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

Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications Inc.	)))))))))	WC Docket No. 16-70

PETITION TO DENY OF INCOMPAS

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Pursuant to Sections 214 and 309(d) of the Communications Act[1] and Sections 1.939 and 63.52(c) of the Commission's rules,[2] INCOMPAS submits this petition to deny the above-captioned application of Verizon Communications Inc. ("Verizon") and XO Holdings (together with Verizon, the "Applicants"), for consent to the transfer of control of XO Communications, LLC ("XO") from XO Holdings to Verizon.[3]

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[1] 47 U.S.C. §§ 214, 309(d).

[2] 47 C.F.R. §§ 1.939, 63.52(c).

[3] XO Holdings, Inc. and Verizon Communications Inc., Consolidated Application for Consent to Transfer Control of Domestic and International Section 214 Authorizations (filed Mar. 4, 2016) ("Transfer of Control Application"). *See Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications, Inc.*, WC Docket No. 16-70, Public Notice, DA 16-393 (rel. Apr. 12, 2016). This Petition reflects the position of a majority of INCOMPAS members. Individual members may be filing separate petitions or comments in which they advocate positions that are different from those set forth herein. Some members do not join in this Petition, including the Applicants.

The proposed acquisition is part of a larger transaction which consists of Verizon's proposed acquisition of XO; Verizon Wireless's leasing arrangements with Nextlink Wireless, LLC ("Nextlink"), a subsidiary of XO Holdings; and an Equity Purchase Agreement that gives Verizon Wireless the option to purchase Nextlink. The spectrum leasing arrangements are described in the separate application for consent to a long-term *de facto* transfer spectrum lease,[4] and INCOMPAS has filed today a Petition to Deny the Lease Application that includes many of the arguments set forth herein.[5] As explained below, however, the wireless and wireline components of the transaction pose threats to many of the same relevant markets and should therefore be considered together.

I. Introduction and Summary

On April 15, 2016, President Obama issued an Executive Order which stated the following:

> Maintaining, encouraging, and supporting a fair, efficient and competitive marketplace is a cornerstone of the American economy. Consumers and workers need both competitive markets and information to make informed choices.[6]

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[4] Application of Cellco Partnership and Nextlink Wireless LLC for Long-Term *De Facto* Transfer Leasing Arrangement, ULS File No. 0007162285 (filed Mar. 2, 2016) ("Lease Application"). *See Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC, a Subsidiary of XO Holdings, Seek FCC Consent to a Long-Term De Facto Transfer Spectrum Leasing Arrangement Involving Local Multipoint Distribution Service and 39 GHz Spectrum*, ULS File No. 0007162285, Public Notice (rel. Apr. 12, 2016).

[5] *See* Petition to Deny of INCOMPAS, ULS File No. 0007162285 (filed May 3, 2016).

[6] Exec. Order No. 13,725, 81 Fed. Reg. 23,417, 23,417 (Apr. 20, 2016) (Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy (Apr. 15, 2016)), https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers ("Executive Order").

The Executive Order goes on to state that certain business practices, including mergers, can "erode the foundation of America's economic vitality,"[7] and the immediate results are harmful to American consumers and workers. In contrast, competitive markets promote economic growth and can advance our national priorities, including "access to fast and affordable broadband."[8] The President has asked federal agencies to promote competition and identify actions they can take to promote "access to critical resources that are needed for competitive entry."[9]

The Commission should heed President Obama's guidance and conduct an in-depth competitive analysis of both the proposed merger and the leasing arrangements. Conducting such a review would be consistent with the policy goals of the Executive Order because the wireless assets that are the subject of the Lease Application could well be important inputs for competitive entry in the wireless broadband marketplace. Indeed, Chairman Wheeler has emphasized that "access to competitive backhaul is important to the buildout of wireless networks, to investment in wireless networks and to the creation of 5G—the next step in wireless innovation."[10] Thus, the future deployment of 5G must be fully considered and addressed in the Commission's review of the proposed transactions. Moreover, as the Commission has stated,

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local Exchange Carriers,* WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulations of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Statement of Chairman Tom Wheeler, at 1 (rel. Apr. 28, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0428/DOC-339101A2.pdf.

"[p]reserving and promoting competition in mobile wireless services is central to the Commission's mission and is critical for driving innovation and investment to the ultimate benefit of the American consumer."[11] Accordingly, the public interest requires the Commission to review the totality of the arrangements among XO Holdings and Verizon and their respective subsidiaries.

That review will show that the proposed transactions pose serious threats to competition and consumer welfare. Specifically, Verizon's proposed acquisition of XO's extensive wireline assets would, if permitted, eliminate XO as a competitor in the provision of retail and wholesale wireline business data services ("BDS") such as Ethernet-over-Copper ("EoC"), both within Verizon's incumbent LEC region and in the many geographic areas that XO serves outside of Verizon's incumbent LEC region. The transaction would also eliminate XO as an important wholesale provider of BDS inputs, including central office collocations and transport services. The related proposed leasing arrangements through which Verizon Wireless would acquire *de facto* control of Nextlink's LMDS and 39 GHz spectrum would compound the harms of the proposed acquisition by effectively eliminating XO as a possible provider of wholesale and retail wireless services in the future. Verizon Wireless's exercise of its option to purchase Nextlink would render the loss of possible future competition permanent. Thus, by itself, and in combination with the proposed leasing arrangements, the proposed transfer of control of XO would harm competition and consumer welfare.

