

June 24, 2016

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: WC Docket No. 16-70**

Dear Ms. Dortch:

The proposed transaction between XO Holdings (“XO”) and Verizon Communications Inc. (“Verizon”) will allow Verizon to acquire new fiber assets, enabling it both to better serve enterprise and wholesale customers and to improve backhaul capabilities as it densifies its wireless network with 5G. DISH’s recent filing in opposition does not undermine those facts or provide any reason for the Commission not to approve the application.<sup>1</sup>

DISH is not currently an XO customer. Nor does DISH have any cell sites to which it might need backhaul – and DISH’s own filing underscores the absence of any real plans to build a network using them.<sup>2</sup> The DISH filing is nothing more than a kitchen-sink assortment of unsupported claims and specious arguments that ignore standard competition policy analysis, disregard Commission precedent, and refuse to acknowledge marketplace realities. The Commission should proceed with its review of the proposed transaction and disregard DISH’s attempts to distract. The following highlights a few of the flaws in DISH’s advocacy.

**Enterprise Market**

- *In nearly every building, there will be at least two competitors post-closing.* DISH’s feigned concern with regard to the number of in-building competitors ignores Commission precedent on transactions.<sup>3</sup> As the Applicants noted already, the Commission has expressed concern when two merging entities are the *only* carriers with direct connections to a building *and* where *additional* competitive entry is unlikely.<sup>4</sup> But neither is the case here. In *all but (at most) one building* there will be

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<sup>1</sup> Reply of DISH Network Corp., WC Docket No. 16-70 (filed June 6, 2016) (“DISH Reply”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 12.

<sup>4</sup> See Joint Opposition of Verizon and XO Holdings, WC Docket No. 16-70 (filed May 27, 2016) (“Joint Opposition”) (citing *SBC Commc’ns, Inc. and AT&T Corp.*, 20 FCC Rcd 18290, 18308 ¶ 32 (2005) (“*SBC/ATT*”) (where merging entities are the only carriers with direct connections to a building, and barriers to entry make it unlikely that other carriers will build their own facilities, the merger is likely to

at least two competing alternatives post-transaction, and in most cases there will be three or more competitors.

- *Cable provides additional competition.* As Applicants have demonstrated, all but one building post-transaction will have at least two competitors post-closing, and in most cases, there will be more either in the building or closely nearby. In its misstatement that the transaction is “more properly viewed as a 2 to 1” transaction,<sup>5</sup> DISH ignores current and increasing cable competition over fiber facilities that are rapidly being deployed to virtually all commercial locations. As the Commission found in the Business Data Service (“BDS”) rulemaking<sup>6</sup> and as further confirmed by updated data, cable providers are capable of providing true Metro Ethernet service in many more locations than previously understood.
- *Additional competitors near affected buildings also provide competition.* DISH is wrong when it asserts that reliance on the existence of potential competition 0.1 miles away is misplaced. Department of Justice competition policy analysis finds that buildings within 0.1 miles of a competitor’s network are serviceable.<sup>7</sup> The FCC’s economist has concluded that even one facilities-based competitor in a census block – often much bigger than 0.1 miles – has a constraining effect on pricing.<sup>8</sup> This is particularly true in XO’s urban footprint, in which there is a high density of competitors.
- *Dark fiber is irrelevant.* DISH’s claims about XO’s dark fiber ignore that the Commission has not addressed dark fiber in any major wireline transaction dating back at least ten years. And in two cases it specifically declined to consider dark fiber as a relevant product market.<sup>9</sup> But even more puzzling is the substance of DISH’s claim because the transaction does not change the amount of dark fiber available.

### **Transit Market**

- *The Commission has already determined that the transit market is competitive.* DISH ignores the transit market findings in the Commission’s *Global Crossing/Level 3*

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have an anticompetitive effect); *Verizon Commc’ns Inc. and MCI, Inc.*, 20 FCC Rcd 18433, 18451 ¶ 32 (2005) (“*Verizon/MCI*”) (same)).

<sup>5</sup> DISH Reply at 4.

<sup>6</sup> *Business Data Services*, Further Notice of Proposed Rulemaking, FCC No. 16-54, ¶ 66 (rel. May 2, 2016).

<sup>7</sup> See *id.*, ¶ 212 n.560 (citing *AT&T/BellSouth*, 22 FCC Rcd 5662 ¶¶ 42-49 (2007)).

<sup>8</sup> *Id.* ¶ 165 and App. B, Marc Rysman, *Empirics of Business Data Services*, White Paper, at Table 19 (Apr. 2016).

