

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant	)	WC Docket No. 14-192
to 47 U.S.C. § 160(c) from Obsolete ILEC	)	
Regulatory Obligations that Inhibit Deployment of	)	
Next-Generation Networks	)	

**COMMENTS OF XO COMMUNICATIONS LLC**

XO Communications, LLC (“XO”), by its attorneys, hereby submits its comments on the October 6, 2014, Petition of United States Telecom Association (“USTelecom”) for Forbearance (“Petition”) from a number of Title II regulations that apply to incumbent local exchange carriers (“ILECs”).<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Petition seeks forbearance relief of applicable regulations which have been a bulwark in supporting the development and continuation of competitive markets. The Petition and Petition Public Notice group the relief sought into seven categories.<sup>2</sup> While XO is concerned

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<sup>1</sup> The FCC’s Public Notice soliciting comment on the Petition provided for comment by December 5, 2014. Public Notice, DA 14-1585, WC Docket No. 14-192 (Nov. 5, 2014) (“Petition Public Notice”).

<sup>2</sup> The Petition Public Notice described the categories in which the Petition seeks relief as follows and required commenters to identify the categories on which they are providing comment:

Category 1: Remaining section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order (47 U.S.C. §§ 271, 272, 251(g)).

Category 2: Structural separation requirements for independent incumbent LECs, including any conditions imposed by prior Commission Orders granting partial forbearance from 47 C.F.R. § 64.1903.

about a potential grant of forbearance in a number of the categories, it will primarily focus these comments in opposition to the requests for forbearance falling under Categories 6 (access to newly deployed entrance conduit) and 7 (pricing flexibility and use of contract tariffs).

As an initial matter, USTelecom's requests in Categories 6 and 7 should be summarily rejected because USTelecom utterly fails to present a *prima facie* case in support of the requested relief. Indeed, the Petition lacks sufficient factual support throughout. Moreover, competitive market conditions have not sufficiently developed to justify widespread forbearance in either of these two categories. The requested forbearance from enforcing the provision or regulation in these two categories will neither promote competitive market conditions nor enhance competition among telecommunications providers. To the contrary, the effectively nationwide forbearance relief that USTelecom seeks, without demonstration of the emergence of sufficient competition in any specific markets, would almost certainly have anti-competitive effects. Accordingly, the Commission should continue to require ILECs to provide access to unused capacity in newly deployed conduit to competitive telecommunications carriers and cable

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Category 3: Requirement to provide 64 kbps voice channel where copper loop has been retired (47 C.F.R. § 51.219(a)(3)(iii)(C)).

Category 4: All remaining 47 U.S.C. § 214(e) obligations where a price cap carrier does not receive High Cost Universal Service Support, including 47 C.F.R. §54.201(d). And, the Commission's determination that an Eligible Telecommunications Carrier is required to provide the "supported" services throughout its service area regardless of whether such services are actually "supported" with high-cost funding throughout that area (47 U.S.C. § 214(e); 47 C.F.R. § 54.201(d)).

Category 5: Remaining Computer Inquiry rules, obligations imposed by the Commission's Computer II Orders, and obligations, including Comparable Efficient Interconnection (CEI) and Open Network Architecture (ONA), and other requirements set forth in the Commission's Computer III orders (47 C.F.R. § 64.702) .

Category 6: Requirement to provide access to newly deployed entrance conduit at regulated rates (47 U.S.C. §§ 224, 251(b)(4)).

Category 7: Rules prohibiting price cap incumbent LECs' use of contract tariffs for business data services in all regions. And, if necessary, the requirement that packet-switched or optical transmission services be subject to price cap regulation in order to be eligible for pricing flexibility (47 C.F.R. §§ 61.3(o), 61.55(a), 69.709(b), 69.711(b), 69.727(a), 69.705).

operators to the same extent as ILECs must continue to do in existing conduit, an ongoing obligation which the USTelecom Petition does not challenge. Only in those markets where, in the future, the advantages inherent to ILECs when deploying conduit erode relative to the challenges competitive carriers face might the Commission consider forbearance. In addition, rather than grant forbearance from the pricing flexibility rules generally, the Commission, in the context of its special access proceedings, should, if anything, consider updating the triggers for Phase I pricing flexibility and, subsequently, continue to entertain pricing flexibility requests on a geographic specific basis.

In addition, XO offers brief comment in opposition to the requests for forbearance in categories 1 (section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order), and 5 (Computer Inquiry requirements).<sup>3</sup> In short, rather than grant the nationwide forbearance the Petition seeks, the Commission should continue to apply a market power analysis on a geographic specific basis and with respect to business/enterprise services separately from residential product markets.

## **II. FORBEARANCE RELIEF REGARDING ACCESS TO NEWLY DEPLOYED ENTRANCE CONDUIT IS UNJUSTIFIED AND WOULD HARM COMPETITION (CATEGORY 6)**

In the Petition, USTelecom seeks forbearance on behalf of ILECs from the conduit access provisions of Sections 224 and 251(b)(4) of the Communications Act.<sup>4</sup> Those provisions obligate local exchange carriers to make available their poles, conduit, ducts, and other rights of way to telecommunications carriers and cable operators. However, because Congress defined

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<sup>3</sup> To the extent these comments do not oppose a grant of forbearance relief in any of the seven categories set out in the Petition, these Comments should be construed as not offering a position at this time, rather than as an implicit statement of no opposition.

