

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Ensuring Customer Premises Equipment Backup Power for Continuity of Communications	)	PS Docket No. 14-174
)	
Technology Transitions	)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
)	
Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)	)	WC Docket No. 15-1
)	

**COMMENTS OF XO COMMUNICATIONS ON THE
TECH TRANSITIONS NOTICE OF PROPOSED RULEMAKING AND
ON THE PETITION FOR DECLARATORY RULING OF WINDSTREAM**

Lisa R. Youngers
Tiki Gaugler
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
Washington, D.C. 20007
Telephone: (202) 342-8400

*Attorneys for
XO Communications, LLC*

February 5, 2015

TABLE OF CONTENTS

SUMMARY 2

I. INTRODUCTION 4

II. THE COMMISSION SHOULD MODERNIZE THE COPPER RETIREMENT RULES 7

 A. Practical, Flexible, and Comprehensive Definition of Copper Retirement Should Be Established 10

 B. The Content of Retirement Notices Should Be Made Consistent Across ILECs 13

 C. ILECs Should Be Required to Implement and Maintain a Publicly Available, Searchable Database Reflecting the Status of Copper Loops 15

 D. Retirement Notices Should Be Given One Year in Advance 16

 E. In Addition to Notices of Copper Retirements, ILECs Should Be Required to Provide Periodic Non-Binding Forecasts of Notices They Anticipate Filing within the Following Twelve Month Periods and Engage in an Ongoing Collaborative Process with Competitors 18

 F. The Commission Should Establish a Regulatory Framework That Applies in the Wake of Natural Disasters and Emergencies That Cause Unplanned Damage and Destruction of Copper 20

III. SERVICE DISCONTINUANCE RULES SHOULD BE UPDATED TO ENSURE TECHNOLOGY TRANSITIONS DO NOT UNDERMINE WHOLESALE COMPETITION 22

IV. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT THE TRANSITION FROM TDM TO IP DOES NOT OBVIATE THE NEED TO PROVIDE UNBUNDLED DS1 AND DS3 LOOPS 27

V. CONCLUSION 30

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Ensuring Customer Premises Equipment Backup Power for Continuity of Communications	)	PS Docket No. 14-174
)	
Technology Transitions	)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
)	
Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)	)	WC Docket No. 15-1
)	

**COMMENTS OF XO COMMUNICATIONS ON THE
TECH TRANSITIONS NOTICE OF PROPOSED RULEMAKING AND
ON THE PETITION FOR DECLARATORY RULING OF WINDSTREAM**

XO Communications, LLC (“XO”), by its attorneys, hereby files its initial comments on the Notice of Proposed Rulemaking in the above-referenced proceeding¹ in which the Commission examines and issues proposals and proposed rules on certain important aspects of the technology transitions.

¹ *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-184 (rel. Nov. 25, 2014) (“*NPRM*”).

SUMMARY

The *NPRM* focuses on the technological evolution, already well under way, from legacy public switched networks based on time-division multiplexed (“TDM”) circuit-switched voice services using copper facilities to an all-Internet Protocol (“IP”) public communications network (“PCN”) featuring multiple transmission media including fiber, copper, co-axial cable, and wireless. XO is encouraged that the Commission recognizes that the all-IP PCN will include a mix of technologies and especially that copper loops will continue to be an important part in delivering advanced telecommunications services, such as high bandwidth Ethernet. As XO explains herein, the Commission should take several discrete actions to improve the copper retirement process to reflect the market and technological realities of today, which are different from when the current retirement rules were adopted, and to maintain and encourage, rather than harm, competitive provision of advanced telecommunications services.

The Commission should adopt a comprehensive definition of “retirement” that reflects the various ways in which copper loops practically become unavailable to competitive providers, especially for the provision of Ethernet over Copper (“EoC”) service. Incumbent local exchange carriers (“ILECs”) should also be required to provide notices of retirement one year in advance and maintain an updated publicly available and searchable database of available copper loops. In addition to notices, the Commission should require ILECs to provide public, non-binding forecasts of anticipated retirement notices to be issued in the following year, updated semiannually. The Commission should also require ILECs to engage in an open collaborative process regarding copper retirement with competitors to facilitate information sharing, coordinate planning, and develop best practices, complemented by carrier-specific meetings, when needed.

When copper is damaged or destroyed in a natural disaster or an emergency, the Commission should make clear that is not a retirement and should be treated in a different manner. ILECs should be required to develop, in advance, plans to be put into effect after a disaster or emergency, including a collaborative process and alternative services and facilities to be offered for at least two years where damaged copper cannot be restored, repaired or replaced. Further, the Commission should refine and bolster the discontinuance rules implementing Section 214 of the Communications Act, as amended (the “Act”), 47 U.S.C. §214, so that, as the technology transition continues to advance and large ILECs consider substantial changes in their service offerings, the public interest is served, and consumers and competition are not harmed. The Commission should clarify that the discontinuance of last-mile access products provided to competitors on a wholesale basis will inherently discontinue or impair end user services and thus requires Commission approval under Section 214. When seeking discontinuance of special access services and other last mile access products, during the technology transitions to an all-IP network, ILECs should simultaneously identify functionally equivalent services to those being replaced that will be offered at equivalent rates, terms, and conditions. The Commission should require ILECs to offer such equivalent services indefinitely, unless at some relevant point the Commission specifically finds, through the appropriate regulatory vehicle, that competition in the relevant geographic and product markets has developed to a point that obviates the need for any continued regulatory oversight. Further, requests for approval of discontinuance of DS1 and DS3 services should be provided two years in advance to reflect that competitive carriers enter into customer contracts typically with terms of two-to-three years. This period of lead time will minimize any potential change for the customers and ensure that cost assumptions, service configurations and functionality – all of which are factored directly into the rates, terms, and conditions of the customer contract at the time of signature – can all still be supported.

Finally, XO offers comments in support of the Petition of Windstream Corporation for a Declaratory Ruling to confirm that an ILEC's obligations under Section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3),² to provide requesting telecommunications carriers unbundled access to DS1 and DS3 capacity loops are unaffected either by replacement of copper loops with fiber loops or by the conversion of transmission from TDM to IP format. The Act is technology neutral and it is clear that, absent a finding of no impairment or a grant of forbearance, ILECs have an obligation to unbundle such loops regardless of the physical medium of the network or the protocol used on the loop.

I. INTRODUCTION

XO recognizes the tremendous value that industry-wide implementation of an all-IP presents and, as a leading provider of IP-enabled services itself, supports the technological evolution of the public network. Increasing adoption of IP innovations by XO and other carriers fosters greater network efficiencies, enables the development of new and advanced services, and delivers great value to customers. At the same time, the Commission needs to consider the rules applicable to the technology transitions to ensure that, as the Commission intends, “[t]echnology transitions must not harm or undermine competition.”³

Since its inception, XO has been an industry innovator and was one of the first carriers to exploit the opportunity to use copper loops to bring IP-based services to locations that did not have fiber – which are still a clear majority of buildings in the country.⁴ In 2006, XO pioneered the deployment of high-capacity services over copper facilities with the launch of its EoC

² See also 47 C.F.R. § 51.319(a)(4).

