

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

In the Matter of	)	
	)	
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
	)	

**COMMENTS OF XO COMMUNICATIONS, LLC ON THE  
TECH TRANSITIONS FURTHER NOTICE OF PROPOSED RULEMAKING**

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  
*Its Attorneys*

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## SUMMARY

XO Communications, LLC (“XO”), by its attorneys, hereby submits its comments on the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the Technology Transitions proceeding (GN Docket No. 13-5). XO supports the Commission’s efforts in this docket and urges the Commission to act on two issues raised in the *FNPRM* to minimize the potential for disruption to end user customers and harm to competition.

First, the Commission should amend its rules to require the ILECs to provide one year’s notice to wholesale customers of a planned discontinuance, reduction, or impairment of service used as a wholesale input, whether or not a Section 214 approval will be required. Competitive carriers such as XO are often dependent on ILEC facilities to provide competitive services. A one year advance notice requirement would allow competitive carriers sufficient time to prepare their networks and end user customers for a planned service discontinuance.

A twelve month period is the minimum reasonable period of advance notice if the Commission wishes to minimize service disruption and harm to end user customers. In response to a service discontinuance notice, XO would engage in a sequence of steps to transition its services and customers prior to the discontinuance. As an initial matter, assuming a modestly scoped discontinuance, XO would identify the scope of customers that will be impacted and analyze its options for transitioning customers, developing a proposed network redesign (which would take approximately two months). XO would then seek corporate approval for the redesign and any capital funding required, which would take approximately two weeks. Following approval, for transitions that will involve some measure of new construction, XO would engage in equipment and network engineering and implement the build, which would take at least six months, and could take considerably longer if there are any problems obtaining access to

buildings, rights-of-way, or infrastructure. In parallel with the network engineering and build work, XO could begin to work with customers and prepare to groom customers over. (At least four months would be needed for grooming when a transition only no build.) Finally, XO would move the customers over once the new build is operational, which would take one to three months.

A one-year notice period will also support the Section 214 rule changes made in the *Tech Transitions Order*. Advance notice will facilitate communication between ILECs and CLECs and better enable ILECs to make the “meaningful evaluation” of the impact of the discontinuance of the wholesale service on end user retail customers required by the *Tech Transitions order*.

Second, to facilitate a smooth transition as a result of a copper retirement, the Commission should enumerate objective criteria to judge whether an ILEC has worked in “good faith” with interconnecting entities. Implementing specific good faith criteria is consistent with Commission precedent and would enable fair and balanced enforcement of the obligation. Moreover, the following other actions should be among those that the Commission deems inconsistent with the good faith obligation when evaluating conduct by ILECs ahead of a copper retirement:

- Failure by the ILEC to acknowledge within five (5) business days and respond within ten (10) business days to a request for information in a timely fashion and to provide specific reasons in writing for not providing full information in response to a request;
- Failure by the ILEC to (a) respond to a reasonable request for a teleconference or meeting within five (5) business days to discuss the retirement and options in the wake of the retirement to transition services or customers, and (b) meet within three weeks of the request for a conference or meeting except in extraordinary circumstances;

- Failure by the ILEC to designate a representative with authority to address requests for information or a meeting (and notify requesting party of changes to the same); and
- Failure to adhere to any voluntarily assumed obligations in the course of an information exchange or as a result of a meeting.

Adoption of the foregoing criteria should not foreclose the ability of an interconnecting carrier to bring a complaint based on other grounds alleging an ILEC has failed to act in good faith in the case of a copper retirement.

Finally, if a carrier alleges that an ILEC fails to comply with the good faith requirement, the Commission should have a procedure in place to address the complaint promptly. Where the Commission finds a failure to comply with the requirement, a postponement of the retirement by 90 days (assuming no further failures by the ILEC to act in good faith) is an appropriate remedy.

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XO Communications, LLC (“XO”), by its attorneys, hereby submits its comments on the Further Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1</sup>

In its *Tech Transitions Order*, the Commission adopted measures to advance its pro-competition policies with the goal of propelling deployment of innovative communications facilities and services. For example, the Commission extended the notice period for copper retirement to 180 days,<sup>2</sup> required incumbent local exchange carriers (“ILECs”) to act in good faith when coordinating with competitors following a notice of copper retirement,<sup>3</sup> modified its

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<sup>1</sup> *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97 (rel. Aug. 7, 2015) (“*Tech Transitions Order*” or “*FNPRM*,” depending on context).

<sup>2</sup> *See id.* ¶ 29.

