June 5, 2015

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


Dear Ms. Dortch:

On June 3, 2015, Lisa Youngers and Samuel Koetter (via telephone) of XO Communications LLC (“XO”) and the undersigned, Thomas Cohen, of Kelley Drye & Warren LLP, counsel for XO, met with Deena Shetler, Daniel Kahn (via telephone), Randy Clarke, David Zesiger, Heather Hendrikson, Virginia Metallo, John Visclosky, Bakari Middleton, Michelle Brelove (via telephone), and Jean Ann Collins (via telephone) of the Wireline Competition Bureau in regard to the above-referenced dockets.1 The following summarizes the presentation by the XO representatives.

In its comments in the Technology Transitions proceeding, XO submitted that the Commission could best sustain and enhance competition and benefit consumers in the transition to an all-IP public communications network by ensuring that incumbent local exchange carriers (“incumbents” or “ILECs”) supply essential wholesale inputs to competitors for use in providing

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services to retail business customers. To that end, XO proposed, as elaborated upon below, that
the Commission update its procedural requirements for the retirement of copper loops accessed
at wholesale and provide for a robust Section 214 discontinuance process which protects end
users from either losing service or having their rates increase substantially.2

Enhancements to the Copper Retirement Process

As discussed in its comments,3 XO makes extensive use of copper facilities (DS0s, DS1s, and DS3s)4 purchased at wholesale from ILECs, as well as special access services purchased from ILECs that are provided over copper facilities. Of particular relevance for the Technology Transitions proceeding, XO uses copper loops obtained from ILECs on an unbundled basis to provide Ethernet over Copper (“EoC”) service to thousands of commercial customers at speeds up to 100 Mbps.5 Other carriers, including the ILECs, also are providing EoC in large numbers because so many commercial buildings are not served by fiber and because, even where fiber is available, EoC can be a cost effective way to offer customers high-bandwidth service. Thus, EoC has proven to be and remains an attractive service for consumers desiring advanced capabilities and a pivotal means to jumpstart the transition to IP-based networks.

The problem faced by retail customers of XO and other competitive providers is that, under the Commission’s copper retirement rules, ILECs can wipe out their access to EoC and other competitive broadband services by precipitous retirement of copper. Moreover, the incumbents have an incentive to do so to favor their own Ethernet services. Unfortunately, the copper retirement process has been plagued by uncertainty and a lack of transparency, and as currently implemented, unilaterally favors the incumbents.

2 XO also supports Windstream’s Petition for Declaratory Ruling to Clarify that Technology Transitions Do Not Alter the Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3), WC Docket No. 15-1.


4 The DS0 facilities XO purchases from ILECs have no electronics attached and are often called “dark” – as opposed to “lit” – copper loops.

5 XO also uses DS1 lines leased from incumbent LECs to provide Ethernet services, but because of technical limitations, the ability to innovate and offer higher speeds is not as great as with EoC.
To date, these shortcomings in the copper retirement process have not had a material adverse impact because incumbents have not retired much last-mile copper in the areas where XO provides its (and where many other competitive local exchange carriers (“CLECs”) focused on the business sector provide their) retail services. But, that is changing, and XO understands from recent meetings with ILECs that they are planning to accelerate retirements, which will increase the likelihood that areas where XO and many other competitors have customers will be affected. Accordingly, the Commission should update its copper retirement rules to reflect the important role that EoC plays in the IP-transition and to ensure that the evolution of ILEC networks to fiber-based solutions does not undermine the competitive marketplace for advanced services, giving business customers increased choice and the benefits of lower prices that competition brings.

Among the fixes XO proposes to the copper retirement process are --

**Copper Retirement Notices** – Incumbents should provide notice of retirement one year in advance. The content and format for notices should be consistent across all ILECs.

**Copper Retirement Database** – Incumbents should build on their current process of supplying information about available copper facilities by maintaining a searchable database of

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6 All of XO’s proposals are detailed in a “redline” of the Commission’s current rules attached to the XO Reply Comments.

7 XO submits that its proposal on requiring incumbents establish and maintain a Copper Retirement Database was properly noticed in the NPRM. For instance, the Commission sought comment “on how to address allegations that in some cases incumbent LECs are not adequately maintaining their copper facilities that are not yet retired.” *See NPRM, ¶ 49.* XO’s database proposal is one step in addressing this concern since it suggests an objective, publicly available resource identifying a facility as either retired or not, and, for those locations where copper facilities are not retired, makes clear that the ILEC has an obligation to undertake maintenance. In addition, the Commission stated its intent to consider adopting “improvements to our copper retirement process to better promote competition and protect consumers.” *See id.* Without the information in XO’s proposed database, there is a lack of transparency about retirements which could undermine competition and adversely affect consumers. Further, the Commission asked “how would the Commission determine if an incumbent LEC’s treatment of its copper facilities fits the definition [of retirement].” *See id., ¶ 53.* The information needed for the database is not a new data collection because it is data the incumbents already need to be tracking to comply with the Commission’s copper retirement rules. The database will assist in addressing the *de facto* retirement issue because if a facility is not in the database, it is deemed available. This also addresses the Commission’s desire to create an objective standard of *de facto* retirement.
retired copper or copper noticed for retirement for access by their wholesale customers. The
database should contain current (updated each month) information (address list) of where copper
has been retired or noticed for retirement. While the database does not have to be centralized for
each incumbent, the format should be consistent and have search capabilities for easy public
access.8