<sup>4</sup> Petition at 85-94. *See also* 47 U.S.C. §§ 224 & 251(b)(4).

the term “telecommunications carrier” as used in Section 224 to exclude ILECs, ILECs currently must make their conduit available to telecommunications carriers and cable operators, but competitive local exchange carriers (“CLECs”) are not obliged to make their conduit available to incumbent carriers. The Petition seeks to lift the conduit access obligations from ILECs (but, interestingly, not from CLECs).

The Petition claims, providing absolutely no data support or analysis, that incumbent carriers “have no special advantages” in carrying out deployments of new conduit. USTelecom claims that “[i]n today’s market, all providers are equally capable of constructing entrance conduits in new developments (‘greenfields’) or to buildings previously unserved by fiber in existing developments (‘brownfields’).”<sup>5</sup>

While these assertions are central to the USTelecom claim for forbearance relief, they are made in a conclusory fashion and, ultimately, without any factual support. For these reasons, the Petition fails to make a *prima facie* case on the issue of Category 6 relief. Section 1.54(e)(2) of the Commission’s rules, 47 C.F.R. § 1.54(e)(2) places the burden on USTelecom in this case to make a “full statement of the petitioner’s *prima facie* case for relief” sufficient to meet each of the statutory criteria for forbearance.<sup>6</sup> The Commission has explained that this requirement requires inclusion *with the petition*, “the facts, information, data, and arguments on which the petitioner intends to rely,” which must “show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought.”<sup>7</sup> The

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<sup>5</sup> Petition at 85.

<sup>6</sup> *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, FCC 09-56, WC Docket No. 07-267 (June 29, 2009) (“Forbearance Procedure Order”).

<sup>7</sup> *Id.* ¶ 17.

Commission underscored the importance of adherence to these requirements in making the *prima facie* case and that “[it] will not assume relationships that a petition does not state.”<sup>8</sup>

Regarding Category 6, USTelecom fails to meet these threshold requirements. Plainly stated, the Petition provides no data, affidavits, declarations, or analysis in support of the broad assertions that are central to the Petition as it applies to USTelecom’s request for relief under Section 10 of the Communications Act from the Section 251(b)(4) and Section 224 requirements that ILECs make available newly deployed conduit (and other rights of way) to competitive telecommunications carriers and to cable operators. The little information USTelecom does provide is, at most, anecdotal.

The facts the Petition states are conclusory and made without support. They are presumed true rather than demonstrated. Central to USTelecom’s argument is the claim that “all providers are equally capable of constructing entrance conduits in new developments . . . or to buildings previously unserved by fiber in existing developments.”<sup>9</sup> USTelecom makes this claim in several different ways, but in each case cites without factual evidence or analysis in support of the claim.<sup>10</sup> Repetition of an assertion does not make that assertion true. While USTelecom states, that “competitors can – and do – engage in such construction,” the Petition offers no evidence as to how often this happens or whether CLECs have the ability to engage in such

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<sup>8</sup> *Id.* n. 67.

<sup>9</sup> Petition at 85.

<sup>10</sup> *See* Petition at 89 (“Competitors . . . can and do construct their own conduit”); 89 (“Experience shows that CLECs indeed have this capability [to construct entrance facilities.]”); 90 (“the assumptions underlying the imposition of asymmetrical conduit access obligations on ILECs no longer reflect current market realities.”); 91 (“the [ILEC] advantage has eroded and today no longer exists”); 91-92 (“ILECs stand in the same position as their major CLEC competitors when it comes to competing for and providing the service at issue”).

activity on the same scale as ILECs. They do not. The *mere physical capability*<sup>11</sup> of competitive carriers to construct entrance conduits is insufficient evidence to satisfy the burden USTelecom carries in requesting forbearance.

The Petition also claims that “the overall imbalance between the conduit infrastructure deployed by ILECs and their major CLEC competitors has narrowed considerably.”<sup>12</sup> But not a single datum is offered by the Petition in support of that contention. In the markets in which XO has deployed facilities, this has not been the case.<sup>13</sup>

Similarly, the Petition asserts that where the CLEC is a “major cable company operating through a CLEC affiliate,” the competitor need not “rely upon ILEC infrastructure to offer services.”<sup>14</sup> Yet again, the Petition provides no supporting evidence in the case of any “major cable company” or “affiliated CLEC” in any market. More importantly, USTelecom offers no comparable assertion about CLECs not affiliated with a “major cable company.”<sup>15</sup>

The Petition also contends that ILECs are deterred from building new conduit because of the difficulties of making a return on their capital investment if the ILEC must make its conduit available to competing carriers and cable operators.<sup>16</sup> Yet USTelecom offers no supporting demonstration of how frequently this has been the case, if it has been the case at all. Moreover, the Petition fails to demonstrate that the rates CLECs pay for occupying ILEC conduit pursuant

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<sup>11</sup> See Petition at 86 (“competitors have demonstrated that they are equally capable of constructing the entrance conduits at issue”).

<sup>12</sup> Petition at 89.

<sup>13</sup> See attached Declaration of George Kuzmanovski , Vice President of Access Planning and Implementation of XO, dated December 5, 2014 (“Kuzmanovski Declaration”).

<sup>14</sup> *Id.*

<sup>15</sup> The Petition purports to relay the experience of CenturyLink which exemplifies the asymmetric incentives under the current regime but the entire discussion is not supported by a declaration or affidavit or even a single cite to a CenturyLink filing. See Petition at 90, n. 278.