<sup>3</sup> *See id.* ¶ 32.

definitions in the copper retirement rules to more accurately reflect carriers' understanding of the terms,<sup>4</sup> and expanded the Section 214 discontinuance approval requirement to include wholesale service discontinuances that impact retail customers.<sup>5</sup>

In the *FNPRM*, the Commission identifies aspects of its rules that might benefit from the adoption of complementary measures. XO supports the Commission's efforts and urges it to act on two issues raised in the *FNPRM* to minimize the potential for disruption to end user customers and harm to competition. First, to facilitate competitive carrier planning in the face of all future ILEC plans to discontinue wholesale services – and to make the recent revisions to Section 214-related rules more effective – the Commission should amend its rules to require the ILECs to provide one year's notice to wholesale customers of a planned discontinuance, reduction, or impairment of service used as a wholesale input, whether or not a Section 214 approval will be required. Second, to facilitate a smooth transition as a result of a copper retirement, the Commission should enumerate objective criteria to judge whether an ILEC has worked in "good faith" with interconnecting entities. XO's proposals strike the appropriate balance between "the planning needs of competitive carriers and customers and the need for incumbent LECs to be able to move forward in a timely fashion with their business plans."<sup>6</sup>

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<sup>4</sup> See *id.* ¶¶ 79-88.

<sup>5</sup> See *id.* ¶ 102.

<sup>6</sup> See *FNPRM* ¶ 238.

**I. A ONE-YEAR ADVANCE NOTICE OF DISCONTINUANCE OF WHOLESALE SERVICES IS NECESSARY FOR COMPETITORS TO PROPERLY TRANSITION THEIR NETWORKS AND CUSTOMERS AND WILL FACILITATE MEANINGFUL EVALUATION OF WHETHER SECTION 214 APPROVAL IS REQUIRED**

In the *Tech Transitions Order*, the Commission recognized that “[d]iscontinuance, reduction, or impairment of wholesale service is subject to section 214(a)”<sup>7</sup> and decided that “prior authorization is required when the actions will discontinue, reduce, or impair service to retail customers, including carrier-customers’ retail customers.”<sup>89</sup> The ILEC determines, in the first instance, whether approval must be obtained when it discontinues service provided as a wholesale input to carrier customers. But importantly, the ILEC must undertake a “meaningful evaluation” before making the decision.<sup>10</sup> The *Tech Transitions Order* further explains that the ILEC “must evaluate whether an application is required using all information available, including information obtained from carrier-customers. This meaningful evaluation must include consultation directly with affected carrier-customers to evaluate the impact on those carrier-customers’ end users.”<sup>11</sup> Under the rules, if an ILEC determines that the discontinuance is subject to approval and submits an application, the application is presumptively approved after sixty days for dominant carriers absent Commission notification or action to the contrary.<sup>12</sup>

The *FNPRM* asks whether, to complement the steps taken in its *Tech Transitions Order*, the Commission should modify Section 63.71 of its rules to require ILECs to provide advance

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<sup>7</sup> *Id.* ¶ 113.

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

<sup>9</sup> *See id.* ¶ 119.

<sup>10</sup> *See id.* ¶ 105.

<sup>11</sup> *Id.* ¶ 114.

<sup>12</sup> *See* 47 C.F.R. § 63.71(d). Presumptive Section 214 approval occurs after thirty-one days for non-dominant carriers.

notice of a planned discontinuance of a wholesale service in a given geographic area, or whether the procedures under the existing rules (*i.e.*, providing notice to affected customers simultaneously with the application) are sufficient.<sup>13</sup> XO submits that the Commission should require an ILEC to provide at least a one-year advance notice of any plans to discontinue, reduce, or impair wholesale service in a given area, whether or not formal approval of the discontinuance will eventually be required. As XO and others noted in prior comments in this proceeding, advance notice is needed to enable competitors to assess their own network and customer requirements when a wholesale input will no longer be offered and to minimize disruption to end users' services.<sup>14</sup> An advance notice requirement is consistent with Commission policy that "it would be unreasonable to expect other telecommunications carriers or information service providers to be able to react immediately to network changes that the incumbent LEC may have

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<sup>13</sup> See *FNPRM* ¶ 238.