³ *NPRM*, ¶ 110

⁴ See Comments of XO Communications, LLC and Broadview Networks, Inc., GN Docket No. 12-353 and RM-11358, Declaration of Samuel J. Koetter ¶ 8 (filed Mar. 5, 2013) (“Koetter Declaration”).

service.⁵ EoC speeds achieved by XO have progressed from an original capability of 10 Mbps to a robust current capability of 100 Mbps.⁶ Furthermore, XO is exploring ways to increase downlink speeds using EoC significantly beyond what is offered today.⁷

The scope of XO's deployment of EoC to business customers has grown tremendously, underscoring the role competitive access to copper loop facilities continues to play. Today, XO provides EoC in over 565 local serving offices ("LSOs") and to approximately 953,000 buildings.⁸ The growth in EoC using existing copper infrastructure could not have been foreseen when the Commission adopted the copper retirement rules a dozen years ago nor even when XO, BridgeCom, and many other competitive local exchange carriers ("CLECs") eight years ago filed petitions seeking reforms to the copper retirement rules.⁹

XO has led the transition to an all-IP PCN in other respects. XO's nationwide fiber backbone network achieved 100 Gbps speeds in 2012, coast-to-coast, for which XO earned Light

⁵ *Id.*, ¶ 4.

⁶ *XO Communications Extends its Ethernet Services Leadership with New Speeds and Expanded Nationwide Coverage* (Nov. 7, 2012), <http://www.xo.com/about/news-and-events/press-releases/xo-communications-extends-its-ethernet-services-leadership-with-new-speeds-and-expanded-nationwide-coverage/>.

⁷ *See* Koetter Declaration, *supra*, ¶ 4. Other competitive providers are already deploying even faster speeds. *See, e.g., TelePacific Introduces 220 Mbps EoC Service*, (Feb. 28, 2013), <http://www.fiercetelecom.com/story/telepacific-introduces-220-mbps-eoc-service/2013-02-28> (competitive provider announcing the availability of EoC at speeds up to 220 Mbps in California and Nevada).

⁸ For comparison, in 2009, XO was offering EoC in fewer than 350 LSOs.

⁹ *See* Petition for Rulemaking filed by XO Communications, LLC, *et al.*, Rulemaking to Amend Certain Part 52 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Subloops (filed January 18, 2007) ("XO Petition"); Petition for Rulemaking filed by BridgeCom International Inc., *et al.*, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers (filed January 18, 2007).

Reading's "Best New Service" award in the Telecom category.¹⁰ In 2007, XO introduced its advanced IP-VPN solutions using Multi-Protocol Label Switching ("MPLS") which offer businesses a secure, intelligent, and managed network to connect multiple offices over a single IP network infrastructure. And XO's product "XO Anywhere," for which XO won the 2008 Telephony Innovation Award, permits companies with mobile and distributed workforces the flexibility to enable employees to turn any phone into an XO IP Flex office phone.¹¹ A successor product, XO's "WorkTime" mobility application won the 2014 "Most Innovative SMB Service" Leading Lights Award and the 2014 INTERNET TELEPHONY "Product of the Year Award."¹² In 2009, the company introduced "XO Enterprise SIP" ("Session Initiation Protocol"), for which XO garnered the 2009 INTERNET TELEPHONY Product of the Year Award, giving its business and enterprise customers the capability to transform their distributed voice network architecture into a more centralized and cost-effective VoIP solution on a scalable basis.¹³ Two

¹⁰ *Light Reading Names 2012 Leading Lights Winners* (Nov. 7, 2012), <http://www.lightreading.com/ethernet-ip/light-reading-names-2012-leading-lights-winners/d/d-id/699576>.

¹¹ *XO Communications Receives 2008 Telephony Innovation Award* (Oct. 1, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awzjuFD6EBP0>.

¹² *XO Communications Wins 2014 "Leading Lights" Award* (July 21, 2014), <http://www.xo.com/about/news-and-events/press-releases/xo-communications-wins-leading-lights-award-for-most-innovative-business-service/>; *2014 INTERNET TELEPHONY Product of the Year Awards* (Jan. 23, 2014), <http://news.tmcnet.com/news/2014/01/23/7643864.htm>.

¹³ Erik Linask. *2009 INTERNET TELEPHONY Product of the Year Awards* (Feb. 2000, Volume 13, No. 2), <http://www.tmcnet.com/voip/0210/2009-internet-telephony-product-of-the-year-awards.htm>.

other XO products, “XO Hosted PBX”¹⁴ and “Contact Center on Demand,” won INTERNET TELEPHONY awards in subsequent years.¹⁵

In the *NPRM*, the Commission recognizes several ways in which its rules should be revamped to ensure that the technology transitions do not harm customers or competition. XO supports many of these proposals and encourages the Commission to complete this proceeding expeditiously. The transition to an all-IP PCN is well under way and further delay in implementing the rule changes may squander the opportunity to establish an environment in which technological innovation is advanced without sacrificing the competitive environment Congress envisioned when passing the 1996 Telecommunications Act.

II. THE COMMISSION SHOULD MODERNIZE THE COPPER RETIREMENT RULES

In the *NPRM*, the Commission proposes to retain the notice-only framework of the copper retirement process. The Commission’s current rules governing network changes are triggered when and where an ILEC plans to retire copper facilities and move to fiber-based infrastructure. Provided the retirement does not also constitute a Section 214 discontinuance of service, the ILEC need only provide notice of its intent to retire the copper facilities.¹⁶ While XO agrees that the Commission should not stand in the way of a carrier’s use of fiber-based loop

¹⁴ 2012 INTERNET TELEPHONY Product of the Year Awards (Dec. 7, 2012), <http://www.tmcnet.com/submit/2012/12/10/6783271.htm>.

¹⁵ TMC Announces 2013 INTERNET TELEPHONY Excellence Award Winners (Aug. 21, 2013), <http://www.tmcnet.com/submit/2013/08/21/7357302.htm>; XO Communications Receives A 2013 INTERNET TELEPHONY Excellence Award (Sept. 12, 2013), <http://www.xo.com/about/news-and-events/press-releases/xo-communications-receives-a-2013-internet-telephony-excellence-award.aspx>.