<sup>16</sup> See, e.g., Petition at 94.

to FCC regulations implementing Section 224 of the Act, in combination with service charges from ILEC customers benefitting from the conduit, do not fully compensate the ILEC. Even if it is the case that paying a conduit rental charge to an incumbent carrier is more cost effective for a competitor than building its own conduit, as the Petition claims,<sup>17</sup> that does not mean that the incumbent LEC fails to recover its costs of deploying the conduit.

Other allegedly supporting statements in the Petition are irrelevant, even if they were factually correct. For example, if it is the case that competitors on occasion have placed facilities in ILEC conduit without authorization or have damaged conduit facilities because of a disregard for applicable engineering standards,<sup>18</sup> then enforcement actions are the answer, not forbearance as USTelecom contends. In any event, the Petition provides no evidence whatsoever to support the truth of these claims or the frequency with which such situations occur.

As the above discussion overwhelmingly demonstrates, the Petition fails to make a *prima facie* case regarding forbearance in Category 6 by failing to provide “facts, information, data, [or supported] arguments.”<sup>19</sup> This is reason enough to deny the relief sought with respect to Category 6.

Beyond the failure of USTelecom to meet its evidentiary burden of presenting a *prima facie* case, the Petition should be rejected because the existing conduit access regime created by Sections 224 and 251(b)(4) of the Act furthers the public interest and ensures that competitive carriers have a cost effective method of accessing buildings, installing their own infrastructure, and providing facilities-based service when they cannot justify or are simply unable to build conduit. The attached Declaration of George Kuzmanovski, the Vice President of Access

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<sup>17</sup> See Petition at 92.

<sup>18</sup> See Petition at 90-91, n. 278.

<sup>19</sup> See *Forbearance Procedures Order* ¶ 17.

Planning and Implementation of XO, catalogues in detail why incumbents have several clear advantages over competitors when it comes to deploying entrance conduit. As Mr. Kuzmanovski explains, XO’s network consists of a mix of facilities that it owns (whether XO deployed or acquired from others), facilities leased by XO or indefeasible rights of use (IRUs), and services obtained from others, such as special access.<sup>20</sup> XO and its predecessors have deployed their own networks in more than three dozen large and mid-size metropolitan markets, which are connected by XO’s nationwide fiber backhaul facilities, and connect more than 3,300 buildings.<sup>21</sup> By virtue of an ongoing \$500 million capital expansion project, XO will light many more buildings. XO has been developing its managed IP-based network for more than ten years and “has every expectation that its network will become completely IP-based on a pace with, if not ahead of, the industry.”<sup>22</sup>

Mr. Kuzmanovski states that XO “provides on-net services – voice, Ethernet, and other communications services – to many thousands of business and enterprise retail end users and to many carriers on a wholesale basis.”<sup>23</sup> Mr. Kuzmanovski observes that, where it is economic to do so, XO will build its own conduit to buildings, but that “access to conduit of other providers remains essential in many cases if XO is to provide competitive, facilities-based services to customers.”<sup>24</sup>

In commenting on the Petition, Mr. Kuzmanovski summarizes that “incumbents have a number of clear advantages when it comes to deploying entrance conduit that justifies competitors continuing to have access to incumbent conduit on reasonable terms and conditions,

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<sup>20</sup> Kuzmanovski Declaration, ¶ 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 5.

<sup>23</sup> *Id.* ¶ 4.

<sup>24</sup> *Id.*

not only in existing builds, but in new greenfield and brownfield environments.”<sup>25</sup> He lists various challenges that XO and other competitors face but that ILECs generally do not:

- The retail business market “still responds much more favorably to the incumbent carriers,” allowing them to more readily justify deployment of conduit.<sup>26</sup>
- Incumbents are also advantaged by “pervasive existing relationships with property owners and developers” making it easier and less costly for ILECs to deploy conduit. This is particularly the case in brownfield deployments. Indeed, owners and developers often invite incumbents to build as construction is ongoing.<sup>27</sup>
- Incumbents, because of their scale and nearly ubiquitous physical presence, have the ability to “compete for virtually every new build within their operating territory” and are “much more likely than not to be the first to build.” This ubiquitous presence translates into a clear cost advantage over competitors, who have presence on a far smaller scale, which might seek to deploy their own facilities.<sup>28</sup>
- Moreover, even if a trench for new conduit opened by an incumbent were made available to competitors to lay conduit at the same time, CLECs on average may not be as readily able to deploy as the ILECs.<sup>29</sup>
- Not only are ILECs much more likely than not to be the first to build, CLECs are with some regularity denied a later opportunity by property owners or managers to lay their own conduit when deployment of their own facilities becomes justified, prohibitions which on the whole are not regulated.<sup>30</sup>
- Even where an owner/developer does not deny a later-comer the ability to deploy its own conduit after the incumbent has deployed to a building, there is often an insurmountable economic hurdle for the competitor to deploy because the competitor

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<sup>25</sup> *Id.* ¶ 6.

<sup>26</sup> *Id.* ¶ 7.

<sup>27</sup> *Id.* ¶¶ 8, 11.

<sup>28</sup> *Id.* ¶¶ 9-10.

<sup>29</sup> *Id.* ¶ 10.

