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REDACTED – FOR PUBLIC INSPECTION

October 5, 2016

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations, WC Docket No. 16-70

Dear Ms. Dortch:

In accordance with the Protective Order in the above-captioned proceeding, DISH Network Corporation submits the attached public, redacted version of its *ex parte* letter dated October 5, 2016. The symbols "{{**BEGIN HCI END HCI**}}" note where Highly Confidential Information has been redacted. A Highly Confidential version of this letter is being simultaneously filed with the Commission and will be made available under the terms of the Protective Order.

Please contact me with any questions.

Respectfully submitted,

Stephanie A. Roy
Counsel for DISH Network Corp.

Enclosure

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October 5, 2016

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Applications of XO Holdings LLC and Verizon Communications Inc. for Transfer of Control of Licenses and Authorizations, WC Docket No. 16-70

Dear Ms. Dortch:

As DISH has explained, Verizon and XO have failed to demonstrate that their proposed transaction will serve the public interest, and have failed to provide key information necessary for the Commission and the public to evaluate the transaction.[1] It is now clear why the Applicants did not want to provide the Commission with the information normally used to evaluate transfers of control. The Applicants' attempts to cure the defects in their Application through their voluminous submissions to the Commission have only served to substantiate the proposed transaction's *harms* instead of its alleged, and still unsupported, benefits.

As detailed below, a review of the materials and documents submitted in response to the Commission's information requests shows that the transaction, if consummated, will result in a **{{BEGIN HCI END HCI}}** in investment and competition in the industry. On the other side of the ledger, the claimed benefits of this transaction are either speculative or not transaction-specific.

[1] Petition to Deny of DISH Network Corporation, WC Docket No. 16-70, at 7 (May 3, 2016).

One of the Applicants' own stated, explicit goals for the merger is **{{BEGIN HCI END HCI}}**[2] Just as important, XO's documents reveal **{{BEGIN HCI END HCI}}** In turn, Verizon documents show it is not shy about admitting one of the merger's true goals: it will obviate the need to bring fiber to buildings **{{BEGIN HCI END HCI}}**[3] This means that the transaction is a horizontal merger that would result in a loss of competition that appears to be beyond the few areas of current overlap identified by Applicants. As explained below, the transaction would result in a direct 2-to-1 reduction in competition for some businesses.

I. The Transaction will Result in Decreased Investment and Less Competition

Most of the purported benefits of the transaction relate to the increased investment that Verizon states will occur because of its ability to use XO's assets.[4] However, the Applicants have not explained why or how Verizon will be a better steward of these assets than XO. Indeed, XO is in the midst of a substantial fiber buildout program.[5] XO's internal planning documents indicate that **{{BEGIN HCI END HCI}}**[6] XO's goal is to bring an additional **{{BEGIN HCI END HCI}}**[7] To accomplish this goal, XO

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[2] **{{BEGIN HCI END HCI}}**

[3] **{{BEGIN HCI END HCI}}**

[4] *See* XO Holdings and Verizon Communications, Inc., Applications to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-70, Exhibit 1 at 6-10 (March 4, 2016) ("Application"); Joint Opposition of Verizon and XO Holdings to Petitions to Deny and Comments, WC Docket No. 16-70 at 3-5 (May 27, 2016) ("Verizon Opposition").

[5] *See* Sean Buckley, FierceTelecom, "XO Takes Success-Based Approach to On-Net Fiber Buildouts," http://www.fiercetelecom.com/telecom/xo-takes-success-based-approach-to-net-fiber-buildouts (Sept. 3, 2015) ("This fiber expansion effort is part of an initiative the CLEC launched in 2014 to invest up to $500 million to grow its nationwide network.").

[6] **{{BEGIN HCI END HCI}}**

[7] **{{BEGIN HCI END HCI}}**

anticipated spending **{{BEGIN HCI END HCI}}**[8]

XO has a successful track record in fulfilling ambitious investment and buildout goals; **{{BEGIN HCI END HCI}}**[9] The elimination of XO would halt this aggressive, successful expansion in its tracks, extinguishing competition that would have occurred between XO and its competitors, including Verizon, in each of the many buildings that XO would have directly connected to its network absent approval of this transaction.

