

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Applications of XO Holdings and Verizon Communications Inc. for Transfer of Control of Licenses and Authorizations)	WC Docket No. 16-70
)	
Applications of CELLCO Partnership D/B/A Verizon Wireless and Nextlink Wireless, LLC, a Subsidiary of XO Holdings, for Consent to a Long-Term <i>De Facto</i> Transfer Spectrum Leasing Arrangement Involving Local Multipoint Distribution Service and 39 GHz Spectrum)	ULS File No. 0007162285
)	
)	

REPLY OF DISH NETWORK CORPORATION

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LLC, a Subsidiary of XO Holdings, for)	
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Spectrum Leasing Arrangement Involving)	
Local Multipoint Distribution Service and 39)	
GHz Spectrum)	
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REPLY OF DISH NETWORK CORPORATION

DISH Network Corporation (“DISH”) respectfully replies to the Joint Opposition to Petitions to Deny and Comments (“Purchase Opposition”) submitted by Verizon Communications Inc. (“Verizon”) and XO Holdings (“XO”) in the above-referenced proceeding.¹ The Applicants continue to argue that their long-term lease and purchase transactions are separate, even though Verizon seeks control of related assets (fiber and spectrum) from affiliated companies (XO Communications, LLC (“XO Communications”) and Nextlink Wireless, LLC (“Nextlink Wireless”)), and even though they emphasize themselves that fiber and wireless backhaul services are substitutes. They dismiss most calls for additional information, claiming that such essential information as their agreements and the identity of their

¹ See Joint Opposition of Verizon and XO Holdings to Petitions to Deny and Comments, WC Docket No. 16-70 (May 27, 2016) (“Purchase Opposition”). Verizon, XO Holdings, XO Communications, and Nextlink Wireless are collectively referred to as “the Applicants.”

competitors in each market is unnecessary or irrelevant. What information they do provide is insufficient. With respect to enterprise customers, their competitive defense is that the acquisition will result in a “3 to 2” in hundreds of buildings; in fact, what they present as 3 to 2 is more properly viewed as a 2 to 1 if business data services (“BDS”) and Ethernet-over-Copper (“EoC”) are not substitutes for one another. The Commission has already found they are not. Verizon is thus conceding that the acquisition will bring about a 2 to 1 for hundreds of customers unless the Commission were to reverse that finding.

With respect to transit services, Verizon claims the transaction will not harm competition in the fiber backbone/transit market, but again, fails to define the markets or provide evidence to support its assertions. Neither does Verizon address the fact that, post-merger, Verizon would act as both a Tier 1 ISP and transit provider as well as a terminating access network. Verizon’s sole control over access to customers within its network renders its arguments about the remaining Tier 1 ISP competitors post-merger inapposite. The number of routes into Verizon’s network matter little when Verizon can choke off any of those routes, except for the one provided by Verizon using XO Communications’ fiber assets.

For backhaul, Verizon attempts to argue that eliminating XO Communications will not affect competition because XO Communications’ services do not currently include backhaul from cell sites to wireless carriers; Verizon reasons they would not include such services in the future. This is contrary to Verizon’s own claims that a current snapshot does not provide an accurate view of the competitive landscape.² Unlike fiber deployment, building facilities to

² See XO Holdings and Verizon Communications Inc., Consolidated Applications to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-70, at 13-14 (Mar. 4, 2016) (“Application”) (“[C]ompetition in a dynamic marketplace ‘is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively

provide backhaul is something XO might have done absent Verizon’s acquisition. Instead, Verizon will now control an even greater stockpile of the backhaul inputs that are, and will continue to be, crucial to growing data usage and deployment of 5G technologies.

I. Verizon Cannot Avoid Scrutiny of Its Transactions by Misdirection

A. It Is Verizon, Not Petitioners, that Bears the Burden of Proving that the Proposed Transactions Are in the Public Interest

Verizon has yet to rebut many of the transaction-specific harms Petitioners have identified.³ And in the few instances in which Verizon does address these harms, its response is cursory and lacks the type of empirical evidence and analysis that the Commission requires.⁴

According to Verizon, the additional information identified by DISH either is unnecessary or its

through the snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve.”) (citation omitted).