INCOMPAS members would experience these harms because they rely on BDS and wireless broadband services as inputs to their downstream retail and wholesale service offerings.

[11] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Eighteenth Report, 30 FCC Rcd. 14515, ¶ 1 (2015).

For example, several INCOMPAS members purchase DS1, DS3, and Ethernet wireline BDS services from XO to reach customer locations that they cannot reach with their own network facilities. INCOMPAS members also purchase wholesale wireless broadband services in order to serve their own downstream wireless broadband customers. By eliminating XO as a current provider of wireline BDS, and as a possible future provider of wireless broadband services, the proposed transactions would diminish the chances that INCOMPAS members would benefit from lower prices and increased innovation in the purchase of relevant wholesale inputs. These harms would ultimately be passed on to American consumers in the form of higher prices and reduced innovation.

II. The Transfer of Control Application is Insufficient on its Face

In analyzing transactions such as Verizon's proposed acquisition of XO and the leasing arrangements, the Applicants bear the burden of demonstrating that the transaction is in the public interest.[12] In assessing whether this is so, the Commission "considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue."[13] In order to demonstrate that the proposed transaction is in the public interest under this standard of review, the Applicants should have, at a minimum, defined the relevant product and geographic markets in which the Applicants compete or in which they might compete at some point in the foreseeable future and then analyzed the effect of the proposed merger on competition in those

[12] *See Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd. 9131, ¶ 18 (2015) ("*AT&T/DIRECTV Order*").

[13] *Id.* ¶ 21.

relevant markets.

The Applicants have failed to do this. In fact, the Applicants have hardly even attempted to analyze the competitive effects of Verizon's proposed acquisition of XO, even after being prompted by the Wireline Competition Bureau to provide information relevant to this issue.[14] Nowhere do the Applicants provide good reason to conclude that Verizon will continue to make services comparable to XO's available to carrier customers, rather than use this transaction as an opportunity to engage in more price squeezes and to further raise rivals' costs.

Instead, the Applicants provide limited information as to the extent to which XO facilities overlap with Verizon's facilities in Verizon's incumbent LEC regions, and only make vague references to "sufficient supply of high-capacity facilities from other major providers" and "exploding demand" for high-speed data services.[15] The "other major providers" are cursorily labeled as "cable companies, CLECs, wireless companies, and other non-traditional players,"[16] and demand for high-capacity services is premised on growth estimates for all Ethernet services without any attempt to assess relevant Ethernet markets.[17] The Supplement Letter adds little to these wafer-thin assertions, vaguely claiming that a large percentage of the buildings served by XO within Verizon's incumbent LEC footprint are also served by "at least one other CLEC or cable company."[18] Critically, the Applicants do not differentiate between BDS and non-BDS,

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[14] *See generally* Letter from Bryan Tramont, Counsel for Verizon, and Thomas Cohen, Counsel for XO Holdings, WC Docket No. 16-70 (Mar. 22, 2016) ("Supplement Letter").

[15] Transfer of Control Application at 13.

[16] *Id.* at 14.

[17] *Id.* at 13.

[18] *See* Supplement Letter at 2. The Applicants state that Zayo, Cogent, Lightower, Lumos, and FirstLight are among the entities that provide services in these buildings. *Id.* at n.6.

such as best-efforts services. The Applicants also do not provide information as to the extent to which XO utilizes various types of unbundled network elements to compete with Verizon. The Applicants' failure to provide this information makes their assertions meaningless in the context of the Commission's rigorous competition analysis.

Nor do the Applicants assess in any meaningful way the extent to which they compete outside of the Verizon incumbent LEC territory. They assert that most of XO's network lies outside of Verizon's incumbent LEC footprint, but they fail to assess the extent to which XO and Verizon compete outside of the incumbent LEC territory or the effect the proposed transaction would have on competition in those areas. In particular, the Applicants fail to acknowledge that XO has been uniquely successful in developing and operating EoC as an attractive alternative to multiple tiers of Verizon's and other incumbent LECs' BDS offerings.

It is also significant that the Applicants' analysis of the related leasing arrangements is insufficient. The Applicants assert that Nextlink "is not being transferred with XO Communications and will continue as an independent provider of wireless-based services to commercial and wholesale customers."[19] This is technically true but substantively false. As explained below, Verizon Wireless has entered into a long-term *de facto* transfer of control lease agreement with Nextlink that leases all of Nextlink's LMDS and 39 GHz spectrum through December 31, 2018, along with an option to acquire the spectrum.[20] The Applicants simply have not taken seriously their obligation to demonstrate that the proposed transactions would promote competition and serve the public interest, convenience, and necessity.

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[19] *Id*. at 4.

[20] Lease Application at 1-2.

III. The Proposed Transfer of Control of XO Would Harm Competition

Even in the absence of an appropriate competition analysis in the Application, it is clear that the transaction as proposed will almost certainly result in significant net harms to competition and consumer welfare.

In the proposed transaction, XO Holdings has agreed to sell XO and its subsidiaries to Verizon. Verizon will thus acquire XO's coast-to-coast fiber-based IP and Ethernet networks, including an inter-city network of 20,000 fiber route miles, and more than 5,600 owned metro fiber route miles. Services provided by XO over this network include local and long distance voice, Internet access, cloud connectivity, security, private line, Ethernet, and other private data and network transport services for small and medium-sized companies, enterprises, national and government customers, and other carriers, both on a managed and wholesale basis. Verizon's acquisition of these assets would both cement its market power within its incumbent LEC region and harm competition outside of its incumbent LEC region.