<sup>14</sup> See *e.g.*, *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Comments of the Wholesale DS-0 Coalition, 11-12 (Feb. 5, 2015) ("the 30 and 60 day timeframes currently provided under the Commission's Section 214 discontinuance rules are insufficient for dealing with the wide range of issues likely to be involved in as ILECs transition from TDM to IP-based networks and services. The identification of an adequate, functional equivalent, substitute wholesale service, including disclosure of the rates, terms and conditions of that substitute service, should be required well in advance of an ILEC's section 214 filing so that CLECs and the public can have adequate time to plan for the needed for the transitions, and to negotiate and enter into the necessary multi-year contracts that such shifts will necessitate."); *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Comments of Birch, Integra and Level 3, 10 (Feb. 5, 2015) ("incumbent LECs should provide at least 12 months of notice before filing a discontinuance application. This timeframe will likely allow 'a competitive LEC to move its customers to alternative service arrangements absent disruption in service while not unduly impeding the incumbent LEC's ability to transition.'"); *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Reply Comments of Birch, Integra and Level 3, n.29 (Mar. 9, 2015) ("The Commission should adopt [the 12 month notice] requirement because competitive carriers need adequate time to, among other things, (1) plan for any necessary changes to their service offerings that rely on the discontinued inputs and prepare existing retail business customers for those changes; (2) offer services to new retail business customers (many of whom demand multiyear contracts); and (3) conduct the requisite business planning.") (internal citations omitted).

spent months or more planning and implementing.”<sup>15</sup> Moreover, there is no reason to believe that a notice requirement would interfere with an ILEC’s plans to discontinue, reduce, or impair wholesale service.

**A. Competitors Are Often Dependent on ILEC Facilities to Provide Competitive Services, and Therefore Need Time to Prepare for a Planned Service Discontinuance**

**1. Wholesale Service Discontinuances Interfere with the Arrangements Between Competitive Carriers and End-User Customers**

To bolster its own facilities where buildouts are not economically feasible, XO often must purchase ILECs’ services to access end user locations or complement interoffice fiber facilities. As a result, XO has entered into many long-term contracts with ILECs for DSn special access service to use as wholesale inputs.<sup>16</sup> This creates the business stability for competitors to offer multi-year contracts that enterprise and carrier customers demand.<sup>17</sup> As a provider, XO therefore enters into long-term contracts with its enterprise and business customers, typically for

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<sup>15</sup> *In re Implementation of the Local Competition Provisions Act of the Telecommunications Act of 1996, et al.*, CC Docket No. 96-98 *et al.*, Second Report and Order and Memorandum Opinion and Order, FCC 96-333, ¶ 214 (Aug. 8, 1996).

<sup>16</sup> *See In re Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Comments of XO Communications, LLC on Further Notice of Proposed Rulemaking on Sections IV.A and IV.C, Ex. 2 at 2-3 (“In those locations where XO does not have facilities in place within price cap LEC territories, XO obtains the vast majority of its DS1 and DS3 circuits from the price cap LECs. ... Under [the price cap LECs’] tariff terms and conditions, XO can buy special access DS1s and DS3s, transport and channel terminations, at rates lower than the price cap LECs’ month-to-month rates, but rates still much higher than those of competitive access providers by agreeing to buy, or rather ‘lock-in,’ for three to five years.”) (“XO February 2015 Comments”).

<sup>17</sup> 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 multi-year service periods with end user customers. As such, 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.

three years, and often with an automatic renewal. XO, like other competitors, expects that the ILEC-provided wholesale inputs it has contracted for will continue to be available through the end of contract terms – and in all likelihood beyond as well since renewals have been a virtual certainty.<sup>18</sup> Accordingly, in the event ILEC inputs are discontinued, competitors and their end user customers may suffer material harm because the presumptions upon which their contracts are based may be undermined. To minimize those adverse impacts, XO requires adequate notice to plan for a transition.

## **2. XO Undertakes Extensive Measures Ahead of a Wholesale Service Discontinuance**

When XO receives notice of a discontinuance, it undertakes a sequence of steps, several of them resource and time intensive, to minimize the impact of the discontinuance. XO identifies the scope of impact and its options for transitioning customers, redesigns its network (including wholesale inputs), and then implements those decisions, which can include new builds, grooming to new services, or both.

Network inventory and analysis is the initial phase after a notice of discontinuance is received, and it takes approximately two months.<sup>19</sup> Within that period, the company identifies which customers will be affected by the discontinuance and what volume of services or circuits are involved – a potential two week process. XO then commences the process of network redesign by analyzing options to transition the customers, whether onto XO's network by means

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<sup>18</sup> This is especially the case for DS1 and DS3 circuits where ILECs are, in a substantial number of locations, still the only option for competitors to reach end user locations, leaving competitors with little choice but to enter into successor agreements, again for extended terms, in order to obtain the best possible rates and remain competitive.