³ See Purchase Opposition at 1 n.2 (claiming “Opponents of the transaction have failed to identify transaction-specific harms”); *but see* DISH Network Corp., Petition to Deny, WC Docket No. 16-70, at 3-4, 10-11, 17-19 (May 3, 2016) (“DISH Petition”) (discussing transaction-specific harms to the markets for wireless- and fiber-based backhaul for mobile services, interconnection, and 5G technologies); DISH Network Corp., Reply, WC Docket No. 16-70, at 4, 6-7 (May 20, 2016) (“DISH Reply”) (same); *see generally* Competitive Carriers Association, Comments, WC Docket No. 16-70 (May 12, 2016); INCOMPAS, Petition to Deny, WC Docket No. 16-70 (May 3, 2016) (“INCOMPAS Petition”); ViaSat, Inc., Comments, ULS File No. 0007162285 (May 3, 2016); Public Knowledge, Petition to Deny and Comments, WC Docket No. 16-70 (May 12, 2016) (“Public Knowledge Petition”); Transbeam Inc., Comments, WC Docket No. 16-70 (May 12, 2016); New America’s Open Technology Institute, Comments, WC Docket No. 16-70 (May 12, 2016) (“OTI Comments”); Windstream Services LLC, Comments, WC Docket No. 16-70 (May 20, 2016); Catron County (NM) Astronomical Association, Comments, WC Docket No. 16-70 (May 27, 2016).

⁴ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, FCC 16-59, ¶¶ 2, 26, 317 (May 10, 2016) (“*Charter/TWC Order*”) (the Commission engages in a “rigorous analysis” to determine whether applicants have met their “burden of providing sufficient evidence to support each claimed benefit to enable [the Commission] to verify its likelihood and magnitude” and their “burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest”).

inclusion would not be meaningful. But information like the Applicants' purchase agreement, market definitions and analysis, and their identification of who their remaining competitors will be post-transactions is fundamental to the Commission's public interest analysis.

B. The XO Communications and Nextlink Wireless Transactions Must Be Evaluated as a Whole

As DISH and others have urged, the Commission must consider holistically the competitive effects of the XO Communications and Nextlink Wireless transactions.⁵ Even Verizon seems to struggle to support its assertion that the transactions “can and should be considered separately.”⁶ This is because Commission precedent does not mandate, or even suggest, that fiber/wired and wireless transactions between the same parties must be analyzed separately.

To support their argument, the Applicants cite the very same case they cited in their prior Joint Opposition—a case involving transactions between a rural Oklahoma Telephone Company and a small wireless company, in which the applicants' domestic Section 214 application and wireless transfer application happened to be evaluated separately.⁷ Importantly, there is not one word of explanation as to why. The Commission made no statement that separating its analysis of the two transfers was warranted, let alone mandated.

The other cases cited by Verizon are all inapposite because they concern transactions between the same transferee/assignee and unaffiliated transferors/assignors. In one case, the Commission decided to treat separately 1) Contel's application to acquire CICI and CTP from

⁵ INCOMPAS Petition at 2; OTI Comments at 1; Public Knowledge Petition at 1.

⁶ Purchase Opposition at 2.

⁷ See Joint Opposition at 24 n.79 (citing Domestic Section 214 Application Filed for the Transfer of Control of Oklahoma Western Telephone Company to KCL Enterprises, Inc., Public Notice, 30 FCC Rcd. 14053 (WCB 2015)).

