

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)	

REPLY COMMENTS OF XO COMMUNICATIONS, LLC

XO Communications, LLC (“XO”), by its attorneys, hereby submits its reply comments on the Petition of United States Telecom Association (“USTelecom”) for Forbearance (“Petition”) in the above-referenced docket. USTelecom, on behalf of incumbent local exchange carriers (“ILECs”), seeks forbearance from a number of Title II regulations.¹ In its initial comments,² XO focused first on the lack of evidence in the Petition for the relief requested, particularly in Categories 6 (access to newly deployed entrance conduit) and 7 (pricing flexibility and use of contract tariffs). XO showed that USTelecom’s requests for forbearance relief in these two categories should be summarily rejected because USTelecom utterly failed to present a *prima facie* case in support as required by the Commission’s rules.³ XO’s comments then

¹ 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”). The Petition Public Notice described seven categories in which the Petition seeks relief.

² Comments of XO Communications, LLC, WC Docket No. 14-192 (filed Dec. 5, 2014) (“XO Comments”).

³ 47 C.F.R. § 1.54(e)(2) places the burden on a petitioner for forbearance relief, 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. 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.” *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the*

demonstrated that in any event, because of continuing market power, the requested relief should not be granted.

In particular, XO showed that 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 that ILECs receive forbearance relief from their obligations under Sections 251(b)(4) and 224 of the Communications Act of 1934, as amended, to make available space to telecommunications carrier and cable operators in newly deployed conduit (Category 6).⁴ XO demonstrated, supported by the Declaration of George Kuzmanovski, XO's Vice President of Access Planning and Implementation, that ILECs continue to have several clear advantages over competitors when it comes to deploying new entrance conduit, such that forbearance from the requirements that ILECs make available space in newly deployed conduit would neither promote competitive market conditions nor enhance customer welfare. Rather, continued enforcement of these requirements furthers the public interest and ensures that competitive carriers have a cost-effective method of accessing buildings, installing their own network plant, and providing facilities-based voice, broadband, and other service when they cannot yet make the business case for, or otherwise prevented from, building their own conduit at a specific location.

The Petition also seeks to bypass the ongoing process in which the Commission is reformulating the flawed competitive triggers for granting price cap LECs Phase I pricing flexibility and asks the Commission to make available, through forbearance, "blanket Phase I authority everywhere under the pricing flexibility rules."⁵ Rather than fix the triggers, the

Communications Act of 1934, as Amended, Report and Order, FCC 09-56, WC Docket No. 07-267, ¶ 17 (June 29, 2009).

⁴ See generally XO Comments at 3-10 (opposing USTelecom's request for forbearance under Category 6).

⁵ Petition at 10.

Petition seeks to remove the triggers altogether. XO demonstrated that the effect of this “relief” would be to preclude competition from developing in price cap LEC territories where it has not yet taken hold.⁶ XO showed that the Petition, by relying on broad nationwide statistics, fails completely to offer data or other evidence to extend pricing flexibility to those specific geographic areas where price cap LECs do not already enjoy flexibility, failing, once again, as with Category 6, to make a *prima facie* case in support of forbearance relief.⁷ XO urged the Commission to deny the Category 7 relief in its entirety and address 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 and updating the triggers for pricing flexibility in the pending special access proceeding, WC Docket No. 05-25.⁸

A number of ILECs, including those that are most likely to benefit from the forbearance relief, submitted comments in support of the relief USTelecom requests in the Petition. Yet these comments lend the Petition no additional support, not only as a general matter but especially with respect to relief Categories 6 and 7. In so doing, the comments serve to underscore the lack of justification for forbearance relief.

⁶ See generally XO Comments at 10-16 (opposing USTelecom’s request for forbearance under Category 7).

⁷ See 47 C.F.R. §1.54(e)(2) (placing burden on petitioner for forbearance to include in the petition a *prima facie* showing).

⁸ XO also offered brief comments 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 and related requirements). XO submitted that the Commission should, in considering ILEC-specific requests for forbearance from these requirements, continue applying a market power analysis on a geographic and product specific basis. XO Comments at 16-18.

Verizon, for example, gives Categories 6 and 7 short shrift, allocating just one paragraph in its otherwise brief comments to each request for relief.⁹ Verizon offers no data or other evidence in support of its assertion that “incumbents have no special advantages either in brownfield or greenfield areas when it comes to constructing conduit,” and this contention fails for the same reason the Petition fails in justifying forbearance relief regarding Category 6, as XO showed.¹⁰ Similarly, with respect to Category 7, rather than offer evidentiary support for relief, Verizon simply urges the Commission to grant nationwide pricing flexibility to price cap LECs without offering any justification for a demonstration of location-specific competition.¹¹ Verizon also contends that little harm will occur because, as the Petition itself and the comments of the other ILECs argued, “Customers who prefer the generally available tariffed terms and conditions would still have those available.”¹² However, the continued offering of tariffed, generally available terms and conditions is not a sufficient justification for Phase I pricing flexibility; as the Commission found in its *Pricing Flexibility Order*, a showing of competitive presence is

⁹ Verizon devotes half of its ten-page pleading to USTelecom’s request that the Commission forbear from the requirement that an incumbent LEC provide an unbundled 64 kbps voice channel where it has replaced a copper loop with fiber. Verizon Comments, WC Docket No. 14-192, at 2-6 (filed Dec. 5, 2014) (“Verizon Comments”). The Comments of ITTA are even more streamlined, offering just two sentences in support of each of Category 6 and 7, reiterating the statements in the Petition and citing only to the Petition. *See* ITTA Comments, WC Docket No. 14-192, at 9-10 (filed Dec. 5, 2014).