<sup>9</sup> See *SBC/AT&T*, 20 FCC Rcd at 18306 ¶ 27 n.90; *Verizon/MCI*, 20 FCC Rcd at 18448-49 ¶ 27 n.89. “Major” wireline transactions are those included on the FCC Transaction Team’s “Major Transaction Decisions” web page.

decision.<sup>10</sup> There, the Commission provided an overview of how intensely competitive the provision of transit services has been and will be – a marketplace reality that DISH refuses to confront. DISH’s claim that this transaction will reduce roughly ten Tier 1 providers by one<sup>11</sup> is analytically meaningless since market concentration will not change materially. In addition, DISH’s claim ignores that XO’s transit services rely primarily on infeasible rights of use, none of which are leased from Verizon. The entities that own those facilities will thus continue to do so.

- DISH’s hypothetical claims that the transaction will lead to anti-competitive effects in the transit market because of Verizon’s role as an ISP also lack merit.<sup>12</sup> DISH fails to acknowledge that Verizon – an ISP and transit provider today – widely interconnects on reasonable terms and no content provider has opposed this transaction. Indeed, it is telling that the only evidence DISH cites of potential competitive harms is from *other* deals involving *other* parties.<sup>13</sup>

### **Backhaul Market**

- *XO does not provide backhaul for cell sites, and thus there is no loss of competition.* DISH’s assertion that Verizon’s acquisition of XO’s fiber assets will adversely affect the market for wireless cell site backhaul is nonsense.<sup>14</sup> XO does not provide backhaul from cell sites today and thus there can be no loss of competition as a result of the transaction.<sup>15</sup>

### **Data Collection**

- *The Commission should not countenance DISH’s fishing expedition for more documents and information.* DISH offers no basis why it should be entitled to conduct a prolonged campaign reviewing Applicants’ documents.<sup>16</sup> This type of complaint has become a common practice in DISH’s frequent opposition to

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<sup>10</sup> See *Global Crossing Ltd. and Level 3 Comm’ns, Inc.*, 26 FCC Rcd 14056, 14069 ¶ 28 (2011) (“*Global Crossing/Level 3*”) (“The emergence of several new Tier 1 peers in the past six years undercuts the argument that there are overwhelming barriers to entry into the Tier 1 market.”); *id.* at 14069 ¶ 29 (“Finally, if we were to consider the role of non-Tier 1 ISPs in the marketplace, there may be as many as 38 providers that sell transit or offer peering on a nationwide basis.”).

<sup>11</sup> DISH Reply at 19.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.* at 17 & n.47 (citing petitions to deny filed by Netflix and Cogent in the Comcast/Time Warner Cable merger). Verizon has interconnection agreements with Netflix and Cogent and many other parties.

<sup>14</sup> *Id.* at 20-21.

<sup>15</sup> See Joint Opposition at 23.

<sup>16</sup> See, e.g., DISH Reply at 9 (demanding expert testimony and economic analyses); *id.* at 11 (seeking the identities of all competitive alternatives post-transaction); *id.* at 13 (calling for the names of competitors); *id.* at 19 (demanding information about how Verizon’s and XO’s fiber networks substitute for each other for transit services).

transactions,<sup>17</sup> but DISH cannot point to any legitimate reason that it is entitled to more internal Applicant data. That the Commission sought such information from the parties in the AT&T/DIRECTV merger offers no justification for comparably extensive information requests in this much smaller and different transaction.<sup>18</sup>

- DISH even misrepresents Commission precedent in claiming that the FCC always seeks certain information (*i.e.*, transaction agreements) for approval of major transactions. That is simply not true.<sup>19</sup>

In short, DISH's opposition to this transaction has no legal or factual basis and should not prevent the Commission from approving this deal expeditiously.

Respectfully submitted,

/s/ Lisa R. Youngers

**XO HOLDINGS**

Lisa R. Youngers  
XO Holdings  
13865 Sunrise Valley Drive  
Herndon, VA 20171  
(703) 547-2258

*Attorney for XO Holdings*

/s/ William H. Johnson

**VERIZON**

William H. Johnson  
Gregory M. Romano  
Katharine R. Saunders  
Verizon  
1300 I Street, NW  
Suite 400 West  
Washington, DC 20005  
(202) 515-2492

*Attorneys for Verizon*

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<sup>17</sup> See, e.g., Reply of DISH, MB Docket No. 15-149, at 2 (Nov. 12, 2015) (complaining about “the very small fraction” of documents that DISH’s counsel had been allowed to see in the Charter/Time Warner Cable merger proceeding).

<sup>18</sup> DISH Reply at 9-10.

<sup>19</sup> See e.g., *Altice N.V. and Cablevision Systems Corp.*, DA-16-485, (rel. May 3, 2016); *Frontier Commc’ns Corp. and Verizon Commc’ns Inc.*, 30 FCC Rcd 9812 (2015); *Frontier Commc’ns Corp. and AT&T Inc.*, 29 FCC Rcd 9203 (2014); *Global Crossing/Level 3*, 26 FCC Rcd 14056.