<sup>30</sup> *Id.* ¶¶ 12-13. As the Petition notes, “dig once” restrictions are increasingly common in new buildings and developments. Petition at 89. As Mr. Kuzmanovski notes, CLECs are not in the same position, on the whole, as ILECs in being able to take advantage of trenches when they are open during construction to lay their own conduit. Kuzmanovski Declaration ¶ 10.

only has one or a small number of would-be customers, or the timing requirements of the would-be customer militate against the competitor building its own conduit.<sup>31</sup>

- ILECs have less expensive access in numerous markets to the public rights-of-way (“PROW”) than competitors (e.g., competitors must pay a per linear foot fee or a gross revenues fee to occupy local or state government PROW whereas incumbents often pay a smaller fee or even no fee at all to lay conduit.<sup>32</sup>
- Oftentimes, competitors must pay one-time restoration fees when they disturb the surface whereas, as a practical matter, incumbents face such restoration fees less often, assuming they apply to ILECs.<sup>33</sup>

In short, Mr. Kuzmanovski’s Declaration explains that, although competitors sometimes have the capability of building their own conduit in suitable circumstances, XO and other competitors are “decidedly not in the same position as the incumbents to deploy conduit to new buildings or to buildings today only served by copper.”<sup>34</sup> Incumbents face a more favorable environment in which to build entrance conduit than competitors in terms of costs as well as relationships with owners, prospective customers, and municipalities which gives them an overall advantage over competitive carriers. It remains essential, consequently, for XO and other competitive carriers to continue to have access to incumbent entrance conduit in greenfield and brownfield developments, as well as generally. The USTelecom Petition with regard to Category 6 should be denied.

### **III. USTELECOM’S REQUEST TO ELIMINATE COMPETITIVE TRIGGERS FOR PHASE I PRICING FLEXIBILITY IS WHOLLY UNSUPPORTED BY ANY DEMONSTRATION OF COMPETITIVE PRESENCE**

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<sup>31</sup> *Id.* ¶ 14.

<sup>32</sup> *Id.* ¶¶ 16 and 17

<sup>33</sup> *Id.* ¶ 14.

<sup>34</sup> *Id.* ¶ 18.

USTelecom also asks the Commission to forbear from applying the regulations that preclude price cap LECs from offering TDM special access services and tariffed enterprise broadband services pursuant to contract tariffs.<sup>35</sup> The Petition notes that the principal customers for these services are other carriers on a wholesale basis.<sup>36</sup> Thus, the primary role these services play is in supporting the competitive provision of wholesale and retail services. XO relies on TDM special access services and tariffed enterprise broadband services it purchases from ILECs, in addition to its own network facilities, to serve many of its customers today.<sup>37</sup>

Under the Commission’s regulatory regime, the Commission has granted ILECs the ability to offer special access services and tariffed enterprise broadband services pursuant to contract tariffs in certain geographic areas under pricing flexibility. Pursuant to the *Pricing Flexibility Orders*, price cap LECs have been able to obtain pricing flexibility in locations where certain competitive conditions – referred to as “triggers” – were fulfilled.<sup>38</sup> Price cap LECs granted Phase I pricing flexibility have been permitted to offer special access and other Business Data Services under contract tariffs and volume and term discounts on one day’s notice as long as they maintained their generally available price cap tariffed rates for those services. “Phase

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<sup>35</sup> Petition at 94-115. Collectively, the Petition refers to these services as “Business Data Services.”

<sup>36</sup> Petition at 110.

<sup>37</sup> Kuzmanovski Declaration, ¶ 3.

<sup>38</sup> See *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14,221, 14,234, ¶¶ 24, 93-99 (1999) *aff’d* WorldCom v. FCC, 238 F.3d 449 (D.C. Cir. 2001). (“Pricing Flexibility Order”) (triggers for Phase I pricing flexibility, including sufficient levels of local sunk investment in facilities by competitors).

II” pricing flexibility is granted to price cap LECs upon a more stringent competitive showing and permits them to file tariffs on one day’s notice free from any price cap rate level or rate structure rules, thus permitting price cap LECs to more freely to raise or lower rates.<sup>39</sup>

As the Petition notes, two years ago, the Commission suspended any further grants of pricing flexibility while it examines and updates the competitive “triggers” that have been in use.<sup>40</sup> In particular, the rule which deems pricing flexibility petitions granted after 90 days unless denied was suspended.<sup>41</sup> Existing grants of pricing flexibility were left in place. The Petition notes that while most price cap LECs have obtained forbearance from tariff and other dominant carrier regulation for their business enterprise services, the relief the Petition seeks would affect TDM special access services and a more limited set of enterprise broadband services.<sup>42</sup>

In effect, the Petition seeks to bypass the correction or updating of the competitive triggers with which the Commission found flaws in the *Pricing Flexibility Suspension Order* just two years ago and “provide blanket Phase I authority *everywhere* under the pricing flexibility rules as they existed prior to their suspension.”<sup>43</sup> Rather than fix the triggers and condition grants of pricing flexibility on the presence of effective competition, the Petition seeks to remove the triggers altogether. Rather than grant relief where there is competition, which has been the applicable regime, which the *Pricing Flexibility Suspension Order* only recently upheld, the Petition asks the Commission to grant pricing flexibility relief in all locations *regardless of*

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<sup>39</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14235 ¶ 25, 14258 ¶ 69.

<sup>40</sup> *Special Access For Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557, 10558 ¶¶ 1, 5 (2012) (“Pricing Flexibility Suspension Order”),

<sup>41</sup> *Id.* at 10616 App. A (suspending Section 1.774(f)(1) of the Commission’s Rules).

<sup>42</sup> Petition at 98-99.

