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July 14, 2011

VIA ECFS AND EMAIL

Mindel De La Torre, Bureau Chief, International Bureau
Sharon Gilett, Bureau Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of:* Global Crossing Limited and Level 3 Communications, Inc., Application for Consent to Transfer Control of Authority to Provide Global Facilities-Based and Global Resale International Telecommunications Services and of Domestic Common Carrier Transmission Lines, Pursuant to Section 214 of the Communications Act, as Amended; Level 3 Communications, Inc., Petition for Declaratory Ruling Under Section 310(b)(4) Of the Communications Act of 1934, as Amended; IB Docket No 11-78;

Comments of XO Communications, LLC (including Appendices)
Request for Highly Confidential Protective Order

Dear Madam Bureau Chiefs:

In response to discussions on July 12 and 14 with the General Counsel's Office, XO Communications, LLC ("XO"), by its counsel, hereby requests that the Commission adopt and implement a Highly Confidential Protective Order in the above captioned matter to ensure that certain highly confidential and sensitive documents and information that XO (and any other qualifying party) submits are afforded adequate protection.

As background to this request, on July 7, 2011, the undersigned counsel spoke with International Bureau staff responsible for the above-referenced matter to ask if it intended to issue for this proceeding confidential and highly confidential protective orders to ensure that certain information that our client (as well as others) intended to file would be afforded adequate protection. International Bureau staff subsequently advised that it had determined it would not

Marlene H. Dortch
July 14, 2011
Page Two

establish such protective orders and that, if we wished to submit such information, we should do so by following the procedures set forth in Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459. We complied with that directive when submitting the XO Comments in the above-referenced matter (including appendices) on July 11, 2011 ("XO Comments"). A portion of the information contained in the confidential and proprietary version of the XO Comments, which was filed under seal with the Secretary's Office, consists of calculated market share data on traffic that XO exchanges with certain Internet Backbone Providers ("IBPs"). This information is highly proprietary and extremely sensitive data, the disclosure of which to competitors would have a significant adverse impact on XO's business and for each respective IBP's business and place them at a competitive disadvantage.

From our discussion with you, we understand that counsel for Level 3 Communications, Inc. ("Level 3") has requested access to the confidential and proprietary version of the XO Comments, that the Commission would entertain a request from XO for it to adopt a Highly Confidential Protective Order pursuant to which those comments could be filed, and that XO, once the protective order was adopted, could refile the confidential and proprietary comments pursuant to that protective order. XO wishes to cooperate with the Commission and provide Level 3 appropriate access to its confidential and proprietary information. Accordingly, XO requests that the Commission adopt and implement a Highly Confidential Protective Order in this proceeding that permits the confidential and proprietary information it filed in its comments to be designated as Highly Confidential and limits access to such material only to outside counsel of record, their employees, and outside consultants or experts who are not involved in competitive decision-making. The Commission has authority to issue such an order pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

This information is highly proprietary and commercially sensitive information that is not ordinarily disclosed to unrelated third parties because disclosure of the information could have adverse competitive consequences for the parties. Accordingly, this information qualifies for confidential treatment under Exemption 4 of the Freedom of Information Act ("FOIA") as "trade secrets and commercial or financial information obtained from any person and privileged or confidential-categories of materials not routinely available for public inspection." *See* 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

The Commission in many prior transactions has granted special protection, with more limited access, for material that, if released to competitors, would allow those competitors to gain advantage in the marketplace.¹ Among the types of documents for which the

¹ *See, e.g., Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Second

Marlene H. Dortch
 July 14, 2011
 Page Three

Commission has granted this additional protection are lists of specific customers or customer data (such as revenues attributed by customer or customer data aggregated to a relatively detailed level), competitive analyses such as future pricing, product or marketing plans, detailed engineering capacity information, build out plans, detailed merger integration specifics or efficiencies, and other future business plans.² The calculated market share data on traffic that XO exchanges with certain IBPs contains some of the most sensitive information regarding XO's business and for each IBP's particular information, the respective IBP's business, and falls within the categories for which the Commission has previously granted Highly Confidential treatment. This information is not only commercially sensitive in itself, but much of it would reveal information about XO's and, for each IBP's particular information, customers and would allow competitors to analyze the strengths and weaknesses of their service offerings and to particular customers and classes of customers.

The Commission should therefore adopt a Highly Confidential Protective Order that would permit commenting parties to designate documents containing the foregoing information "Highly Confidential," and limit disclosure of such documents only to outside

Protective Order (Revised), DA 11-1100 (rel. June 22, 2011); *Application filed by Qwest Communications International, Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Protective Order, DA 10-2093 (rel. Oct. 29, 2010) (adopting a second protective order); *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, Second Protective Order, WC Docket No. 06-74, 21 FCC Rcd 7282 ¶ 3 (WCB 2006) ("*AT&T/BellSouth Second Protective Order*"); *SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, Order, WC Docket No. 05-65, Order, 20 FCC Rcd 8876 (WCB 2005) ("*AT&T/SBC Second Protective Order*") (adopting second protective order); *Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless For Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, Second Protective Order, 24 FCC Rcd 14569 (WTB 2009); *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Second Protective Order, 24 FCC Rcd 7182 (WTB 2009); *Application of News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, Protective Order, 22 FCC Rcd 12797 (MB 2007) (adopting a second protective order); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, MB Docket No. 05-192, Order, 20 FCC Rcd 20073 (MB 2005) (adopting a second protective order); *News Corporation, General Motors Corporation, and Hughes Electronic Corporation*, MB Docket No. 03-124, Order, 18 FCC Rcd 15198 (MB 2003) (adopting a second protective order).

² See, e.g., *AT&T/BellSouth Second Protective Order*, ¶¶ 3,5; *AT&T/SBC Second Protective Order*, ¶¶ 3, 4.

Marlene H. Dortch
July 14, 2011
Page Four

counsel of record, their employees, and their outside consultants or experts. Limiting access to outside counsel and their experts is absolutely essential to preserve the competitive dynamics in the marketplace and ensure that parties submitting comments are not placed at a significant competitive disadvantage. In addition, the Commission should specify that any person who obtains access to Highly Confidential information shall use the documents or information solely for the preparation and conduct of this proceeding before the Commission and shall not use such documents or information for any other purpose, including without limitation any business, governmental, or commercial purposes, or in other administrative, regulatory, or judicial proceedings.³ The Commission has repeatedly found that such enhanced protection for highly sensitive categories of information appropriately balances the Commission's need to develop a more complete record on which to base its decision, the public's right to participate in proceedings and the submitting parties' interest in safeguarding highly sensitive data.⁴

Thank you for your consideration of this request, and please contact us if you have any questions.

Respectfully submitted,



Thomas Cohen
Randall W. Sifers
Counsel to
XO Communications, LLC

cc: Carrie-Lee Early (via email)
Jim Bird (via email)
Virginia Metallo (via email)
Dennis Johnson (via email)

³ See, e.g., *AT&T/BellSouth Second Protective Order*, ¶ 6.

⁴ See, e.g., *AT&T/BellSouth Second Protective Order*, ¶ 3; see also *AT&T/SBC Second Protective Order*, ¶ 3.