

October 18, 2016

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

Re: Applications of XO Communications, LLC and Verizon Communications Inc. for Transfer of Control of Licenses and Authorizations, **WC Docket No. 16-70**; Business Data Services in an Internet Protocol Environment, **WC Docket No. 16-143**; Special Access for Price Cap Local Exchange Carriers, **WC Docket No. 05-25**.

Dear Ms. Dortch:

On October 14, 2016, Phillip Berenbroick of Public Knowledge and Joshua Stager of New America's Open Technology Institute ("Competition Advocates") met with Madeleine Findley, Daniel Kahn, Terri Natoli, Virginia Metallo, Christopher Sova, Mike Ray, and Zachary Ross of the Wireline Competition Bureau, and Joel Rabinovitz of the Office of General Counsel, and discussed issues in the above-captioned proceeding.

The Competition Advocates explained that the Federal Communications Commission ("Commission" or "FCC") should not permit Verizon to acquire XO Communications ("XO"). Verizon and XO have failed to meet their burden of demonstrating that this transaction would promote competition and serve the public interest.¹

It is clear that Verizon's planned takeover of XO will reduce competition in already concentrated markets. The proposed acquisition is a classic horizontal merger between two facilities based telecommunications providers that are direct competitors in some of the nation's largest markets, including New York City, Philadelphia, and Boston.

Verizon is already the dominant incumbent local exchange carrier and provider of business data services ("BDS") and backhaul for wireless providers in its home markets. XO is a leading competitive provider in the BDS market with facilities that compete head-to-head with Verizon in multiple major markets. Permitting Verizon to acquire XO would eliminate a major competitor in these markets, reducing competition for enterprise BDS customers, and enhancing Verizon's market power and ability to raise prices. Allowing Verizon to increase its market power cannot be justified.

Permitting Verizon to acquire XO would be particularly harmful to the BDS marketplace due to XO's position as an innovative competitive alternative to Verizon and other incumbent local exchange carriers. For example, XO has been uniquely successful in offering Ethernet-over-Copper ("EoC") as a lower-cost alternative to incumbent BDS products. As INCOMPAS has explained, "it is unlikely that another competitive carrier would be able to replace XO as a

¹ See 47 U.S.C. § 310(d).

provider of EoC because XO has developed special expertise in the provision of EoC that other competitors have been unable to replicate.”² Post-transaction, Verizon is unlikely to continue to offer XO’s EoC product, and even if it did continue to offer it, it would have no incentive to maintain XO’s competitive pricing, terms, and conditions. As a result, BDS prices would rise and innovation would suffer.

Additionally, XO is a key supplier of wholesale BDS to competitive carriers serving enterprise customers outside their carrier footprints. Eliminating XO as a competitive wholesale option would reduce the number of wholesale BDS providers for competitive carriers to purchase wholesale access from. As a result, Verizon will have additional market power as a wholesale BDS provider, which will increase its power to raise prices for critical inputs needed by competitive providers (the wholesale purchasers) that compete directly with Verizon’s enterprise BDS services. Removing XO from the marketplace will reduce both enterprise and wholesale BDS competition, which will result in higher prices for business customers, government agencies, and community anchor institutions purchasing BDS, and ultimately, higher prices on goods and services for consumers.

The proposed Verizon/XO transaction will also have a substantial negative effect on the internet transit market. XO is one of the few independent providers of internet transit services; eliminating it as a competitor would further concentrate the transit market and risks increasing costs for edge providers, content creators, and consumers. As one of only five internet access providers to charge anticompetitive interconnection fees to reach end-users, Verizon has been a particularly bad actor in the transit market. Verizon has also attempted to avoid complying with voice interconnection agreements, allowed its customers to suffer from prolonged service degradation during interconnection negotiations, and has business incentives to manipulate interconnection fees to benefit Verizon-affiliated content. The harmful impact of less competition and higher prices for internet transit include: reduced investment in companies that require internet transit, depressed business formation, fewer new jobs, less innovation and content creation, and higher prices for downstream consumers as edge providers are forced to pass on higher costs.

The Commission recently highlighted the need to closely monitor the transit market in its orders in the AT&T/DirecTV and Charter/Time Warner Cable/Bright House Networks transactions.³ However, the transit market is notoriously opaque, with rampant non-disclosure agreements clouding the public’s ability to adequately monitor for anticompetitive harms. The Commission has taken important steps to increase oversight of the transit market by requiring AT&T and Charter to submit transparency reports about interconnection deals, but Verizon remains largely free of such oversight. Verizon’s proposed acquisition of XO would be more threatening to the transit market than either AT&T/DirecTV or Charter/TWC, neither of which

² Notice of *Ex Parte* of INCOMPAS, WC Docket No. 16-70, at 3 (filed July 6, 2016); *see also* Petition to Deny of INCOMPAS, WC Docket No. 16-70, at 11, 21 (filed May 3, 2016).

