for term plans beyond three years constitutes an unjust and unreasonable practice and would result in unreasonable rate structures and terms and conditions under Section 201(b) of the Communications Act. In addition, with respect to price-cap services, AT&T has failed to provide the information required under the Commission’s rules to determine whether the proposed restructuring of its services would cause it to exceed the applicable price cap indices and pricing bands.

While AT&T has at times claimed that the proposed changes are necessary to advance the technology transition to packet-based services, this is simply not true. If AT&T were solely seeking to further that transition, it could have eliminated its term commitments longer than three years without eliminating the associated discounts (*e.g.*, by applying the discounts currently available under five-year plans to three-year plans). Instead, AT&T is proposing to exploit its

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dominance in the special access market by effectively imposing a substantial rate increase on many of its special access customers. Because market conditions, and in some cases AT&T's own exclusionary lock-up special access arrangements, give these customers no choice but to continue purchasing DS1 and DS3 special access services for the foreseeable future, this effective rate increase will inflict irreparable harm on competition as well as both wholesale and retail customers.

Accordingly, the Bureau should suspend and investigate the instant transmittals. Doing so would give the Bureau time to develop a record sufficient to determine whether AT&T's proposed tariff revisions are lawful and to design appropriate remedies.

II. BACKGROUND

A. AT&T's Dominance in the Provision of DS1 and DS3 Special Access Services

Before it was acquired by SBC, AT&T lamented that "the Bells are fleecing special access customers nationwide, and, by doing so, are reaping shocking windfalls."² AT&T was particularly critical of the incumbent LECs for having "maintained or even *raised*" special access rates in the geographic areas where they had been granted Phase II pricing flexibility and were therefore no longer subject to price cap regulation.³ According to AT&T, "[t]he Bells have used pricing flexibility to do precisely what the Communications Act is designed to prevent – they have strategically raised rates to reap monopoly profits and to impede competition."⁴

Furthermore, AT&T argued that incumbent LECs had stunted the development of wholesale

² AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, at 8 (filed Oct. 15, 2002). AT&T pointed out, for example, that "SBC's special access revenues in 2001 exceeded amounts that would have produced an 11.25% rate of return by an astonishing \$2.5 billion." *Id.*

³ *Id.* at 11 (emphasis in original).

⁴ *Id.* at 33.

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competition by imposing “anticompetitive” lock-up commitments on special access customers that needed relief from the incumbents’ onerous rates, terms and conditions.⁵ AT&T urged the FCC to quickly address the incumbent LECs’ “naked exercise of monopoly power.”⁶

More than ten years have passed since AT&T described the state of the special access market, but little has changed except for the fact that AT&T is now part of the SBC-Ameritech-BellSouth-PacBell-Nevada Bell-SNET incumbent LEC conglomerate whose service territory encompasses large swaths of 22 states. The AT&T incumbent LECs remain the dominant providers of DS1 and DS3 special access services in AT&T’s 22-state incumbent LEC region. This is so as a matter of law because the FCC classifies AT&T as dominant in the provision of these services.⁷ But it is also unquestionably so as a matter of fact. By virtue of its incumbent LECs’ historical monopolies, AT&T still owns last-mile facilities capable of delivering special access services to virtually every commercial location in its incumbent LEC territory. And due to exceptionally high entry barriers, competitors have only been able to construct last-mile facilities to a very small percentage of these locations.⁸ As a result, AT&T owns the only such

⁵ *Id.* at 21-22 (“The Bells are using their market power to force carriers to enter into anticompetitive optional pricing plans (‘OPPs’) that remove even the possibility that market forces could constrain the Bells’ market power. . . . Carriers have agreed to these OPP deals, because of the urgent need to cut access expense (or, at least, to keep it from rising even further).”).

⁶ *Id.* at 13.

⁷ *See generally Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990) (“*LEC Price Cap Order*”) (applying dominant carrier price cap regulation to incumbent LEC special access services).

⁸ This fact has been confirmed on numerous occasions by the FCC, Department of Justice, Government Accountability Office, and independent researchers. *See* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25 *et al.*, at 14-19 (filed Feb. 11, 2013) (“*BT Americas et al. Feb. 11, 2013 Comments*”) (discussing these findings).

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facility to most of the businesses in its incumbent LEC territory, and it is the only facilities-based provider of DS1 and DS3 special access services thereto.

B. The Current Regulatory Regime and the Rates, Terms and Conditions on Which AT&T Offers DS1 and DS3 Special Access Services

The FCC has failed to address AT&T's dominance in the provision of DS1 and DS3 special access services with effective regulation of the rates, terms and conditions on which AT&T offers these services. The Commission has granted AT&T (or its incumbent LECs) Phase II pricing flexibility for special access channel terminations to end users in at least 70 Metropolitan Statistical Areas,⁹ and AT&T has "maintained or even *raised*" its rates for such services in these areas—the very practice that AT&T once condemned.¹⁰ In August of 2012, over AT&T's objections, the Commission found that its special access pricing flexibility triggers "have not worked as intended" and have resulted in "under-regulation" in many parts of the country.¹¹ However, the price increases that AT&T implemented for non-price-cap services remain in effect.

⁹ See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd. 10557, Appendix D (2012) ("*Triggers Suspension Order*"). The FCC has also granted AT&T Phase II pricing flexibility for special access rate elements other than channel terminations to end users, but the FCC did not list the markets subject to such deregulation in the *Triggers Suspension Order*.

¹⁰ For example, AT&T's monthly recurring charges ("MRCs") for DS1 channel terminations in the portions of legacy Southwestern Bell territory where AT&T has been granted Phase II pricing flexibility are as much as 17 percent higher than its corresponding MRCs in price cap portions of this territory. See *Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 § 7.3.10(F)(1)* (setting forth AT&T's rates for DS1 channel terminations in areas subject to price cap regulation); *id.* § 39.5.2.7.1(A) (setting forth AT&T's rates for DS1 channel terminations in areas subject to Phase II pricing flexibility). See also Comments of Sprint Nextel Corp., WC Dkt. No. 05-25 *et al.*, Exhibit 1 (filed Aug. 8, 2007) (comparing AT&T and other incumbent LEC rates in areas subject to price cap regulation with those in areas subject to Phase II pricing flexibility).

¹¹ See *Triggers Suspension Order* ¶ 22.

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In the portions of AT&T's 22-state incumbent LEC region where it has not been granted Phase II pricing flexibility, AT&T is subject to price cap regulation of its DS1 and DS3 special access services, but the price cap regime for these services is ineffective in its current form. Thirteen years ago, the FCC adopted the "CALLS" plan under which it reduced the price caps for special access services each year for five years.¹² The Commission predicted that sufficient competition would develop in special access markets during those five years to constrain the incumbent LECs' rates and eliminate the need for further price cap reductions beyond that period.¹³ Accordingly, the Commission scheduled the rate reductions to end in 2005 and stated that it would "re-examine . . . whether competition has emerged to constrain rates effectively" at that time.¹⁴ Despite this commitment, the FCC never conducted such a reexamination. Thus, although it is now abundantly clear that the Commission's predictions of competition have not been borne out, the price caps have not been reduced to account for this development. These price caps, which govern AT&T's price-cap services at issue here, unquestionably permit rates that are unreasonably high.

AT&T exploits the absence of effective rate regulation by, among other things, setting its undiscounted month-to-month rates for DS1 and DS3 special access services (*i.e.*, the rates that AT&T charges if a customer does not agree to a term commitment) exorbitantly high. Competitive carriers cannot compete profitably in downstream retail business services markets if they must pay AT&T's undiscounted rates. As a result, they must purchase special access

¹² See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000).

¹³ *Id.* ¶ 166.

¹⁴ *Id.* See also *id.* ¶ 170 ("[T]he rates will remain at the target rates until July 1, 2005, at which time the Commission will reexamine them.").

