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June 4, 2014

**Via ECFS**

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

**Re: *Ex parte* Presentation in GN Docket No. 13-5, Technology Transitions, and GN Docket No. 12-353, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition**

XO Communications, LLC (“XO”) submits this *ex parte* to elaborate on certain aspects of its response to AT&T’s proposed Internet protocol (“IP”) transition trial in Kings Point, Florida, as well as to support recommendations of other competitive providers about the policies and rules that should be included in the Commission’s IP Managerial Framework. XO has participated actively in the above-referenced dockets and filed comments concerning AT&T’s IP trial,<sup>1</sup> seeking to ensure that the Chairman’s mantra of “competition, competition, competition” prevails as this transition occurs. Since so many local markets are not sufficiently competitive, this means ensuring that providers competing with incumbent local exchange carriers (“LECs”) have access to key last-mile facilities of and can interconnect with the incumbent during and after the transition.

Recently, Windstream and COMPTTEL filed *ex parte* letters in the above-referenced dockets critiquing AT&T’s proposed trial and proposing fixes and setting forth policies/rules for the Managerial Framework.<sup>2</sup> XO generally supports the positions taken in those filings, and the

<sup>1</sup> See Comments of XO Communications LLC, GN Docket Nos. 13-5 and 12-253 (Mar. 31, 2014); Reply Comments of XO Communications LLC, GN Docket Nos. 13-5 and 12-253 (Apr. 10, 2014). See also AT&T Proposal for Wire Center Trials, GN Docket Nos. 13-5 and 12-353 (Feb. 27, 2014).

<sup>2</sup> Letter of Eric Einhorn *et al.*, Windstream Communications, Inc., to Jonathan Sallet, General Counsel, and Julie Veach, Chief, Wireline Competition Bureau, FCC, GN Docket Nos. 13-5

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associated proposals, as elaborated herein. In addition, XO has participated in meetings with staff from the Commission's Office of General Counsel, Wireline Competition Bureau, and Office of Strategic Planning and Policy Analysis), urging the Commission not only to address the flaws of the AT&T IP trial proposal, but to expeditiously make policy decisions governing the transition to an all-IP Public Communications Network ("PCN") independent of addressing the AT&T trial proposal.<sup>3</sup> The Commission should move promptly to adopt the positions taken in those letters to preserve consumer choice and make competition robust throughout and following the transition.

### AT&T's Proposed IP Trial

The *Transition Trials Order*<sup>4</sup> made clear that any trial involving wholesale services satisfy certain baseline requirements, including conditions that comparable services to those currently offered be made available "at equivalent prices, terms, and conditions,"<sup>5</sup> that the price and costs of access do not increase as a result of the trial,<sup>6</sup> and that "neither wholesale nor retail customers are penalized as a result of the experiment (*e.g.*, purchases of alternative services count towards discounts for purchases outside of the experiment areas, early termination fees are waived if early termination is caused by the experiment)."<sup>7</sup> The AT&T proposed IP trial wholly fails to satisfy these requirements regarding the wholesale aspects of the proposed trial. Before it can be allowed to go forward, AT&T must be required to provide sufficiently complete information on the wholesale offerings that will be offered in Kings Point to demonstrate that these conditions will be met.<sup>8</sup>

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and 12-353 (Apr. 28, 2014) ("*Windstream ex parte*"). Letter of Angie Kronenberg *et al.*, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353 (Apr. 2, 2014) ("*COMPTTEL Managerial Framework ex parte*"). *See also* Letter of Charles W. McKee, Sprint Corporation, GN Docket Nos. 13-5 and 12-353 (May 9, 2014) and Letter of Joseph C. Cavender, Level 3, GN Docket Nos. 13-5 (May 16, 2014) (supporting *Windstream and COMPTTEL ex partes*); Letter of Angie Kronenberg, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353 (May 15, 2014) ("*May 15 ex parte*").

<sup>3</sup> *See e.g. May 15 ex parte.*

<sup>4</sup> *Technology Transitions, et al.*, GN Docket No. 13-5, *et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-5, ¶ 8 (rel. Jan. 31, 2014) ("*Transition Trials Order*").

<sup>5</sup> *Transition Trials Order*, ¶ 59. ("We further expect that any proposal of an ongoing experiment of this kind would, in addition, offer to replace wholesale inputs with services that offer substantially similar wholesale access to the applicant's network.")