Forecasts of Copper Retirements9 – Incumbents should, at least every 6 months, issue a
non-binding forecast of copper retirements for the next 12-24 months, i.e. the year following the
one-year notice period (proposed by XO as noted above).10

XO also addressed in its comments the elimination of access to incumbent copper
facilities as a result of a natural disaster or emergency. In these instances, copper is not being
“retired.” Rather, prior to this situation, neither the incumbent nor its wholesale customer has
any expectation that copper will be taken off-line. Therefore, XO proposed that the Commission
require incumbents to produce and publish in advance a formal plan that would govern how they
will work with wholesale customers in the event of an emergency so that they can, in turn, better

8  XO submits there is no such thing as a “de facto retirement of copper,” and the
Commission should not find there is. Copper is either retired or not. A failure by an
incumbent to maintain copper is contrary to its obligation under the rules. Moreover,
should the Commission permit an incumbent to “retire” copper facilities by failing to
maintain them, it would provide a strong incentive for the incumbent not to maintain
copper facilities. It also would obfuscate whether copper is available to wholesale
customers. Accordingly, the Commission should hold to a strict definition of retirement
pursuant to the notice processes.

Contrary to claims of the ILECs, maintenance of such a database would impose minimal
burdens on them since they already maintain a database, accessible by competitive
providers, of available copper loops that can be provisioned as unbundled network
elements. XO is asking that notices of copper upcoming retirements be added to this
database so competitive providers cannot only know what is available today but what will
be available one year in advance (assuming XO’s notice requirement is adopted). By
adding this information, XO will avoid the situation it described to the staff at the
meeting where an incumbent filled an order for unbundled loops for a group of nursing
homes only to then retire them a short time later because it provisioned a new order on
facilities that were to be retired but failed to track that internally, leaving the group of
nursing homes in immediate danger of being without service.

9  XO’s forecast proposal was raised in the NPRM, ¶ 57. (“Would it be helpful for
incumbent LECs to provide annual forecasts of expected copper retirements or other
network changes; if so, to whom should they provide such forecasts?”)

10  XO believes there are mechanisms to address any need of an incumbent to protect
competitively sensitive information, including limiting access and disclosure.
coordinate network activities with their retail consumers with greater certainty and minimal disruption because of the impact on the availability of wholesale inputs. Incumbents’ emergency plans should be filed with the Commission for its review (after a period for public comment) and approval. In addition, where a disaster destroys existing copper, the Commission should either require the incumbent to deploy and enable the wholesale customer to access new copper facilities or, in the event it does not deploy new copper, to provide equivalent access at the same rates, terms, and conditions to other transmission facilities for a period of at least 2 years.

Section 214 Discontinuance Process

While XO has its own facilities to serve many of its retail customers, it often needs to supplement its own network by obtaining at wholesale incumbent special access services. At a large share of customer locations, the incumbent special access facilities are XO’s only practical means of accessing the end user because competitive options do not exist and an extension of XO’s own facilities would not be economic under the circumstances (e.g., considering the length and difficulty of the build, the volume of service sought by the customer, and other factors). Typically, XO obtains these services through long term discount plans in return for certain volume commitments, since otherwise the rates charges by ILECs on a month-to-month basis are uneconomical. The terms and conditions of these long term volume commitment plans, including high shortfall and early-termination penalties, effectively lock-up XO’s demand. The record firmly establishes the anti-competitive impact of these volume commitment plan terms and conditions. XO and other competitors have come to rely upon these volume commitment plans for the inputs to serve its retail customers and price multi-year agreements with them. Thus, should an incumbent be permitted to discontinue suddenly these special access circuits or to eliminate volume commitment plans of a certain duration (e.g., all plans for DS1 or DS3 circuits of five years or longer), it would result in XO – and its retail customers – either facing a lack of service or having to access new services at excessive rates. Accordingly, the issue of obtaining access to IP equivalent services notwithstanding, XO is seeking sufficient notice and a reasonable period to transition (if needed) when an incumbent discontinues offering these services, including the elimination of volume commitment plans of a certain duration.

Among XO’s proposed solutions are the following:

Rebuttable Presumption – XO supports the adoption of the Commission’s proposed rebuttable presumption requiring an incumbent to file a Section 214 application and obtain approval before discontinuing wholesale service offerings, including special access discount plans, even if comparable non-tariffed offerings exist in the market. XO proposes that incumbents be required to file a certification with a rationale for discontinuance 60 days prior to submitting its Section 214 filing.
Notice – XO submits there must be sufficient notice, at least one year, of any proposed discontinuances of a DSn special access discount plan, and, once the Commission approves a discontinuance, there should be a three-year period to transition existing circuits (with no shortfall penalties or early termination fees being imposed).\(^{11}\)

Access to Equivalent Service – XO supports Windstream’s proposal on the need for incumbents to provide equivalent wholesale access in the case of a discontinuance and the six elements by which equivalency will be determined.

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

Respectfully submitted,

[Signature]

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\(^{11}\) Other CLECs submitted a similar proposal. See e.g. Comments of Birch, Integra, and Level 3, GN Docket No. 13-5 \textit{et al.} at 23-24 (Feb. 5, 2015).