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May 11, 2015

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

**Re: Notice of *ex parte* presentation -- *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25; *Technology Transitions,* GN Docket No. 13-5, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM- 10593**

Dear Ms. Dortch:

On May 7, 2015, Lisa Youngers and Mike Parker of XO Communications LLC ("XO") and Edward A. Yorkgitis, Jr. and the undersigned, Thomas Cohen, of Kelley Drye & Warren LLP, counsel for XO, met with Deena Shetler, Pam Arluk, Eric Ralph (participating by phone) David Zesiger, Marvin Sacks, and Susan Lee, of the Wireline Competition Bureau.

The principal purpose of the meeting was to describe how Verizon interprets its tariff to calculate shortfall penalties ("Penalties") pursuant to XO's Commitment Discount Plans ("CDPs") with the incumbent local exchange carrier ("ILEC") pursuant to which XO purchases special access DSn circuits.[1] XO explained that Verizon's calculation of the Penalties resulted in

[1] XO noted at the outset of the meeting that Verizon has filed an action against XO with multiple claims, including a claim seeking to recover "millions" of dollars in shortfall penalties under the special access CDPs XO had with Verizon. *Verizon Virginia, LLC,* et al., *v. XO Communications, LLC, and XO Virginia, LLC,* Case No. 3:15cv171 (REP) (E.D. VA docketed Mar. 19, 2015). XO explained that it was still developing its response to the Verizon complaint and declined to discuss the positions it intended to take in the litigation. XO intends to inform the Commission staff of its public filings once they are submitted to the court. In addition, XO representatives underscored that for purposes of the meeting they were focusing on their concerns with Verizon's Penalties as

Penalties that were unjust and unreasonable in violation of the Communications Act. XO emphasized that the excessive Penalties underscore the urgent need for the Commission to adopt expeditiously remedies to address provisions in ILEC special access tariffs and contracts that are on their face or in effect, as implemented by the ILECs, anticompetitive and delay the IP transition.

XO reiterated its position that the substantial volume commitments under the CDPs (90% of purchase levels of channel terminations at the time of renewal (the "Minimum Commitment")) enable Verizon to thwart competition at the time when the industry is poised to accelerate the transition to IP-based services. This harm to competition is exacerbated by the excessive Penalties that Verizon assesses.

Mr. Parker explained how the Penalties Verizon has calculated are excessive because of the methodology Verizon uses. The Verizon CDP tariffs provide that, on a semi-annual basis, Verizon will determine whether XO has met its Minimum Commitment under its CDP.[2] If XO fails to purchase a sufficient number channel terminations to meet its Minimum Commitment, the tariff provides that the Penalty for the six-month period is to be equal to the difference between the total actual charges and the total charges that would have been incurred if a sufficient number of channel terminations had been purchased. So, for example, if XO had committed to purchase 100 DS3 channel terminations and only purchased 95 on average over the previous six months, the appropriate shortfall payment would be simply the price of the five "missing" DS3 channel terminations – a payment that would put Verizon in the same position it would have been in had the Minimum Commitment been met. However, despite this clear tariffed standard based on the commitment to purchase a certain number of DSn channel terminations (*see*, § 25.1.7(B)(1) and (2)[3]), Verizon does not base its Penalty calculations on the

calculated and invoiced, and they reserved the right to discuss other objections to the Penalties after filing the response to the Verizon complaint.

2 The tariff defines the Minimum Commitment solely in terms of the number of channel terminations purchased. Verizon Tariff FCC No. 1, § 25.1.3(A)(1) ("The CDP requires that a Minimum Commitment of ***channel terminations*** be established … ") (emphasis added).

3 "If the CDP Customer fails to maintain its Minimum Commitment for a service type or combined service type over the preceding six (6) months, the CDP Customer shall be assessed an amount equal to the difference between (1) the total dollar amount associated with that service type or combined service type over the preceding six (6) months and (2) the total dollar amount associated with that service type or combined service type which would have been applied over the preceding six (6) months had the Minimum Commitment been satisfied." Verizon Tariff FCC No. 1, § 25.1.7(B)(1) and (2).

cost of DSn channel terminations, or even the average cost of DSn circuits with channel termination purchased by XO. Rather, Verizon divides the sum of XO's total spend on all DSn circuits, with and without channel terminations, (the "Numerator") by the number of DSn circuits with channel terminations only (in terms of DS0 equivalent circuits) (the "Denominator"). Verizon then applies this inflated "average" DS0 equivalent rate to the number of DSn circuits with channel terminations (expressed in terms of DS0 equivalents).