COMSAT, and 2) Contel's application to acquire Equatorial.⁸ In the other case, the Commission decided to treat separately 1) the merger of Nextel with OneComm and 2) Nextel's purchase of Motorola licenses.⁹ But CICI and CTP were not affiliated with Equatorial, and OneComm was not affiliated with Motorola. The same cannot be said here: Verizon is seeking to control the fiber assets of XO Communications and the spectrum assets of XO Communications' affiliate Nextlink Wireless. In any event, even if these cases were apposite, none of them mandates separate treatment. To the contrary, the Commission stated clearly in *AT&T/Qualcomm*: "of course, we have the right in future circumstance to consolidate proposed transaction applications depending upon the actual facts of the applications."¹⁰

Verizon points to irrelevant factual differences between Verizon's deals with XO and Nextlink Wireless and the transactions in the proceedings referenced by DISH: AT&T Wireless' acquisition of Cingular and the *ALLTEL* transaction.¹¹ In *AT&T/Cingular*, AT&T sought to acquire Cingular contingent upon the transfer of various types of licenses from Cingular to T-

⁸ See *Commc 'ns Satellite Corp., et al., Application for Consent to Transfer Control of and to Reissue Comm'n Authorizations, Memorandum Opinion and Order*, 2 FCC Rcd. 7202, 7205 ¶ 22 (1987) ("*Commc 'ns Satellite Corp.*"); see also *Application of AT&T Inc. and Qualcomm Inc. for Consent to Assign Licenses and Authorizations, Order*, 26 FCC Rcd. 17589, 17622 ¶ 80 (2011) ("*AT&T/Qualcomm*") (declining to consolidate the unrelated pending applications for transfers to AT&T with the application of AT&T to acquire Qualcomm, while noting its "right in future circumstance to consolidate the proposed transaction applications").

⁹ *Nextel Commc 'ns, Inc. for Transfer of Control of OneComm Corp., N.A., Order*, 10 FCC Rcd. 3361, 3364 ¶ 18-20 (WTB 1995) ("*Nextel/OneComm*") (OneComm transferring licenses to Nextel as part of merger and Motorola transferring licenses to Nextel in exchange for voting shares in Nextel).

¹⁰ *AT&T/Qualcomm Inc.*, 26 FCC Rcd. at 17622 ¶ 80.

¹¹ See *AT&T Wireless Servs., Inc. and Cingular Wireless Corp.*, 19 FCC Rcd. 21522 (2004) ("*AT&T/Cingular*"); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd. 17444 (2008) ("*ALLTEL*").

Mobile and a spectrum swap between Triton PCS and AT&T.¹² In *ALLTEL*, Verizon sought to acquire all licenses, spectrum leases, and authorizations held by Atlantis Holdings through *ALLTEL* in a series of transfers.¹³ The Applicants point to the fact that the merger agreement was contingent upon other transfers, or that the ultimate merger would result in one company controlling all transferred assets, rather than just leasing assets, as Verizon will here. But these differences are immaterial. First, Verizon likely reached its agreement to acquire XO Communications after negotiating the proposed lease with XO Holdings—the Applicants’ merger agreement may prove the purchase to be “contingent” on this lease transfer, if it is provided. Second, Verizon’s acquisition of all Atlantis Holdings’ assets would allow it to step into “spectrum leasing arrangements,” just as Verizon will here.

In the end, all Verizon can say is that the purchase and long-term *de facto* leases considered by the Commission jointly in those transactions are slightly *more* related than the purchase and long-term *de facto* lease at issue here—Verizon does not and cannot argue that the two transactions here are unrelated.

Finally, the transactions at issue here *do not* “raise distinct issues that are properly dealt with separately,” in contrast with those discussed in *Nextel*.¹⁴ The Applicants concede, and indeed emphasize, that fiber and wireless backhaul services are substitutes. They should not be heard to say in the next breath that the acquisition of fiber assets is somehow “distinct” from the acquisition of control over substitutable wireless assets. Whatever else they are, the two are not

¹² See generally *AT&T-Cingular*.

¹³ See generally *ALLTEL*.

¹⁴ *Nextel/OneComm*, 10 FCC Rcd. at 3364 ¶ 20.

distinct for the purposes of competitive analysis, precisely in light of the substitutability of the two modes of delivery.

C. Any Benefits, However Poorly Supported, Would Likely Be Outweighed by the Transactions' Harms, but the FCC and the Petitioners Have Yet to be Granted Access to Information Sufficient to Perform this Balancing

Even if we accept the benefits alleged by Verizon at face value, Verizon has failed to demonstrate that such benefits would outweigh the transactions' harms. Indeed, while Verizon repeatedly asserts throughout its Applications, the March 22 Supplement, and its Oppositions that the transactions would not result in *any* material harm, that conclusion continues to be unsupported by substantive evidence and analysis in the record.¹⁵ Rather than provide such information and analysis, Verizon instead suggests that the identified information is not needed to evaluate the transaction.¹⁶ Indeed, Verizon fails entirely to address other requests for information, such as economic analysis or expert testimony.