¹⁶ To be sure, the Commission should take the opportunity to remind ILECs that retirement of copper is not the same as retirement of services, and that, absent a discontinuance approved by the Commission, ILECs must continue to provide the Title II services (or unbundled network elements – *See* Section IV of these Comments, *infra*) that retired copper facilities supported. For example, upon the retirement of copper facilities used to provide DS1s and DS3s, the ILEC should still provide these circuits to the affected addresses over fiber.

facilities, where the carrier is an ILEC upon which competitors depend significantly for access to end user locations, the copper retirement rules should also consider the impact on wholesale markets and the end users served by competitive providers. Accordingly, XO supports amending the copper retirement rules to expand the scope of the “copper retirement” definition to cover actions that ILECs take beyond simply removing or decommissioning “home run” copper loops and that make copper unavailable to competitors as a practical matter. The Commission must also ensure that competitors and the public at large receive adequate notice of planned copper retirements. To ensure there is sufficient transparency in the copper retirement process, and to facilitate competitors’ ability to plan through the technology transitions as ILECs consider and make changes affecting the important wholesale input that copper has come to be to advanced services, ILECs should be required to provide non-binding forecasts of retirements, maintain a publically available and searchable database of copper availability, and establish a collaborative process with their carrier customers.

As the technology transitions progress, the provision of EoC using copper loops obtained from ILECs on an unbundled basis will remain a critical means by which XO provides advanced broadband services to business customers in major metropolitan and smaller markets. Other carriers, too, are utilizing EoC in greater numbers, including the ILECs themselves, simply because the majority of commercial buildings are not served by fiber, yet customers are demanding Ethernet speeds and functionalities.¹⁷ Thus, EoC has proven a way to jumpstart the transition to IP-based networks for many customers, even where fiber to a building has been

¹⁷ See Koetter Declaration, ¶ 8; see also S. Buckley, “AT&T, BT’s TDM-to-IP migrations to drive new copper, fiber-based Ethernet deployments, says Infonetics” (Fierce Telecom, June 23, 2014) (“[C]opper-based Ethernet continues to become a larger factor amongst both large incumbent telcos and CLECs such as Integra, MegaPath, TelePacific and XO”) found at <http://www.fiercetelecom.com/story/att-bts-tdm-ip-migrations-drive-new-copper-fiber-based-ethernet-deployments/2014-06-23> (last visited Feb. 5, 2015).

installed by the ILEC, where there is continued availability of suitable copper, EoC provided by a competitor can be a cost-effective way to offer customers a choice for high bandwidth service at that address. XO has provisioned EoC service to many thousands of business and enterprise customers out of more than 565 LSOs at a price (on a per Mbps basis) significantly below that for traditional TDM DSn services.¹⁸

Under the copper retirement rules, the potential exists for ILECs to eliminate or severely reduce the availability of competitive broadband alternatives deployed using EoC in competition with their own Ethernet services. The copper retirement process has been plagued by uncertainty and a lack of transparency and, as originally drafted, unilaterally favors the incumbents. Accordingly, the Commission should update its copper retirement rules to reflect the important role that EoC plays and to ensure that the evolution of ILEC networks to fiber-based solutions does not undermine the competitive marketplace for advanced services, giving business customers increased choice and the benefits of lower prices that competition brings.

XO also is a major customer of the ILECs for DS1 and DS3 special access services and unbundled network elements (“UNEs”). At many locations, DS1s and DS3s are provisioned over copper facilities, not fiber. When copper retirements occur in areas where XO obtains copper-based DS1 and DS3 circuits, it is crucial that XO continue to be able to obtain these circuits supported on fiber infrastructure. Alternatively, it is important that functionally equivalent services be made available to XO where copper-based DS1s and DS3s are being eliminated and the ILECs do not plan on offering fiber-based DS1 and DS3 options.

¹⁸ XO also uses DS1 lines leased from incumbent LECs to provide Ethernet services, but because of technical limitations, the ability to innovate and offer higher speeds is generally not as great as with EoC.

A. Practical, Flexible, and Comprehensive Definition of Copper Retirement Should Be Established

A critical aspect of any regulatory framework is a clear statement as to the scope of its applicability. Somewhat surprisingly, as the *NPRM* notes, the current copper retirement rules do not define “retirement,”¹⁹ albeit it is known that, at a minimum, the retirement rules apply to the removal, disabling, or replacement of “home run” copper loops and sub-loops. Fortunately, the Commission recognizes the need to rectify this situation.²⁰ XO encourages the Commission to do so expeditiously so that the ILEC notice requirements are clear as the transition accelerates in the coming months and years. A clear definition of “retirement” with appropriate scope will allow competitors to utilize retirement notices most effectively and ensure that ILECs are limited in their ability to take actions which effectively render copper unusable without giving appropriate notice.

First, XO agrees with the Commission’s proposed rule that, as a general matter, retirements should encompass “removal or disabling” of facilities that are subject to the copper retirement framework as well as the “replacement” of such facilities with fiber or other media.²¹ However, equally important as defining when a retirement notice is required, the Commission should adopt rules that make plain the ILECs’ obligations with regard to copper that is not being “removed, disabled, or replaced.” In particular, regarding copper facilities that have not been the subject of a retirement notice, ILECs must maintain that copper, and not let the facilities suffer

¹⁹ *NPRM*, ¶ 50.

²⁰ At the same time, the Commission should make clear that there is a distinction between copper retirement and discontinuances. Where removal or decommissioning of copper would amount to the discontinuance of a service, the ILEC must seek Section 214 approval and may not simply file copper retirement notices to effectuate the planned change.

²¹ *NPRM*, Appendix B, Proposed New Rule Section 51.332(a).

neglect from lack of maintenance.²² Where copper is not the subject of a notice, CLECs should be allowed to presume that the copper will be available for orders and not allowed to slide into an uncertain status somewhere between still available and retired. Certainty is vital for competitive carriers to be able to plan properly. Similarly, where copper has suffered damage or has become defective, outside of emergency situations which are addressed below, ILECs should be required to repair or replace it in a timely fashion, until such time that it is retired. Again, CLECs should be entitled and able to rely upon the lack of a retirement notice as much as to respond where there is a notice. Finally, the Commission should make clear that, absent a retirement properly noticed, ILECs must provision copper loops upon request if they have not removed, disabled, or physically replaced with non-copper facilities. In recent years, in Verizon territory, for example, XO has experienced situations where copper is reported, upon request for loops, as “no longer available” for new orders even though the copper has not been the subject of a network change notice. Specifically, where Verizon brings FiOS to a building previously served by copper, Verizon has apparently adopted a policy of no longer supporting new orders for copper loops to the building, even if the loop facilities are still in place and not defective or degraded.²³ In such cases, XO typically learns that copper is no longer being offered at the building only when it seeks to place an order. Again, if copper is not retired, it must be made

²² While XO does not disagree in principle that the definition of retirement should be modified to include those instances where ILECs are no longer maintaining their copper facilities, it is more critical that the Commission reiterate in the first instance that the ILECs are required to maintain the copper if they are not retiring, *i.e.*, “removing,” “disabling,” or “replacing,” the copper. Any middle ground, and the attendant uncertainty, should not be permitted.