If the pending transaction is approved, however, Verizon has not explained how much (if any) of this investment it will continue. Both Verizon and XO have identified **{{BEGIN HCI END HCI}}** as one of the "synergies" of the merger.[10] Verizon estimates **{{BEGIN HCI END HCI}}**[11] Another Verizon document goes even further, **{{BEGIN HCI END HCI}}**[12]

Just as troubling, an XO document vividly shows the direct effect of the proposed merger on competitive choices: **{{BEGIN HCI**

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[8] **{{BEGIN HCI END HCI}}**

[9] **{{BEGIN HCI END HCI}}**

[10] **{{BEGIN HCI END HCI}}**

[11] **{{BEGIN HCI END HCI}}**

[12] **{{BEGIN HCI END HCI}}** *See also* Verizon Communication Inc., Response to Information and Document Request, WC Docket No. 16-70 at 29-30 (July 7, 2016) ("Verizon RFI 1") (noting that Verizon would realize synergies by **{{BEGIN HCI END HCI}}**

END HCI}}[13] Notably, a major goal of XO's buildout program is to **{{BEGIN HCI**

END HCI}}[14] Reducing **{{BEGIN HCI** **END HCI}}** would of course mean more extensive facilities-based competition. The proposed merger would avert that competition.

The transaction will therefore likely result in **{{BEGIN HCI** **END HCI}}** in fiber buildouts, with a corresponding adverse impact on competition. There will be additional instances where horizontal competition is reduced from 2-to-1 beyond what has already been described by the Applicants. The Applicants should, at least, explain how many buildings that are currently lit by Verizon would have received additional competition from XO as part of XO's expansion program. While the Applicants concede that there is "only" a 15% overlap between Verizon's ILEC footprint and XO's on-net buildings,[15] this does not take into account planned investment by XO that would increase the direct competition between the two Applicants. By purchasing XO, Verizon will eliminate this direct source of competition.[16]

II. The Claimed Benefits of the Proposed Merger Are Not Transaction-Specific

The Applicants propose several benefits relating to Verizon's planned use of the assets it would acquire from XO, but such benefits are not transaction-specific. The Commission has previously found that a buyer cannot simply adopt the existing investment plans of the seller's company and call such plans a transaction benefit, as Verizon seems to have attempted here.[17]

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[13] **{{BEGIN HCI**

END HCI}}

[14] **{{BEGIN HCI**

END HCI}}

[15] Verizon Opposition at 7.

[16] *See* Petition to Deny of DISH Network Corp., WC Docket No. 16-70, at 24-25 (May 3, 2016) ("Given XO's expansive unlit footprint, the Applicants' brief discussion likely underestimates dramatically the true overlap of the standalone companies by a significant margin.").

[17] *See Memorandum Opinion and Order, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, FCC 16-59, ¶ 320 (May 10, 2016) ("Charter Order") (rejecting claimed benefits of residential broadband speed upgrades or network buildout to residential customers as not transaction-specific).

For example, Verizon claims that it would quickly deploy XO's unlit, "dark" fiber assets;[18] as described above, however, **{{BEGIN HCI** **END HCI}}** Indeed, an operational priority for XO is to **{{BEGIN HCI** **END HCI}}**[19] As described above, **{{BEGIN HCI** **END HCI}}**[20] This growth is significant; Verizon has not put forth any evidence to suggest that its proposed use of XO's fiber would outpace XO's current growth plans.

In a related vein, the Applicants also allege that a key benefit of the transaction is that Verizon will "light" up XO's dark fiber assets. However, the Applicants have not shown why and to what extent Verizon will utilize these fiber assets faster than XO would without the merger being approved.[21] Indeed, as described above, **{{BEGIN HCI** **END HCI}}** As the Commission found in the Charter/TWC proceeding, "[a]pplicants do not explain why [they] lack the scale to undertake the fixed cost capital investments needed..."[22] The same is true with Applicants here, especially in light of **{{BEGIN HCI** **END HCI}}**

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[18] *See* Application at 10.

[19] **{{BEGIN HCI** **END HCI}}**

[20] **{{BEGIN HCI** **END HCI}}**

[21] *See* Charter Order ¶ 355 ("Applicants have failed to show the extent to which New Charter's upgrading the acquired systems would outpace Time Warner Cable and Bright House's likely efforts in the absence of the proposed transaction.").

[22] *See* Charter Order ¶ 361.

For these reasons, among the many others raised by opponents,[23] the transaction should be denied.[24]

Respectfully submitted,

Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corp

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[23] *See* Petition to Deny of DISH Network Corporation, WC Docket No. 16-70 (May 3, 2016); Petition to Deny of INCOMPAS, WC Docket No. 16-70 (May 3, 2016); Petition to Deny and Comments of Public Knowledge, WC Docket No. 16-70 (May 12, 2016).

[24] While Verizon's application to lease various spectrum leases from XO Holdings subsidiary Nextlink was approved, that order emphasized that this would not "preclude or limit any analysis, action, or remedy that may be found appropriate with respect to the Transfer of Control Application." *Memorandum Opinion and Order, Application of Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC For Consent to Long-Term De Facto Transfer Spectrum Leasing Arrangement*, DA 16-838, ¶ 10 (July 25, 2016).