<sup>19</sup> All of the time estimates provided here assume a modest discontinuance in one market without technical, legal, regulatory or negotiation barriers that create delays. A large scale discontinuance, as discussed below, would require additional analysis and transition time.

of a new build<sup>20</sup> or grooming to other ILEC wholesale products or those of another provider.<sup>21</sup> To explore grooming, XO requests quotes from other vendors and may have to wait several weeks to obtain complete responses. Based on XO's experience in extending its presence to new areas, the analysis and network redesign can take approximately 45 days after the inventory is complete in the case of a modest scale discontinuance.

In the second phase, XO's management team approves the network redesign and authorizes corporate capital expenditures, if required, to implement it. Such management approval usually takes at least two weeks.

Implementation of the network redesign is the third phase, for which there may be a build portion, a grooming function, or some combination thereof. To a certain extent these two sub-phases may proceed simultaneously. Once approval is obtained, for network redesigns that have a build element, the redesign is sent to XO's network engineering department. Implementation of the build sub-phase typically takes about six months, although it can be much longer for reasons outside XO's control.<sup>22</sup> The network engineering department first determines the physical requirements to implement the network redesign architecture. Once this step is completed, the equipment engineering department places orders with vendors.<sup>23</sup> The process of ordering and receiving necessary parts, and then installing them, takes about six to eight weeks (assuming the fiber build, discussed below, progressed promptly).

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<sup>20</sup> Alternatively, in some cases, XO may have existing capacity in the market which it can leverage.

<sup>21</sup> Many solutions involve a hybrid of two or three of these options, especially as the scale of the discontinuance is larger.

<sup>22</sup> For example, if negotiations to obtain building access rights (discussed below) or efforts to gain access to rights of way are protracted, the time for network engineering and construction could take a number of months longer.

<sup>23</sup> Because XO was not planning for the discontinuance in advance, it may not have the requisite equipment in inventory or on order.

Simultaneously with equipment engineering, also as part of build implementation, XO's outside plant engineering team undertakes the lengthy process of engineering and building the fiber for the network redesign. This involves, among other things, developing the paths the build will take and identifying what infrastructure will be utilized, making applications to utilities or other carriers to occupy their infrastructure with the new fiber, obtaining construction permits from municipalities and other local authorities, seeking infrastructure access from utilities and ILECs, securing building access from owners and managers,<sup>24</sup> and, once those are obtained, constructing the fiber and support facilities. At the back end of the build implementation, once the fiber and equipment has been installed, several weeks are needed to test and activate the new build to make it operational and ready to accept customers.

To the extent implementation of the network redesign in the third phase will involve grooming current wholesale services to new services or facilities of other providers – whether ILEC or other competitor – this will take a minimum of four months, based on XO's experience with similar activities moving customers from one service platform to another outside the discontinuance context. When this process commences, either right after approval of the network redesign or at a later point, depends upon whether there will be a build as well. The grooming process involves service design, negotiation of contracts or contract amendments with the other providers, engineering by the ILEC or other provider (which may itself involve a build

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<sup>24</sup> Building access negotiations are a key component to the fiber engineering process and are often the long-pole in the tent in terms of timing of any build. Unless and until XO obtains building access rights, the equipment and fiber engineering phases can grind to a standstill. Indeed, obtaining building access can become contentious and protracted, taking up to six to nine months (and possibly longer) when successful. There is always the chance the building owner will not consent. But if the process of obtaining building access rights drags on more than two months, XO will put a hold on completing other aspects of the build implementation phase, i.e., equipment engineering and fiber engineering, to ensure money and other resources are not spent on a project which may be severely delayed or ultimately unsuccessful.

of some facilities), possible CPE and wiring changes implemented by the customer at or near the premises, integration with XO's systems, and testing and activation of the new services.

Once the build sub-phase is complete and the new facilities are operational, XO enters into the fourth phase and moves the customers to the new build. This takes an additional one to three months. Planning for the customer migration often works in parallel with network engineering discussed in the previous phase, but the change orders, i.e., the moves themselves, must wait until implementation of the build is complete. To turn up customers, XO engages in circuit design, installs inside wiring where necessary for the customer to take the new service,<sup>25</sup> and, before the cutover occurs, tests and then activates the circuit.<sup>26</sup>

Based on the foregoing, where there is a build as all or part of the network redesign following a notice of discontinuance of modest scope, at least one year will be required for XO and its customers to make a transition.<sup>27</sup> Even where the network design consists solely of grooming to service or facilities of other, in the best of circumstances this will require at least seven months.<sup>28</sup>

The above discussion assumes there are no significant complications with obtaining rights of way or securing building access rights that would inordinately lengthen the process. In addition, while XO seeks to engage customers early to explain options and secure approval about

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<sup>25</sup> The customer may engage in this process itself.