²³ Just as ILECs must maintain and repair facilities which are not retired, the Commission should make clear that an ILEC may not charge special construction when it has not gone through the copper retirement process at the location and there is capacity available to support the order consequentially on existing copper facilities (even if they require repair, maintenance, or even replacement (if defective)). ILECs may not deem copper facilities unavailable at a non-retired location and an order subject to special construction charges, simply because an ILEC adopts a policy that the copper facilities are not to be used by new or additional customers once the location is transitioned over to fiber-only services.

available for both UNEs and special access services, it must be maintained, and it must be repaired when defective. In short, XO and other competitors should be entitled to rely upon the lack of a retirement notice as a commitment by the ILEC to make copper-based network elements and services available upon request.²⁴

Second, the Commission should, as proposed, remove any ambiguity and clarify that any elimination of “home run” copper loops constitutes a “retirement.” There should be no question about this, and it would appear that the current rules are already resolved that this is the case.²⁵ But to be certain, the definition should apply equally to the elimination of copper loop facilities to a single building as well as to the elimination of copper to an entire wire center. When providing notice, the ILEC should be required to identify the particular addresses that will be affected by the elimination of the copper and to update a public database of all addresses within its operating territory that continue to be serviced by home run copper loops, as discussed more fully below.

Third, as discussed above, XO and a number of other competitors rely upon copper loops to support their EoC services. Consequently, any definition of “retirement” must account for the fact that EoC requires “home run” copper loops. If any portion of the transmission path of copper loop plant is replaced with fiber, or another medium, the resulting hybrid loops can no longer be used for EoC service, just as surely as if the entire copper loop was retired. Accordingly, where an ILEC projects or plans on replacing copper feeder plant, or another portion of a loop back to the point of termination in the center office, with fiber, such replacement should fall within the scope of copper retirement. There should be no distinction

²⁴ While it should not alleviate or lessen any obligation to provide notices of copper retirement or to maintain, repair, and make copper available, this is an additional reason why ILECs must be required to maintain a database of locations where copper is available.

²⁵ See, e.g., § 51.325(a)(4).

based upon which part of the loop is replaced with fiber, whether the feeder plant, or some other element. The Commission's current rules provide for network change notices when sub-loops are retired, but the definition should leave no doubt that any elimination of copper at any point along the home run copper loop is a retirement subject to notice requirements.

The foregoing scenarios, which fall short of disabling or removing home run copper loops, are at least as common as actual retirement of copper in a wire center. Because these situations create adverse impacts that are or (in the case of cessation of maintenance) can be indistinguishable from the elimination of "home run" copper loops, the Commission should address these scenarios, and the corresponding ILEC obligations, in its copper retirement rules to remove ambiguity. Otherwise the copper retirement process would be of extremely limited value to competitors.

B. The Content of Retirement Notices Should Be Made Consistent Across ILECs

XO urges the Commission to require that copper retirement notices follow a standard format to facilitate their usefulness to competitive providers and to minimize the potential for interpretation error which could result if ILECs are left to implement the notice requirements as they see fit. Most importantly, the scope of "retirement" should be expanded to require ILECs to issue retirement notices in each of the scenarios described above. The notices should include the addresses that will be affected by the planned retirement, the CLLI codes for each loop, and the nearest intersection. To maximize the practical usefulness of the notice to carrier customers, for each affected address, a notice should identify the sub category of retirement affecting copper loops to specific locations, *e.g.*, decommissioning/removal of the entire loop, retirement of copper feeder, or some other action disabling the "home run" copper loop. In cases where the planned retirement, in combination with any previous retirements in the wire center, does not

impact the wire center as a whole, the notice should identify all addresses in the wire center that will remain unaffected following the retirement.

XO receives from some, but not all, ILECs a notice supplementary to the general public retirement notice that discusses XO-specific impacts given the copper facilities that XO purchases from that ILEC. Such carrier-specific notices, in addition to the more general notices, should be mandatory from all ILECs, and notice of retirement should not be considered compliant and effective unless and until all carrier-specific notices have been delivered.²⁶ Further, ILECs should be required, in such carrier-specific notices, to provide a listing (by circuit ID) of the copper facilities currently being purchased that will be affected.

Retirement notices should also be required to identify the alternative services the ILEC will provide in the absence of the copper loop facilities and at what rates those alternatives will be made available. The rates, terms, and conditions must be equivalent and reasonable, in keeping with the *NPRM*'s core value to ensure that technology transitions do not undermine or harm competition.²⁷

Ensuring the foregoing information is contained within each retirement notice is vital for XO to plan the transition from the copper-based services or network elements it obtains from the ILEC in a manner that least affects its ability to continue providing service to existing customers. Moreover, even regarding retirements in those areas where XO does not yet have customers, its planning can be materially impacted by a retirement notice if it is considering the commencement of service in the areas affected by the planned retirement. Having the complete set of information issued in general notices will facilitate prompt planning by competitors and reduce uncertainty regarding the alternatives that will be available from the ILEC, which affected

²⁶ Thus, the one-year notice period, which XO proposes below, should commence only when both the general notice and the carrier specific notices have been issued.

²⁷ See *NPRM*, ¶ 110 (“[t]echnology transitions must not harm or undermine competition”).

competitors can compare against the options of self-provisioning or obtaining service, capacity, or elements from third-party providers.

C. ILECs Should Be Required to Implement and Maintain a Publicly Available, Searchable Database Reflecting the Status of Copper Loops

Just as important to providing adequate notice of planned retirements, each ILEC should be required to maintain and regularly update a publicly available and searchable database of copper availability and should be responsible for not provisioning new orders over facilities that have been noticed for retirement.²⁸ Specifically, the Commission should adopt rules obligating each ILEC to establish and maintain a database that can be accessed freely by CLECs and both federal and state regulators regarding copper availability. The database should indicate whether copper has been retired or is being retired, at the level of individual addresses, and whether a decision has been made that the copper will be permanently removed. The database should reflect, and contain links for, pending notices to retire or remove copper as well as

²⁸ In XO's experience, obligating ILECs to keep track of the copper facilities they are retiring and where they have pending notices is critical. In April of 2011, a major ILEC filed a retirement notice for certain copper facilities. In November of 2011, seven months later, that ILEC provisioned a new XO customer over copper facilities in the area that was the subject of the earlier retirement notice. In January 2012, XO received a 24 hour warning that that ILEC was taking the XO customer – a group of nursing homes – down the next day because there was a pending retirement notice affecting the service. XO had no way of knowing that the ILEC had erroneously provisioned a new customer over a facility set to be retired. XO, after emergency legwork, stopped the retirement at the eleventh hour. Given the potential for scenarios like this increasing as the tech transition progresses without better procedures and mechanisms being in place, the FCC should remove any doubt that each ILEC must be obligated to monitor the status of its facilities, and when in receipt of an order for a copper-based service where the facilities are the subject of a retirement notice, should not provision new orders on the facilities set to retire. The proposed ILEC database should help ILECs to this end, and should provide the public with better information in a single source than that which had been available to XO. But the database requirement should not relieve the ILECs of the obligations to monitor the status of their facilities and not provision new orders on loops already set for retirement, unless in receipt of express consent of the prospective customer after being informed subsequent to placing the order about the planned retirement.

retirement or removal that has already taken place.²⁹ The database should be searchable on a geographic and address-specific basis and should be updated frequently, at least monthly.

