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September 17, 2014

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.
*In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; 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 September 15, 2014, Lisa Youngers and Mike Parker of XO Communications LLC (“XO”) and Thomas Cohen and Edward A. Yorkgitis, Jr. of Kelley Drye & Warren LLP, counsel for XO, met with Deena Shetler, Eric Ralph, Billy Layton, Pam Arluk, Kenneth Lynch, and Christopher Koves of the Wireline Competition Bureau, and Madeleine Findley, Joel Rabinovitz, Doug Klein, and Marcus Maher of the Office of General Counsel. The purpose of the meeting was to describe in detail:

- The facilities XO builds or purchases from third party providers to serve all types of business customers in major markets throughout the United States.
- The factors used by XO to decide whether to build or purchase facilities to these customers.
- XO’s practices for deciding whether and how to purchase unbundled network elements (“UNEs”) and special access circuits from large incumbent local exchange carriers (“ILEC”).
- How certain terms and conditions of its special access arrangements with large ILECs are both thwarting the development of wholesale competition in the special access and Ethernet markets and impeding the technology transition from time

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division multiplexing-based (“TDM-based”) services and facilities to Internet protocol-based (“IP-based”) services and facilities such as Ethernet.

- The urgent need for the Commission to adopt remedies to address provisions in ILEC special access tariffs and contracts that are on their face or in effect anticompetitive and delay the IP transition.

In this filing, XO summarizes the discussion by Lisa Youngers and Mike Parker of XO and its counsel.

To serve its small and large business and enterprise customers, XO relies on a mix of inputs including its own fiber network facilities, UNEs obtained from ILECs, ILEC TDM-based special access facilities (DS1s and DS3s), ILEC Ethernet facilities, and services and facilities from third party alternative suppliers (both TDM- and IP-based). When making the choice how to serve a customer request, XO uses these inputs in its least cost provisioning tool to determine which options, among those that would ensure acceptable service quality, are available and technologically suitable at the given locations. The determination from among qualifying options is ultimately a financial decision, although in XO’s experience, most often the only available choice is ILEC-provided facilities – usually special access circuits since UNE availability is more limited.

To acquire ILEC special access (TDM) circuits at reasonable rates, XO needs to enter into multi-year arrangements since the standard tariffed month-to-month rates for DS1 and DS3 circuits from ILECs are far too high as a result of the Commission’s flawed “price flex” regime. As XO has described in detail in other pleadings submitted in WC Docket No. 05- 25,¹ these multi-year special access arrangements with the large ILECs enables XO to receive substantial discounts off the month-to-month rates but only in return for committing to purchase special access in volumes of 80-95% (depending on the ILEC) of its historical special access purchases. In return for the commitments, XO also may receive other benefits, such as circuit portability, which allows it to change the location of special access circuits without early termination penalties. If XO fails to meet the volume commitments, however, it faces shortfall penalties which may even exceed the cost of the special access circuits themselves. (If its special access needs exceed the volume commitments, XO faces the Hobson’s choice of either paying the ILECs’ high month-to-month rates for the additional circuits or increasing its volume commitment (and locking it in) by including the additional circuits within a new, larger commitment.)

¹ See Comments of XO Communications LLC on, WC Docket No. 05-25 and RM-10593, at 8-13 (filed Feb. 11, 2013).

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It is evident that the large ILECs' special access volume commitments – by which ILEC revenues are, in effect, protected from effective competition by the substantial shortfall penalties – penalize XO just when the industry is poised to accelerate the transition to IP-based services. For instance, XO will make the seemingly irrational economic decision – because of the onerous shortfall penalties it would face – to continue to purchase DS1 or DS3 special access “for” a customer which will not be used or resold by XO even though it has already begun to serve that customer using IP-based services. As a consequence, XO is forced to pay *twice* – and, where XO uses the ILEC's Ethernet service, *the ILEC is paid twice* – simply to provide the service to the customer *once*. (As XO emphasized, its long-term special access arrangements with the ILECs – which are governed by currently tariffed terms and conditions – do not give XO credit toward its special access volume commitment when it purchases Ethernet services, even when XO transitions an existing TDM-based customer using ILEC special access DS1s or DS3s to an Ethernet solution.²) On other occasions, XO will continue to serve the customer using the TDM special access services largely as a consequence of the discount plans' lock-in arrangements. In the former circumstances, XO assumes the added burden of monitoring and timing disconnects of the “phantom” DS1 and DS3 circuits so as to ensure that they do not count toward subsequent periods' volume commitments. As a result of these disconnects, XO, for a short time, will be relegated to paying the excessive shortfall penalties for these circuits, again, even when XO may already be paying the ILEC for Ethernet services which have replaced the DS1 and DS3 circuits that have been disconnected.

