

user and telecommunications industry.²

In the *Special Access Rulemaking*, the FCC requested comment on proposed changes to its special access regime, including the rules regarding requests for pricing flexibility.³ Based on substantial record evidence that exclusive reliance on facilities-based collocation in a small minority of wire centers in an MSA is not an accurate predictor of competition in the MSA, the Commission sought comment on "whether actual marketplace developments support the predictive judgments that underlie the special access pricing flexibility rules."⁴ It queried "whether [its] assessment in the *Pricing Flexibility Order* of the relationship between entry barriers and irreversible, sunk investment by competitive carriers remains sufficiently robust."⁵ The Commission further asked "whether the MSA remains a reasonable geographic market in which to measure irreversible sunk investment in the relevant special access product markets, and particularly for channel terminations between the LEC office and the customer premise."⁶ The record in the *Special Access Rulemaking* shows that the answer to all of these questions is "no".⁷

It would be premature for the Commission to grant all of the relief requested in the Petitions while it is considering whether to modify the very criteria on which the Petitioners rely.

² The record shows overwhelmingly that little (if any) competition exists in the provision of channel terminations between SBC wire centers and end user premises. The Department of Justice has also recognized this lack of competition. *United States of America v. SBC Communications Inc. and AT&T Corp.*, Civil Action No.: 1:05CV02102 (EGS), Competitive Impact Statement (filed November 16, 2005) at 3-4. Level 3 accordingly focuses this Opposition on these services and not on the requests for Phase I or Phase II relief for Special Access (other than channel terminations to end users) and Transport services at this time.

³ The Commission has not acted on the issues raised in the *Special Access Rulemaking*. On October 31, 2005, the Commission gave its consent to the merger between SBC and AT&T. *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order (released November 17, 2005). As part of that Order, SBC and AT&T committed to conditions related to their provision of special access services. These conditions sought to address the perceived harms of the merger rather than the systematic issues related to ILEC monopoly control over last mile inputs to end-to-end services. *Id.* ¶¶ 3-4. Accordingly, the issues underlying Level 3's concern in this proceeding have not been addressed.

⁴ *Special Access Rulemaking* at ¶ 5.

⁵ *Id.* ¶ 110.

⁶ *Id.* at ¶ 89.

⁷ See generally, *Special Access Rulemaking*, Reply Comments of WilTel Communications, LLC.

SWBT and Ameritech seek Phase II pricing flexibility based on discredited rules created on the predictive judgment the Commission is now questioning. The Petitioners seek authority for Phase II relief in MSAs, even though the Commission is questioning whether the MSA is the appropriate geographic market in which to grant flexibility. They rely on the wire center revenue test even though the Commission may eliminate it. By asking the Commission to take these steps, the Petitioners are making a blatant attempt to obtain relief that is against public policy. Instead of granting the Petitions under the old regime, the Commission should reform its Special Access regime, provide for a more rationale pricing flexibility mechanism and then consider whether price cap LECs qualify for relief.

The public record in the *Special Access Rulemaking* shows clearly that ILECs (including SWBT and Ameritech) have monopoly control over the vast majority of end user channel terminations and that the Commission's existing criteria for obtaining pricing flexibility do not accurately predict the advent of competition for end user channel terminations throughout the MSA. The Commission has not resolved these issues. Nevertheless, the Petitioners now seek to use the discredited criteria to obtain flexibility to maintain and raise their already-high prices and maintain their unreasonable practices. To prevent a result that is not in the public interest and to discourage future requests for pricing flexibility under the existing regime, the Commission should deny or defer action on the Petitions to the extent set forth in this Opposition.

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC

By: /s/ Adam Kupetsky

Adam Kupetsky
Regulatory Counsel
Level 3 Communications, LLC
One Technology Center TC15H
Tulsa, OK 74103
918 547 2764 (telephone)
918 547 2360 (facsimile)
Adam.kupetsky@wiltel.com

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