However, to be clear, the ILEC database should complement, and not replace the need for, specific notices of copper retirement. The notices will provide a clear picture of changes being presently implemented by the ILECs; the database would provide an overall network snapshot at any one time. Both will be important to competitive carriers as well as regulators for meaningful and effective planning as the technology transition progresses.

D. Retirement Notices Should Be Given One Year in Advance

The typical length of XO's contracts with its business and enterprise customers, as well as its wholesale customers, is two or three years. In setting its pricing for a contract, XO makes assumptions on the continued availability of any wholesale inputs throughout the contract term. XO uses a least cost pricing tool when determining whether it can meet a service request and, if there are multiple options to satisfy a customer's needs, how it can do so most cost effectively. In the event XO receives a retirement notice affecting inputs used to serve any existing customer, XO's contract pricing decisions potentially, if not likely, will be undermined. Moreover, XO must determine if there is a reasonable and cost effective means through alternate inputs from the ILEC or from a third-party provider that will allow it to continue to provide the service. One other option, depending on the proximity of XO's backbone network or other fiber and the business case, may be for XO to build out fiber to the customer's location from XO's own network. Alternatively, there may be another competitive provider that is in a position to do so.

²⁹ Because XO's ability to offer certain speeds of EoC at a location depends significantly on the length of the copper loops available to that address, the ILEC should be required to indicate the length of copper loops available at a given address in the publicly accessible database of copper availability, as discussed below. This would be critical information for XO to take it into account during its planning and not for the first time when it seeks to obtain the copper loops.

The notice periods in the current rules, as short as 90 days,³⁰ are in many cases inadequate to allow XO to transition customers from services using copper purchased from an ILEC – copper DS0 loops supporting EoC offerings, DS1s or DS3s – to more costly alternatives without disruption. The transition involves XO engaging in multiple steps, internally, with the customer, with the ILEC, with other providers, and potentially with government and property owners (in the event XO makes a decision to build out to the customer). XO must validate the impact the noticed retirement will have, meet with the customer to explore service migration options (including possible renegotiation of the contract), examine service alternatives with the ILEC and other service providers, consider whether there is a business case to build out to the customer’s location, and so forth. This understandably all takes time in the ordinary course of business and cannot be “expedited.”

There may be some cases when XO’s best solution to continue to support the customer is to build out fiber to the premises. In XO’s experience, fiber builds to end user locations – where otherwise justified – can take upwards of nine months and involves numerous hurdles, including permits, building owner issues, coordination with other rights-of-way users, scheduling, construction, and testing. The installation of a fiber build can take even longer if XO encounters seasonal moratoria on new builds.

Accordingly, for the foregoing reasons, a notice period of at least one year would provide XO and other competitors with an opportunity to explore, select, and implement a transition solution to continue to support existing customers in most instances.

³⁰ 47 C.F.R. § 51.333(b)(2) (short term notices of copper loop and sub-loop retirement).

E. In Addition to Notices of Copper Retirements, ILECs Should Be Required to Provide Periodic Non-Binding Forecasts of Notices They Anticipate Filing within the Following Twelve Month Periods and Engage in an Ongoing Collaborative Process with Competitors

While one-year notices of planned copper retirements in a consistent format (within and across ILECs) are vital, XO and other competitors would also benefit for purposes of network planning were they to receive regular periodic forecasts from ILECs of the copper retirements they anticipate *noticing* over the coming year.³¹ XO considers that these forecasts, which should be made in good faith by the ILECs although non-binding, would precede and complement the actual location-specific retirement notices, not replace them. Such forecasts would assist XO in its planning and ease the potential disruptions due to transitions when actual retirement notices are issued. The scope of the potential retirements set forth in a forecast would be particularly important. In addition, forecasts would confer upon XO better insight into the prospective soundness of its cost assumptions as it enters into new or successor contracts. These forecasts should be made publicly available so that the Commission and any interested parties are able to access them and collectively track them to obtain an industry-wide perspective.

XO envisions the provision of forecasts would simply be one aspect of a more collaborative process between ILECs and their wholesale customers regarding copper retirement. The forecasts should be made as part of semi-annual meetings between each ILEC and interested parties/competitors for the indeterminate future as the technology transitions proceed.³² In the collaborative meetings, in addition to presenting and discussing the forecasts, the carriers, both incumbents and competitors, should review ILEC copper retirements that are planned and those

³¹ Thus, given a one-year retirement notice requirement, the non-binding forecasts would list those retirements anticipated between twelve and twenty-four months after the date of the forecast.

³² The Commission should periodically review the frequency and usefulness of the collaborative process.

that have recently taken place, anticipated challenges, problems encountered, and solutions arrived at so as to develop a set of best practices. The collaborative process would also be a forum in which to address issues surrounding the successful compliance with obligations of maintenance and replacement of copper. A process in which CLECs can have their questions answered in an open forum of all interested parties would reduce uncertainty and allow CLECs to better plan for contingencies in anticipation of expected retirements long before notices are issued. The meetings would also present an opportunity to discuss the adequacy and availability of alternate services in the wake of retirement. Competitors should have the opportunity, ancillary to the collaborative meetings, to meet one-on-one with the ILEC to discuss company-specific circumstances and issues of concern.

Forecasts, combined with a collaborative process and coupled with a more robust notice framework and publicly available database reflecting the current status of copper availability, would help address the lack of transparency in the incumbents' current processes used to retire copper and would help promote the maximum use of existing copper infrastructure during the transition to fiber and other transmission media. A collaborative process would better ensure that competitors have sufficient time and information to work with the incumbent to ensure that all end user customers' interests are best served – either by maintaining access to the copper facilities or by enabling an adequate transition to new transmission media, perhaps well in advance of an actual retirement.