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services pursuant to term plans that offer discounts. The discounts available under such plans are substantial. Moreover, the discounts that AT&T offers for term plans longer than three years yield significantly lower prices than the discounts that AT&T offers for term plans of three years or less. Thus, as explained in the attached declarations of Gary Black of Level 3 and Michael Rouleau of tw telecom, purchasing these services pursuant to term plans longer than three years is the most viable means of providing competitive services to business customer locations in AT&T's incumbent LEC territory.¹⁵ In fact, Level 3 and tw telecom currently purchase the vast majority of their DS1 and DS3 special access services from AT&T under such plans.¹⁶

While the discounts available under term plans are substantial, purchasing special access services under these plans exposes competitive carriers to potentially large early termination penalties. This is because competitors must often discontinue a special access service before the expiration of the applicable term for that service (*e.g.*, because the competitor's retail customer has stopped purchasing service from the competitor). Where this is the case, AT&T imposes large early termination penalties. In order to avoid these penalties, competitors must obtain so-called "circuit portability." Under a circuit portability arrangement, AT&T waives early termination penalties on individual circuits if the competitive carrier customer commits to purchasing a specified (usually extremely large) volume of special access services from AT&T across a relevant geographic area for a specified period of time.¹⁷

¹⁵ See Declaration of Gary Black on Behalf of Level 3 Communications, LLC, at ¶ 5 (attached hereto as "Appendix A") ("Black Decl."); Declaration of Michael Rouleau on Behalf of tw telecom inc., at ¶ 7 (attached hereto as "Appendix B") ("Rouleau Decl.").

¹⁶ See Black Decl. ¶¶ 5, 7-8; Rouleau Decl. ¶ 7.

¹⁷ AT&T's term plans and volume commitment provisions (which, as explained below, do not permit customers to count Ethernet services toward their volume commitments) are both part of a broader exclusionary tariff structure that locks up demand in the special access market. See, *e.g.*, BT Americas *et al.* Feb. 11, 2013 Comments at 20-30 (describing the exclusionary aspects of the

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C. AT&T's Proposed Elimination of DS1 and DS3 Special Access Term Plans Longer Than Three Years

AT&T's proposed tariff revisions would allow it to further exploit its dominance in the provision of DS1 and DS3 special access services and would result in several harmful consequences. Most importantly, the discounts associated with term plans longer than three years would be eliminated. As Messrs. Black and Rouleau explain, this change would force Level 3 and tw telecom to begin purchasing special access services from AT&T under three-year term plans subject to the less favorable discounts available under those plans.¹⁸ This change would cause Level 3 to pay AT&T approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] more each year for DS1 and DS3 special access services, an increase of approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent,¹⁹ and would cause tw telecom to pay AT&T approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] more each year for DS1 and DS3 special access services, an increase of approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent.²⁰

incumbent LECs' special access tariffs). The Commission should address the exclusionary aspects of these tariffs as soon as possible. *See Stanley M. Besen et al.*, "Anticompetitive Provisions of ILEC Special Access Arrangements," at 28-38 (Feb. 11, 2013) (attached as "Appendix A" to BT Americas *et al.* Feb. 11, 2013 Comments) (proposing remedies to combat the incumbent LECs' exclusionary terms and conditions); *see also* BT Americas *et al.* Feb. 11, 2013 Comments at 42-47 (same). However, until the Commission takes such action, many competitive carriers have no choice but to purchase special access services under these arrangements because they are the only viable DS1 and DS3 pricing options offered by AT&T.

¹⁸ *See* Black Decl. ¶ 6; Rouleau Decl. ¶ 8.

¹⁹ *See* Black Decl. ¶¶ 6-8. This total annual impact estimate is based on the monthly tariff-by-tariff impact estimates provided in Mr. Black's declaration. *See id.*

²⁰ *See* Rouleau Decl. ¶ 8. Mr. Rouleau's declaration also includes (1) an estimate of the schedule by which this cost increase would phase in; (2) an estimate of the tariff-by-tariff impact of the transmittals; and (3) an estimate of the impact of the transmittals on tw telecom's profitability. *See id.* ¶¶ 9-11.

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Moreover, this increase in input costs would weaken the companies' competitive position in the AT&T incumbent LEC territory because, among other things, the competitors would experience slim or negative margins when serving customers via DS1 and DS3 special access services purchased from AT&T and would be vulnerable to an AT&T price squeeze.²¹ Competitive carriers such as these would likely have no choice but to increase the retail prices that they charge their customers in AT&T's incumbent LEC footprint.²²

It is also possible that charging higher retail prices would cause the demand for a competitor's retail services to decline. If this were the case, the competitor might well fail to meet the minimum volume commitment it has made to AT&T in order to obtain circuit portability. Failing to meet such minimum volume commitments would expose the competitor to significant penalties.

D. Competitive Carriers' Limited Ability to Rely on Wholesale Ethernet *in lieu of* Wholesale DS1 and DS3 Special Access Services

It is usually not possible for competitors to avoid the harmful consequences just described by purchasing Ethernet services *in lieu of* DS1 and DS3 special access services from AT&T. Many business customers simply demand TDM-based services rather than Ethernet services.²³ Whatever their reasons, when customers make this choice, competitive carriers must rely on AT&T's TDM-based services, rather than AT&T's Ethernet services, to serve them.²⁴

Even where retail customers would prefer to purchase Ethernet services, competitive carriers are often unable to rely on AT&T's Ethernet services as a wholesale input. This is so for

²¹ See Black Decl. ¶¶ 9-11; Rouleau Decl. ¶¶ 12-14.

²² See Rouleau Decl. ¶ 12.

²³ See *id.* ¶ 5.

²⁴ See *id.*

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several reasons. *First*, AT&T does not generally permit its customers to count Ethernet services purchased from AT&T toward their circuit portability volume commitments for DS1 and DS3 special access services.²⁵ *Second*, the cost to obtain Ethernet service with a similar level of service reliability as TDM-based services can be prohibitive.²⁶ The specific prices AT&T charges for such services are subject to non-disclosure agreements, but the Commission could require AT&T to provide data on this point, which it should have readily available.²⁷ *Third*, AT&T does not reliably offer Ethernet service in approximately 45 percent of its wire centers.²⁸ This uncertainty limits competitive carriers' ability to rely on AT&T's Ethernet service to serve customers in these wire centers. *Fourth*, AT&T takes far longer to provision Ethernet services than it does to provision DS1 and DS3 special access services.²⁹ And while AT&T publishes standard installation timeframes for TDM-based services, it has been generally unwilling to provide the same information for its Ethernet services.³⁰

III. STANDARD OF REVIEW

The general rule established by FCC precedent is that a tariff filing should be suspended and investigated if there are significant issues or questions concerning the tariff's lawfulness.³¹

²⁵ See Rouleau Decl. ¶ 6.

²⁶ See Black Decl. ¶ 4.

²⁷ See *id.*

²⁸ See Rouleau Decl. ¶ 6. In addition, AT&T does not offer a wholesale Ethernet-over-copper solution. As a result, competitive carriers cannot rely on AT&T's Ethernet service unless and until AT&T has deployed fiber to a business customer's location.

²⁹ See *id.*; Black Decl. ¶ 4.

³⁰ See Black Decl. ¶ 4.

³¹ See *Bell Atlantic Telephone Cos. (Video Dialtone Tariff)*, Order, 10 FCC Rcd. 10831, ¶ 3 (1995). The Bureau suspends and investigates tariff filings when it finds, after initial review,

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Section 1.773(a) of the Commission's rules establishes more rigorous standards for suspension and investigation for specific categories of tariff filings described therein.³² The instant transmittals do not fall within any of the categories set forth in Section 1.773(a). The "significant issues or questions" standard therefore applies. This is the case with regard to both the non-price-cap services and the price-cap services encompassed by the transmittals.

A. Standard of Review for Non-Price-Cap Services

Section 1.773(a) prescribes relatively rigorous standards for suspension and investigation of tariffs submitted by (1) non-dominant carriers; (2) small incumbent LECs (those serving 50,000 or fewer access lines in a given study area³³) pursuant to Section 61.39; (3) price cap carriers filing pursuant to Section 61.49(b); and (4) price cap carriers filing pursuant to Section 61.42(d)(4)(ii).³⁴ None of these four categories encompasses AT&T's non-price-cap services. AT&T's non-price-cap services do not qualify for the first category because AT&T is classified as dominant in the provision of DS1 and DS3 special access services.³⁵ This is true even where AT&T has received Phase II pricing flexibility. AT&T's non-price-cap services do not qualify for the second category because AT&T does not serve 50,000 or fewer access lines in any given study area. And AT&T's non-price-cap services do not qualify for the third or fourth categories because the non-price-cap services are not subject to price caps. Accordingly, the Commission

that a more complete record is needed to resolve whether all or certain parts of the tariff filings are lawful. *Id.*

³² See 47 C.F.R. § 1.773(a)(ii)-(v).