<sup>43</sup> Petition at 100 (emphasis added).

*whether there is competition in the provision of the affected services.* The effect of the requested forbearance relief in Category 7, in those areas where there is not effective competition in the provision of TDM special access services and business enterprise services, would be to preclude such competition from developing. The requested Category 7 forbearance relief should not be granted.

As XO and others have repeatedly demonstrated over the past two years, the ILECs continue to have market power in the provision of TDM, especially DS1 and DS3, special access services as well as Ethernet services and induce “many purchasers of those services to enter into tariffed offerings, contract tariffs, and commercial agreements that contain anticompetitive terms and conditions.”<sup>44</sup> These special access volume commitment arrangements effectively stifle the emergence of robust competition and slow the technology transition by locking-in competitive carrier demand.<sup>45</sup> Granting the price cap LECs ubiquitous Phase I pricing flexibility where they do not already have it without a showing of effective competition, which is what the Petition requests, would only exacerbate the existing situation, even as the ongoing examination of special access services is the subject of close scrutiny through the Commission’s special access

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<sup>44</sup> See, e.g., Letter from Angie Kronenberg and Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, dated September 10, 2014, at 2-3 and generally the comments of competitive carriers cited therein, e.g., *id.* at 2, n. 6, citing the February 2013 WC Docket No. 05-25 comments of XO and other competitive carriers.

<sup>45</sup> The special access volume commitment arrangements that price cap LECs “offer” competitors are not based on operating “efficiencies associated with larger traffic volumes,” as the Petition contends. See Petition at 106-107. Rather, because these arrangements lock-in competitive demand and impose various penalties and ratcheting requirements unrelated to actual traffic volumes but on a percentage of a carrier customer’s historic purchases, no matter how large or small, any justification for traditional term and volume discounts which were based on absolute, objective time periods or purchase volumes lend no support to the alleged reasonableness of the these “lock-in” special access arrangements.

collection proceeding.<sup>46</sup> Given the current concerns about ILEC long term volume discount special access plans and ILEC special access prices, terms, and conditions generally, what the USTelecom petition requests really borders on the absurd.

The Petition fails to offer data or other evidence to extend pricing flexibility to those geographic areas where price cap LECs do not already enjoy it. As such, the Petition fails to make a *prima facie* case in support of forbearance relief in Category 7.<sup>47</sup> The Petition offers general, nationwide statistics that “[t]he high-capacity service marketplace is highly competitive and growing,”<sup>48</sup> but none of the statistics are targeted toward the geographic areas where price cap LECs do not yet “enjoy” grants of pricing flexibility. As such, in those very locations where USTelecom seeks forbearance relief for price cap LECs, the Petition offers no market or other area-specific analysis whatsoever. Whatever else their flaws are, the pricing flexibility rules require location specific showings of competitive conditions. In order to obtain forbearance relief, the Petition must do the same. But in this USTelecom fails, and as result it cannot demonstrate that the criteria for forbearance relief in Section 10 of the Act have been achieved.<sup>49</sup> The Petition is particularly woeful in showing the extent to which conditions have changed in areas where pricing flexibility had not been granted since the *Pricing Flexibility Suspension Order* in 2012.<sup>50</sup>

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<sup>46</sup> See *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (“Special Access Data Collection Order”).

<sup>47</sup> See 47 C.F.R. §1.54(e)(2) (placing burden on petitioner for forbearance to include in the petition a *prima facie* showing).

<sup>48</sup> Petition at 102-105.

<sup>49</sup> See 47 U.S.C. §§160(a)(1-3).

<sup>50</sup> See Petition at 105. Most of the statistics offered by the Petition are from 2011 and before. And again, only national trends or price cap LEC regional trends are supplied, not statistics focused on areas that do not have pricing flexibility already.

The Petition offers nationwide statistics indicating that the “preeminent role played by the DS<sub>n</sub> [special access] offerings principally at issue here,” has declined.<sup>51</sup> While the importance of Ethernet services is growing, DS1 and DS3 services remain vitally important inputs into the provision of IP-based offerings – and are expected to continue doing so for some time. Their importance is especially marked in those areas where there is not at present effective facilities-based competition that would have warranted a grant of pricing flexibility under the suspended triggers. Further, XO, which welcomes and has been feverishly working toward the transition to an all-IP public communications network, fully anticipates that DS1 and DS3 services will remain important for the provision of services by both ILECs and CLECs for years to come.<sup>52</sup>

The Petition offers no analysis whatsoever whether competition is as marked as the alleged national trends described in the Petition in those areas where price cap LECs have not been granted pricing flexibility to date, the very areas where the Petition seeks relief. USTelecom’s claims that, in effect, there is “an intensely competitive environment” nationwide are wholly unsupported, and the Petition should be denied as to Category 7 relief. Without a demonstration that market-specific competition exists, the Commission cannot determine that the prohibitions against contract tariffs are not needed to ensure that price cap ILEC rates, terms and conditions for TDM-based special access and enterprise broadband services are just, reasonable and not unjustly or unreasonably discriminatory. Rather than give the price cap LECs greater flexibility to respond to competition in areas where pricing flexibility has not previously been

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<sup>51</sup> Petition at 104.

<sup>52</sup> Ironically, one of the biggest drags on the transition to an all-IP environment is the term and volume commitment plans for special access of the price cap LECs which undermine competition in the provision of high-capacity data services and put a brake on the ability of competitive carriers to transition, when conditions warrant, from DS<sub>n</sub> special access services to Ethernet.

granted,<sup>53</sup> a grant of forbearance under Category 7 as requested in the Petition would only serve to ensure that such competition does not readily develop.