Reduced Wholesale and Retail BDS Competition in the Verizon Incumbent LEC Territory. The proposed transaction would harm competition in the Verizon incumbent LEC territory in several ways. For example, in locations where XO has deployed its own last-mile connections, the proposed transaction would harm competition by eliminating XO as an independent provider of retail and wholesale services over its own facilities.

The Applicants assert that only 18 buildings within Verizon's incumbent LEC region will experience a reduction in competition as a result of the proposed transaction.[21] In particular, the Applicants state that "only" 691 of XO's on-net buildings – approximately 15 percent – are

[21] Supplement Letter at 2.

located within Verizon's incumbent LEC region, and, they assume, are also served by Verizon.[22] They also state that 537 of those 691 buildings where XO and Verizon overlap are also served by "at least one" competitive LEC or cable provider.[23] These calculations are misleading for two reasons.

First, the Applicants maintain that the merged firm would face competition from "a wide array" of competitors, such as cable companies, wireless companies, and "other non-traditional players."[24] As explained above, the Applicants do not differentiate between dedicated BDS and non-BDS such as best efforts services. Dr. Jonathan Baker, the former FCC Chief Economist working on behalf of a group of competitive LECs in the Commission's BDS rulemaking proceeding, has established that best-efforts broadband[25] and fixed wireless service[26] are not substitutes for BDS. In addition, the record in the BDS rulemaking proceeding demonstrates that Ethernet-over-HFC is not a substitute for fiber- or copper-based Ethernet.[27] Thus, the Applicants' reliance on cable and wireless competition is unpersuasive.

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[22] *Id*.

[23] *Id*.

[24] Transfer of Control Application at 14.

[25] *See* Revised Public Version of Declaration of Jonathan Baker on Behalf of Level 3, Windstream, and XO, WC Docket No. 05-25, RM-10593, ¶¶ 31-33 (filed Apr. 14, 2016) ("Baker Decl.") (explaining why best efforts broadband is excluded from a product market defined as dedicated services provided over a wireline connection).

[26] *See* Baker Decl. ¶ 34 (explaining why fixed wireless service is excluded from a product market defined as dedicated services provided over a wireline connection).

[27] *See generally* Letter from Thomas Jones, Counsel for Level 3 and EarthLink, to Marlene Dortch, FCC, WC Docket No. 05-25, RM-10593 (filed Apr. 14, 2016).

Second, even assuming that the buildings with overlapping Verizon and XO connections today will have two in-building BDS providers post transaction, those buildings are unlikely to be competitive. As Dr. Baker has explained, "in many cases, one of the two firms will provide no more than a limited constraint on the prices charged by the other"[28] where one of the two providers is an incumbent LEC and the other is a competitive provider. This concern is heightened in the instant transaction, given that XO, unlike Verizon, commonly distinguishes itself from other providers by offering the lowest-priced option for wholesale capacity.

The Applicants next claim that, of the remaining 154 overlapping buildings, 136 are "within 0.1 miles of the fiber of a leading CLEC or within 0.1 miles of a cable company lit building."[29] However, as Dr. Baker has explained, the relevant geographic market for BDS is each customer location served by a dedicated connection; this definition necessarily excludes dedicated connections that are merely nearby.[30] Thus, none of the nearby connections that the Applicants describe (many of which likely do not meet the definition of BDS in the first place) would ameliorate concentration in the 136 building locations where there is no in-building competitor.[31]

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[28] Baker Decl. ¶ 49.

[29] Supplement Letter at 2.

[30] *See* Baker Decl. ¶ 35 ("[C]ustomers of dedicated services provided over wireline, wholesale and retail, are tied to specific locations, and cannot substitute services located elsewhere. . . . Accordingly, service to each customer location served by a dedicated connection—whether a specific office suite within a building, a particular cell tower, or the location of the channel term or local transport facility sought by a CLEC—is appropriately defined as a geographic market.")

[31] *See* Baker Decl. ¶¶ 96-106. Dr. Baker explains that "the prospect of entry is unlikely to deter incumbent providers from charging supracompetitive prices." *Id.* ¶ 96. He concludes in this context that "[e]ven in urban centers, one would expect to see incumbents charging supracompetitive prices and accommodating limited entry." *Id.* ¶ 106.

Furthermore, the proposed transaction would eliminate XO as a competitive provider of retail and wholesale BDS via leased last-mile connections in the Verizon incumbent LEC territory. For example, XO is the largest and most effective of the very few EoC providers, and XO EoC provides a much-needed alternative to incumbent LEC DSn service. If Verizon ceases offering EoC service—which is a likely result given that Verizon has never offered a copper-based Ethernet product—the competitive marketplace will lose an important competitive provider of Ethernet.[32] To the extent that Verizon's incumbent LEC would continue to offer XO's EoC services, Verizon's current practices indicate that it would likely do so on terms and conditions that are much less reasonable than those offered by XO today.

Finally, XO currently provides a variety of facilities and services in metro areas that, if eliminated, would have a substantial negative impact on competitive prices that competitive LECs pay today for all types of XO-provided services. These services and facilities include long haul, hi cap, optical, and EoC, that cannot be replicated by coverage or price.

