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Ex parte

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; High Cost Universal Service Support, WC Docket NO. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal State Joint Board on Universal Service, CC Docket No. 96-45*

Dear Ms. Dortch:

XO Communications, LLC (“XO”) submits this ex parte to support the requests of other competitive local exchange carriers (“CLECs”) urging the Commission to issue a declaratory ruling that “equivalent functionality” for end office switching does not require a CLEC and/or its affiliated or unaffiliated VoIP partner to provide the loop facility to the called party under the Commission’s VoIP symmetry rule.¹ Despite the Commission’s intent to “reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams,”² AT&T’s interpretation of access charges applicable to VoIP-PSTN traffic turns the VoIP symmetry rule on its head, increasing carrier disputes where AT&T has withheld payment of end office access charges that do not meet AT&T’s criteria.

AT&T incorrectly argues that neither a CLEC nor its over-the-top VoIP (“OTT VoIP”) provider partners perform the equivalent of end office switching without also providing the local loop connection to the called party.³ However, as CLEC commenters have highlighted, the costs

¹ See Letter of Tamar Finn, Counsel, Bandwidth.com, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, *et al.* (filed June 11, 2012) (“CLEC June 11 Ex Parte”); Letter of John T. Nakahata, Counsel, Level 3 Communications, LLC, and Tamar Finn, Counsel, Bandwidth.com, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, *et al.* (filed Aug 8, 2013); Letter of Michel Singer Nelson, O1, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, *et al.* (filed Aug. 22, 2013).

² *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform--Mobility Fund; Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, 26 FCC Rcd. 17663, ¶ 946 (2011) (“*USF/ICC Transformation Order*”).

³ Letter of Jack Zinman, AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, at 1 (filed July 16, 2012) (“AT&T July 16 Ex Parte”).

for transmitting a call over the local loop are recovered through separate loop/common line charges, not through the end office switching charge.⁴ AT&T's argument is a red herring supplied to support AT&T's collection of asymmetric access payments despite the Commission's VoIP symmetry rule that equivalent functionality does not require that functions be performed exactly as the ILEC does or with the same network technology.⁵

XO agrees with CLEC commenters that "the core function of an end office local switch cannot and should not rationally be defined by the lines to which it connects, but by the functions it actually performs in the network."⁶ AT&T claims that CLECs serving OTT VoIP providers are only supplying the equivalent of tandem switching; however, call set-up and take down are unambiguously functions of the end office local switch, not the tandem switch, the loop, or the broadband Internet access provider's router that transits traffic to/from the called party.⁷ Thus, when a CLEC provides the necessary call take down functions for a call originated from an AT&T customer to a called party using OTT VoIP services, the CLEC supplies more than the functional equivalent of tandem switching. It provides the functional equivalent of end office switching. XO agrees that the "equivalent functionality" of end office switching should focus on the intelligence and infrastructure that manages the interaction with the called party's telecommunications or VoIP service and provides the capability to make or receive calls.⁸ Thus, XO urges the Commission to clarify that "equivalent functionality" for end office switching does not require a CLEC and/or its affiliated or unaffiliated VoIP partner to provide the loop facility to the called party.⁹

Finally, XO takes issue with AT&T's claim that "where a CLEC has lawfully tariffed charges for access functions provided by it or its retail VoIP partner, AT&T pays those charges without dispute."¹⁰ Instead, AT&T has wantonly disputed and refused to pay end office access charges to XO based on AT&T's mere (inaccurate) speculation of the percentage of XO terminating traffic destined to customers of OTT VoIP services, without AT&T providing any factual justification whatsoever. Even if XO conceded that AT&T's reading of the VoIP symmetry rule was correct (which XO does not), AT&T's withholding of end office access charges in this manner is indisputably unlawful. Because AT&T's speculation regarding XO's traffic patterns is grossly inaccurate, AT&T has, in fact, been improperly withholding a significant portion of end office access charges from XO that are applicable to traffic XO terminated directly to its own retail customers (not to OTT VoIP providers or their customers). Thus, AT&T is disingenuous in "explaining" to the Commission that it pays without dispute these lawfully tariffed charges. Rather, AT&T has made baseless and inaccurate assertions regarding XO's traffic patterns and is engaging in a fishing expedition where it expects XO to provide documentation to validate its traffic patterns to AT&T's satisfaction *before* AT&T will pay such

⁴ Letter of John T. Nakahata, Counsel, Level 3 Communications, LLC, and Tamar Finn, Counsel, Bandwidth.com, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, *et al.*, at 6 (filed April 15, 2013)("CLEC April 15 Ex Parte").

⁵ Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, *et al.*, at 2 (filed Oct. 25, 2011). *See USF/ICC Transformation Order* ¶ 970.

⁶ CLEC April 15 Ex Parte at 1 & 4.

⁷ *Id.*

⁸ CLEC June 11 Ex Parte at 3.

⁹ *Id.*

¹⁰ Letter of Christi Shewman, AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, at 1 (filed March 14, 2013).

charges. XO submits that AT&T is using this tactic in an effort to force XO to negotiate for less than full payment of its lawfully tariffed access charges and urges the Commission to act quickly to resolve this issue.

Given the Commission's goal to reduce uncertainty and disputes over intercarrier compensation charges and the unfairness of applying access charges asymmetrically to different carriers, particularly to the disadvantage of those deploying IP networks, XO joins requests for the Commission to clarify the interpretation of the VoIP symmetry rule. XO agrees that the Commission has the authority to resolve this dispute over the application of current law and rules pursuant to 47 U.S.C. § 1.2, without seeking further comment.¹¹ When CLECs provide the same core switching and transport functions as AT&T, they are entitled under the VoIP symmetry rule to the same level of compensation as AT&T for performing these functions.¹² Thus, the Commission should address this issue to prohibit AT&T from continuing to manipulate the rules to its advantage.

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets. If you have any questions, please feel free to contact me at (703) 547-2258.

Respectfully Submitted,

/s/

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Vice President and Assistant General Counsel,
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cc: Rebekah Goodheart
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¹¹ CLEC April 15 Ex Parte at 2.

¹² *Id.*