The Commission should deny the Category 7 relief in its entirety. Instead, the Commission should focus on addressing the anti-competitive terms and conditions present in the price cap LECs special access commitment discount plans, as well as also completing the special access data collection and analysis. Only in this way will the Commission help stimulate a more competitive environment in the provision of high capacity services, promote the evolution to an all-IP public communications network, and better promote the welfare of end users through increased choice and lower prices.

#### **IV. THE COMMISSION SHOULD DENY THE REQUESTED FORBEARANCE RELIEF IN CATEGORIES 1 AND 5 AS WELL**

Among other categories of relief, the Petition seeks broad forbearance for Regional Bell Operating Companies (“RBOCs”) from section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order (collectively, Category 1) and incumbent LEC’s Computer Inquiry and related requirements (Category 5).<sup>54</sup> In each of these cases, the regulatory provisions at issue in the Petition are designed to ensure that CLECs are able to obtain the wholesale access to inputs needed to compete on reasonable terms and conditions to provide services to business customers by checking potential incumbent LEC abuses in an *upstream* market of service inputs offered by traditionally dominant carriers to downstream providers. In making its arguments for forbearance, USTelecom improperly focuses principally on the level of competition in the

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<sup>53</sup> See Petition at 111-12.

<sup>54</sup> See Petition at 16-38 and 73-81.

*downstream* markets, such as voice services,<sup>55</sup> fails to analyze conditions in local markets, or fails to distinguish between mass-market services and business and enterprise markets.<sup>56</sup>

USTelecom’s arguments are based upon broad national statements about market share. They are not based upon local market power analyses or differentiation between business and enterprise product markets, on the one hand, and residential product markets on the other. In the recent past, the Commission has established and used a traditional market based test applied at the local, *i.e.*, wire center, level and applied independently to mass-market and business/enterprise markets.<sup>57</sup> This same test should continue to be used to consider whether, on a local level and on a carrier–by-carrier basis to forbear from traditional dominant carrier regulation designed to ensure that wholesale inputs are just and reasonable. With regard to the business/enterprise markets, the Petition falls well short of offering data to allow such a market analysis to occur, making it impossible for the Commission to conclude that the Section 10 standards for forbearance have been satisfied. Consequently, the Commission should simply dismiss the Petition with respect to the statutory and regulatory provisions at issue in Categories 1 and 5, especially with respect to the business/enterprise markets. Rather, the Commission

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<sup>55</sup> See, *e.g.*, Petition at 24 (“competition for all-distance voice service from providers across many platforms has rendered Section 271 itself as anachronistic as stand-alone long distance[, with] the RBOCs and other ILECs barely hanging on to a small fraction of the total voice marketplace . . .”). The two economists’ declarations attached to the petition discuss competitive alternatives to ILEC wired voice telephony service and fail to offer carrier specific analysis and or market share/market power data in any specific markets.

<sup>56</sup> See, *e.g.*, Petition at 77 (“The original regulatory rationale underlying the *Computer Inquiry* rules – that competitive providers of enhanced services ‘will be dependent upon common carriers for reasonably priced communications facilities and services’ – no longer exists. As broadband and wireless have grown, the ILEC share of the fixed line voice marketplace has eroded. . . . As of June 2013, there were nearly as many interconnected VoIP residential lines as traditional switched access residential lines in the U.S.”)

<sup>57</sup> See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113 (2010) (“*Qwest Phoenix Order*”).

should continue to entertain ILEC specific demonstrations, assuming they can be made, that the carrier no longer has market power in the relevant geographic and product markets before considering granting forbearance.<sup>58</sup>

## V. CONCLUSION

For the reasons set forth herein, the Commission should deny USTelecom's requests for forbearance relief in Categories 1, 5, 6, and 7. Rather, the Commission should proceed to require ILECs to make unused capacity in newly deployed conduit available to telecommunications carriers and cable operators to the same extent as existing conduit. In addition, the Commission should, in the context of its special access proceedings, proceed to update the triggers for Phase I pricing flexibility and entertain pricing flexibility requests on a geographic specific basis. Finally, the Commission should continue to apply a traditional market power analysis focused on local markets before considering from forbearing enforcing incumbent carrier obligations pertaining to from section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order and incumbent LEC's *Computer Inquiry* requirements.

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<sup>58</sup> The Petition's request for forbearance from the structure separation requirements as part of Category 5 carries a particularly high evidentiary burden because the Commission, only in 2013, denied a very similar request. *In the Matter of Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, FCC 13-69 (rel. May 17, 2013). USTelecom would have to demonstrate, as it has not, that ILECs, due to development in less than the last two years, no longer "continue to have incentives and the potential ability to misallocate costs from their long distance operations to their access services, to increase rates for access services that are not capped or being phased down, and to engage in price squeezes." *Id.* ¶ 153.