³³ See *id.* § 61.39

³⁴ See *id.* § 1.773(a)(ii)-(v).

³⁵ See *supra* note 7.

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should suspend and investigate the transmittals as applicable to non-price-cap services if there are significant issues or questions concerning the transmittals' lawfulness.

B. Standard of Review for Price-Cap Services

The heightened standards of review for suspension and investigation set forth in Section 1.773(a) also do not apply to the transmittals to the extent that they encompass price-cap services. This conclusion is supported by the terms of the Commission's rules and the logic of the *LEC Price Cap Order*.

AT&T's price-cap services do not qualify for the first and second categories of tariff filings listed in Section 1.773(a) for the same reasons that AT&T's non-price-cap services do not qualify for those categories. AT&T's price-cap services also do not qualify for the fourth category of tariff filings listed in Section 1.773(a) because this category consists of price cap tariffs filed under Section 61.42(d)(4)(ii)³⁶ for the removal of corridor and interstate intraLATA toll services from the interexchange price cap basket, which is not relevant here.

This leaves only the third category of tariffs listed in Section 1.773(a), *i.e.*, tariffs filed under 61.49(b).³⁷ The instant transmittals do not qualify for this category because they propose "restructured services" under the Commission's price cap rules, and tariffs proposing such services are not filed pursuant to Section 61.49(b).

Section 61.3 of the Commission's rules defines a restructured service as "[a]n offering which represents the modification of a [price cap] service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to

³⁶ 47 C.F.R. § 61.42(d)(4)(ii).

³⁷ *Id.* § 61.49(b).

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customers.”³⁸ The Commission has explained that “eliminating” prices for components of a tariffed offering, such as rate elements, qualifies as a restructured service.³⁹ Here, AT&T is proposing to modify its service offerings by eliminating term plans longer than three years. In so doing, AT&T is introducing a more restrictive method of charging for these services. This change will not result in a net increase in the options available to customers because the tariff provisions at issue will merely offer DS1 and DS3 special access services pursuant to term plans of three years or less. There can therefore be no doubt that AT&T is proposing restructured services.

Tariffs proposing restructured services are filed pursuant to Section 61.49(e).⁴⁰ That provision, in combination with Sections 61.46(c) and 61.47(d), require that a carrier proposing a restructured service include in its tariff filing a recalculation of the carrier’s average prices to account for the restructuring (*e.g.*, by estimating the number of customers that will need to switch to a different service option as a result of the restructuring).⁴¹

In contrast, Section 61.49(b) applies to tariffs proposing new, “within-cap” and “within-band rates” that do not qualify as restructured services.⁴² In fact, Section 61.49(b) includes no reference to restructured services.⁴³ Instead of requiring an analysis of the effect of a

³⁸ *Id.* § 61.3(mm).

³⁹ *See LEC Price Cap Order* ¶ 314.

⁴⁰ 47 C.F.R. § 61.49(e).

⁴¹ *See id.* §§ 61.49(e), 61.46(c), 61.47(d).

⁴² *See id.* § 61.49(b). Within-cap rates yield an actual price index (“API”) that does not exceed the applicable price cap index (“PCI”). Within-band rates yield a service band index (“SBI”) that does not exceed the applicable pricing bands.

⁴³ *See id.*

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restructuring, Section 61.49(b) requires an analysis of why proposed new rates yield within-cap and within-band prices.⁴⁴

It follows that Section 61.49(e) and Section 61.49(b) establish mutually exclusive tariff filing requirements. Given that Section 1.773(a) defines the third category of tariffs subject to a heightened standard of review as those filed pursuant to Section 61.49(b),⁴⁵ tariffs like the instant transmittals that are governed by Section 61.49(e) do not fall within the third category.

Finally, the logic of the *LEC Price Cap Order* confirms that tariffs proposing restructured price-cap services are treated as entirely distinct from tariffs proposing non-restructured price-cap services. In the *LEC Price Cap Order*, the FCC held that a tariff filing proposing within-cap, within-band prices should be subject to a heightened standard for suspension and investigation because it was “unlikely” that rates “constrained by the price cap formula” “would be unreasonably high.”⁴⁶ Accordingly, the Commission allowed carriers to submit such filings on 14 days notice and applied the somewhat heightened standard of review for suspension and investigation set forth in Section 1.773(a)(1)(iv).⁴⁷ But the Commission held that tariff filings proposing restructured services required a different approach because they raise the possibility of unreasonable discrimination and anticompetitive effects.⁴⁸ The Commission further indicated that these “serious concerns” exist even where the restructured service results in within-cap and within-band prices:

⁴⁴ *See id.*

⁴⁵ *See* 47 C.F.R. § 1.773(a)(1)(iv).

⁴⁶ *See LEC Price Cap Order* ¶ 293.

⁴⁷ *See id.* ¶¶ 293-95.

⁴⁸ *See id.* ¶ 324.

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LEC restructured service filings must contain a showing demonstrating compliance with the price cap and banding limits of the basket to which the service belongs. We will review this showing carefully, to ensure that the restructuring did not produce unreasonable discrimination among service users nor have any other anticompetitive effects.⁴⁹

In light of this concern, the Commission required that carriers file tariffs proposing restructured services on 45 days notice, and it applied the lenient “significant issues or questions” standard for suspension and investigation.⁵⁰

IV. ARGUMENT

To address the harm to competition and business customers posed by AT&T’s proposed tariff revisions, the Bureau should suspend and investigate the instant transmittals. It should do so by finding that there are significant questions as to whether AT&T’s withdrawal of the critically important term plans for price-cap and non-price-cap services without offering an adequate substitute for those plans (1) is an unreasonable practice under Section 201(b) of the Communications Act;⁵¹ and/or (2) results in an unreasonable rate structure or other unreasonable terms and conditions under Section 201(b).⁵² In addition, as to price-cap services, the Bureau should find that AT&T has failed to comply with the tariff-filing requirements for transmittals proposing restructured services. Moreover, even if the heightened standard for suspension and investigation in Section 1.773(a)(1)(iv) of the FCC’s rules were to apply to AT&T’s price cap

⁴⁹ *Id.*

⁵⁰ *See id.* Although Congress later passed Section 204(a)(3) of the Communications Act, 47 U.S.C. § 204(a)(3), which gives LECs the right to file even tariffs proposing restructured services on 15 days notice, the Commission never questioned the soundness of its conclusion that tariffs proposing restructured services should in every other respect (including the standard of review for suspension and investigation) be treated differently from tariffs proposing non-restructured services.

⁵¹ *Id.* § 201(b).

⁵² *Id.*

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services, which it does not, the Bureau should find that that standard would be met here. Finally, the Bureau should find that AT&T's proposed tariff revisions cannot be justified as a necessary aspect of the ongoing technology transition. In fact, the proposed tariff revisions constitute nothing more than a unilateral price increase that is powerful evidence of AT&T's dominance in special access markets.

A. AT&T's Proposed Tariff Revisions Raise Significant Questions of Lawfulness As to Both Non-Price-Cap and Price-Cap Services.

The Bureau should find that AT&T's proposed tariff revisions raise significant questions of lawfulness that apply to both non-price-cap and price-cap DS1 and DS3 special access services.

First, the Bureau should find that there is a significant question as to whether AT&T's withdrawal of the widely-relied-upon discounts for term plans beyond three years would constitute an unjust and unreasonable practice under Section 201(b).⁵³ The FCC has held that the prohibition against unjust and unreasonable practices encompasses a wide range of carrier conduct. For example, it has found that unjust and unreasonable practices include access stimulation schemes,⁵⁴ unauthorized charges placed on customers' telephone bills,⁵⁵ and rural

⁵³ *See id.* ("All charges, *practices*, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, *practice*, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]") (emphasis added).

⁵⁴ *See In re AT&T Corp., Complainant, v. All American Telephone Co., E-Pinnacle Communications, Inc., ChaseCom, Defendants*, Memorandum Opinion & Order, 28 FCC Rcd. 3477 (2013).

⁵⁵ *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 4436 (2012).