<sup>26</sup> Of course, the customers must have any requisite new customer premises equipment (CPE) in place as well, ready to take the new service.

<sup>27</sup> To summarize, under normal circumstances without delay or challenges, the inventory and analysis phase can take two months, the approval phase can take approximately two weeks, the network redesign implementation phase can take at least six months (and perhaps much longer), and the customer move phase can take up to three months.

<sup>28</sup> Where there is no build, the inventory and analysis phase is two months, the approval phase is approximately two weeks, and the process of moving the customers can take at least four months (and perhaps much longer).

service transition, these communications and negotiations may take an extended period of time, which could delay certain phases of the buildout or the grooming sub-processes.

Moreover, the time frames outlined above assume a modestly scoped service discontinuance. Were an ILEC to notice a large scale discontinuance, such as the elimination of a DS<sub>n</sub> service throughout a former Bell operating territory,<sup>29</sup> XO would be taxed to carry out many of the construction-related and grooming activities in the time frames described above. Since only ILECs control the announcement of discontinuances, XO would need time to identify its needs and secure additional resources in response to notice of a large scale discontinuance. Accordingly, where a discontinuance is of significant scope, the Commission should grant requests from competitors for additional time before the ILEC should be allowed to discontinue its services.

**B. Advance Notice of a Discontinuance Will Facilitate Communication Between ILECs and CLECs and Better Enable ILECs to Make a “Meaningful Evaluation” of the Impact of the Discontinuance**

A one-year notice requirement when an ILEC seeks to discontinue, reduce, or impair service used as a wholesale input will also facilitate the process ILECs must undertake to evaluate whether a Section 214 application will be necessary “using all information available, including information obtained from carrier-customers.”<sup>30</sup> Under the new rules, ILECs are required to make a “meaningful evaluation” about whether discontinuance of the wholesale service used by carrier customers as an input into their own services will constitute a discontinuance, reduction, or impairment of retail end user service.<sup>31</sup> By receiving one year’s

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<sup>29</sup> AT&T has indicated its intentions to sunset DS<sub>n</sub> services later in this decade.

<sup>30</sup> See *Tech Transitions Order* ¶ 119.

<sup>31</sup> See *id.* ¶ 105.

notice of a planned discontinuance, the carrier customers of an ILEC will engage in activities like those just described and, as a result, be in a much better position to provide information to the ILEC regarding whether its planned elimination of the service will operate as a discontinuance, impairment, or reduction of service to retail end user customers of the competing carrier that requires approval. The one year notice XO advocates will help make more transparent the ILEC's deliberations about whether it must obtain Section 214 approval.<sup>32</sup> Accordingly, a one year notice requirement will minimize the prospects for disputes over whether a Section 214 application was required when an ILEC does not file one and enable a better record to be presented to the Commission about the impact of the planned discontinuance to resolve any disputes that, nevertheless, arise.

Finally, the Commission seeks comment on the position of AT&T that "any expanded notice is not necessary because the Commission has the option to remove a section 214 application from streamlined processing."<sup>33</sup> The Commission should reject this assertion because, immediately following the filing of a discontinuance application without advance notice, competitors are unlikely to have developed information to submit an immediate and meaningful objection to a service discontinuance. Further, AT&T's approach, unlike XO's proposal, does not address any service discontinuances that ILECs conclude do not require Section 214 approvals. Nor would AT&T's alternative to expanded notice in any way contribute

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<sup>32</sup> If an ILEC determines that its wholesale discontinuance is not subject to approval because it will not result in discontinued, impaired or disrupted service to end-users, the current rules do not provide any mechanism for competitors to challenge such a determination. Moreover, the Commission made clear in the *Tech Transitions Order* that an ILEC will not be required to present documentation to support its determination. *See Tech Transitions Order* ¶ 124. These rule limitations underscore the value of a one-year advance notice requirement to allow ILECs and competitors to engage in meaningful investigation and transparent discussions about the potential impact of a wholesale service discontinuance.