<sup>6</sup> *Id.*, Appendix B, ¶ 35.

<sup>7</sup> *Id.*

<sup>8</sup> The Commission should reject any trial, such as that originally proposed by AT&T, that does not meet all conditions in the *Transition Trials Order*.

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Of particular concern, AT&T should be required to explain how wholesale customers may be affected by wholesale customers choosing to transition TDM-based circuits to the new IP offerings. As Windstream notes in its *ex parte*, “AT&T is utterly silent as to how a wholesale customer’s purchase of a replacement IP product will be treated with respect to Minimum Revenue Commitments or early termination fees for legacy TDM services.”<sup>9</sup> Any IP transition trial – and indeed the transition to an all-PCN network itself – should be implemented in a manner that does not penalize competitors that transition from TDM-based circuits and services to IP-based wholesale offerings.<sup>10</sup> Without information regarding how wholesale customers will be treated with respect to Minimum Revenue Commitments or early termination fees should they choose to select IP-based offerings, the true costs of wholesale customer participation in the trial is unknown, making it impossible to assess if the *Transition Trials Order* conditions identified above will be met.<sup>11</sup> More importantly, taking the IP offerings should not require a wholesale customer or its customers to incur any new expenditures, At

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XO reiterates the *May 15 ex parte* to the effect that, at a minimum, information about replacement services should include:

- (1) The functional definition of the replacement service and the prices, terms, and conditions of such offerings (so as to ensure equivalency), as well as installation intervals for replacement services;
- (2) Detailed explanation of how wholesale customers will avoid incurring any penalties for switching from TDM-based special access services to packet-based or other services;
- (3) If new facilities are required for provision of wholesale service, AT&T should specify the extent to which a competitive provider will be responsible for paying the special construction costs and how any such costs will be determined;
- (4) AT&T also should explain in detail how the bare copper loop will be made available to competitors. It should provide information regarding the location, length, and condition of its copper loops. Plans for retiring copper loops should be made available to competitors.

<sup>9</sup> *Windstream ex parte* at 7.

<sup>10</sup> Apart from these considerations raised by IP-based trials and the transition to an all-IP PCN, the Commission also should deal expeditiously (i.e., independently of completion and review of the special access data collection) with the larger issue of incumbent exclusionary practices in special access contracts, for example, from onerous lock-up arrangements, a matter on which an extensive record was developed in early 2013 in WC Docket No. 05-25 and RM-10593 and which is ripe for decision.

<sup>11</sup> Should wholesale customers be adversely affected with regard to Minimum Revenue Commitments or early termination fees as a result of participation in IP trials or, more generally, as the result of ILEC action to discontinue TDM services, any provisions concerning such Minimum Revenue Commitments or early termination fees should be found unjust and unreasonable and declared unlawful under Section 201 of the Act.

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the very least, if new expenditures are permitted to be incurred, AT&T should be required to explain those new costs.

Moreover, the *Transition Trials Order*, by requiring incumbent LECs engaging in trials to make available comparable services to those currently offered, “at equivalent prices, terms, and conditions,” imposed an obligation on AT&T in connection with the transition to an all-IP PCN that extends currently to DS1 and DS3 special access and all unbundled network elements. The plain language of the conditions brooks no obfuscation. Yet AT&T is vague about whether IP-based equivalents will be offered under the requisite conditions of the *Transition Trials Order*, noting that replacement services to DS1 and DS3 special access, as well as UNEs, will be made available on “commercial terms.”<sup>12</sup> On its face, this violates the plain language of the *Transition Trials Order* and must be corrected by AT&T before the trial can move forward.

Finally, AT&T must explain how it will meet the conditions of the *Transition Trials Order* as they apply to unbundled loops. In the *AT&T Reply*, AT&T maintains that any obligations under Section 251(c)(3) of the Communications Act, as amended, (the “Act”)<sup>13</sup> to provide unbundled access to loops do not survive the transition to all-IP based network facilities.<sup>14</sup> AT&T is incorrect. As Windstream notes, AT&T is obligated under the Act and the Commission’s orders to provide continued access to UNE loops after it transitions to new technologies and protocols.<sup>15</sup> Windstream correctly notes that UNEs are not technology specific, and “[n]othing in the *Triennial Review Remand Order* limits a DS1 or DS3 UNE to TDM, or limits it to copper facilities.”<sup>16</sup> Thus, the Commission stated plainly that “DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops.”<sup>17</sup> Accordingly, AT&T should not be permitted to

<sup>12</sup> See Reply to Comments of AT&T Services, Inc., GN Docket Nos. 13-5 and 12-353, at 29 (Apr. 10, 2014). (“AT&T Reply”).