One model that the Commission might consider in implementing a collaborative process requirement is that established by the regulator, Ofcom, in the United Kingdom.³³ Ofcom tasked an independent organization, OTA2, to create and implement a collaborative process for telecommunications industry participants to address key issues dealing with network

³³ See OTA Website at <http://www.offta.org.uk/>.

deployments and performance. Perhaps most relevant for the technology transition facing providers in the United States is OTA2's objective of enabling "migrations between broadband and narrowband products" to be "seamless, timely, and with minimal interruption to service for end users." By facilitating an industry dialogue resulting in collaborative solutions, the OTA2 process appears to have minimized major disputes, which slow service rollouts and lead to the expenditure of large amounts of time and resources. XO, therefore, urges the Commission to consider a framework akin to that adopted by Ofcom to help manage the copper-fiber transition.³⁴

F. The Commission Should Establish a Regulatory Framework That Applies in the Wake of Natural Disasters and Emergencies That Cause Unplanned Damage and Destruction of Copper

The Commission should adopt rules to ensure that ILEC activity in the wake of damage to or destruction of copper loop facilities as a result of natural disasters does not harm or undermine competition. In such circumstances, copper facilities actively being leased and used by XO (and other competitors, as well as the ILEC itself) may be suddenly rendered unusable and may be beyond repair. In the situation of disaster or destruction, neither the incumbent nor competitive wholesale customers had any intention or expectation immediately prior to the disaster or emergency that the copper facilities would not continue in service for the indefinite future. As a result, if copper becomes unavailable in the wake of such a disaster, the incumbent is not itself retiring the copper facilities. Rather, the ILEC faces a decision whether it will replace destroyed and repair or replace damaged facilities, and the general copper retirement rules and policies simply should be considered inapplicable.³⁵

³⁴ XO is open to other, viable alternative processes supporting ILEC-CLEC collaboration.

³⁵ ILECs should not have the opportunity to simply treat the damage or destruction as a *de facto* accelerated retirement by filing an after-the-fact notice of retirement in the wake of the disaster.

A different framework is needed in such circumstances. Specifically, as an initial matter, in advance of any such disaster or emergency, incumbent LECs should be required to establish (and publish) a process whereby it and competitors can meet expeditiously, frequently, and regularly following a disaster to gain a better understanding of the impact suffered by the network. Having a process in place in adherence to Commission rules will help ensure that there is a means for sharing information and competitor options about facility and service availability in a timely and orderly way in the event of an emergency or disaster.³⁶ By that process, incumbent LECs should be required to keep competitors informed in a timely fashion of changes to the availability, replacement, repair, or decisions not to replace or repair copper on a near real-time basis as ILECs themselves become aware of information. Daily updates regarding status availability should be required and shared electronically, although meetings need not be as frequent depending on the circumstances.³⁷

³⁶ Following Hurricane Sandy, information provided by Verizon was subject to fundamental change (both with regard to copper availability and unavailability) and any process to share information that existed was put together on an *ad hoc* basis. Competitive carriers were at the mercy of what Verizon believed was appropriate and any process, such as it was, was cobbled together on the fly. Ideally competitors should be as informed as is practicable, with updates on a very frequent basis – and affected ILECs should be required to make available wholesale alternatives on a just, reasonable, and non-discriminatory basis. Were ILECs required to have a system in place in advance – as well as alternatives in the face of a disaster – incumbents and competitors would be able to work together to expeditiously restore service to competitive carriers’ end users by installing new facilities to wholesale carrier customers on reasonable terms where repair or replacement of copper are not viable options.

³⁷ In addition, as part of the contingency planning for natural disasters or emergencies rendering copper unavailable on an unplanned basis, the Commission should consider requiring ILECs to predefine, and receive Commission approval for, the alternate services and pricing they will offer if copper loops and DS1s and DS3s are rendered unavailable due to a disaster. Such contingency plans should be shared with competitors when proposed initially as well as in the case of any material modifications. Competitors should have the opportunity to comment on the propriety and adequacy of any proposed plans prior to Commission approval. If the incumbent does not re-provision copper facilities in the wake of a disaster, XO should have access to the equivalent facility at the same price for a reasonably sufficient period to meet its retail customer’s expectation of continuing to have service. For those services which serve as inputs for competitors, the ILECs should be required to publish in advance what the alternative, equivalent services will be in the case of a disaster, how long it will be available, and what the equivalent

The potential benefits from advance contingency planning, advance identification of equivalent service and facility alternatives, and collaborative activity in the wake of a natural disaster cannot be overstated. XO's experience in the wake of Hurricane Sandy makes this plain. A contingency plan established in advance almost certainly would have mitigated some of the confusion and uncertainty that pervaded the post-disaster environment. The absence of a plan shared with competitors in advance (and reviewed and accepted/approved by the Commission) led to a poorly coordinated response and collaboration in the wake of a disaster.

III. SERVICE DISCONTINUANCE RULES SHOULD BE UPDATED TO ENSURE TECHNOLOGY TRANSITIONS DO NOT UNDERMINE WHOLESALE COMPETITION

The *NPRM* recognizes, as a general matter, that the Commission should “define carriers’ responsibilities when discontinuing legacy services to ensure that we carry our values forward without regard to the particular technology used.”³⁸ Accordingly, the *NPRM* seeks comment on better defining the scope of its Section 214(a) discontinuance authority, particularly with respect to wholesale services. The Commission also seeks comment on its tentative conclusion that “incumbent LECs that seek section 214 authority to discontinue, reduce, or impair a legacy service used as a wholesale input by competitive providers to commit to providing equivalent wholesale access on equivalent rates, terms, and conditions.”³⁹

XO wholly endorses a proposed Commission rule to establish a rebuttable presumption that where a carrier seeks to discontinue, reduce, or impair a wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community, requiring approval

rates, terms, and conditions will be. Because XO's contract terms are typically at least two or three years in duration – as is common in the industry -- such alternatives should be available for at least two years following a disaster at the same prices, terms, and conditions prior to the disaster.

³⁸ *NPRM*, ¶ 92.

³⁹ *Id.*

pursuant to Section 214(a).⁴⁰ As an initial matter, it is virtually axiomatic that when an ILEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with service, such as DS1s or DS3s, this will affect the competitive LECs' retail customers. Discontinuance of a wholesale input, such as special access, is likely to cause service disruptions to CLEC end user customers and may, in the worst of circumstances, make it impossible for a CLECs to continue to provide its services at all to that customer. Another strong possibility, even where service can physically be maintained in the face of discontinuance, is that the cost assumptions underlying the CLEC's service contract will be undermined, especially when the next most cost-effective option for the wholesale input may not be economically practical. This may lead to an increase in the end user customers' charges. Depending upon when the discontinuance occurs relative to the commencement of the term of XO customer agreements, the cost assumptions could be undermined for a significant portion of XO's typical two or three year service period. Thus, XO submits that the need for section 214 approval should unequivocally be required when the wholesale service at issue used to provide end users with last-mile access.

If the Commission instead adopts a rebuttable presumption, however, ILECs should be required to file a certificate with the Commission in advance of discontinuances. The certificate should lay out the grounds for its proposed rebuttal reflecting the specific circumstances. Such a certification should be required at least 60 days in advance of the discontinuance and a copy should be served, and such service certified to, on all competitive LECs purchasing the wholesale service in the affected area. In this way, competitors will have an opportunity to challenge the rebuttal before the discontinuance takes effect.