Reduced Wholesale and Retail BDS Competition Outside of Verizon's Incumbent LEC Territory. Verizon's acquisition of XO also would reduce BDS competition in areas outside of Verizon's incumbent LEC footprint. Verizon asserts that this area includes 85 percent of XO's

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[32] EoC technology provides more bandwidth than T1 and nxT1 services at lower costs (1Mbps to 10Mbps). T1 services use transmission standards and technologies that are not directly compatible with computer networks and is not as easily scalable as EoC technology. Upgrading T1 (bonded) circuit speeds can take months because the local phone company has to drop additional loops. With an EoC circuit, the port speed can often be increased remotely. EoC technology is more cost-effectively scaled than T1 technology, as T1 lines must be bonded together for a customer to get up to 12 Mbps, and the cost of the service is equal to the cost of one T1 line multiplied by the number of lines bonded. Finally, although EoC and T1 service are of comparable reliability, customers benefit from the fact that EoC uses multiple pairs of copper, which provides redundancy.

on-net buildings, a total of 3,796 buildings,[33] and 85 percent of XO's fiber sheath miles in XO's top 20 fiber areas.[34] But there is no basis for assuming that Verizon will utilize the XO assets to compete aggressively in the provision of BDS outside of the Verizon incumbent LEC territory. In fact, Verizon does not have existing facilities in 3,303 of the out-of-region buildings served by XO, or 87 percent of such buildings.[35] Thus, if approved, the transaction would at best have the effect of essentially freezing XO's competitive impact outside of Verizon's incumbent LEC footprint. More likely, as discussed below, the proposed transaction would remove a vigorous and innovative BDS competitor everywhere XO provides service today.

The effects of XO's competitive offering of EoC and other wholesale services and facilities outside of the Verizon incumbent LEC region is especially significant. As explained, XO is the largest and most adept of the small number of competitive providers of EoC. If XO were to be acquired by Verizon, it would likely be far less aggressive in its provision of EoC and other forms of BDS. This would likely result in higher prices for BDS given the limited facilities-based competition that exists in that marketplace.

Indeed, the effects of Verizon's past acquisitions illustrate the likely consequences of the proposed transaction even outside of Verizon's incumbent LEC territory. For example, INCOMPAS's members' experience is that, prior to Verizon's acquisition of MCI, MCI's competitive LEC, Metropolitan Fiber Systems ("MFS"), offered very aggressive DS1 pricing

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[33] Supplement Letter at 2.

[34] *Id.* at 3.

[35] *Id.* at 2. This shows that Verizon has found few instances in which it has a viable economic case to deploy last-mile facilities outside its incumbent LEC areas, and suggests that there are significant limits on the ability of competitive LECs to use their own last-mile facilities to compete against a Verizon/XO entity.

(e.g., $150 monthly recurring charges for 0 mile loops from MFS central offices). Verizon abandoned these aggressive prices in 2010 even in areas outside of the Verizon incumbent LEC territory and generally has been very uncompetitive outside of its region. Given Verizon's higher pricing today, there is every reason to expect that Verizon would also cause XO to abandon its aggressive competitive pricing outside of the Verizon territory.

Reduced Availability of Critical Wholesale Inputs Other Than BDS to Competitive LEC Service Nationwide. Verizon's proposed acquisition of XO would also harm competition both inside and outside of the Verizon incumbent LEC territory in the provision competitive wholesale services that leverage XO's fiber transport and/or collocation assets. The loss of these wholesale services would reduce competition and diversity in network infrastructure. Indeed, XO is the only competitive provider of these services in some geographic areas.

Verizon's acquisition of XO would reduce competitively available fiber transport (including collocations) where XO's network is currently available within Verizon's incumbent LEC footprint. The size and density of the XO network makes the proposed transaction especially harmful because XO's nationwide network is among the largest, operates in tier 1, tier 2, and tier 3 markets, and has a very deep central office density. The threat of harm from loss of competitive access to collocations is particularly acute within Verizon's incumbent LEC territory because XO's deployment of collocations and transport facilities to those collocations represent significant sunk costs, and most other competitive LECs would not have the ability to make the investments necessary to deploy such collocations and transport facilities.

The proposed transaction would also put an end to XO's multi-year network expansion plans,[36] which were slated to continue in 2016. As a result, competitive LECs would not have

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[36] Press Release, XO Communications Announces Planned Expansion of Award-Winning

access to anticipated competitive BDS fiber transport, and likely other competitive services at new locations.[37]

Harms Related to Voice Interconnection and Internet Traffic Exchange. The proposed transaction will also likely harm competitors' ability to obtain voice interconnection and to exchange Internet traffic on reasonable rates, terms, and conditions. This is because the transaction would likely cause Verizon to replace XO's efficient and flexible interconnection practices and policies with Verizon's less efficient and less flexible interconnection practices and policies.

Interconnection is the First Amendment of networks; networks cannot function without it. Congress recognized the critical role that interconnection plays in promoting voice competition by adopting Sections 251 and 252 of the Communications Act,[38] and the Commission has reinforced the importance of Internet interconnection and traffic exchange (peering) with respect to the delivery of broadband Internet access service by adopting a policy framework for these arrangements in the *2015 Open Internet Order*.[39] The proposed transaction would undermine the policies underlying these requirements in several respects.

Nationwide Communications Network (Apr. 3, 2014), http://www.xo.com/XO-Press-Release.aspx?id=10737422463.