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call routing practices that lead to call termination and quality problems.⁵⁶ In each of these instances, the prohibition against unjust and unreasonable practices served as a vital, flexible grant of authority for the Commission to combat carrier practices that directly or indirectly cause significant harm to end users. AT&T's proposed tariff revisions would unquestionably cause such harms. As discussed in Section II above, they would significantly increase the cost of business broadband service and inflict serious harm on competition in the provision of such services.

Importantly, even if the Bureau finds that AT&T's proposed tariff revisions would otherwise comply with price cap regulations and other tariffing rules, it may still find that they constitute an unjust and unreasonable practice under Section 201(b). This is because harm caused by carrier conduct can justify a finding that a practice is unjust and unreasonable even if the carrier charges prices that have been classified as lawful. For example, the Commission has found that access stimulation schemes are unlawful even where the schemes consist of generating traffic for lawfully-tariffed access services.⁵⁷

Second, the Bureau should find that there is a significant question as to whether AT&T's proposed tariff revisions would render its special access rate structures or other terms and conditions unreasonable under Section 201(b). The Bureau routinely suspends and investigates tariff filings that raise significant questions of lawfulness regarding the reasonableness of

⁵⁶ See *Developing an Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling, 27 FCC Rcd. 1351 (2012).

⁵⁷ See, e.g., *AT&T Corp.*, *supra* note 54 at ¶ 31 (“Defendants’ assertion that their billings to AT&T were lawful because they benchmarked their rates in compliance with . . . the Commission’s rules is irrelevant.”).

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incumbent LECs' special access rate structures and terms and conditions.⁵⁸ AT&T's proposed tariff revisions would yield rate structures and terms and conditions that impose substantial harm on competition in the market for business broadband services and on business customers in AT&T's incumbent LEC territory. This is of course because the rate structure would effectively impose a large increase in the cost of essential inputs. Additionally, as a competitive carrier seeks to pass through those increased costs to business customers, the volume of demand for its retail services and the special access services it purchases to provide them could decline substantially. The decline in the competitor's special access purchases could in turn cause the competitor to fall short of the volume commitments it has made in order to receive circuit portability, thereby exposing the competitor to substantial shortfall penalties. Thus, by effectively increasing the underlying prices for DS1 and DS3 special access services, AT&T may also be effectively imposing further financial penalties on large purchasers. This is patently unreasonable.

Each of these issues requires thorough scrutiny by the Bureau. The Bureau should suspend and investigate the instant transmittals in order to develop a record sufficient to determine whether the AT&T's proposed tariff revisions are lawful.

⁵⁸ See, e.g., *Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, Suspension Order, 12 FCC Rcd. 4201, ¶ 2 (1997) (“[W]e find that Transmittal 2622 [regarding Southwestern Bell's High Capacity Term Pricing Plan] raises significant issues of lawfulness regarding the rate levels, rate structures, and terms and conditions of SWBT's access service. We therefore suspend Transmittal No. 2622 for five months and initiate an investigation into the lawfulness of its provisions.”); *Ameritech Operating Companies Revisions to Tariff FCC No. 2 et al.*, Order, 8 FCC Rcd. 4589, ¶ 7 (1993) (“[W]e find the LECs' expanded interconnection tariffs raise significant questions of lawfulness regarding cost allocations, resulting rate levels, rate structures, and terms and conditions of service that warrant suspension for one day, investigation, and imposition of an accounting order.”).

B. AT&T Has Failed To Demonstrate That The Rates for Its Proposed Restructured Price-Cap Services Would Not Exceed the Applicable Price Caps and Pricing Bands.

As explained in Section III above, the FCC's rules impose clear requirements on carriers proposing to restructure price-cap services.⁵⁹ Specifically, the carrier must recalculate its average prices to account for the restructuring and demonstrate that its proposed rate structure would not yield APIs that exceed the applicable PCIs (*i.e.*, that the restructuring would yield rates that are within-cap) and would not yield SBIs that exceed the applicable pricing bands (*i.e.*, that the restructuring would yield rates that are within-band). This showing requires "the conversion of existing rates into rates of equivalent value under the proposed structure, and then the comparison of the existing rates that have been converted to reflect restructuring to the proposed restructured rates."⁶⁰ This "may require the use of carrier data and estimation techniques to assign customers of the preexisting service to those services (including the new restructured service) that will remain or become available after the restructuring."⁶¹

In the current context, this means that AT&T must estimate the extent to which customers that had purchased special access services pursuant to its lower-priced term plans longer than three years would instead need to purchase such services pursuant to its higher-priced plans of three years or less. AT&T must then demonstrate that its revised APIs would not exceed the PCIs for the special access basket and that its revised SBIs for DS1 and DS3 special access services would not exceed the applicable pricing bands.

⁵⁹ See 47 C.F.R. §§ 61.46(c), 61.47(d), 61.49(e).

⁶⁰ *Id.* § 61.46(c); see also *id.* § 61.47(d).

⁶¹ *Id.* § 61.46(c); see also *id.* § 61.47(d).

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AT&T has failed to make such a showing. AT&T's APIs for the special access basket and its SBIs for DS1 and DS3 special access services are based on averages of the rates available under each of its term plans, weighted by the demand for each of those plans.⁶² In order to properly account for the impact of AT&T's proposed restructuring on its APIs and SBIs, the Commission would be required to estimate the number of customers that will need to switch to higher-priced circuits as a result of the restructuring. However, AT&T has not provided any materials with its transmittals that would assist the FCC in doing so.

Rather, AT&T submitted calculations in which it claims that its APIs and SBIs will not change as a result of the transmittals despite the impending effective rate increase. This approach is flatly inconsistent with how AT&T itself calculates its APIs and SBIs—and with how the Commission's rules require these metrics to be calculated.⁶³ AT&T's incongruent claim is a prime example of why the FCC requires an additional showing for restructured services—to account for the consequences of tariff changes that are not fully captured by the price cap formulas.⁶⁴ AT&T's failure to make this additional showing is an independently sufficient basis for suspending and investigating its transmittals to the extent they encompass price-cap services.

⁶² See, e.g., Southwestern Bell Telephone Companies, Tariff F.C.C. No. 73, Transmittal No. 3375, Description and Justification, Exhibits 6.1 & 6.2 (filed June 24, 2013), *available at* https://apps.fcc.gov/etfs/public/view_a_141044.action?id=141044 (calculating SWBT's API for the special access basket and SBIs for DS1 and DS3 special access services).

⁶³ It also suggests that AT&T could eliminate all of its term plans without having any effect on its APIs and SBIs, notwithstanding that AT&T justifies its current rates by expressly relying on the fact that customers purchase services under the discounts associated with those plans.

⁶⁴ See *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order, 4 FCC Rcd. 2873, ¶ 518 (1989) (“*AT&T Price Cap Order*”) (“[R]estructured services must receive special treatment because they present a possible means of avoiding the price cap pricing restrictions.”).

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C. Suspension and Investigation of the Transmittals as Applicable to AT&T's Price-Cap Services Would Be Warranted Even if the Bureau Were to Apply the Standard of Review in Section 1.773(a)(1)(iv).

AT&T may argue that the suspension and investigation standard in Section 1.773(a)(1)(iv) of the Commission's rules⁶⁵ should apply to the services it offers subject to price caps. As explained in Section III above, the Commission should reject this argument. But even if the Bureau were to apply the standard set forth in Section 1.773(a)(1)(iv), suspension and investigation would nonetheless be warranted.

Under Section 1.773(a)(1)(iv), the Bureau may suspend and investigate a within-cap, within-band tariff filing if it finds that (1) "there is a high probability the tariff would be found unlawful after investigation"; (2) "the suspension would not substantially harm other interested parties"; (3) "irreparable injury will result if the tariff filing is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest."⁶⁶ All four parts of this test are satisfied here.

First, there is a high probability that AT&T's proposed tariff revisions will be deemed unlawful in the portions of its incumbent LEC territory where its DS1 and DS3 special access services are subject to price cap regulation. As discussed in Section IV.A above, there are significant questions of lawfulness regarding whether (1) AT&T's proposed tariff revisions constitute an unjust and unreasonable practice; and (2) AT&T's proposed tariff revisions would render its special access rate structures or other terms and conditions unreasonable. These questions apply fully to AT&T's price-cap services. In addition, as discussed in Section IV.B above, AT&T has not met the FCC's minimum requirements for price cap carriers proposing

⁶⁵ 47 C.F.R. § 1.773(a)(1)(iv).