<sup>13</sup> 47 U.S.C. §§ 251(c)(3).

<sup>14</sup> See *AT&T Reply* at 40-42.

<sup>15</sup> See *Windstream ex parte* at 11-12.

<sup>16</sup> See *id.* at 12, citing *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2629-33 ¶¶ 174-181 (2005) (“*Triennial Review Remand Order*”).

<sup>17</sup> See *id.*, citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 17,173, ¶ 325 n.956 (“*Triennial Review Order*” or “*TRO*”). Any limitations that were adopted in the *TRRO* are with respect to Mass Market Loops, not Enterprise Market Loops. See *Windstream ex parte* at 12. In a recent *ex parte*, AT&T continues to argue that there is “no high capacity loop UNE requirement in all-IP environment,” and it cites to the *TRO*, ¶ 324. See Attachment to Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, GN Docket Nos. 13-5 and 12-353, WC Docket No. 09-223, and RM-11358 (May 30, 2014). However, as noted above, AT&T’s reliance on this

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conduct its trial without first explaining how the *Transition Trials Order* conditions will be satisfied by maintaining access to unbundled loops.

### FCC's Managerial Framework

COMPTEL's *Managerial Framework ex parte* proposes a framework under which the Commission could resolve relevant and long open legal and policy issues, as well as establish preconditions for vibrant competition, consumer choice of advanced service offerings, and investment in the provision of voice and broadband services to businesses and large enterprises. XO agrees that the Commission should proceed promptly to clarify key points and adopt rules concerning the regulatory framework that will apply during and after the transition to an all-IP PCN. Such clarifications and rules should affirm the statutory obligations of the incumbent LECs apply regardless of the technologies used within their network and not look past the high economic hurdles that prevent competitors in most instances from building out networks which can bring about robust competition.

*1. Continued Last-Mile Access on Just and Reasonable Terms.* As COMPTEL and Windstream explain, the Commission needs to ensure competitors have equivalent access on reasonable rates, terms and conditions to last-mile facilities of incumbent LECs during and after the transition to an all IP-PCN,<sup>18</sup> and it should outlaw contractual provisions that would penalize wholesale customers moving circuits from TDM to IP technologies, by causing them to trigger early termination penalties or to fall short on volume term commitments in long-term special access agreements. Further, the Commission should ensure incumbent LECs unbundle loops in an all-IP network environment wherever they retain market power over last-mile facilities. As Windstream notes, the Commission has long recognized the difficulty of competitors to deploy their own facilities

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paragraph of the *TRO*, which is contained in the section addressing of unbundled facilities in the mass market, is misplaced. Rather, the more specific language of the *TRO* on unbundling of DS-1/DS-3 facilities in the enterprise market controls, and it directs the incumbent LEC to provide these high-capacity services “regardless of the technology used.”

<sup>18</sup> COMPTEL notes, “Absent access to last-mile facilities and interconnection on reasonable rates, terms, and conditions, competitive carriers would likely be unable to serve most of the business customer locations they serve today. Hundreds of thousands of American businesses would lose their service provider and/or would be forced to pay higher prices.” *COMPTEL Managerial Framework ex parte* at 5. Windstream states, “Given the extent to which CLECs must rely on AT&T and other ILECs for last-mile connections...there can be no ambiguity about whether AT&T and other ILECs (including Windstream) are required to provide comparable replace services at equivalent prices, terms, and conditions.” *Windstream ex parte* at 9

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on a wide-scale to make facilities-based competition ubiquitous.<sup>19</sup> Because competitors continue to face these barriers, incumbent LECs retain market power extensively. The Commission should ensure there is no trace of uncertainty that the unbundling obligations of incumbent LECs, absent location-specific forbearance or a showing of no impairment, continue after they make the transition to an all-IP network environment.