³ *See* In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, *Memorandum Opinion and Order*, 31 FCC Rcd 6327, 6379-6392 ¶¶ 107-139 (May 10, 2016); Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, *Memorandum Opinion and Order*, 30 FCC Rcd 9131, 9211-9215 ¶¶ 214-219 (2015).

involved the acquisition of a major transit provider. Accordingly, Verizon’s proposed takeover of XO demands far greater scrutiny.

Verizon has suggested that nearby cable and competitive providers – potential competitors – negate the risk of harm from reduced competition and the commensurate increase in Verizon’s market power. The Commission should not rely on the specter of potential competition to counteract the competitive harms that would result from this transaction. As Public Knowledge has extensively noted in the BDS context, the FCC has long proven itself incapable of predicting future competition in the BDS market.⁴ Likewise, the Government Accountability Office has been scathing of the Commission’s ability to predict BDS competition, finding the FCC’s predictions were often wrong, and the FCC often permitted the potential competitors it did identify to be acquired by incumbent providers.⁵ The Commission itself has also been critical of its track record predicting competition, pointing out that FCC predictions of new competition have been unsound, and that in reality, where there are high barriers to entry, potential competition often poses no serious competitive restraint and “cannot be relied upon to constrain market prices.”⁶ The Commission should not repeat these mistakes in the context of this transaction, or in the pending BDS proceeding.

Additionally, the Commission must not consider the proposed Verizon/XO combination in a vacuum. The Commission is currently weighing efforts to reform the BDS marketplace, and between 2014-2015, collected what is possibly the most comprehensive data set ever assembled for a Commission rulemaking proceeding.⁷ The data confirm that the vast majority of BDS customer locations have little or no competition. At least ninety-five percent of customer locations have no more than duopoly competition.⁸ The record also demonstrates that the Herfindahl-Hirschman Index (“HHI”) “exceeds 5,000 in approximately 99 percent of census blocks” where BDS is provided by an incumbent LEC.⁹ By comparison, the *Horizontal Merger*

⁴ See Letter from Public Knowledge to Tom Wheeler, Chairman, Federal Communications Commission; WC Docket Nos. 16-143, 15-247, 05-25, RM-10593; at 3-4 (filed June 16, 2016).

⁵ See United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services 1, 14-15 2006.

⁶ See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area; WC Docket No. 09-135; *Memorandum Opinion and Order*; 25 FCC Rcd 8622, 8633-34 ¶ 24, 8660-62 ¶¶ 72-73, 8666-67 ¶¶ 84-85 (2010).

⁷ Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC Docket Nos. 16-143, 15-247, 05-25, RM-10593; *Tariff Investigation Order and Further Notice of Proposed Rulemaking*; 31 FCC Rcd 4723, 4737-4743 ¶¶ 29-43 (2016) (“FNPRM”).

⁸ See *id.* 4799 ¶ 175 (explaining Dr. Jonathan Baker’s findings that “almost all buildings (at least 95%) have no more than two providers”); *id.* 4801 ¶ 181 (discussing Dr. Stanley Besen and Dr. Bridger Mitchell’s findings that “almost all purchaser locations, 97 percent, are served by only one or two suppliers . . .”).

⁹ *Id.* 4802 ¶ 183 (quoting Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Docket No. 05-25, at 20-21) (originally filed Jan. 27, 2016 and revised consistent with protective orders Apr. 11, 2016)).

Guidelines used by both the U.S. Department of Justice and Federal Trade Commission characterize a market with an HHI above 2500 as “Highly Concentrated.”¹⁰

It would be counterproductive for the FCC to permit Verizon to acquire XO at a time when the Commission has acknowledged the BDS market is overly-concentrated and is poised to adopt pro-competitive reforms to address concentration-related harms. To fully account for the proposed transaction’s effect on the BDS ecosystem, the Commission should review this transaction in the context of the already concentrated BDS market, on which it has abundant data. Permitting Verizon to obtain even greater market power in already concentrated markets is unacceptable, particularly in light of the fact that the Commission has indicated that it plans to seek additional information on competition, pricing, and marketplace developments for packet-based BDS.¹¹ Allowing additional consolidation before resolving the existing shortcomings in the FCC’s BDS regulatory regime will not serve the public interest.

Because Verizon and XO have not met their burden to show that the proposed transaction would enhance competition and serve the public interest, the Commission cannot approve it. Instead, the Commission should deny Verizon’s planned takeover of XO and take affirmative steps to promote much-needed competition in the BDS marketplace. If Verizon wishes to increase its footprint and bandwidth in its home markets or enter new markets, it should invest its billions in new facilities rather than acquire one of the few existing competitors. The Commission cannot make good on its mandate to promote competition if it allows dominant firms to acquire the few competing providers.

In accordance with Section 1.1206(b) of the Commission’s rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

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¹⁰ United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* 19 (2010), *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

¹¹ Chairman Wheeler’s Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market, at 3 (rel. Oct. 7, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf.

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