While some ILECs are floating new agreements with an overall revenue-based volume commitment that includes both DS1 and DS3 special access services and Ethernet services, this does not mean that XO is seeing a transition to an environment where DS1 and DS3 purchases are truly fungible with Ethernet service for purposes of meeting volume commitments. Rather, the ILECs are not only asking XO to make an overall spend commitment on Ethernet and special access services, but also are signaling their intentions to require that XO still meet a minimum “sub-commitment” for DS1 and DS3 special access services. In other words, the ILECs are locking in through their contracts on-going TDM purchases while hamstringing the ability of the competitive LECs to avail themselves of IP (Ethernet) offerings, all while publicly calling for a

² While, for example, ¶2.9.4 of Verizon's Tariff F.C.C. No. 1 appears on the face to provide carriers with Commitment Discount Plans some ability to transfer DS1 and DS3 special access circuits to Ethernet products without immediate impact on volume commitments, the relevant conditions and requirements that apply to such “Technology Migrations” under ¶2.9.6 are so restrictive in XO's experience that replacement is operationally infeasible. Paragraph 2.9.6 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.

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rapid transition to IP. Such new arrangements would not alleviate the problems XO described above or by other competitors in their *ex parte* presentations in this docket³ but merely perpetuate them in a different form. While XO noted in the September 15th meeting that an overall spend commitment with a special access sub-commitment would be a step in the right direction, sub-commitments for special access are a continued obstacle to competition and the technology transition.

In light of the harm these exclusionary provisions are causing to wholesale competition and the technology transition, the Commission should act now to eliminate the large ILECs' special access volume commitment plans' lock-in and related provisions, which convert historical special access spending amounts into uneconomic constraints going forward and impose uneconomic shortfall penalties for failure to meet the volume commitments. Specifically, the Commission should issue an order finding unjust and unreasonable, and therefore unlawful, the following provisions, whether in contract tariffs or in out-of-the-tariff standard plans, that prevent XO from purchasing its inputs – including ILEC-provided Ethernet – in a competitive market and that slow the technology transition:

- Provisions requiring special access volume commitments in return for special access discount pricing and other benefits should be found unlawful and immediately unenforceable if the volume discounts are not subject to recalculation at least once every twelve months.⁴ To the extent existing

³ See, e.g., Letter from Michael J. Mooney, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM- 10593 (filed Feb. 22, 2012); Letter from Angie Kronenberg & Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Sept. 10, 2014); Letter from Thomas Jones, Wilkie Farr and Gallagher LLP, Counsel for BT Americas, Inc., Cbeyond Communications, LLC, Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Sept. 11, 2014).

⁴ As a result of such an order, XO envisions that existing five-year arrangements, for example, would remain multi-year to allow carrier customers to secure the discount pricing, but the volume commitments would not remain static throughout the five-year term, as is the case now. Rather the commitments would be recalculated annually subject to the content of the Commission actions. XO submits that the requested Commission actions would not harm the ILECs because, under the ILECs' special access discount plans today, pricing is based on a volume commitment measured by each individual customer's historic spend levels and not against some objective measure applicable to all existing or potential customers. If anything, the immediately effective Commission actions requested here would help eliminate what is otherwise discriminatory pricing by the ILECs today, as one customer entering into a, say five-year agreement today might

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arrangements and tariffs provide that the volume commitments are in effect for more than twelve months, the Commission should order that such volume commitment levels and associated shortfall penalties or other payments or conditions triggered by a failure to meet the commitments are enforceable only up to one year, after which the commitments must be recalculated based on the previous year's purchases.

- Provisions setting special access volume commitments should be found unlawful and immediately unenforceable if they require the purchase of more than 50% of the customer's special access spend from the previous twelve-month period. To the extent existing arrangements and tariffs provide that the customer must purchase an amount of special access equal to a greater percentage of what it purchased the previous year, the Commission should order that such terms may be enforced up to a level of one-half of the previous year's spend.
- Provisions that establish volume commitments should be found unlawful and immediately unenforceable if they fail to allow a customer's purchase of Ethernet services from an ILEC as a substitute or replacement for ILEC special access services to count toward satisfaction of the volume commitment.

As a result of the discussions with Commission staff in the September 15th meeting, XO also submits that the Commission should forbear from enforcing any applicable rules that may restrict the ability of ILECs to negotiate arrangements with wholesale customers that base prices on a mix of tariffed and non-tariffed services, subject to general Commission oversight under Sections 201 and 202 of the Communications Act for unjust, unreasonable, and unjustly and unreasonably discriminatory practices, charges, or terms. The resulting capability to obtain interrelated or even blended pricing with the added ability to choose among a variety of ILEC-provided inputs afforded by such forbearance will confer on competitors needed flexibility to deal with the evolving requirements of customers, which will only be accelerated during the ongoing technology transition. However, such forbearance and flexibility should not come at the cost of the relief described above.

have to commit to purchasing more special access circuits than another customer to obtain the same per circuit pricing if its historic special access purchase volumes are larger than the second customers. In other words, there are different volume commitments, in terms of absolute capacity requirements, for different customers to get the same pricing. The actions requested by XO would help reduce that disparity over time.

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The foregoing actions would greatly benefit the public interest. The requested Commission actions will create opportunities for competitive wholesale supply of both TDM- and IP-based 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. As always, the Commission can address any proposed tariff changes that violate Sections 201 and 202 of the Act, or other Commission orders or regulations.

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

Respectfully submitted,



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