Respectfully Submitted,

XO COMMUNICATIONS, LLC



Lisa R. Youngers  
XO Communications, LLC  
13865 Sunrise Valley Drive  
Herndon, VA 20171  
Telephone: (703) 547-2258

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Thomas W. Cohen  
Edward A. Yorkgitis, Jr.  
Kelley Drye & Warren LLP  
3050 K Street NW  
Suite 400  
Washington, D.C. 20007  
Telephone: (202) 342-8400  
Facsimile: (202) 342-8451

December 5, 2014

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant	)	WC Docket No. 14-92
to 47 U.S.C. § 160(c) from Obsolete ILEC	)	
Regulatory Obligations that Inhibit Deployment of	)	
Next-Generation Networks	)	

**DECLARATION OF GEORGE KUZMANOVSKI**

1. My name is George Kuzmanovski. I am Vice President of Access Planning and Implementation of XO Communications LLC (XO). I joined XO in February, 2012, and, in my present position, I am responsible for all last mile connectivity associated with XO’s current On-Net Build Initiatives as well as all previous incumbent relationships. Prior to XO, I was at Global Crossing, from 2000 to 2010, in which I was responsible for the operations of the Service Delivery Group which interacted with all incumbent carriers on a daily basis.

2. I submit this Declaration in support of the Comments of XO on the forbearance petition of USTelecom (“USTelecom Petition”) in the above-referenced proceeding.

3. XO’s network today consists of a mix of facilities that it owns (which it built itself or acquired through transactions or fiber swaps) and facilities that XO leases or in which it has rights of usage, such as indefeasible rights of use (IRUs), supplemented by finished services acquired from others (such as special access). Each of these components has been and will continue to be critical to the success of XO during the technology transition to an all-IP public communications network, one in which XO has been a leader, and will continue to be for the foreseeable future.

4. XO and its predecessors have, since the mid-1990s, installed, expanded, and updated their own network facilities in more than 36 large and mid-size metropolitan markets across the country. Today, XO fiber connects to more than 3,300 buildings and provides on-net services – voice, Ethernet, and other communications services – to many thousands of business and enterprise retail end users and to many carriers on a wholesale basis. (XO provides service to many more end users and providers using facilities and services it leases and purchases, in combination with XO’s own network facilities or on a standalone basis.) In addition, XO’s metropolitan network facilities are connected by an industry-leading 100 Gigabits per second (Gbps) nationwide fiber backbone. Currently, XO is in the middle of a \$500 million capital expansion project in which thousands of additional buildings will be connected to XO’s network with fiber. To reach these buildings, where it is economic to do so, XO will build its own conduit. But the reality is that access to conduit of other providers remains essential in many cases if XO is to provide competitive, facilities-based services to customers.

5. XO has been transforming its original circuit-switched-based network into a managed IP-based network for more than ten years through the installation of routers, soft switches, and session border controllers throughout its footprint to augment and, over time, replace its legacy circuit switches. XO is evolving decidedly toward a predominantly packet-based IP network, and has every expectation that its network will become completely IP-based on a pace with, if not ahead of, the industry.

6. In the USTelecom Petition, USTelecom claims that incumbent carriers “have no special advantages” in carrying out deployments of new conduit. The USTelecom Petition claims that “[i]n today’s market, all providers are equally capable of constructing entrance conduits in new developments (‘greenfields’) or to buildings previously unserved by fiber in

existing developments (‘brownfields’).” As I explain in this Declaration, based on my experience at XO and Global Crossing, these claims in the USTelecom Petition are without foundation. To the contrary, incumbents have a number of clear advantages when it comes to deploying entrance conduit that justifies competitors continuing to have access to incumbent conduit on reasonable terms and conditions, not only in existing builds, but in new greenfield and brownfield environments.

7. XO faces many challenges in lighting up a building with its own facilities that may preclude it from building its own conduit. These are challenges that incumbents do not face or do not face to the same degree. Before constructing its own conduit to a building, XO must make sure there is a business case to do so. XO must have sufficient confidence or assurances that it will be able to serve enough customers in the building to justify the extra up front and maintenance expenses. On average, the retail business market still responds much more favorably to the incumbent carriers, which are consequently more easily able to justify construction of conduit.

8. Incumbents are, on the whole, much more regularly able to make that business case to deploy their own conduit. Incumbents have pervasive existing relationships with property owners and developers which makes it easier and less costly for them, relative to their competitors, to obtain permission to add additional conduit to either deploy fiber to a building that currently only has copper or to deploy facilities to new buildings owned or managed by those owners and developers.

9. In many cases where there are new builds, XO and other competitors face other general disadvantages. While XO may in some cases be able to secure the ability to be the first to lay conduit to a building or within a development, on the whole it has neither the capability to

compete for such builds on the same scale, nor is it in the same position as the incumbents to be assured of success where it does build. The incumbents, because of their scale, have an ability to compete for virtually any new build that is required within their operating territory. To illustrate this, XO is in the midst of a multi-year \$500 million campaign to expand its on-net reach nationwide, but the largest ILECs spend several times more than this in a year simply to *maintain* their conduit. Thus, it is a simple matter of economics and existing network presence within markets that for new builds and overbuilds to buildings, the incumbents are much more likely than not to be the first to build.

10. To elaborate, incumbents have nearly ubiquitous conduit and facilities in the markets in which XO operates. As a result, incumbents' costs to lay facilities to any new building or development, or to overbuild to a building they already serve – bring fiber to that building in new conduit – are less, on average, than those of competitors which have existing conduit and facilities that are not as widely and densely distributed. Accordingly, even if a trench for a new conduit, when opened by an incumbent, were made available to competitors to lay their own conduit, they may not be as readily able to do so. As a result of these challenges, XO normally stands in a less advantageous position than incumbent local exchange carriers with respect to the deployment of new conduit facilities.