Using specific examples involving DS3 circuits, Mr. Parker illustrated that the resulting shortfall penalties, per DS3 circuit, were 50-65% above what would apply if the Numerator were to exclude DS3 circuits without channel terminations (which again do not count toward the Minimum Commitment) or if the Denominator included DS3 circuits without channel terminations. XO emphasized that these other calculations -- which, as just described, overstate the proper shortfall penalty calculation, which is based simply on the price of the number of DSn channel terminations purchased below the Minimum Commitment -- conclusively showed that Verizon's calculation could not be defended as reasonable.

Mr. Parker closed by highlighting again the harmful effects of Verizon's CDP. He explained that XO finds it more "economical" to maintain "unused" DS3 circuits because it costs less to pay the current monthly recurring charge than to incur the substantial shortfall penalty. He also stated that it causes XO to see if other competitive carriers can provide only a limited set of its circuits, those DS3s that do not bill channel terminations, to drive down the shortfall rate. Not only are both examples a concern for XO, but they should be for the Commission since it results in inefficiencies and harms the development of competition.

The staff also asked XO about the impact on XO from Verizon's "all or nothing" provision by which all special access circuits XO obtains from Verizon within the geographic territory relevant to the CDP must be ordered under the CDP or none of the circuits may be. Mr. Parker responded that this provision has been problematic for XO. For example, he explained that because of the "all or nothing" provision, XO has no flexibility to hold back some new installs, if XO so chooses, toward the end of an agreement's term to throttle the volume that would go into the CDP, to keep the level of the Minimum Commitment in the successor CDP lower. This led to a discussion of XO's relatively recent entry into a successor CDP with Verizon and the transition to the new arrangement. Mr. Parker noted that XO could not afford to take more of a reduction than the Minimum Commitment provisions allow – i.e., 90% of the spend on DSn circuits with channel terminations at the time of the expiration of the previous agreement – by reducing the number of such circuits in advance because of the unreasonably large shortfall penalties that would apply.[4]

In response to a staff question about whether Ethernet purchases apply toward a CDP commitment, Mr. Parker acknowledged that Section 2.9.4 of Verizon's Tariff F.C.C. No. 1 appears on its face to allow CDP carrier customers some ability to transfer DS1 and DS3 special access circuits to Ethernet products without immediate impact on volume commitments, but the relevant conditions and requirements that apply to such "Technology Migrations" are so restrictive that replacement under these conditions is operationally infeasible.[5] XO urged the Commission, in addition to other relief it should take regarding special access terms and conditions, to address this issue and require Verizon and other ILECs to allow Ethernet purchases to count toward minimum commitments under CDPs and similar special access term and volume commitment arrangements.

In sum, XO calls upon the Commission to find unlawful and immediately unenforceable:[6]

- Provisions requiring special access volume commitments in return for special access discount pricing and other benefits if the volume discounts are not subject to recalculation at least once every twelve months.

- Provisions setting special access volume commitments if they require the purchase of more than 50% of the customer's special access spend from the previous twelve-month period.

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4 Mr. Parker also explained that there are substantial practical difficulties in moving circuits off a CDP plan. Despite making substantial capital investments in facilities, XO does not have facilities in most locations where customers want service. In addition, there are no competitive alternatives available in most instances. As a result, XO needs to rely on ILEC facilities, and it would like, for example, to convert special access to UNEs (assuming there has been no impairment) on a larger scale. However, currently, Verizon will process only 30 conversions per day.

5 Specifically Paragraph 2.9.6 of Tariff F.C.C. No. 1 places a number of restrictions on such service replacements, i.e., requirements on terminating locations, length of service term, bandwidth, and revenue commitment, among others, that XO is rarely able to take advantage of these terms as written.

6 *See* Letter of Thomas Cohen, Kelley Drye & Warren, LLP, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25; GN Docket No. 13-5, RM- 10593 (Sept. 17, 2014).

- Provisions setting penalties for early termination or failure to meet a minimum commitment that are based on more than the difference between what was actually spent on the committed purchases (channel terminations) and what would have been spent on the committed purchases had the commitment been met.

- Provisions that establish volume commitments should be set aside if they fail to allow a customer's purchase of Ethernet services from an ILEC to act as a substitute or replacement for ILEC special access services in calculating satisfaction of the volume commitment.

These actions will create opportunities for competitive wholesale supply of both TDM- and IP-based transport and last-mile (channel termination) inputs. In addition, by reducing, if not eliminating, the effective requirement for competitive providers that rely in part on the special access inputs of ILECs to purchase TDM-based circuits from ILECs when customers are increasingly requesting Ethernet and other IP-based solutions – or face uneconomic shortfall penalties and/or forfeit portability rights – the Commission will accelerate the technology transition. XO submits that the competitive forces that will be unleashed by the foregoing Commission actions will discipline the ILECs, at least in the long-term, and prevent them from materially raising prices for special access.

Please contact the undersigned if there are any questions or if you require further information.

Respectfully submitted,

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