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October 21, 2011

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

Re: *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92;
Establishing Just and Reasonable Rates for Local Exchange Carriers, WC
Docket No. 07-135; *A National Broadband Plan for Our Future*, GN Docket No.
09-51

Dear Ms. Dortch:

For more than a decade, AT&T has ardently supported and actively participated in the Commission's efforts to reform the agency's intercarrier compensation regime. Because AT&T plays many different roles in the telecommunications industry – incumbent local exchange carrier (ILEC), competitive local exchange carrier (CLEC), interexchange carrier (IXC), wireless carrier, and Internet Service Provider (ISP) – we see intercarrier compensation issues from many perspectives and we are acutely aware of the urgent need to eliminate investment-distorting arbitrage from the current regime while avoiding new arbitrage opportunities going forward. We were therefore dismayed to read Comcast's recent proposal to eliminate the well-established Commission rule that prevents CLECs (including Comcast's CLEC affiliates) from collecting access charges for access services that they do not actually provide.¹ In particular, the modification suggested by Comcast would permit CLECs to collect switched access charges at the full benchmark rate for delivering PSTN-originated calls to VoIP providers, even when those CLECs perform few, if any, of the benchmark functions identified in the Commission's rules. Comcast's proposal, as currently drafted, is deeply flawed and should be rejected for at least three basic reasons.

First, the proposal is flatly inconsistent with the Commission's existing rule governing CLEC access charges and its "long-standing policy" that CLECs, just like ILECs, "should charge only for those services that they provide."² Without this common-sense safeguard in place, the regulatory door would be thrown wide open to massive arbitrage schemes by CLECs seeking to gin-up inflated access charges on PSTN-to-IP call flows, countless disputes over who owes what

¹ Letter from Mary McManus, Comcast, to Marlene Dortch, FCC, WC Docket No. 10-90, et al (Sept. 22, 2011) (Comcast Letter).

² *Access Charge Reform*, CC Docket No. 96-262, 8th Report and Order, FCC 04-110 ¶ 21 (May 18, 2004) (8th Report and Order).

to whom, and costly litigation among ILECs, CLECs, VoIP providers, and IXCs to sort out the mess.

Second, if the Commission were to modify its rules only for CLECs serving VoIP providers, but maintain those rules for CLECs (or ILECs) serving CMRS providers, it would arbitrarily tilt the regulatory playing field in favor of Comcast's preferred technology (VoIP) and against the technology deployed by many of its competitors (wireless). Indeed, such a result would allow CLECs (or ILECs) to collect access charges on calls terminated to customers of VoIP services but not customers of CMRS services, even though the latter are telecommunications services typically provided over circuit-switched networks while the former have never been classified and are provided over broadband IP networks.

Third, because the Commission failed to seek comment on Comcast's proposal, it has not sufficiently vetted this proposal and thus is in no position to comprehend all of its implications. The proposal's implications for IP-to-PSTN calls made with "over the top" VoIP services, like Vonage and Skype, provide just one cautionary example. The proposal would permit CLECs to collect full benchmark switched access charges for functions actually being performed by ISPs who receive PSTN-to-IP calls from those CLECs and route them over Internet backbones, middle mile facilities, and broadband Internet access connections for termination to customers of "over the top" VoIP services. Thus, *Comcast's proposal would extend tariffed switched access charges to the Internet* – a startling and presumably unintended reversal of this agency's commitment not to apply legacy common carrier rate regulation to the Internet.³

For all of these reasons, which are discussed in more detail below, the Commission should reject Comcast's ill-conceived proposal.

Comcast's Proposal Would Open the Door to Arbitrage and Fraud. More than a decade ago, the Commission recognized that CLECs are able to exercise "monopoly power" over calls sent or received by their end user customers.⁴ This monopoly power, combined with the Commission's then existing intercarrier compensation rules, gave CLECs the incentive and ability "to impose excessive access charges on IXCs and their customers."⁵ To address that situation, the Commission prohibited CLECs from tariffing switched access charges above the rate charged by the competing ILEC, also known as the "benchmark rate."⁶ The Commission also made clear that, consistent with its "long-standing policy" regarding ILEC access charges, CLECs should similarly be allowed to charge only for those access services they actually

³ See *The Third Way: A Narrowly Tailored Broadband Framework*, FCC Chairman Julius Genachowski (May 6, 2010) ("the FCC should not regulate the Internet" or change its "practice of not regulating broadband prices or pricing structures"); *AT&T Corp. v. Ymax Communications Corp.*, File No. EB-10-MD-005, Memorandum Opinion and Order, FCC 11-59 ¶¶ 35-47 (April 8, 2011) (rejecting YMax's argument that routing PSTN-to-IP calls over the Internet entitles YMax to collect end office switching and other switched access charges under its tariff).

⁴ *Access Charge Reform*, CC Docket No. 96-262, 7th Report and Order, FCC 01-146 ¶ 38 (April 27, 2001) (7th Report and Order).