11. Furthermore, building owners have the discretion to deny carriers the right to deploy conduit to a building or development. In XO's experience this happens regularly, often after the initial conduit has been deployed. Because the incumbents are much more likely than not to be the first to build – indeed, owners and developers often will invite the incumbents to build as construction is ongoing. In several major metropolitan markets such as New York, San Francisco, Chicago and Boston, XO Communications is routinely denied access to properties

based on the property owners' decisions made during the 'construction' itself. More specifically, property owners often have the incumbents install conduit facilities at the outset and do not want new carriers to physically change the 'building aesthetics' through construction of new conduit, which is simply not possible. Whether it is tearing up a sidewalk, trenching through some grass, or digging some holes, to give just a few examples, conduit construction always leaves at least 'temporary' mark which building owners wish to avoid. In most cases, XO has found, building owners will push the new carriers to contact existing incumbents already with access into the building and to work a deal to utilize the existing conduit, rather than allowing a new installation.

12. In short, competitors that seek to serve customers in buildings, where they do not have the opportunity or ability to lay their own conduit and fiber when the incumbent trench is open, may be denied a later opportunity to lay their own conduit once it becomes justified. In other words, even where there is a business case for a competitor to come later and lay its own conduit and fiber, because of owner/manager decisions to preclude additional builds, competitors may have no choice but to try to seek rights to occupy unused space in the conduit of carrier(s) that already serve the building. Recently, for example, a property owner on Pine Street in New York City, denied XO rights to build access into the building and advised XO that it must contact existing carriers to utilize existing conduit if XO wants to provide service to the building.

13. Although XO has occupied incumbent conduit many times in such situations, absent regulatory protections requiring the incumbents to act reasonably, a competitor can be put in a disadvantageous position for the following reasons: 1) the competitor must now 'rent' existing conduit from the incumbent vs. being allowed to lay their own network and is beholden to what may, in effect, be monopoly pricing by the incumbent since all access must go through it, and 2) the time associated with putting this type of agreement in place due to 'red tape' process

and policies of the incumbents may take up to 180-days (Boston, MA). XO has found that lengthy delays by incumbents acting unreasonably, may threaten or even cancel a deal where XO is working on a timeline based on customer requests.

14. Even where an owner/developer does not deny a newcomer the ability to deploy its own conduit after the incumbent has deployed to a building, there is often an insurmountable hurdle for the competitor to deploy. While XO might have a potential customer desirous of receiving service, the cost to deploy conduit simply to serve that one customer may be prohibitive and make it difficult for XO to serve that customer cost effectively. The increased costs from deploying its own conduit to serve that one customer may not be justified. (By contrast, in a multitenant environment, the incumbent has a much greater prospect of serving a sufficient number of tenants to allow it to easily recover its deployment costs.) Further, competitors laying their own conduit in order to compete with incumbents invited to deploy when construction was ongoing are often at a disadvantage because of restoration fees. While both incumbents and competitors may be subject to the same restoration fees in theory, the restoration fees being incurred by incumbents are effectively much lower than XO and other competitors simply because the incumbents are typically first in the majority of buildings since they were invited to deploy to the building during its initial construction phases. Therefore they have a much larger conduit network already in-place and, in reality, restoration fees are not even a concern or necessity for the incumbents in a large number of cases.

15. Moreover, where XO competes for customers in a building or development where the ILEC has already deployed its own facilities, time can be a significant factor in securing a customer. XO could bring facilities-based service to the customer much more rapidly by occupying the existing conduit with its own fiber than by having to construct its own conduit

facilities, including the administrative hurdles of permitting, etc. If XO or another newcomer could not serve a customer until such tasks were complete, it would risk losing many customers to the incumbent (or other competitor(s) already in place), depending upon the customer's need for expeditious service. Moreover, those customers would be left without or with reduced competitive options.

16. Incumbents have other advantages relative to competitors when it comes to laying conduit in addition to those just discussed as a result of decisions made by municipalities. For example, in many markets, incumbent carriers are able to lay new conduit in public rights-of-way (PROW) under franchise agreements that uniquely benefit incumbents. In many cities, XO and other competitors under their franchise agreements must pay a per linear foot fee to occupy municipal (or other local or state government) PROW. By contrast, incumbents often pay a smaller fee, or even no fee at all, to lay conduit. For example in New York City, XO is required to pay franchise fees related to telecommunications services, while the incumbent (Verizon) is not required to pay this franchise fee.

17. In other municipalities, XO and other competitors pay franchise fees as a percentage of gross revenues. But even in these instances, incumbents have an effective advantage over their competitors where they pay a lesser fee or no fee at all, despite the fact that the laying of conduit in and of itself does not increase the competitors' franchise fee payments. Because the purpose of the conduit is to serve additional customers, and thus receive increased revenues, when competitors lay conduit, the increased costs put them at even a greater disadvantage relative to incumbent carriers that pay a lower rate or no franchise fee at all.

18. In short, from my experience and given the real world in which XO must operate, despite relatively isolated instances to the contrary, XO is decidedly not in the same position as

the incumbents to deploy conduit to new buildings or to buildings today only served by copper. Incumbents face a more favorable environment in terms of costs and relationships – with building owners, prospective customers, and municipalities – than do XO and other competitors. For XO to remain competitive, even where it puts a premium on deploying its own facilities when justified, it is essential for XO to continue to have access to incumbent conduit in greenfield and brownfield developments.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on December 5, 2014

  
George Kuzmanovski