⁶⁶ *Id.*

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restructured services. There is a high probability that the Commission will find that the instant transmittals are unlawful on at least one of these grounds.

Second, suspension and investigation of AT&T's proposed tariff revisions would not harm other interested parties. To the contrary, this action would prevent (or at least delay) significant harm to purchasers of special access services and downstream business customers. In addition, AT&T itself would not be harmed. It would be free to continue charging the rates that it currently charges for special access services, and it would not sustain any revenue losses or cost increases. Furthermore, any claim by AT&T that suspension and investigation would impede its ability to efficiently transition its network from providing TDM-based services to providing only packet-based services should be viewed with considerable skepticism. As discussed in Section II above, AT&T's own business practices (*e.g.*, special access lock-up arrangements, high Ethernet prices, lack of reliable Ethernet availability, and slow Ethernet provisioning) have contributed significantly to competitors' inability to accelerate the transition to packet-based services. In addition, as discussed below, the tariff revisions as proposed by AT&T are in no way necessary to promote the transition to packet-based services. In any event, suspension and investigation would last no longer than five months after AT&T's proposed effective date for the revisions,⁶⁷ hardly a material delay in a process that is likely to take a number of years.

Third, AT&T's special access customers and downstream retail business customers will suffer irreparable injury if the instant transmittals are not suspended. As explained in Section II above, AT&T's proposed tariff revisions would cause AT&T's special access customers, such as competitive carriers, to pay AT&T significantly more for DS1 and DS3 special access services.

⁶⁷ See U.S.C. § 204(a)(1) (authorizing the Commission to suspend a tariff filing "but not for a period longer than five months beyond the time when it would otherwise go into effect").

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If competitive carriers pass these increased costs through to downstream business customers in AT&T's incumbent LEC footprint, these businesses customers will incur additional costs as well. In addition, as a result of lower demand for their services, competitive carriers could incur shortfall penalties for failing to meet the minimum volume commitments for obtaining circuit portability.

This harm to special access customers and downstream retail business customers would be irreparable because of AT&T's choice to file its tariff revisions pursuant to Section 204(a)(3).⁶⁸ Under that provision, if the Bureau does not suspend the instant transmittals within 15 days of their filing, they will be "deemed lawful."⁶⁹ In that event, even if the tariff revisions were subsequently found to be unlawful in a Section 205 investigation or in a Section 208 complaint proceeding, AT&T's special access customers and downstream retail business customers would not be able to obtain refunds for paying AT&T's increased rates (or the resulting increased rates for downstream business broadband services) during the time that they are considered lawful.⁷⁰ Only by suspending and investigating the tariff filings can the Bureau

⁶⁸ *Id.* § 204(a)(3).

⁶⁹ *See id.*

⁷⁰ *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 2170, ¶ 20 (1997) ("*Streamlined Tariff Order*") (adopting an interpretation of "deemed lawful" that precludes refund liability). When the FCC first adopted its four-part test for overcoming the presumption against suspension of within-cap, within-band filings by price cap LECs, it acknowledged that irreparable harm "usually means that the party . . . must be facing an injury which is not compensable through money damages." *AT&T Price Cap Order* ¶ 457 (1989) (applying the four-part test to AT&T tariff filings); *see also LEC Price Cap Order*, ¶ 293 (applying the four-part test to price-cap LEC tariff filings). At that time, a mere increase in rates was less likely to meet that standard because, if a tariff was subsequently found to be unlawful, an injured party could seek a refund for the unlawful portion of the rates it paid. However, as a result of Congress's adoption of Section 204(a)(3) and the FCC's implementation thereof in the *Streamlined Tariff Order*, this is no longer the case.

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strip them of their “deemed lawful” status, thereby making retrospective remedies available.⁷¹

In addition, competitive carriers that increase their retail prices stand to lose many new business customers to AT&T.⁷² This harm would be irreparable as well because there is a high probability that these carriers would be unable to win these customers back in the future. This is so because (1) these customers would likely purchase services from AT&T subject to term commitments; and (2) business customers are sensitive to the cost and disruption associated with switching service providers and therefore tend to purchase services from the same provider for a long period of time.⁷³

Fourth, suspension and investigation would not otherwise be contrary to the public interest. In fact, suspension and investigation would further the public interest by preventing the imminent harm to competition in the markets for business broadband services and the irreparable injury to competitive carriers and business customers. As to AT&T, the only practical effect of suspension and investigation would be to continue charging its current special access rates during the period of investigation. Moreover, as discussed below, suspension and investigation would not inhibit the ongoing transition from TDM-based services to packet-based services.

D. The Proposed Tariff Revisions Cannot be Justified as a Necessary Aspect of the Ongoing Technology Transition.

AT&T’s proposed tariff revisions are not necessary to promote the ongoing transition from TDM-based services to packet-based services. If AT&T were solely seeking to further that transition, it could have simply eliminated its term plans beyond three years without eliminating

⁷¹ See *Streamlined Tariff Order* ¶ 19 (holding that tariffs that the Commission suspends and investigates are not “deemed lawful”).

⁷² See Black Decl. ¶ 10; Rouleau Decl. ¶ 13.

⁷³ See Black Decl. ¶ 10; Rouleau Decl. ¶ 13.

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the associated discounts. In other words, AT&T could have proposed to offer discounts on its three-year term plans that are equivalent to the discounts currently available under its existing term plans longer than three years (*e.g.*, five-year term plans). It could have also changed its volume commitment plans so as not to force customers to continue purchasing DS1 and DS3 special access services in order to obtain benefits such as circuit portability. AT&T could have even retained the five-year term plans in their current form until 2015 and only eliminated the seven-year term plans now, which would have still allowed it to meet its goal of transitioning to all packet-based services by 2020. This approach would not likely have resulted in significant harm at this time because there do not appear to be many special access services purchased under the seven-year plans. Of course, AT&T did none of these things. Rather, AT&T chose to “promote the transition” by effectively imposing a unilateral price increase.

This approach makes AT&T’s long-term plan clear. If permitted, AT&T will iteratively discontinue its most viable TDM-based special access service offerings, effectively increasing its prices for these services and weakening its competitors.⁷⁴ As a result, business customers will have few competitive choices and eventually will have no alternative but to purchase Ethernet services from AT&T. Thus, competition in the market for business broadband services (and

⁷⁴ In a letter to its customers, AT&T stated that its proposed tariff revisions are “an initial step” toward converting its network to provide all packet-based services by 2020. *See* AT&T Accessible Letter (dated Oct. 25, 2013), *available at* https://clec.att.com/clec/access_letters/view.cfm?CPSWorkplace/getContent?objectStoreName=Accessible...Letters&objectType=document&guestid=P8guest&id={066AE411-7B5F-4804-89F2-1B5D31458D55}; *see also* Ryan Knutson, “Rivals Protest AT&T Rate Shift,” *Wall Street Journal* (Oct. 22, 2013), *available at* <http://online.wsj.com/news/articles/SB10001424052702303672404579152003883090792> (citing an AT&T spokesman who explained that that AT&T’s proposed tariff revisions are “an effort to wean customers off TDM-based services”).

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business customers themselves) will be at the mercy of AT&T's unchecked dominance.⁷⁵ The Commission should promptly update its competition policies to prevent such an outcome,⁷⁶ and it should not allow AT&T to use the instant transmittals to push the industry closer toward it.

E. The Proposed Tariff Revisions Provide Strong Evidence that AT&T Possesses Market Power in the Provision of DS1 and DS3 Special Access Services.

Consistent with the economics literature, the FCC defines market power as “the control a firm can exercise in setting the price of its output.”⁷⁷ A firm with market power is able to unilaterally “set[] price above competitive costs in order to earn supranormal profits,” whereas a firm without market power “must take the market price as given, because if it raises price it will face an unacceptable loss of business.”⁷⁸

AT&T's behavior is clearly consistent with that of a firm possessing market power. AT&T has argued that its special access services face “explod[ing]” levels of intermodal competition from sources such as cable companies' “best efforts” broadband services,⁷⁹ but its

⁷⁵ AT&T and other incumbent LECs are dominant in the provision of non-TDM-based special access services such as Ethernet. *See* Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Docket No. 05-25 *et al.*, at 30-56 (filed Nov. 2, 2012).