⁵ 7th Report and Order ¶¶ 2, 10, 31.

⁶ 7th Report and Order ¶ 3.

provide.⁷ In particular, the Commission concluded that when a CLEC does not serve the end user, but merely acts as an “intermediary” and performs a limited subset of access functions, it may only collect access charges for those limited functions and not the full benchmark rate.⁸

The Comcast proposal would turn this principle on its head. The Comcast CLECs do not perform the full suite of switched access services when they deliver calls from IXCs to the Comcast VoIP affiliates; rather they perform limited transiting functions in the middle of calls.⁹ Yet under the Comcast proposal, they would be able to collect the full benchmark rate. In Comcast’s own words, its proposal would affirmatively authorize CLECs to impose full benchmark access charges “regardless of the specific functions provided or facilities used.”¹⁰ Getting paid for work not performed may be a desirable business model for some companies, but it is hard to fathom how such a practice could be deemed “just and reasonable” under the Communications Act.¹¹ As Commission experience has shown, permitting CLECs to use the agency’s regulatory processes “to recover a disproportionate share of their costs from other carriers” distorts the price signals sent to the CLECs’ customers and “undermine[s] the operation of competitive markets.”¹² Indeed, artificially inflated switched access charges, like those Comcast seeks here, are the primary driver of “access stimulation” and other “wasteful arbitrage” that the Commission is striving to eliminate in the instant proceeding.¹³ Thus, consistent with its

⁷ 8th Report and Order ¶ 21.

⁸ 8th Report and Order ¶ 17; *Qwest v. Northern Valley Communications*, File No. EB-11-MD-001, Order on Reconsideration, FCC 11-148 ¶¶ 4, 8 (Oct. 5, 2011) (*Northern Valley Order*). See also 61.26(a)(3) (describing individual switched access rate elements of the competing ILEC for which a CLEC would be entitled to collect access charges if it provides a functionally equivalent service: “carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching”). To the extent CLECs actually perform these more limited functions, AT&T has no objection to them collecting the applicable switched access charges for the functions they perform.

⁹ For example, Comcast’s VoIP affiliates (not the Comcast CLECs) actually perform functions analogous to end office switching and other associated access services, which are typically the largest components of the applicable full benchmark switched access rate. See, e.g., Comcast Phone of Pennsylvania, LLC, Supplement No. 67 to PA PUC Tariff No. 1, Section 11.1.3.B., Local Interconnection Service (“The IP-based, broadband connecting facility between Customer [the Comcast VoIP affiliate] and Subscribers [the Comcast Digital Voice end-users], the CMTS [Cable Modem Termination System], the *soft switch*, the *connecting facilities* to the Company’s [the Comcast CLEC’s] media gateway, and all customer premises equipment *must* be provided by the Customer [the Comcast VoIP affiliate] or its Subscribers and is *not included* as part of LIS.”) (emphasis added). Because Comcast’s VoIP affiliates are not LECs and do not provide switched access services, however, they have no right to collect switched access charges under Commission rules. 8th Report and Order ¶ 16.

¹⁰ Comcast Letter, Attachment (proposed revision to section 61.26(a)(3)).

¹¹ See 47 U.S.C. § 201(b).

¹² *High-Cost Universal Service Support*, WC Docket No. 05-337, et al, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 ¶ 3, n.11 (Nov. 5, 2008).

¹³ *Connect America Fund*, WC Docket No. 10-90, et al, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 ¶¶ 35-44 (*Connect America Notice*). See also *id.* ¶ 606

goal of “curbing” rather than expanding opportunities for arbitrage,¹⁴ the Commission should decline Comcast’s request for CLECs to get paid for services they do not perform.

Adopting Comcast’s Proposal Would Be Arbitrary and Capricious, Particularly If It Excludes CMRS Providers. Less than three weeks ago, the Commission explained in the *Northern Valley Order* that its CLEC access charge rules play a vital role in implementing the Commission’s longstanding policy that neither IXC’s nor their customers should be charged an “unfair share of the LEC’s costs in transporting interstate calls.”¹⁵ As the Commission further explained, the roots of that policy go back nearly three decades to the dawn of the Commission’s access charge regime:

The concept that users of the local telephone network [for interstate calls] should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness. It assures that ratepayers will be able to make rational choices in their use of telephone service, and it allows the burgeoning telecommunications industry to develop in a way that best serves the needs of the country.¹⁶

Comcast’s proposal would be a stark and unjustified departure from this sound policy, as it would permit Comcast’s CLECs to collect access charges for access services they did not perform, thus unfairly raising the costs of long distance service for IXC’s and their customers. It would be all the more arbitrary if the Commission were to grant these windfall access fees to CLECs serving VoIP providers (including Comcast’s own VoIP affiliates), while continuing to preclude CLECs (as well as ILECs) serving competing CMRS providers from similarly collecting the full benchmark rate.¹⁷ There could be no rationale for such an arbitrary distinction, which would represent nothing more than a flagrant instance of competition-

(“[I]ntercarrier rates above incremental cost are an incentive to increase revenues through arrangements such as ‘access stimulation,’ in which carriers seek to inflate the amount of traffic they receive subject to intercarrier compensation payments. For example, a LEC with high switched access rates will agree to share its access revenues with a company that expects to receive large numbers of incoming calls, such as a company providing an adult chat line. Because these incentives exists, investment is directed to arbitrage activities, such as ‘free’ conference calling services, the cost of which are ultimately spread among all customers whether they use any of these offerings or not.”).