[37] It should be emphasized that, even with XO in the market, there is insufficient wholesale competition and the service quality provided by XO and Verizon is sometimes poor. Currently, XO and Verizon each experiences frequent outages, and responsiveness and recovery are slow. The proposed transaction would make this situation worse because Verizon would have no incentive to improve these operational deficiencies if the level of competition is reduced.

[38] *See, e.g.*, 47 U.S.C. § 251(c).

[39] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶¶ 194-206 (2015) ("*2015 Open Internet Order*").

First, Verizon maintains that Sections 251 and 252 of the Communications Act only apply to TDM-based voice services (i.e., traditional plain old telephone service).[40] There is no question, however, that the Commission includes *all* VoIP-PSTN, PSTN-VoIP and VoIP-VoIP calling within Section 251(b)(5) – which necessarily requires compliance with Section 252 – when such calls are exchanged in TDM format.[41] Nevertheless, Verizon refuses to publicly offer VoIP interconnection on a non-discriminatory basis – even where it has entered into such arrangements with other providers. Verizon maintains that the mere use of IP formatting at the point of interconnection renders such arrangements "commercial agreements" that inexplicably fall outside the scope of the Act, and that it has no obligation to file them publicly with state commissions or to allow competitors to opt into them.[42] This is contrary to the plain terms of Sections 252(a)(1) and 252(i), which require that incumbent LECs file interconnection agreements with state commissions and make those agreements available for opt in by requesting telecommunications carriers.[43]

Verizon has gone to great lengths to avoid complying with these requirements. For example, the California Public Utilities Commission ("PUC") recently required, as a condition to

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[40] *See, e.g.*, Comments of Verizon, WC Docket No. 10-90, at 26-29 (filed Feb. 24, 2012).

[41] *See Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 954 (2011).

[42] *See id.* While XO will SIP peer across all products and call flows, Verizon does so only to a very limited extent.

[43] *See* 47 U.S.C. § 252(a)(1) (interconnection agreements "shall be submitted to the State commission"); *id*. at 252(i) (granting requesting telecommunications carriers the right to opt into interconnection agreements approved by the State commission).

its approval of the sale of Verizon's assets to Frontier, that the agreements be publicly filed with the PUC, stating:

> If Frontier does not file these new agreements with the Commission, other CLECs will be unable to ascertain, let alone, obtain, these same terms and conditions. As a result, Verizon Business may enjoy competitively advantageous lower costs and greater network efficiencies, and competition for voice services in the business market may be significantly harmed.[44]

Despite the PUC's finding and its requirement that the agreements be filed as a condition of its Order approving the Verizon/Frontier transaction, Verizon first defied the PUC and submitted the VoIP interconnection agreements under seal.[45] Verizon's defiance of an agency order in a state *merger* proceeding should give the Commission pause. Nevertheless, the PUC prevailed, and the eleven VoIP interconnection agreements are now publicly available, albeit with the identity of the contracting entity redacted.[46] It is evident from these interconnection agreements that Verizon is indeed engaging in discriminatory pricing, contrary to the Act's requirements. Moreover, there is no difference in form or substance between a TDM interconnection agreement and a VoIP interconnection agreement. There is no question that the Multistate IP

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[44] *Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, D.15-12-005, Decision Granting Application Subject to Conditions and Approving Related Settlements, at 56, 80, Ordering Clauses 6, 7 (rel. Dec. 9, 2015), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M156/K249/156249641.pdf. The California PUC also required Frontier to submit its VoIP interconnection agreement with Verizon as part of the transaction pursuant to Section 252.

[45] *See* Verizon Advice Letter No. 12725, U 1002 C, to California Public Utilities Comm'n (Feb. 26, 2016).

[46] *See* Verizon Advice Letter No. 12725A, U 1002 C, to California Public Utilities Comm'n (Mar. 8, 2016).

Interconnection Agreements filed by Verizon in California apply to the exchange of voice traffic that is commonly perceived as traditional voice service.[47] These agreements address traditional phone services, even if provided over a new technology.[48]

California is not the only state where Verizon has asserted that it has no legal obligation to provide VoIP interconnection to competitors. In Massachusetts, Verizon has actively fought against Section 251 interconnection obligations applying to VoIP, even where it already has entered into such agreement with another VoIP provider.[49] Verizon would have the Commission believe that commercial negotiations are sufficient and that the nondiscrimination and opt-in provisions of the Act are meaningless. But they are not. Public filing of the agreements would ensure that Verizon and other dominant incumbents are not discriminating against competitors.[50] As the FCC has stated "[c]ompliance with section 252(a)(1) [the filing of voluntary agreements]

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[47] *See* Multistate Interconnection Agreement #2 § 3, attached to Verizon Advice Letter No. 12725A, U 1002 C, to California Public Utilities Comm'n (March 8, 2016) (identifying traffic covered by the agreement).

[48] Ironically, Verizon retains the right to upgrade its network with new technology, recognizing (implicitly) the independence between the service layer and the technology used to support it:

> Notwithstanding any other provision of this Agreement, Verizon shall have the right to deploy, upgrade, migrate and maintain its network at its sole discretion. Nothing in this Agreement shall limit Verizon's ability to modify its network through the incorporation of new equipment or software or otherwise.

Id. § 36.