With respect to the purchase agreement and lease, while access to the Applicants' agreements may not be "required" by the Commission's rules addressing Section 214 transfer applications, the Commission retains the discretion to request them.¹⁷ Indeed, the Commission routinely requests and receives access to such information.¹⁸ Verizon argues as if the rules

¹⁵ Application at 12 ("The transaction poses no material harms"); March 22 Supplement at 1 ("The proposed transaction will benefit the public interest without any material adverse harm to customers or competition"); Opposition at 5 ("no material countervailing harms [] outweigh the [transactions'] benefits.").

¹⁶ Purchase Opposition at 5.

¹⁷ 47 C.F.R. § 63.24(e)(3).

¹⁸ *Id.*; *see, e.g.*, Commission's Information and Discovery Requests for DIRECTV, MB Docket No. 14-90, at 15 (Sep. 9, 2014) (requesting that DIRECTV "[p]rovide all merger simulations, econometric modeling, or similar analysis that have been undertaken by the Company or any consultant or expert hire by the Company to analyze the effect of the Transaction, including all data and documents used in those analyses) ("DIRECTV Information Request"); Commission's

addressing the contents of Section 214 transfer applications are the sum total of any information the Commission may seek to evaluate such applications. But this is wrong. Such regulations establish what must be submitted as a threshold matter only.¹⁹ The Commission is free to request, and the Applicants must provide, information that is substantially broader in scope. Section 63.24(e)(3) of the Commission’s regulations is clear that, in the context of the proposed transfer or assignment of any international Section 214 license, “[t]he Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.”²⁰

No major transaction has ever been approved by the Commission without evaluation of the merger agreements as an important part of the record. Indeed, the Commission routinely requests to review the purchase agreement in transaction proceedings.²¹ Fundamentally, the purchase agreement touches on issues that go to the core of the Commission’s public interest determination.

Information and Discovery Request for AT&T Inc., WT Docket No. 11-65, at 4 (May 27, 2011) (same) (“AT&T Information Request”).

¹⁹ See Purchase Opposition at 5 n.9 (citing 47 C.F.R. §§ 63.04, 63.18, 63.24).

²⁰ 47 C.F.R. § 63.24(e)(3).

²¹ See AT&T Information Request at 2 (requesting that AT&T Inc. provide “to the extent not already provided, all agreements and similar documents relating to the Proposed Transaction, including all attachments, appendices, schedules, side or separate letter agreements to the Stock Purchase Agreement by and between Deutsche Telekom AG and AT&T Inc., and all similar documents by and among the Applicants, their Subsidiaries, Affiliates, or any subset thereof.”).

II. Verizon Has Failed to Show How a Reduction in Competition in BDS Is in the Public Interest

A. Verizon Has Provided Some, but Not All, of the Geographic Market Overlap Information Necessary to Evaluate the Transactions

Verizon continues to draw the Commission’s attention to the geographic overlap of only Verizon’s and XO Communications’ lit fiber footprints. Just as it did in the Application, Verizon touts the fact that only 15 percent of XO Communications’ fiber network is located inside Verizon’s ILEC wireline footprint.²² But the 15 percent figure gives only a rough view of the competitive situation. This number only accounts for XO Communications’ on-net or “lit” buildings—the majority of XO Communications’ fiber in each of its top 20 fiber areas is unlit, or “dark.”²³ Verizon’s math therefore fails to account for the potential harm to competition in markets where Verizon could light up fiber.

Verizon continues to assert that the “data” submitted in its Application materials provide information sufficient to support their assertion that there is “no potential for competitive harm.”²⁴ However, details on XO Communications’ expansive unlit footprint are still unavailable, as is information on the identity of the competing lit fiber alternatives available post-merger. Verizon’s cursory discussion continues to underestimate dramatically the true overlap of the standalone companies by a significant margin.