¹⁰ *See* Verizon Comments at 9-10. *See also* XO Comments at 4. Alaska Communications Systems (“ACS”), in its comments supporting Category 6 relief, myopically focuses on the basic physical capability of CLECs and ILECs to construct new conduit and fails to take into account the factors which give ILECs advantages over their competitors making it much more likely than not that the ILECs will construct new conduit to buildings, as discussed in the Declaration of Mr. Kuzmanovski of XO. *See* Comments of ACS, WC Docket No. 14-192, at 9-10 (filed Dec. 5, 2014).

¹¹ *See id.* at 10.

¹² *Id.* at 10.

required as well.¹³ Neither the Petition nor the comments of Verizon or any other ILEC offer a persuasive explanation why a showing of sufficient competition should no longer be a prerequisite to a grant of pricing flexibility, especially in light of the harms from lock-in volume and term commitment plans that have resulted from pricing flexibility.¹⁴ The Commission should develop new competitive showing rules reflecting today’s marketplace realities in the special access proceeding, not abandon the need for a competitive showing altogether.

CenturyLink’s brief comments, too, are devoid of further factual support for the relief USTelecom requests. Without regard for the actual contents of the Petition, CenturyLink defers to USTelecom rather than proffer its own evidence in support of the requests for relief for Categories 6 and 7: “each of these requirements, the Petition demonstrates persuasively, *with strong supporting evidence*, that the requirement is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable and not unjustly or unreasonably discriminatory.”¹⁵ The “evidence” to which CenturyLink alludes are the declarations in the Petition from Dr. Kevin W. Caves, PhD and Professor John W. Mayo that, according to CenturyLink, confirm the competitive impact on wireline voice service as customers have shifted

¹³ See *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14,221, 14,258, ¶ 69 (1999) *aff’d* WorldCom v. FCC, 238 F.3d 449 (D.C. Cir. 2001) (a price cap LEC that satisfied the competitive showing to permit Phase I pricing flexibility is required to maintain its generally available price cap-constrained tariff rates; both are required).

¹⁴ See, e.g., Comments of Activation Charges at 12 (arguing that maintaining tariffing of generally available terms and conditions will eliminate the potential for mischief from pricing flexibility in the absence of competition). See also XO Comments at 13-14 (explaining the harms that have come from ILEC special access volume and term commitment plans); see also Comments of Birch Communications, Inc., BT Americas Inc., Integra Telecom, Inc., and Level 3 Communications, LLC, WC Docket No. 14-192, at 18-19, 20-21 (filed Dec. 5, 2014) (Phase I pricing flexibility has enabled ILECs “to enter into onerous “overlay” contract tariffs in which buyers commit to even higher purchase levels than are required under the off-the-shelf volume and term discount offers,” to which levels they are then largely locked-in in subsequent agreements).

¹⁵ CenturyLink Comments, WC Docket No. 14-192, at 5 (filed Dec. 5, 2014).

to wireless voice service.¹⁶ However, CenturyLink repeats the error in the Petition, failing to draw a nexus between the discussions of voice services in these declarations and the relief sought in Categories 6 and 7, for which no other specific market data support is provided. As XO demonstrated in its comments, an analysis of voice services is essentially inapt to address these categories; rather, the relevant product markets are telecommunications and cable services generally in the case of entrance conduit access and special access service and business data telecommunications in the case of Phase I pricing flexibility.¹⁷

The Puerto Rico Telephone Company (“PRTC”) contends forbearance from applying ILEC conduit access obligations to new entrance conduits would create a level playing field, claiming, without facts or any declaration or affidavit, that in some cases ILECs are discouraged from deploying new infrastructure to avoid the risk that competitors will co-opt much of the value of their capital investment.¹⁸ PRTC claims, without providing detailed instances or any statistics as to frequency, that CLECs urge customers to request that PRTC construct entrance facilities into new buildings for service and that the CLECs then offer less expensive business services once the CLECs can obtain the new network at unbundled network element pricing.¹⁹ But the question of network elements is unrelated to the issue at hand, which is whether ILECs must continue to offer capacity in entrance conduits for CLECs to deploy their own network

¹⁶ *Id.* at 3-4.

¹⁷ *See* XO Comments at 3-16.

¹⁸ Puerto Rico Telephone Company Comments, WC Docket No. 14-192, at 7-8 (filed Dec. 5, 2014) (“PRTC Comments”).

¹⁹ *Id.*

facilities.²⁰ Accordingly, even if PRTC's anecdotal evidence could be supported, it is not germane to Category 6 relief.

AT&T provides no comment on Categories 6 or 7 whatsoever.²¹ Apart from Category 4 (addressing Section 214(e) Eligible Telecommunications Carrier requirements in areas where a price cap carrier does not receive or elects not to take federal high-cost universal service support), AT&T's comments lend no support to the other six categories of relief the Petition seeks.

In short, the brief comments of ILECs in this docket do not cure any of the fatal deficiencies of the Petition resulting from lack of factual support for the relief sought in Categories 6 and 7.²² Accordingly, for the reasons set forth herein, and XO's initial comments, the Commission should deny USTelecom's requests for forbearance relief in Categories 6 and 7, as well as 1 and 5.

Respectfully Submitted,
XO COMMUNICATIONS, LLC



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

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

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²⁰ PRTC's comments in support of relief under Category 7, like the comments of Verizon, CenturyLink, and ITTA, simply paraphrase and restate the Petition itself, offering no additional evidence or basis for support. *See* Comments of PRTC at 8-10.

²¹ Comments of AT&T, WC Docket 14-192 (filed Dec. 5, 2014).

²² The Comments of the ILECs fare no better in the case of Categories 1 and 5, again offering no additional factual support and reflecting an explicit reliance on the showings in the Petition itself, which XO demonstrated to be inadequate.