<sup>33</sup> *FNPRM* ¶ 237, *citing* Reply Comments of AT&T at 33 (Mar. 9, 2015).

to the process by which ILECs determine whether a Section 214 approval would be required in the first instance. The one-year advance notice XO proposes is a better alternative because it will allow ILECs and competitors to engage in a meaningful exchange of information that will facilitate a smoother discontinuance with minimal service disruptions for end user customers.<sup>34</sup>

## **II. THE COMMISSION SHOULD ENACT CRITERIA TO MEASURE WHETHER AN ILEC ACTS IN “GOOD FAITH” DURING THE COPPER RETIREMENT PROCESS**

### **A. Objective Good Faith Standards Will Ensure Fair and Balanced Enforcement of the Requirement**

In the *Tech Transitions Order*, the Commission mandated that ILECs give competitors at least 180 days’ notice prior to any copper retirement and that they “work with interconnecting entities in good faith to ensure that those entities have the information needed to allow them to accommodate the transition with no disruption of service to their end user customers.”<sup>35</sup> The Commission’s action is based on the impact a copper retirement can have on an ILEC’s competitors and aims to support competitors’ ability, in the face of an impending retirement, to coordinate with and obtain information from the ILEC to avoid end user service disruption.<sup>36</sup>

The importance of information exchange in connection with a copper retirement subject to objective criteria is illustrated by events following Hurricane Sandy within Verizon’s New

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<sup>34</sup> AT&T asserted in previous comments that only competitive LECs are in a position to know how a discontinuance will affect their end user customers. *See Tech Transitions Order* n.415, *citing* Reply Comments of AT&T, 43 (Mar. 9, 2015). This underscores the importance of the need for a one year advance notice of a discontinuance so that CLECs can provide ILECs with information and ensure compliance with the Commission’s mandate that incumbents undertake a “meaningful evaluation” of the potential impact of a discontinuance and specifically the impact on the CLEC’s end user.

<sup>35</sup> *See FNPRM* ¶ 241.

<sup>36</sup> To avoid service disruption to all end user customers that rely upon the wholesale inputs purchased by a competitor, information and coordination are required with regard to all copper-based services the competitor sells, whether directly to end users or to other competitors who, in turn, use the inputs to provide their end user services.

York City territory. After the storm, a significant amount of copper in specific wire centers in the City was damaged or destroyed. Although this was an emergency situation caused by a natural disaster and not a planned retirement of copper, the potential for customer disruption was significant and not consistently addressed, and the lessons learned are instructive on defining ILEC good faith dealings with competitors in the case of copper retirement. XO found that, following Hurricane Sandy, key information provided by Verizon was subject to change – both with regard to copper availability and unavailability, as well as alternative services – frustrating XO’s emergency-response planning. Verizon’s information sharing process appeared to be put together on an *ad hoc* basis and certainly was not subject to any known criteria. In effect, XO and other competitive carriers were at the mercy of what Verizon believed was appropriate information to provide and when it was appropriate to offer it. This harmed XO’s ability to handle and assist its own end user customers in dealing with the transitions forced by the disaster.<sup>37</sup>

In the *FNPRM*, the Commission seeks comment on whether to enumerate criteria against which to evaluate whether an ILEC has complied with the good faith obligation.<sup>38</sup> XO submits that the Commission should establish non-exhaustive criteria to measure good faith responses to

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<sup>37</sup> XO understands that as a result of a natural disaster such as Hurricane Sandy, copper facilities being leased and used by XO (and other competitors, as well as the ILEC itself) unexpectedly may be rendered unusable and beyond repair. In the situation of disaster or destruction, neither the incumbent nor competitive wholesale customers had any intention or expectation prior to the disaster or emergency that the copper facilities would not continue in service for the indefinite future. Nevertheless, the absence of consistent information subject to a standard framework following that disaster underscores the need for criteria for assessing whether an ILEC is acting in good faith in assisting customers who are also competitors planning for transitions in the wake of an announcement of a copper retirement.

<sup>38</sup> See *FNPRM* ¶ 241.

competitors' requests for coordination and information.<sup>39</sup> With such criteria, discussions with ILECs are almost certain to be more fruitful.<sup>40</sup>

When an ILEC decides to retire copper facilities through which interconnecting entities offer competitive services, competitors depend on ILECs to provide the information necessary to ensure a seamless transition. For example, in addition to the details about where and when the retirement will take place, ILECs are the sole source of information for what alternative facilities the ILEC can offer, if any, as well as what services the ILEC will have available at the affected locations. In connection with this information, the CLEC will also require information regarding prices, terms, and conditions, provisioning intervals, and other matters. The ILEC may also be the source of information regarding space on poles and in conduit should the competitor wish to place its own facilities to replace the copper being retired. In sum, objective criteria will help even the playing field for affected competitors, particularly given that ILECs, when they announce retirements, do so within their own control after an often lengthy internal process – an