⁴⁰ *Id.*, ¶¶ 92-93,

If the rebuttal is challenged with the ILEC, and a copy of the challenge is timely served at the Commission, then the Commission (by rule) should suspend the proposed discontinuance until it can investigate whether the ILEC offered sufficient grounds to rebut the presumption. If the Commission finds the presumption was not rebutted, then the ILEC will have the chance to file a formal Section 214(a) discontinuance notice or abandon its plans. The failure to adopt such open and public procedural protections would leave too much authority in the hands of the ILEC and create the unacceptable risk that were a discontinuance allowed to proceed based solely on the ILEC's showing, without Commission review, even if the rebuttal is challenged, the potential damage from the discontinuance could not be undone.

The *NPRM* also inquires whether it should require a section 214(a) discontinuance application to be filed when an ILEC plans to discontinue certain term discount plans,⁴¹ such as special access volume commitment plans of the ILECs. These plans come in a variety of guises and pursuant to a variety of names. XO has commented in other proceedings about the anticompetitive nature of the terms and conditions of many such volume commitment plans, but also that these plans represent the only means by which XO can obtain end user access at DS1 and DS3 capacity levels to many business and enterprise customers.⁴² Indeed, it is this ability to get a better price for services to locations only the ILECs can offer only by consenting to the lock-in provisions of the discount plans that is the source of their perniciousness. The discounts provided with these plans, when offered over extended periods, such as five years, approach

⁴¹ *NPRM* ¶104.

⁴² *See, e.g.*, Comments of XO Communications, LLC, WC Docket No. 05-25 (Special Access for Price Cap Local Exchange Carriers) and RM-10593 (AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services) (filed Feb. 11, 2013) (“XO Special Access Comments”), Exhibit 2, Declaration of John T. Dobbins, XO Vice President of Network and Access Optimization, ¶ 4 (ILEC channel terminations that provide business and enterprise customers with network access and ILEC transport facilities are far more extensively deployed in all markets in which XO operates than those of any of the ILECs’ rivals).

competitively significant pricing and allow competitors, such as XO, to offer services to enterprise end users in competition with the ILECs. XO sets its rates for its retail services using the special access offerings obtained under the volume commitment plans on the assumption that its five-year commitment to the ILEC will secure certainty as to rates, and thus as to XO's costs in offering its enterprise customers contracts with terms of two or three years.⁴³ Were an ILEC to eliminate longer term plans, the basis for XO's pricing would be swept away with potential adverse consequences for its retail customers, including rendering a service upon which they have come to rely economically unviable, such that XO may be forced to terminate the customer contract. The Commission can and should conclude, therefore, that an ILEC's elimination of a tariffed term plans for special discounted access services will lead to a discontinuance or impairment of service to at least some of the end user customers of the ILEC's wholesale customers purchasing service under that term discount plan. For the foregoing reasons, elimination of extended term discount plans for special access pricing can have the same effect as discontinuance, in terms of impact on end users, and so such proposed eliminations should be treated as discontinuances requiring submission of an application seeking approval under Section 214.

Moreover, given announcements such as AT&T's describing its plan to phase-out DS1 and DS3 TDM special access services, elimination of longer term discount plans is almost certainly just a precursor to later elimination of shorter ones as they all, per AT&T's intentions, get phased out over time on a schedule dependent on the length of the term plans. Thus, at a minimum, where a carrier has manifested its intention to phase out the service entirely,

⁴³ XO does offer enterprise customers contracts with term of more than three years, but most of its customer contracts are two and three years in duration.

elimination of the longer term plans is the commencement of the discontinuance of the service as a whole and should be subject to the Section 214 approval process.

As noted above, XO is dependent in many locations upon ILEC DS1 and DS3 services to access end user customers, having no competitive alternatives. Where incumbent LECs choose to discontinue TDM-based services in the transition from TDM to IP-based services, XO and other competitive LECs are likely to lose the ability to access last-mile facilities necessary to serve their customers, for example DS1 and DS3 special access lines. As a result, XO supports the Commission's tentative conclusion to require ILECs that seek section 214 authority to discontinue, reduce, or impair a legacy service used as a wholesale input by competitive carriers to commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions.⁴⁴ Such alternative service should adhere to the six principles for equivalence set forth by Windstream.⁴⁵ The rates terms and conditions for services that an ILEC plans to make available as an equivalent alternative to discontinued offerings should be posted on the ILEC's website.⁴⁶ Moreover, the Commission should impose the obligation on ILECs that seek discontinuance to commit to offer such equivalent services indefinitely, or at least until such time as the Commission makes a specific finding in the relevant geographic and product

⁴⁴ The mere fact that a service very similar to a tariffed service may be offered by the ILEC on a non-tariffed basis does not obviate the statutory requirement to obtain Section 214 approval when an ILEC seeks to discontinue the tariffed service. However, if that non-tariffed service is *functionally equivalent* and has *equivalent* rates, terms, and conditions to a tariffed last-mile access service used as a wholesale input by competitive carriers, and the ILEC will make the non-tariffed service available indefinitely, that may ease the Section 214 approval process. *See NPRM*, ¶ 105 (inquiring whether the availability of non-tariffed service that is “functionally very similar” to a tariffed service should eliminate the need for Section 214 approval to discontinue the tariffed offering).

⁴⁵ *See NPRM*, ¶ 111.

⁴⁶ As the *NPRM* implies, functionally equivalent services may, in fact, not be tariffed. *See NPRM*, ¶ 105.

markets that competition has developed sufficiently to negate any need for any continued regulatory oversight.

In addition, where an ILEC seeks to eliminate its term discount plans of three or more years' duration, competitors should receive sufficient notice in light of the length of typical end user contracts to address any potential changes for end user customers. In addition, discontinuance has the potential to impact the assumptions of cost, service configurations and functionality, all of which are factored directly into the rates, terms, and conditions of the customer contract at signing. Transitions following discontinuance may involve multiple steps until completion, as well as require deployment of new equipment and processes. Accordingly, XO proposes a notice period of two years for discontinuance of DS1 and DS3 special access tariffed and contract tariff term discount plans.⁴⁷

IV. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT THE TRANSITION FROM TDM TO IP DOES NOT OBVIATE THE NEED TO PROVIDE UNBUNDLED DS1 AND DS3 LOOPS

Windstream has filed a Petition for Declaratory Ruling asking the Commission to “terminate a controversy regarding recent AT&T and Verizon filings asserting that either IP conversion or conversion from copper to fiber relieves them of their obligation to unbundle DS1 or DS3 capacity loops.”⁴⁸ XO supports the Windstream Petition and urges the Commission to

⁴⁷ The term discount plans that XO and other CLECs enter into with incumbents for DS1 and DS3 special access circuits include volume commitments and extremely high shortfall penalties for failure to meet these commitments. *See generally XO Special Access Comments*, n. 42 *supra*. These plans generally prevent the use of Ethernet services as substitutes for TDM services under those commitments. Once notice of a proposed discontinuance is given, XO and other competitors should be freed of any such commitments, penalties, and restrictions so that XO and other affected carriers can identify and obtain new services and/or alternative suppliers and continue to serve their end user customers. Because such an accommodation in such circumstances would make it possible for XO to move to Ethernet offerings of the ILECs without fear of shortfall penalties, this measure would help promote the transition to IP-based services.