**2. *Interconnection for Managed IP Traffic.*** XO has long advocated that the Commission adopt rules requiring interconnection under Section 251 of the Act<sup>20</sup> for managed voice traffic in IP.<sup>21</sup> The question before the Commission is purely legal. That is, the Commission can and should act based on what the statute (Section 251) requires -- and as XO has explained, section 251 applies to telecommunications carriers and their networks regardless of the technologies used to provide services.<sup>22</sup> If an incumbent LEC then wishes to seek forbearance from the requirement, it can file a petition and demonstrate it meets the requirements of Section 10(c) of the Act.<sup>23</sup>

**3. *Special Construction Charges.*** Windstream notes in its *ex parte* that the Commission should address special construction charges as part of the Managerial Framework review as a generic matter, not relying on individual carrier complaints as the sole means of redress.<sup>24</sup> XO too has been encountering problems with incumbent LEC special construction charges and concurs with Windstream. The problems competitors encounter with unreasonable special construction charges are another way incumbent LECs seek to circumvent their legal obligations and should be

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<sup>19</sup> *Windstream ex parte* at 12, citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 01-338 *et al.*, Report and Order and Order on Remand And Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16,978 (2003).

<sup>20</sup> 47 U.S.C. §§ 251.

<sup>21</sup> *See* Comments of XO Communications, LLC on Sections XVII.L-R of the Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, at 9-19 (Feb. 24, 2012); Comments of XO Communications, LLC on Petitions of AT&T and National Telecommunications Cooperative Association, GN Docket No. 12-353, at 12-14 (Jan. 28, 2013) (“XO IP Petitions Comments”).

<sup>22</sup> *See* XO IP Petitions Comments at 13.

<sup>23</sup> 47 U.S.C. §§ 160(c).

<sup>24</sup> *See Windstream ex parte* at 14-15.

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addressed within the Managerial Framework.<sup>25</sup> Incumbent LEC special construction charges imposed on competitors can provide the incumbents with distinct advantages and may even make competitively-provided service economically infeasible. Special construction charges can result in double recovery, support builds that other competitors – including the incumbent LECs themselves – can utilize without incurring the same costs, and are often simply unnecessary because facilities already exist or are of the sort already used by the incumbent LEC at the same location where a competitor wants to provide service. In such situations, special construction charges are unreasonable and thus improper. The Commission should provide specific guidance regarding the limited circumstances under which special construction charges may be reasonable, especially during the transition to an all-IP PCN.

**4. *Objective Criteria for Discontinuance Applications.*** During the course of the transition to an all IP-PCN, Section 214 discontinuance applications will be increasingly used by incumbent LECs as they seek to move from TDM and circuit-based services and networks. XO submits the Commission should not act on these applications on a case-by-case basis in a vacuum. Rather, it needs to develop general policies regarding the granting of permissions to discontinue service offerings so it can evaluate them against a well-reasoned framework, which is designed to ensure competition will remain robust and other core values are preserved if discontinuance is approved. This can be achieved only if the Commission adopts objective pro-competition criteria for Section 214 discontinuance applications filed during the course of the transition. XO concurs with Windstream on the need for this action.<sup>26</sup>

**5. *Updated Copper Retirement Rules.*** XO agrees with COMPTTEL that the Commission should update its copper retirement rules to promote continued availability of innovative and affordable Ethernet over copper (“EOC”) services. Moreover, to facilitate network planning and customer migration during the transition to an all-IP PCN, the Commission should require incumbent LECs to provide forecasts of their planned retirements sufficiently in advance to competitors.<sup>27</sup> Finally, any proposed retirement should be accompanied by a demonstration that equivalent facilities are being made available on comparable rates, terms, and conditions and other concerns identified in the *Transition Trials Order* have been met.

The transition to an all IP-PCN has been underway for over a decade and is still ongoing. If an AT&T wire center-based trial is to be of use to the Commission, it must be revised as discussed

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<sup>25</sup> If complaints have been or are filed regarding special construction charges and practices, the Commission should handle them promptly, as well.

<sup>26</sup> See *Windstream ex parte* at 11.

<sup>27</sup> In this process proprietary information can be kept confidential through a non-disclosure agreement.

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herein. In addition, the Commission should tackle key policy decisions to ensure that the transition to an all-IP PCN does not undermine competition. The sooner the Commission undertakes the actions set forth above, as part of its Managerial Framework, the better the chances that the core values of the Commission will be preserved through the transition to an all-IP PCN and beyond.

Respectfully submitted,



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