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<sup>39</sup> The adoption of criteria should not foreclose the ability of a competitor to claim and demonstrate that an ILEC is failing to act in good faith on other grounds. For example, an ILEC may take other actions that are harmful to the competitor attempting to transition customers and services in the face of an impending retirement or that are in retaliation for the competitor making the request for information or a meeting, such as new or increased demands for the payment of special construction fees. However, the criteria offered herein are likely to cover the most common potential situations. With these objective criteria in place, competitors should be able to demonstrate to the Commission that an ILEC has failed in its obligation, manifesting bad faith and meriting a prompt remedy, as discussed in the next section.

<sup>40</sup> Any criteria the Commission develops should not be considered exhaustive, and the Commission should augment the list of criteria over time.

The Commission has recognized the potential dangers that can result in a lack of information or misinformation about a copper retirement. *See Tech Transitions Order* at n.62 (“We wish to avoid situations such as the one recounted by XO, where it received notice that one of its customers — a group of nursing homes — would be losing service the next day as a result of glitches in the copper retirement process (a result XO narrowly managed to avoid).”).

ILEC may have as much time as it wishes to take to plan for a copper retirement – whereas competitors will never have more than six-months’ notice to react.

**B. The Good Faith Criteria Should Target ILEC Responsiveness and Any Attempts to Impose Unreasonable Conditions on Information Sharing**

The Technology Transitions proceeding is not the Commission’s first foray into requiring that regulated entities act in good faith when negotiating or sharing information. The Commission’s rules require parties to act in good faith in the contexts of retransmission consent negotiations<sup>41</sup> and interconnection agreement negotiations.<sup>42</sup> Several aspects of these frameworks should guide the development of good faith criteria in the copper retirement context. XO submits that the criteria proposed below should be among those that presumptively indicate a lack of good faith and allow competitors to bring a grievance to the Commission’s attention.

*Failure by the ILEC to acknowledge and respond to a request for information in a timely fashion and to provide specific reasons in writing for not providing information*

The Commission should make clear that an ILEC’s refusal to acknowledge a request or provide information concerning alternative services and facilities that will be available, what the rates, terms, and conditions of the alternatives will be, and the means of transition from the copper facilities, is *per se* evidence of bad faith. An ILEC’s failure to acknowledge requests and provide the information in a timely fashion seriously interferes with a CLEC’s ability to develop and implement transition plans in the finite period afforded by the ILEC’s notice. The ILEC should be required to acknowledge any request for information within five (5) business days. Moreover, two weeks (ten business days) after the request is received is more than sufficient time for an ILEC to gather the relevant information and provide it to the requesting party

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<sup>41</sup> See 47 C.F.R. § 76.65.

<sup>42</sup> See 47 C.F.R. § 53.101.

concerning a retirement, which the ILEC may have been planning for many months before issuing the retirement notice. Indeed, it is during this pre-retirement notice period that the ILEC should be gathering the information competitors are most likely to request, making timely, good faith responses possible.

Further, an ILEC should be required to provide specific reasons in writing for rejecting a request for information in order to allow a requesting party to modify its request and submit it again, or alternatively bring the nature of any dispute surrounding a refusal to provide information to the Commission's attention to resolve. The ILEC, if acting in good faith should, in most cases, offer a compromise to the requesting party if any part of its request for information is being rejected. The ILEC should also be required to respond fully to all information requests which the ILEC does not completely reject.

Should an ILEC place conditions on a competitor to obtain a timely or full response to a request for information (or reasons for rejection in writing), the Commission should treat that as no different than the failure to respond in a timely fashion.<sup>43</sup> Similarly, if an ILEC gives preferential treatment to another carrier in responding to information requests, the ILEC's response should be treated as improperly discriminatory.

*Failure by the ILEC to (a) respond to a reasonable request for a teleconference or meeting within five (5) business days to discuss the retirement and options in*

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<sup>43</sup> The imposition of bad faith conditions should include, but not be limited to, requiring payment of a fee for information; a requirement to purchase other services, equipment, or facilities from the ILEC in return for information or the meeting; requiring the carrier to offer services, facilities, or equipment to the ILEC on preferential terms; requiring that a carrier competitor agree to not protest one or more future retirements; demanding a competitor's agreement to withhold from making or affirmatively make a certain regulatory submission; requiring the competitor to not make public the fact of the request or meetings; or demanding a commitment that the competitor agree to not build certain facilities.