²² Application at 13; March 22 Supplement at 2; Purchase Opposition at 2.

²³ XO Communications’ top 20 fiber areas have 79 percent unlit fiber on average, including up to 96 percent unlit in Dallas. *See* Application at 10. XO Communications’ dark fiber includes fiber into buildings where XO Communications has or had customers, as well as fiber rings in the market it services. *See* March 22 Supplement at 3.

²⁴ Purchase Opposition at 6.

B. A Reduction in Competition from 3 to 2 in Many On-Net Buildings Is Concerning

Putting aside the effects of the transaction the Applicants fail to address, the transaction will reduce the number of BDS competitors in many on-net buildings. The Applicants themselves acknowledge that the transaction will eliminate a wholesale and enterprise services competitor throughout Verizon's ILEC footprint. Given the high barriers to entry for deploying fiber, it is unlikely that any new competitor will emerge once XO Communications is swallowed by Verizon.

Verizon's own figures over-represent even this limited state of competition because Verizon considers any cable company or CLEC that serves any on-net building to be a competitor, regardless of whether that provider provides its services over fiber or copper, or whether it provides BDS or alternative "best efforts" services.²⁵ The Commission recently tentatively concluded that "best efforts services" should not be considered the same market as BDS.²⁶ Similarly, market evidence demonstrates that while EoC can reach speeds up to 45 Mbps, fiber can reach up to 1000 Mbps.²⁷ Excluding best efforts services changes Verizon's

²⁵ See Purchase Opposition at 7-8 (assuming that the record in this proceeding will show that best efforts services are true substitutes for many business customers).

²⁶ See *Business Data Services in an Internet Protocol Environment, Tariff Investigation Order and Further Notice of Proposed Rulemaking*, WC Docket No. 16-143, at 69 ¶ 160 (2016) ("Best Efforts services do not appear to be competitive substitutes for BDS.") ("*BDS Order and FNPRM*"); see *id.* at 6 ¶¶ 13-14 ("BDS services typically provide dedicated symmetrical transmission speeds with performance guarantees. . . . A "best efforts" service, in comparison, is typically an asymmetrical service with greater download than upload speeds, is shared among multiple users absent service guarantees, and is subject to failure during high congestion periods.").

²⁷ See, e.g., First Communications, Executive Brief: 10 Reasons to Replace Your TDM Service with Ethernet, at 3 (2014), <https://www.firstcomm.com/wp-content/uploads/Ethernet-vs-T1-White-Paper.pdf>; GlobalCapacity, Wholesale Ethernet over Copper (EoC) (Apr. 2015), http://globalcapacity.com/documents/Global_Capacity_DS_EoC_042015.pdf. Some assertions track EoC as delivering only up to 20 Mbps. See *BDS Order and FNPRM* at 23 ¶ 50

competitive analysis significantly. Indeed, 44 buildings within Verizon's ILEC footprint would have no other post-transaction CLEC or cable provider offering BDS services.²⁸ It is unclear how many of the buildings would have just one competing Ethernet provider post-transaction, as Verizon has failed to provide such data.²⁹

Verizon has also refused to identify the nameless CLECs and cable companies providing service to on-net XO Communications buildings. However, *who* a party's competitors are can be just as important as *how many* such competitors exist. The Applicants' claim that "identification of third-party competitors when the Applicants have already disclosed the number of competitors in each building in which Verizon and XO Communications are located. . . ." "would add nothing of value to the Commission's deliberations" must therefore fail.³⁰ In its review of the AT&T/T-Mobile merger, Commission staff specifically explained the importance of *who* a party's competitors are:

The magnitude of likely price increases [by all providers in a service area] depends, in part, on the relative attractiveness of the

n.116 ("[P]roviders can, and do, add equipment to bare copper loops to offer Ethernet-over-Copper (EoC) service, with capacities ranging from 1-20 Mbps.") (citing McReynolds Decl. at 6 ("EoC can be used to provide higher speeds to a small number of locations, but this is impossible in most locations due to the length of the copper loop and other factors.")). On the residential side, Verizon itself admits that "fiber is the only fix," mandating that customers automatically upgrade from copper to fiber. Jon Brodtkin, *Verizon Won't Fix Copper Lines When Customers Refuse to Switch to Fiber*, ArsTechnica (Apr. 12, 2016), <http://arstechnica.com/business/2016/04/verizons-fiber-is-the-only-fix-program-upgrades-old-copper-lines/>; Jon Brodtkin, *Verizon Workers' Union Wants Investigation of Forced Fiber Upgrades*, ArsTechnica (May 3, 2016), <http://arstechnica.com/business/2016/05/verizon-workers-union-wants-investigation-of-forced-fiber-upgrades/>.

²⁸ As opposed to only one building if the quality of the service being provided by the competitor is ignored. See Purchase Opposition at 8.

²⁹ Verizon does recognize, however, that post-transaction over 40% of the buildings in Verizon's ILEC area will be served by only Verizon and one unknown CLEC or cable competitor providing an unknown service. *Id.* at 7.

³⁰ Purchase Opposition at 5.

third choice for the group of subscribers for whom [the purchased provider] was their second choice. All else equal, the less attractive the third alternative is relative to [the purchased provider], the greater is the incentive for post-transaction price increases among all [] providers.³¹

How a competitor behaves is also important. The *AT&T-Mobile Staff Analysis* found that the anticompetitive effects caused by the proposed transaction would have been exacerbated by T-Mobile's role as a disruptive force.³² Here, XO Communications, like T-Mobile, serves as a disruptive force within the markets it serves.³³ Verizon's reliance on the existence of potential competition 0.1 miles away is misplaced because such a competitor cannot and does not have the same effect as a competitor already in the building. As competitive fiber providers explain, "the presence of nearby fiber-transport facilities is obviously not evidence of *actual* competition, because a competitor must incur significant sunk costs in order to deploy a connection from its transport facilities to a location in order to reach the customer."³⁴

Despite Verizon's insistence to the contrary,³⁵ Verizon's acquisition of vast swaths of dark fiber owned and controlled by XO Communications also raises substantial competitive

³¹ *Applications of AT&T Inc. and Deutsche Telekom AG, Staff Findings and Analysis*, 26 FCC Rcd. 16184, 16318 (2011) ("*AT&T-Mobile Staff Findings*").

³² *Id.* at 16198. The DOJ also considers the identity of the competitors of merging entities when performing its review. See DOJ and FTC, *Horizontal Merger Guidelines* § 2.1.5 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> ("*Horizontal Merger Guidelines*") ("The Agencies consider whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers.").

³³ INCOMPAS Petition at 20 (noting that XO Communications is a "maverick firm" that is "willing to undertake risks and explore different business models" and is a disruptive market force by serving as "an industry leader in providing competitively-priced EoC services").

³⁴ Birch Communications, Inc., EarthLink, Inc., & Level 3 Communications LLC, Reply Comments, WC Docket No. 05-25, RM-10593, at 4-5 (Feb. 19, 2016).

³⁵ See Purchase Opposition at 11 (arguing that DISH is wrong to suggest that "Verizon's acquisition of XO Communications' dark fiber will have a material effect on competition")

concerns. Simply because dark fiber represents potential, and not extant, competition in the BDS market does not mean that the Commission should turn its eye. To the contrary, the Commission should focus on each of the numerous and specific competitive concerns raised in DISH's petition.³⁶ The significance of dark fiber extends well beyond the limited scope of the BDS market. In fact, XO Communications' dark fiber assets are vital inputs to both backhaul and fronthaul services necessary to support the projected 1000-fold increase in mobile traffic over the next decade and is critical to the rollout of 5G.³⁷

In using XO Communications' dark fiber to disadvantage Verizon's downstream market competitors, Verizon would have two sabotage strategies to employ: overcharge backhaul resellers, who lease dark fiber and light it up; or withhold capacity.³⁸ Just as the Applicants claim that a provider with dark fiber is "a potential competitor that could enter the market," dark fiber in the hand of Verizon is dark fiber stripped from a competitor in not just the BDS market, but each of the markets in which Verizon and XO Communications are players.³⁹

because "existing competition," in and of itself, "precludes any material loss of competitiveness in any location"); *id.* (generally dismissing that dark fiber will have a material effect on competition because some competition will remain post-transaction and failing to substantively address issues raised in DISH Petition).