⁷⁶ *See* Letter from Thomas Jones, Counsel for Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc, and tw telecom inc. to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-90 *et al.* (filed Dec. 4, 2012) (explaining the need for the FCC to update its competition policies in light of the transition to packet-based services).

⁷⁷ *See Competitive Common Carrier Services (Classification of Carriers)*, First Report and Order, 85 FCC 2d 1, ¶ 56 (1980) (“*Competitive Carrier First Report and Order*”) (citing F. M. Scherer, *Industrial Market Structure and Economic Performance* (2d Ed. 1980)).

⁷⁸ *Competitive Carrier First Report and Order* ¶ 56.

⁷⁹ *See, e.g.*, AT&T Comments, WC Dkt. No. 05-25 *et al.*, at 18 (filed Feb. 11, 2013). Despite AT&T's claim, “best efforts” services are simply not substitutes for special access services. *See* BT Americas *et al.* Feb. 11, 2013 Comments at 50-57.

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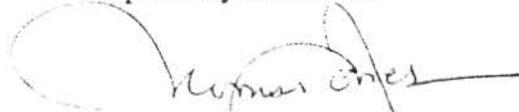
proposed tariff revisions belie this claim. If AT&T actually faced such competition, it would not have the incentive or the ability to impose such a significant, unilateral price increase on its special access customers. Doing so would cause many of its special access customers to buy services from AT&T's supposed competitors rather than AT&T, making such an increase unprofitable. But this is clearly not the case. AT&T's conduct demonstrates that it need not take the market price; it can exercise control over price without fear of losing significant market share.

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V. CONCLUSION

For these reasons, the Bureau should suspend and investigate the instant transmittals. Doing so would give the Bureau time to develop a record sufficient to determine whether AT&T's proposed tariff revisions are lawful and to design appropriate remedies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", written over a large, faint circular stamp or watermark.

Thomas Jones
Matthew Jones
WILLKIE FARR & GALLAGHER LLP
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(202) 303-1000

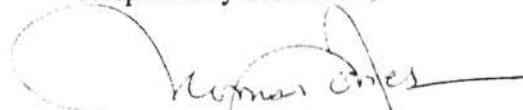
*Counsel for Cbeyond, Integra, Level 3 and
tw telecom*

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V. CONCLUSION

For these reasons, the Bureau should suspend and investigate the instant transmittals. Doing so would give the Bureau time to develop a record sufficient to determine whether AT&T's proposed tariff revisions are lawful and to design appropriate remedies.

Respectfully submitted,



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*Counsel for Cbeyond, Integra, Level 3 and
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APPENDIX A

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Ameritech Operating Companies	)	Transmittal No. 1803
Tariff F.C.C. No. 2)	
BellSouth Telecommunications	)	Transmittal No. 71
Tariff F.C.C. No. 1)	
Nevada Bell Telephone Company	)	Transmittal No. 254
Tariff F.C.C. No. 1)	
Pacific Bell Telephone Company	)	Transmittal No. 498
Tariff F.C.C. No. 1)	
Southern New England Telephone Company	)	Transmittal No. 1061
Tariff F.C.C. No. 39)	
Southwestern Bell Telephone Company	)	Transmittal No. 3383
Tariff F.C.C. No. 73)	

**DECLARATION OF GARY BLACK
ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC**

1. I, Gary Black, am Vice President, Carrier Relations for the North American Off-Net Access Planning organization of Level 3 Communications, LLC (“Level 3”). I am responsible for managing Level 3’s relationships with the service providers from which Level 3 purchases wholesale last-mile access services in North America. My responsibilities include contract management, cost management and ensuring vendor compliance with negotiated agreements and regulated conditions.

2. Level 3 provides local, national and global communications services to enterprise, government and carrier customers. Level 3’s comprehensive portfolio of secure, managed solutions includes fiber and infrastructure solutions; IP-based voice and data communications;

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wide-area Ethernet services; video and content distribution; data center services; and cloud-based solutions. Level 3 serves customers in more than 500 markets in 55 countries over a global services platform, which is anchored by Level 3's own fiber networks on three continents and connected by extensive undersea facilities. In the United States, Level 3 relies heavily on special access services provided by the incumbent LECs, including AT&T, in order to supplement Level 3's own network facilities.

3. The purpose of this declaration is to describe (1) the extent to which Level 3 relies on AT&T's DS1 and DS3 special access services purchased subject to discounts associated with terms plans of greater than three years as wholesale inputs to the services that Level 3 provides to its retail customers; (2) the harmful effect that AT&T's proposed tariff revisions, which would eliminate such discounts, would have on Level 3 if the FCC were to allow the revisions to go into effect; and (3) the harmful effect that AT&T's proposed tariff revisions would have on competition in the business broadband market and retail business customers if the FCC were to allow the revisions to go into effect.

4. Level 3 often seeks to serve business customers in locations where the company neither owns a last mile connection nor is able to deploy one efficiently. In order to provide services to such retail customers, Level 3 must lease DS1 and DS3 last-mile facilities, often together with interoffice transport facilities, from third parties. AT&T owns the only last mile TDM facility to the vast majority of Level 3's retail customer locations in the AT&T incumbent LEC territory. As a result, in order to provide services to business customers in that territory, Level 3 often has no choice but to purchase DS1 and DS3 services from AT&T. In many situations, Level 3 is unable to rely on Ethernet service purchased from AT&T as an input to the services that Level 3 provides to its retail customers, even when those customers purchase

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Ethernet services from Level 3. One common reason is that the cost to obtain Ethernet service with a similar level of service reliability as TDM-based services can be prohibitive. The specific prices AT&T has offered for such services are subject to non-disclosure agreements, but the Commission could require AT&T to provide data on this point, which it should have readily available. In addition, AT&T publishes standard installation timeframes for TDM-based services, but has been generally unwilling to provide the same information for its Ethernet services, despite Level 3's requests for the same. Moreover, Level 3's experience is that installation timeframes can be significantly longer for Ethernet services than for TDM-based services.

5. Level 3 would like to purchase DS1 and DS3 special access services from AT&T on a month-to-month basis, but AT&T's month-to-month rates are so high as to be cost prohibitive. In order to obtain discounts off of the month-to-month rates that are large enough to yield commercially viable rates, Level 3 must purchase these services under term plans that are longer than three years. Outside of the nine-state former BellSouth territory (which I address separately below), Level 3 currently purchases [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent and [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent respectively of the DS1 and DS3 special access services that it purchases from AT&T incumbent LECs under five-year term plans. As a general matter, Level 3 purchases a higher proportion of DS1s on five-year terms than DS3s because AT&T offers broad "portability" plans for DS1s. Portability plans permit Level 3 to terminate individual circuits before the end of the circuit's five-year term without paying early termination charges, in exchange for agreeing to lock up a specified quantity of demand for a number of years. For DS3s, for which broad portability plans are not available, Level 3's decision regarding the length of the term to commit

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to depends on a number of factors, including, among other things, the early termination penalty provisions in the relevant tariff (*e.g.*, the penalties for terminating early are more severe in some regions than in others) and the needs of the customer to be supported using the purchased facilities. The following charts set forth the volumes of DS1 and DS3 special access services that Level 3 purchases on various term lengths in each of AT&T's incumbent LEC territories outside of the nine-state former BellSouth territory. The data provided here is current as of July 31, 2013.