[49] Verizon Motion to Dismiss Petition for a Determination that Verizon IP-to-IP Interconnection Agreements Must Be Filed, Mass. D.T.C. 13-2 (filed Feb. 14, 2013), http://www.mass.gov/ocabr/docs/dtc/dockets/13-2/vrzmtndismiss.pdf.

[50] Joseph Gillan, *The Importance of Section 252 to Competition and the Public Interest: The Continuing State Role in the Age of IP Networks* (Oct. 2015), http://psc.ky.gov/pscecf/2015-00283/yunker%40desuetude.com/11022015040444/The_Continuing_State_Role_in_the_Age_of_IP_-_The_Importance_of_Section_252.pdf ("Gillan Interconnection Paper").

is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[51] Moreover, the availability of opt-in for competitors is a benefit that saves both interconnecting parties time and resources.[52]

As a result of Verizon's standstill on VoIP interconnection (and the Commission's continued acquiescence in not addressing this issue, which remains pending in its ICC reform efforts), competitors must either consent to terms dictated in Verizon's "commercial" agreements (which are unchecked as a result of Verizon's failure to file them publicly) or "manage around" and continue to translate their calls to TDM for delivery to Verizon customers, incurring additional unnecessary costs. Verizon's refusal to make its VoIP interconnection agreements available to all providers via Section 252's opt-in mechanism is slowing the IP transition, and the benefits afforded through the opt-in provision of Section 252 are being thwarted. The Gillan Interconnection Paper observes that:

> [i]n addition to discrimination and higher interconnection costs, competitors and new entrants will face protracted and expensive negotiations with large ILECs for IP interconnection—interconnection that they must attain—if large ILECs do not adhere to the Act. Section 251 and 252's provisions are intended to address these disadvantages.[53]

Verizon has approximately 120 million retail voice customers, which is over one-quarter of all voice lines in the U.S., including mobile and fixed customers.[54] Through its proposed

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[51] *Qwest Corp. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 5169, ¶ 46 (2004).

[52] Gillan Interconnection Paper at 4 (noting that, for example, in one state, more competitors chose to opt into agreements).

[53] Gillan Interconnection Paper at n.5.

[54] Verizon Communications Inc. Annual Report (Form 10-K), at 3 (Feb. 23, 2016) (Wireless Background) and Total Voice Connections, http://verizon.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingHTML1?SessionID=6qjEesgceO99Qim&ID=11203121; *see also* FCC, Voice Telephone Services: Status as of December 31, 2014, fig. 1,

acquisition of XO, Verizon would both eliminate a competitive firm that has been a staunch advocate for VoIP interconnection under Title II[55] and secure its dominance by gaining additional voice customers.

Second, the Commission should consider the harms to the Internet ecosystem, particularly with respect to the exchange of Internet traffic between networks, that would result from the proposed transaction. In particular, Verizon's Internet traffic exchange agreements reflect its status as an ISP with gatekeeper power over millions of consumers,[56] and include terms that Verizon would not be able to obtain absent the exercise of such power.[57] XO, in contrast, has not had the kind of market power that Verizon has had, and its Internet traffic exchange agreements reflect that fact.

If the proposed transaction is approved, Verizon will have the incentive and ability to require providers with traffic exchange agreements with XO to enter into new agreements with Verizon, so Verizon can extend its unfavorable interconnection arrangements to XO's network. Further, there will be one less example of Internet traffic exchange agreements that are the result of negotiations between equals, which will hinder the Commission's ability to accurately assess such arrangements between broadband Internet access service providers and edge or transit

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https://www.fcc.gov/voice-telephone-services-report. There are 449,370,000 retail voice telephone service lines in the U.S. as of December 2014.

[55] *See, e.g.*, Reply Brief of XO Communications Services, LLC, Mass. D.T.C. Docket No. 13-6 (filed June 20, 2014), http://www.mass.gov/ocabr/docs/dtc/dockets/13-6/xoreplybrief.pdf (arguing that Verizon's VoIP interconnection agreements should be filed with the state Commission and made available for opt-in).

[56] *2015 Open Internet Order* ¶¶ 20-21.

[57] For example, Verizon was able to leverage its position as a gatekeeper to obtain payment from Netflix. *See* After Comcast, Netflix signs traffic deal with Verizon, http://www.theverge.com/2014/4/28/5662580/netflix-signs-traffic-deal-with-verizon.

providers. The Commission has recently had occasion to consider Internet traffic exchange issues in other merger or acquisition proceedings.[58] The Commission should likewise carefully consider Internet traffic exchange in this proceeding and build on its previous work, and the lessons learned from those other proceedings, to ensure that a combined Verizon-XO does not harm the Internet ecosystem.

***Elimination of a Maverick Competitor*.** Approval of the proposed transaction would extinguish XO's prominent role as a maverick among competitive LECs, willing to undertake risks and explore different business models in order to compete vigorously. A maverick firm can be an important disruptive force that inhibits tacit collusion in an industry as a whole, and, in this way, mavericks can be particularly beneficial to competition in markets with few participants.[59]

As an industry leader in providing competitively-priced EoC services to customers whose needs are met by lower-speed Ethernet services, XO has played exactly that role. XO has been at the forefront of developing BDS technology that relies on legacy infrastructure to provide high-quality lower cost services to wholesale and end-user customers. In 2006, XO pioneered deployment of high-capacity services over copper loops procured from incumbent LECs; since

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[58] *See AT&T/DIRECTV Order* ¶¶ 217-219 (requiring AT&T to file all Internet interconnection agreements with the Commission and to provide the Commission with certain Internet interconnection performance metrics); *see also* Statement Of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0425/DOC-339028A1.pdf (proposing a condition that will prohibit New Charter from charging interconnection fees, including to online video providers, which deliver large volumes of internet traffic to broadband customers).