*the wake of the retirement to transition services or customers, and (b) meet within three weeks of the requests except in extraordinary circumstances*

Requiring an ILEC to respond to a request by a competitor to schedule a meeting within one week (five business days) will facilitate practical communications about the copper retirement. This communication will allow competitors to expand on previously submitted written requests for information, or, if no such request has been provided to the ILEC yet, will provide competitors with preliminary information about the copper retirement. A competitor's request for a meeting to occur within ten to fifteen business days of the request should be honored absent extraordinary circumstances.

If requests for information are made by the competitor during the meeting or teleconference, the ILEC should respond with the information within ten business days or provide the specific reasonable reason in writing for rejecting any request.

*Failure by the ILEC to designate a representative with authority to address requests for information or a meeting (and notify requesting party of changes to the same)*

To ensure continued effective communications following a notice of retirement, the ILEC should be required to designate a representative with authority to make needed decisions upon responding to the first communications from a competitive carrier regarding a noticed retirement. Having a designated representative to contact reduces the risk of delayed responses and shifts the burden on getting the right personnel involved wholly to the ILEC. The designated representative should be copied on all communications between the ILEC and competitor and should participate in the meetings between the two parties. If the designated representative changes, the ILEC should be required to notify the competitive carrier promptly in writing.

*Failure to adhere to any voluntarily assumed obligations in the course of an information exchange or as a result of a meeting*

As a result of communications, a meeting, or a telephone conference concerning a request for information or coordination in the face of a retirement, an ILEC may make commitments to a competitor. Because requesting carriers will rely upon and act based on these commitments, it would be a common commercial practice to have them memorialized. Accordingly, an ILEC's refusal to memorialize these commitments in a written agreement should constitute a failure to comply with the good faith requirement. Likewise, any failure by an ILEC to follow through with these voluntarily assumed obligations in a reasonably timely fashion, absent compelling circumstances, should entitle the competitor to seek prompt relief from the Commission (i.e., delay of the retirement date).

*Demands by the ILEC that a requesting carrier agree to anything that prevents communication with the Commission about the retirement*

ILECs fail to act in good faith if they require a non-disclosure requirement concerning discussions about a copper retirement that prohibits that party from communicating with the Commission about the information exchanges, meetings, and other communications between the parties. Such a non-disclosure provision would be wholly inconsistent with analogous Commission rules in other areas.<sup>44</sup> ILECs may have legitimate concerns about the security of

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<sup>44</sup> See 47 C.F.R. § 51.301(c)(1); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act*, CC Docket Nos. 96-98, 95-185, GN Docket No. 93-252, Report and Order, 61 Fed. Reg. 45619 (finding that while some nondisclosure agreements are permissible, "overly broad, restrictive, or coercive nondisclosure requirements may well have anticompetitive effects," and expressly prohibiting agreements that "preclude a party from providing information requested by the FCC").

proprietary and non-public business information, but there are methods to ensure that such information is protected if shared with Commission staff without barring all disclosure to the Commission about the parties' communications regarding a retirement.

**C. The Commission Should Promptly Decide Allegations of Bad Faith, Which If Found, Should Cause a 90-Day Delay in a Retirement**

XO agrees with the Commission's suggestion that if an ILEC has not complied with the good faith requirement during a copper retirement, a Commission-mandated postponement of the retirement by 90 days is an appropriate remedy.<sup>45</sup> This extended time period would give affected interconnecting entities the opportunity to engage with the ILEC after the ILEC has been put on notice that its initial conduct contravened the good faith requirement. However, it is not so harsh a penalty that it stops an ILEC in its tracks in its efforts to modernize its systems. Rather, the 90-day additional period reflects an appropriate balance of interests, incentivizing incumbents to act in good faith and encouraging competitive carriers to make their requests promptly after receiving notice of the retirement. To implement such a remedy and ensure that the 90-day timeline is followed, the Commission should install a mechanism akin to the Enforcement Bureau's Accelerated Docket that would allow an aggrieved party to submit a complaint to the

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<sup>45</sup> See *FNPRM* ¶ 241.

Commission that the ILEC has failed to act in good faith and receive a resolution within sixty days.<sup>46</sup> This short time period is reasonable if the foregoing objective criteria are adopted.

Respectfully submitted,



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  
*Its Attorneys*

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<sup>46</sup> See 47 C.F.R. § 1.730.