[BEGIN CONFIDENTIAL]

<u>Incumbent LEC Territory</u>	<u>Commitment Term</u>	<u>DS1 Purchase Volume</u>
Ameritech Tariff F.C.C. No. 2	[REDACTED]	[REDACTED]
Nevada Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Pacific Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Southern New England Telephone Company Tariff F.C.C. No. 39	[REDACTED]	[REDACTED]

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<p>Southwestern Bell Tariff F.C.C. No. 73</p>		
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<u>Incumbent LEC Territory</u>	<u>Commitment Term</u>	<u>DS3 Purchase Volume</u>
<p>Ameritech Tariff F.C.C. No. 2</p>		
<p>Nevada Bell Tariff F.C.C. No. 1</p>		
<p>Pacific Bell Tariff F.C.C. No. 1</p>		
<p>Southern New England Telephone Company Tariff F.C.C. No. 39</p>		
<p>Southwestern Bell Tariff F.C.C. No. 73</p>		

[END CONFIDENTIAL]

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6. If AT&T's proposed tariff revisions go into effect, the term plans longer than three years identified above (and the associated discounts) will no longer be available to Level 3 and other purchasers of AT&T's DS1 and DS3 special access services. As a result, Level 3 would have no choice but to purchase DS1 and DS3 special access services from AT&T under, at the longest, three-year term plans. Unfortunately, AT&T's rates for DS1 and DS3 special access services purchased on three-year term plans are significantly higher than its rates for those purchased on longer-term plans. As a result of this disparity, if AT&T's proposed tariff revisions were to go into effect, the prices that Level 3 pays would increase significantly. The following chart sets forth the dollar amounts and percentages by which Level 3 estimates the total amount it pays to AT&T will increase for DS1 and DS3 special access services that it purchases under each of AT&T's affected tariffs outside of the former BellSouth region. These estimates reflect the increase between the total monthly recurring charges Level 3 currently pays for DS1 and DS3 services, including such services purchased on terms of all lengths, and the total monthly recurring charges Level 3 estimates it would pay for those services today if terms longer than three years were not available.

[BEGIN CONFIDENTIAL]

Incumbent LEC Tariff	DS1 Price Increase		DS3 Price Increase	
Ameritech Tariff F.C.C. No. 2	████████	██	████████	██
Nevada Bell Tariff F.C.C. No. 1	████████	██	████████	██
Pacific Bell Tariff F.C.C. No. 1	████████	██	████████	██
Southern New England Telephone Company Tariff F.C.C. No. 39	████████	██	████████	██

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Southwestern Bell Tariff F.C.C. No. 73	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
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[END CONFIDENTIAL]

7. In the nine-state former BellSouth territory, AT&T incumbent LECs offer discounts for DS1 and DS3 services on terms that differ somewhat from those offered in other regions. In the former BellSouth region, Level 3 purchases DS1 services predominantly under two separate discount plans, the Area Commitment Plan (ACP) and the DS1 Channel Services Payment Plan (CSPP). Level 3 purchases DS1 special access services under both the ACP and the CSPP in a manner designed to maximize its realized discounts while providing adequate flexibility and minimizing potential early termination penalties. The ACP is a type of demand lock-up provision that provides that a customer such as Level 3 may commit to purchasing a specified volume of circuits for a specified period of time and receive a discount. Two different discount levels are available under the ACP. Plan A, which is available in terms of between 24 months and 48 months, offers a lesser discount, while Plan B, which is available for longer terms, offers a greater discount. The elimination of terms of greater than 36 months will eliminate all Plan B discounts but will not eliminate Plan A, although the maximum term available under Plan A will decrease to 36 months. Level 3 currently purchases DS1s under [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

Level 3 also purchases DS1s under the CSPP. The CSPP does not require a volume-based lock-up, but instead, in a manner similar to plans available in AT&T's other incumbent LEC regions, offers a discount for a specified circuit depending on the term length a customer is willing to commit to for that circuit. There are two discount levels available under the CSPP, Plan A,

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which offers terms of between 24 and 48 months, and Plan B, which offers terms of between 49 and 72 months. Unlike in other AT&T incumbent LEC regions, however, a customer can, under the existing tariff, qualify for the greater Plan B-level discount for a circuit on a less than 49-month term in certain circumstances. When a circuit under the CSPP is “re-termed” (when an existing term commitment is replaced by a new term under the provisions of the tariff), the discount applied to the price for that circuit is determined based on the time the circuit has already been in service and the term of the new commitment made by the customer, under section 2.4.8(A)(7) of the BellSouth tariff. In the BellSouth region, AT&T’s proposed tariff will eliminate all Plan B discounts, but will not eliminate Plan A, although the maximum term available under Plan A will decrease to 36 months. As of July 31, 2013, Level 3 purchases

[BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[END CONFIDENTIAL]. Level 3 estimates that the elimination of terms greater than 36 months would cause the prices it pays for DS1s in the BellSouth region to increase by an average of **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** percent, or a total of **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**. This estimate reflects the increase between the monthly recurring charges Level 3 currently pays for DS1 services and the monthly recurring charges Level 3 estimates it would pay for those services today if the discounts associated with commitment terms greater than 36 months were eliminated.

8. Level 3 purchases DS3 services in the nine-state former BellSouth territory predominantly under the Transport Payment Plan (TPP). There are three discount levels

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available under the DS3 TPP: Plan A, available for terms of 12-36 months, Plan B, available for terms of 37-60 months, and Plan C, available for terms of 61-96 months, with greater discounts available for the plans with longer terms. The elimination of terms of greater than 36 months will eliminate all DS3 Plan B and Plan C discounts. As of July 31, 2013, Level 3 purchases

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. Level 3 estimates that the

elimination of terms greater than 36 months would cause the prices it pays for DS3s in the

BellSouth region to increase by an average of [BEGIN CONFIDENTIAL] [REDACTED] [END

CONFIDENTIAL] percent, or a total of [BEGIN CONFIDENTIAL] [REDACTED] [END

CONFIDENTIAL]. This estimate reflects the increase between the monthly recurring charges

Level 3 currently pays for DS3 services and the monthly recurring charges Level 3 estimates it

would pay for those services today if the discounts associated with commitment terms greater

than 36 months were eliminated.

9. The increases in prices that Level 3 pays AT&T for special access services described in this declaration would harm competition in the retail business services markets.

Where Level 3 sells downstream retail services via DS1 or DS3 special access services

purchased from AT&T, Level 3 [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL],

making the overall Level 3 price for service offerings which include these access services far less

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competitive. This is particularly true when Level 3's competition for the relevant customer is AT&T.

10. Of course, Level 3 may lose customers to AT&T if it increases its retail prices. This is especially likely in the case of new business customers for which AT&T and Level 3 (with its newly increased rates) will compete. If Level 3 loses some of these new business customers to AT&T, there is a high probability that Level 3 will not be able to win these business customers back in the future. This is because (1) these customers would likely purchase services from AT&T pursuant to term commitments; and (2) business customers are sensitive to the cost and disruption associated with switching service providers and therefore tend to purchase services the same provider for a long period of time.

11. AT&T is well aware that Level 3 and other competitors have no choice but to continue purchasing these vital wholesale inputs from AT&T in order to serve many business customer locations. AT&T therefore has the incentive and ability to raise Level 3's costs so that it can undercut Level 3's prices and reduce Level 3's margins. AT&T's proposed tariff revisions, if allowed to go into effect, would likely yield this result, weakening Level 3's ability to compete in the retail business services markets.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Gary Black

Dated: 11/26/2013

APPENDIX B

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Ameritech Operating Companies Tariff F.C.C. No. 2	)	Transmittal No. 1083
)	
BellSouth Telecommunications Tariff F.C.C. No. 1	)	Transmittal No. 71
)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 254
)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 498
)	
Southern New England Telephone Company Tariff F.C.C. No. 39	)	Transmittal No. 1061
)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3383
)	

DECLARATION OF MICHAEL ROULEAU ON BEHALF OF TW TELECOM INC.

1. I, Michael Rouleau, am Senior Vice President – Business Development and Public Policy for tw telecom inc. (“TWTC”). Through this position, I am responsible for managing customer relationships, providing critical input into TWTC’s strategic direction, integrating new services and technologies, and developing TWTC’s public policy and advocacy.

2. TWTC, headquartered in Littleton, Colorado, is a leading national provider of managed services, including Business Ethernet and converged and IP VPN solutions for enterprises throughout the United States and globally. TWTC also delivers secure, scalable private connections for transport data networking, Internet access, voice, VPN, VoIP and security to large organizations and communications services companies.

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3. The purpose of this declaration is to describe (1) the extent to which TWTC relies on AT&T's DS1 and DS3 special access services purchased subject to discounts associated with terms plans of five years as wholesale inputs to the services that TWTC provides to its retail customers; (2) the harmful effect that AT&T's proposed tariff revisions, which would eliminate such discounts, would have on TWTC and its end user customers if the FCC were to allow the revisions to go into effect; and (3) the harmful effect that AT&T's proposed tariff revisions would have on competition in the business broadband market and retail business customers if the FCC were to allow the revisions to go into effect.