[59] *See generally* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws,* 77 N.Y.U. L. Rev. 135 (2002).

that time, it has been an innovator in the further development and deployment of EoC services.[60] In 2015 comments filed in the Commission's Technology Transitions proceeding, XO stated that its EoC speeds had "progressed from an original capability of 10 Mbps to a robust current capability of 100 Mbps."[61] XO also noted that the scope of its EoC deployment had "grown tremendously"[62] and that it was "exploring ways to increase downlink speeds using EoC significantly beyond" [63] those offered at that time. This is significant because XO has been an EoC innovator at the very moment in time that Verizon—which, as noted, does not offer a copper-based Ethernet product—is retiring its copper infrastructure because of concerns that customers' reliance on that legacy infrastructure will cannibalize its fiber revenue.

XO's aggressive competitive practices have resulted in significant benefits. For example, INCOMPAS's members have found that XO's prices are often well below other competitors' prices, including the incumbent LECs'. And because XO's EoC services rely on leased facilities, it is able to offer these competitively-priced services at buildings to which it has not deployed its own loops. The elimination of this disruptive force would compound the profoundly harmful effects of Verizon's acquisition of XO – both inside and outside of Verizon's incumbent service areas.

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[60] Press Release, 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-communciations-extends-its-ethernet-services-leadership-with-new-speeds-and-expanded-nationwide-coverage/.

[61] Comments of XO, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1, at 5 (filed Feb. 5, 2015).

[62] *Id.*

[63] *Id.*

XO's aggressive role in the market has also had important consequences for regulatory advocacy. In connection with its efforts to obtain necessary inputs for its EoC services from incumbent LECs, primarily conditioned copper loops, and in other contexts, XO has been an active participant in Commission proceedings concerning competition policy.[64] In so doing, XO has been an important counter balance to the dominant role that incumbent LECs play in regulatory proceedings. XO also has been willing to question whether interconnection and carrier agreements should be kept secret, or open to review and enforcement by the states. Finally, XO has been a leading competitive voice within INCOMPAS, providing us significant expertise in the representation of competitive providers. The proposed transaction would prevent XO from fulfilling these important roles. The likely result would be less balanced regulatory policy and, in turn, less competition.

IV. The Proposed Spectrum Leasing Arrangement Would Harm Competition

Verizon Wireless seeks to obtain *de facto* control of all of the LMDS and 39 GHz spectrum licensed to Nextlink – one of the nation's largest holders of LMDS spectrum – that is not encumbered by existing leases or other contractual requirements. The leasing arrangements

[64] *See, e.g.*, Comments of XO, WC Docket No. 15-247 (filed Feb. 5, 2016) (arguing that BDS tariffed discount plans of incumbent LECs including Verizon are unjust and unreasonable in violation of Section 201(b) of the Communications Act); Comments of XO, GN Docket No. 13-5, at 12-13 (filed Oct. 26, 2015) (arguing that Verizon's deficient information sharing regarding post-Hurricane Sandy copper retirement harmed XO and its end-user customers); Reply Comments of XO, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1, at 16-18 (filed Mar. 9, 2015) (arguing that the Commission should adopt rules to prevent incumbent LEC abuse of special construction charges during the technology transition); Comments of XO, WC Docket No. 14-192 (filed Dec. 5, 2014) (opposing USTelecom's request for forbearance from dominant carrier regulations pertaining to, among other things, access to newly-deployed entrance conduit and pricing flexibility and the use of contract tariffs); Letter from Thomas Cohen, Counsel for XO, to Marlene Dortch, FCC, GN Docket No. 13-5, GN Docket No. 12-353 (filed Aug. 14, 2013) (opposing Verizon's argument that the requirements of Section 251 do not apply to incumbent LEC VoIP interconnection).

also would apply prospectively to the encumbered Nextlink spectrum so that Verizon Wireless would lease that spectrum immediately when it becomes available. What is more, through a separate agreement, Verizon Wireless has the option to acquire Nextlink and its spectrum holdings outright. That the proposed leasing arrangements would terminate upon the later of December 31, 2018 or the exercise of the option suggests that Verizon could exercise the option in the near future should the Commission adopt rules allowing licensees to use relevant bands of spectrum above 24 GHz to provide both fixed and mobile services.[65] Verizon Wireless asserts that it plans to use the leased spectrum to develop and test 5G products and services and as an input to those services. Verizon Wireless also states that it will use the spectrum as an input to BDS that the company would use for wireless backhaul. Verizon's acquisition of these assets would have the potential to harm competition in the provision of wireless broadband.

Loss of Possible Future Wireless Broadband Competition. The Commission has repeatedly found that there is insufficient competition in the provision of broadband services.[66]

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[65] *See generally Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*; *Establishing a More Flexible Framework to Facilitate Satellite Operations in the 27.5-28.35 GHz and 37.5-40 GHz Bands; Petition for Rulemaking of the Fixed Wireless Communications Coalition to Create Service Rules for the 42-43.5 GHz Band; Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services; Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations*, Notice of Proposed Rulemaking, 30 FCC Rcd. 11878 (2015) ("*Spectrum Frontiers NPRM*").