¹⁴ *Connect America Notice* § XV.

¹⁵ *Northern Valley Order* ¶ 11.

¹⁶ *Northern Valley Order* ¶ 11, n.36 (quoting *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 ¶ 7 (1983)) (alteration in *Northern Valley Order*).

¹⁷ See Comcast Letter, Attachment (proposed revisions to section 61.26(a)(3)); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2002) (CMRS carriers may not impose tariffed access charges on IXC’s, nor may CLECs impose tariffed access charges on IXC’s for access functions provided by CMRS carriers); *8th Report and Order* ¶ 16 (“[T]he Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC. If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.”)

distorting regulatory favoritism. The fundamentally arbitrary nature of any such distinction is only compounded by the fact that VoIP providers are not even common carriers and do not operate the types of circuit switched networks for which access charges were originally created, whereas CMRS providers are common carriers and do operate circuit-switched voice networks today. Such a blatant case of the Commission arbitrarily picking winners and losers in the marketplace would not survive judicial review.

Adopting Comcast's Proposal Would Result in the Commission Applying Access Charges to the Internet. The above flaws are reason enough to reject the Comcast proposal, but the Commission is in no position to fully consider all the implications of this last-minute proposal because the agency never sought comment on it.¹⁸ At least one unintended consequence, however, is obvious from the face of Comcast's proposal: if adopted, this proposal would sanction the application of access charges to the Internet.¹⁹

As the Commission is aware, interexchange calls from the PSTN to subscribers of "over the top" VoIP services, like Vonage and Skype, are typically delivered by an IXC to a CLEC that hands the call to an ISP (or chain of ISPs) that routes the call to another ISP that provides broadband Internet access service to the called party.²⁰ This last ISP in the chain then routes the call to the called party who subscribes to the over the top VoIP service. By permitting CLECs to collect full benchmark switched access charges on calls delivered to "any end user, either directly or in conjunction with another provider, regardless of the specific functions provided or facilities used,"²¹ Comcast's proposal would allow CLECs to charge for functions that are actually being performed by the ISP(s) in the call flow above, as they route the calls over Internet backbones, middle mile facilities, and broadband Internet access connections for termination to the called party.²² Thus, if it adopts Comcast's proposal, the Commission would be applying tariffed switched access charges to the Internet. While such a result may or may not have been intended, it highlights the danger of weakening the safeguards in the already "Byzantine and

¹⁸ See 5 U.S.C. § 553.

¹⁹ For a discussion of the impacts Comcast's proposal may have regarding other services, such as eFax and Google Voice, please see *Comcast and the Throes of Addiction*, Hank Hultquist, AT&T Public Policy Blog (Oct. 21, 2011) at <http://attpublicpolicy.com/universal-service/comcast-and-the-throes-of-addiction/>.

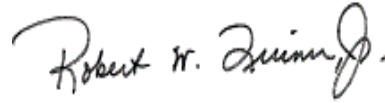
²⁰ See *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (Nov. 12, 2004).

²¹ Comcast Letter, Attachment (proposed revision to section 61.26(a)(3)).

²² Just six months ago, the Commission rejected YMax's attempt to collect tariffed end office switching and other switched access charges for PSTN-to-IP calls routed over the Internet. See *supra* AT&T v. YMax. Comcast does not address that decision, let alone attempt to justify why CLECs should be permitted to collect the full benchmark rate for functions performed by ISPs using Internet facilities.

broken”²³ intercarrier compensation regime at a time when the Commission should instead be phasing it out forever.²⁴

Sincerely,

A handwritten signature in black ink, reading "Robert W. Quinn, Jr." in a cursive script.

Robert W. Quinn, Jr.

²³ Separate Statement of Commissioner Michael J. Copps, *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, 4796 (2005).

²⁴ To the extent the Commission disregards all of the concerns discussed above and adopts Comcast’s proposal, it should consider limiting the availability of full benchmark switched access charges to only those situations where the CLEC delivers the call directly to an affiliated, facilities-based voice provider that directly serves the end user and provides all of the signaling, switching and routing functions needed to reach that end user. While such a limitation would not cure the legal and practical infirmities identified above, it would at least narrow the numerous market-distorting arbitrage opportunities created by Comcast’s proposal.