4. TWTC often seeks to serve business customers in locations where the company neither owns a last mile connection nor is able to deploy one efficiently. In order to provide services to such retail customers, TWTC must often lease DS1 and DS3 last-mile facilities, often together with interoffice transport facilities, from third parties. AT&T owns the only last mile facility to the vast majority of TWTC's retail customer locations in the AT&T incumbent LEC territory. As a result, in order to provide services to business customers in that territory, TWTC often has no choice but to lease DS1 and DS3 facilities from AT&T. Due to a number of factors, DS1s and DS3s are often not available as a legal or practical matter as unbundled network elements in the locations where TWTC needs to lease such facilities from AT&T in AT&T's incumbent LEC territory. TWTC must therefore lease these facilities as special access services under AT&T's FCC tariffs.

5. TWTC is generally unable to rely on Ethernet service purchased from AT&T as an input to the services that TWTC provides to its retail customers. To begin with, many of TWTC's retail customers simply demand TDM-based services rather than Ethernet services. In fact, TWTC uses a significant majority of the TDM-based services it purchases from AT&T to

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3. The purpose of this declaration is to describe (1) the extent to which TWTC relies on AT&T's DS1 and DS3 special access services purchased subject to discounts associated with terms plans of five years as wholesale inputs to the services that TWTC provides to its retail customers; (2) the harmful effect that AT&T's proposed tariff revisions, which would eliminate such discounts, would have on TWTC and its end user customers if the FCC were to allow the revisions to go into effect; and (3) the harmful effect that AT&T's proposed tariff revisions would have on competition in the business broadband market and retail business customers if the FCC were to allow the revisions to go into effect.

4. TWTC often seeks to serve business customers in locations where the company neither owns a last mile connection nor is able to deploy one efficiently. In order to provide services to such retail customers, TWTC must often lease DS1 and DS3 last-mile facilities, often together with interoffice transport facilities, from third parties. AT&T owns the only last mile facility to the vast majority of TWTC's retail customer locations in the AT&T incumbent LEC territory. As a result, in order to provide services to business customers in that territory, TWTC often has no choice but to lease DS1 and DS3 facilities from AT&T. Due to a number of factors, DS1s and DS3s are often not available as a legal or practical matter as unbundled network elements in the locations where TWTC needs to lease such facilities from AT&T in AT&T's incumbent LEC territory. TWTC must therefore lease these facilities as special access services under AT&T's FCC tariffs.

5. TWTC is generally unable to rely on Ethernet service purchased from AT&T as an input to the services that TWTC provides to its retail customers. To begin with, many of TWTC's retail customers simply demand TDM-based services rather than Ethernet services. In fact, TWTC uses a significant majority of the TDM-based services it purchases from AT&T to

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provide TDM-based services to its retail customers. Specifically, TWTC uses approximately [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent of the DS1 special access services and [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent of the DS3 special access services that it purchases from AT&T to provide TDM-based services to its retail customers. In contrast, TWTC uses only [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent of the DS1 special access services and [BEGIN CONFIDENTIAL] ■ [END CONFIDENTIAL] percent of the DS3 special access services that it purchases from AT&T to provide Ethernet services to its retail customers. TWTC's customers have a wide range of reasons for purchasing TDM-based services rather than Ethernet services. But whatever their reasons, when customers make this choice, TWTC must rely on AT&T's TDM-based services, rather than AT&T's Ethernet services, to serve them.

6. Even where TWTC's retail customers would prefer to purchase Ethernet services, TWTC is often unable to rely on AT&T's Ethernet service as a wholesale input for several reasons. *First*, AT&T's volume commitment requirements for DS1 and DS3 special access services prevent TWTC from upgrading a significant number of these services to Ethernet. This is so because, in most of its incumbent LEC territories, AT&T does not permit its customers to count Ethernet services purchased from AT&T toward these volume commitments. Accordingly, if TWTC were to attempt to upgrade a significant number of DS1s and DS3s to Ethernet, AT&T would impose substantial shortfall penalties. *Second*, AT&T does not offer reliably available Ethernet service in many geographic areas. AT&T classifies the wire centers in its incumbent LEC region as "Green," "Yellow," or "Not Available." In Green wire centers, which account for approximately 55 percent of AT&T's wire centers, AT&T offers Ethernet service. In Yellow wire centers, which account for approximately 42 percent of AT&T's wire

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2021	[REDACTED]
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[END CONFIDENTIAL]

10. Furthermore, this cost increase would be distributed among each of AT&T's incumbent LEC territories in which TWTC purchases DS1 and DS3 special access services. The following chart sets forth the annual amount and percentage by which TWTC estimates that the prices it pays to AT&T under each of AT&T's affected tariffs would increase:

[BEGIN CONFIDENTIAL]

<u>Incumbent LEC Tariff</u>	<u>DS1 Price Increase</u>	
Ameritech Tariff F.C.C. No. 2	[REDACTED]	[REDACTED]
BellSouth Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Nevada Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Pacific Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Southern New England Telephone Company Tariff F.C.C. No. 39	[REDACTED]	[REDACTED]
Southwestern Bell Tariff F.C.C. No. 73	[REDACTED]	[REDACTED]

<u>Incumbent LEC Tariff</u>	<u>DS3 Price Increase</u>	
Ameritech Tariff F.C.C. No. 2	[REDACTED]	[REDACTED]
BellSouth Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Nevada Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Pacific Bell Tariff F.C.C. No. 1	[REDACTED]	[REDACTED]
Southern New England Telephone	[REDACTED]	[REDACTED]

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Company Tariff F.C.C. No. 39		
Southwestern Bell Tariff F.C.C. No. 73		

[END CONFIDENTIAL]

11. This cost increase would significantly harm TWTC's profitability. The following chart sets forth the amounts by which TWTC's net income and levered free cash flow would be impacted:

[BEGIN CONFIDENTIAL]

	<u>YTD as of June 2013 (in thousands)</u>	<u>YTD as of June 2013 Adjusted (in thousands)</u>	<u>Variance</u>
Net Income			
Levered Free Cash Flow			

[END CONFIDENTIAL]

12. The increases in prices that TWTC pays AT&T for special access services described in this declaration would harm competition in the retail business services market. Where TWTC sells downstream retail services via DS1 and DS3 special access services purchased from AT&T under five-year plans in the Ameritech, BellSouth, Nevada Bell, Pacific Bell, and Southwestern Bell incumbent LEC territories, TWTC's profit margins are already very thin. Those margins would diminish significantly, and in some cases likely disappear entirely, if TWTC were to provide services to end user customers at its current retail prices via DS1 and

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DS3 special access services purchased under three-year discount plans in these territories. Thus, if AT&T's proposed tariff revisions were to take effect, TWTC would likely have no choice but to seek increases to the retail prices that it charges its customers for these services in AT&T's incumbent LEC footprint.

13. Of course, TWTC may lose customers to AT&T if it increases its retail prices. This is especially likely in the case of new business customers for which AT&T and TWTC (with its newly increased rates) will compete. If TWTC loses some of these new business customers to AT&T, there is a high probability that TWTC will not be able to win these business customers back in the future. This is because (1) these customers would likely purchase services from AT&T pursuant to term commitments; and (2) business customers are sensitive to the cost and disruption associated with switching service providers and therefore tend to purchase services the same provider for a long period of time.

14. AT&T is well aware that TWTC and other competitors have no choice but to continue purchasing these vital wholesale inputs from AT&T in order to serve many business customer locations. AT&T therefore has the incentive and ability to raise TWTC's costs so that it can undercut TWTC's prices and reduce TWTC's margins. AT&T's proposed tariff revisions, if allowed to go into effect, would likely yield this result, weakening TWTC's ability to compete in the retail business services markets.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Michael A. Rouleau
Michael Rouleau

Dated: 12-2-13

CERTIFICATE OF SERVICE

I, Matthew Jones, hereby certify that on this 2nd day of December 2013, I caused to be served a true and correct copy of the foregoing Petition of Cbeyond Communications, LLC, Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. to Suspend and Investigate on the following parties in the following manner:

Confidential version and redacted version via courier:

Julie Veach
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Kalpak Gude
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Redacted version via facsimile and first-class U.S. Mail:

Scott Murray
Area Manager – Rates/Tariffs
311 S. Akard St.
Room 1940.04
Dallas, TX 75202
Fax: (214) 464-2006

Redacted version via email:

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Matthew Jones