[66] *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd. 699, ¶ 4 (2016).

As with BDS, the promotion of competition in the provision of these services should be a key policy objective for the Commission.

Unfortunately, the proposed leasing arrangements will undermine this policy objective. In acquiring *de facto* control, and, potentially, *de jure* control of the Nextlink spectrum licenses, Verizon Wireless would eliminate XO as a possible future source of competition in the provision of wireless broadband services. This is especially significant because mobile broadband use is exploding and super-fast 5G service is poised to become a robust competitor to wired broadband service offerings. As a recent NTIA analysis of U.S. Census Bureau data explains, "[m]obile Internet service appears to be competing more directly with wired Internet connections."[67] The NTIA study reports "three-quarters of American households using the Internet at home in 2015 still used wired technologies for high-speed Internet service, including cable, DSL, and fiber-optic connections[,]"[68] a seven percent reduction in wired home broadband use in just two years. During the same period, "the proportion of online households that relied exclusively on mobile service at home doubled . . . from 10 percent to 20 percent."[69]

Against this backdrop, the Commission has recognized the need to make more spectrum available for mobile broadband use, and that technological advances could unlock the potential of higher frequency spectrum for 5G applications. Through its proceeding to adopt service rules for spectrum above 24 GHz, the Commission proposes to authorize mobile operations in the 28

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[67] Giulia McHenry, Chief Economist, Office of Policy Analysis and Development, NTIA, *Evolving Technologies Change the Nature of Internet Use* (Apr. 19, 2016), https://www.ntia.doc.gov/blog/2016/evolving-technologies-change-nature-internet-use.

[68] *Id*.

[69] *Id*.

GHz and 39 GHz bands, which "could be suitable for deployment of high-capacity, high-throughput small cells as part of mobile broadband deployments," while at the same time providing "licensees with the flexibility to conduct fixed and/or mobile operations."[70]

The Nextlink spectrum cannot be viewed as an input to either an existing or potential substitute for wireline BDS. The record in the BDS rulemaking demonstrates that the existing technical limitations associated with fixed wireless services preclude either classification,[71] and it is unlikely that Verizon or any other carrier will be able to overcome these problems in the foreseeable future. It is nevertheless possible that at some point in the future the Nextlink spectrum could be used to provide a less robust form of transmission service that would be useful, for example, in the provision of wireless backhaul in some cases or as an input for best-efforts transmission services. Such possible future developments are not cognizable in a competition analysis such as the one to be conducted in the BDS rulemaking, but they are cognizable under the public interest test used by the Commission to analyze proposed transactions.

The leasing arrangements would ensure that XO could not develop a competitive wireless broadband offering or make the spectrum licenses available as inputs to a competitive wireless broadband service offered by another provider. This is far from a hypothetical concern because just a few months ago XO was exploring innovative competitive 5G uses of the spectrum that would coexist with existing fixed wireless uses.[72] In comments filed in late January 2016 in

[70] *Spectrum Frontiers NPRM* ¶ 4.

[71] *See, e.g.*, Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25, RM-10593 at 15, 17-18 (filed Jan. 27, 2016).

[72] Comments of XO, GN Docket No. 14-177, IB Docket No. 15-256, RM-11664, WT Docket

response to the *Spectrum Frontiers NPRM,* XO described several potential business plans for the Nextlink LMDS and 39 GHz licenses.[73]

> [I]n a 5G scenario where XO is a neutral host or provides capacity offload, XO could build out 5G mobile networks in the metro core and leverage its extensive metro fiber transport rings for backhaul and on-net locations for traffic aggregation. XO would likely partner with one or more mobile operators (or non-traditional operators) so their users could roam onto XO's 5G networks where available. Finally, in geographic areas where XO itself does not build out 5G facilities, it could lease spectrum to other future 5G operators. XO might lease a block of spectrum to a single operator across an entire license area, or more than one spectrum block to multiple 5G operators in those areas.[74]

Grant of the Lease Application would put the kibosh on XO's plans for its own competitive 5G use of the spectrum and would ensure that XO cannot make the spectrum available as an input to 5G services provided by other competitors of Verizon Wireless.

V. Conclusion

As demonstrated above, Verizon's proposed acquisition of XO would eliminate a significant wholesale and retail BDS competitor, both within Verizon's incumbent LEC region and in the many geographic areas that XO serves outside of Verizon's incumbent LEC region, and would eliminate an important provider of wholesale inputs, including central office collocations and transport. These competitive losses would be all the more significant in light of XO's record of innovative and disruptive BDS service initiatives. The proposed leasing arrangements would eliminate a possible future source of competitive wireless broadband service, forestalling XO's announced options for developing its spectrum in the flexible use environment that the Commission is considering in its *Spectrum Frontiers NPRM*. Verizon

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No. 10-112, IB Docket No. 97-95, at 6-7 (filed Jan. 28, 2016).

[73] *Id*. at 5.

[74] *Id*. at 6.

Wireless's exercise of the option would render the loss of possible future competition permanent. For these reasons, the Commission should deny the Transfer of Control Application and the Lease Application as proposed.

Respectfully submitted,

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May 3, 2016

CERTIFICATE OF SERVICE

I, Angie Kronenberg, hereby certify that on May 3, 2016, I caused true and correct copies of the foregoing Petition to Deny to be served on the following by FedEx Overnight delivery:

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