⁴⁸ *See Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter the Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)*, WC Docket No. 15-1; *Technology*

confirm the continued obligations of ILECs under Section 251(c)(3) of the Act to offer unbundled loops regardless of the network infrastructure utilized by an ILEC, in the absence of a finding of no impairment or a grant of forbearance. In the marketplace today, XO finds that DS1 and DS3 unbundled loop facilities often present the most cost-efficient option to reach end user locations and meet customer needs where customers do not require higher capacity Ethernet services. The technology transitions will not ameliorate the economic barriers that often preclude XO from building out to customer locations with its own facilities nor lessen the distinct advantage that ILECs enjoy today in terms of near ubiquitous last mile physical access to end user locations, including access to business, enterprise, and government locations.⁴⁹ Continued availability of unbundled DS1 and DS3 loop facilities during the technology transition is vital to uphold the core value of competition.

Verizon and AT&T are disclaiming the existence of an obligation to provide unbundled DS1 and DS3 loops in those areas when they retire copper or transition from TDM-based to IP-based services.⁵⁰ Verizon, for example, in recent copper retirement notices informs that it will no longer provide unbundled network elements (“UNEs”) over copper at the affected locations, creating uncertainty whether it will continue to provide access to DS1 and DS3 capacity unbundled loops, albeit on fiber facilities, pursuant to Section § 251(c)(3) of the Act and the

Transitions, GN Docket No. 13-5, Petition for Declaratory Ruling Of Windstream Corporation (filed Dec. 29, 2014)(“Windstream Petition”).

⁴⁹ See, e.g., *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, ¶ 38 (2007) (denying to grant Verizon forbearance from unbundling obligations in its six largest geographic markets in the enterprise product market and finding that “the record does not reflect any significant alternative sources of wholesale inputs for carriers in the 6 MSAs.”); *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, FCC 10-113, 25 FCC Rcd. 8622, 8661, ¶¶ 2, 73 (2010) (“competitors offering business services largely must rely on [last mile] inputs purchased from Qwest itself to provide service”)

⁵⁰ See Windstream Petition at 10.

Commission's Rules. AT&T's approach has been more direct, contending that, in an all-IP environment, no access to high capacity unbundled loops will be provided.⁵¹ Rather, AT&T argues that DS1 and DS3 loops need be unbundled only in a TDM environment.

The obligation to provide UNEs is statutory, provided that the impairment trigger of Section 251(d)(3) is satisfied, and that obligation is technology neutral, limited neither to copper facilities nor to TDM networks. The Commission's rules implementing the Section 251(c)(3) obligation with regard to high capacity DS1 and DS3 loops, 47 C.F.R. § 51.319(a)(4) or (5), are equally technology neutral.⁵² Accordingly, unless there is a demonstration on a location specific basis of no impairment to competitors if the UNEs are not made available, or unless there is a grant of forbearance, an ILEC is not relieved of its obligation to provide UNEs upon request. This is true regardless of the network technology used, the physical medium of the network, or whether any DS1 and DS3 *service* has been discontinued.⁵³

Thus, issuance of a copper retirement notice has no bearing on whether DS1 or DS3 UNEs must still be provided. Indeed, at the time the Commission reiterated the DS1 and DS3 unbundling obligations in the *Triennial Review Remand Order*, ILECs were already providing

⁵¹ See *id.*, 10-11.

⁵² While the Commission in the *Triennial Review Remand Order* noted that it had "limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the *mass market*," the Commission has never placed technology specific limits on the unbundling obligations for DS1 and DS3 capacity loops. *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2562, ¶ 49 (2005) ("*Triennial Review Remand Order*") (subsequent history omitted). Were the Commission to consider doing so on an across-the-board basis – which it should not because of the continuing importance for competition of access to last mile high capacity loops – a notice and comment rulemaking would be required. Rather, the Commission should continue to rely upon geography-specific impairment analysis and/or forbearance.

⁵³ The Commission reiterated in the *NPRM* that UNEs are *not* services. See *NPRM* ¶ 109 quoting *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, 20595, ¶ 95 (1997). See also *Triennial Review Remand Order*, at 2569-70, 2574-75, ¶¶ 62, 65 (discussing that UNEs can help to check special access service pricing).

DS1 and DS3 loops utilizing fiber as well as copper and made no distinction at the time with regard to the unbundling rules.⁵⁴ Similarly, if DS1 or DS3 service is discontinued under Section 214 to particular locations, the obligation to unbundle DS1 or DS3 loops there must be addressed separately under the impairment and/or forbearance standards.⁵⁵

At bottom, the Commission should grant the Windstream Petition and rule that an ILEC's Section 251(c)(3) obligation to unbundle DS1 and DS3 loop facilities is not modified either by the migration from copper to fiber facilities or the transition away from TDM-based network facilities.

V. CONCLUSION

For the foregoing reasons, and as described herein, the Commission should modernize its copper retirement policies and regulations as they apply to wholesale loops. Comprehensive retirement rule updates will help ensure that the technology transition to an all-IP PCN does not harm or undermine competition or end users. The Commission should also promulgate rules that make clear ILEC obligations in the event of natural disasters or other emergency where copper is destroyed or damaged.

The Commission should also make clear that its Section 214 discontinuance requirements apply to services relied upon by wholesale customers, especially (without limitation) to DS1s and DS3s, used to provide for last-mile access to end users. Discontinuance requirements should apply to an ILEC's elimination of individual tariffed special access term discount plans because of their almost certain impact on end user customers. When ILEC services used by carrier

⁵⁴ *Triennial Review Remand Order*, 20 FCC Rcd. at 2616, ¶ 150 (discussing DS1 and DS3 capacity “fiber-based loops”).

⁵⁵ *See NPRM*, ¶ 106 n. 203 (“No discontinuance would affect an incumbent LEC's obligations to provide unbundled access to loops under section 51.319(a)(4) of our rules”).

customers as wholesale inputs are discontinued, the ILEC should be required to provide functionally equivalent services on equivalent prices, terms, and conditions.

Finally, the Commission should grant the Windstream Petition and declare neither conversion of network facilities from TDM to IP nor conversion of facilities from copper to fiber relieves ILECs of their obligation to unbundle DS1 or DS3 capacity loops, or their equivalents, under Section 251(c)(3) of the Act.

Respectfully submitted,
XO COMMUNICATIONS, LLC



Lisa R. Youngers
Tiki Gaugler
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

Its Attorneys

February 5, 2015