³⁶ DISH Petition at 17, 19, 25.

³⁷ *Id.*; Joey Jackson, *Dark Fiber Key to Future of Small cells, Backhaul*, RCRWireless News (Dec. 21, 2015), <http://www.rcrwireless.com/20151221/network-infrastructure/dark-fiber-key-to-future-of-small-cells-backhaul-tag20>.

³⁸ DISH Petition at 19.

³⁹ *Id.* at 25 (citing March 22 Supplement at 3).

III. Verizon Has Offered No Support for Its Assertion that It Lacks an Incentive to Discriminate Against Competitors to Its End-User Business

As noted above, the burden to demonstrate that the proposed transactions are in the public interest lies with the Applicants and the Applicants alone.⁴⁰ However, when confronted by DISH with specific concerns that the proposed transactions would cause significant and negative vertical effects by allowing Verizon to gain control of many inputs needed by Verizon and its competitors for the provision of CMRS service, as well as eliminate one of the limited number of independent providers of Internet transit services,⁴¹ the Applicants once again merely respond that such arguments are not cognizable and are without merit because “Verizon will have neither the incentive nor the ability to raise rivals’ costs as a result of the acquisition because numerous competitive alternatives to XO Communications’ services will remain in virtually all locations.”⁴² However, Verizon fails to identify, both inside and outside of Verizon’s ILEC footprint, the specific competitive alternatives it alleges.⁴³ Of course, it is not only the existence, but the number, identity, and quality of such competitors, that matter.⁴⁴ As such, the Commission should require Verizon to support its assertion regarding the lack of

⁴⁰ *See id.* at 6 n.17.

⁴¹ *See id.* at 11-12.

⁴² Purchase Opposition at 12.

⁴³ *See id.* at 12-13 (arguing that the acquisition of XO Communications’ operations would not lessen competition outside of its ILEC footprint because “Verizon is one of many competitors that provide BDS . . . [s]o it could not raise its rivals costs in those areas,” nor within the in-footprint markets where XO Communications has fiber because harmful discrimination would be “nonsensical even if it was possible” because of the “ample supply of competitive high-capacity facilities from other major providers.”).

⁴⁴ *See AT&T-Mobile Staff Findings*, 26 FCC Rcd. at 16198, 16242-43.

vertical competitive effects by engaging in a foreclosure analysis for each of the following markets: EoC, Internet transit, and mobile backhaul.⁴⁵

IV. Verizon Has Failed to Show That Eliminating an Independent Provider of Internet Transit Services Is in the Public Interest

The Applicants claim the transaction will not harm competition in the fiber backbone/transit market, but again, fail to define the market or provide evidence to support their assertions. Verizon claims that its amorphous transit market is “well-functioning” and “highly competitive,” just as Comcast did in its failed merger with Time Warner Cable⁴⁶ to support its argument that gaining control over another link in the vertical chain will not be harmful. However, many Internet stakeholders have presented significant evidence to the contrary.⁴⁷

In fact, Tier 1 ISPs have every motivation to claim the market is working fine because they can leverage control of the few routes into their networks to foreclose edge providers. These providers, which include Verizon, Comcast, Time Warner Cable, and AT&T, are terminating access networks that have the power to act as gatekeepers to subscribers within their networks. For an Internet content provider to deliver traffic to a Verizon customer, it must work with transit providers (or content delivery networks (“CDNs”) who themselves work with the

⁴⁵ The Commission routinely looks at foreclosure analyses when weighing the public interest harms and benefits of a merger. *See, e.g., Charter/TWC Order* ¶ 173; *Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4382, Appendix B ¶ 3 (2011).

⁴⁶ *Applications and Public Interest Statement of Comcast Corporation and Time Warner Cable Inc.*, Applications and Public Interest Statement, MB Docket No. 14-57, at 159 (Apr. 8, 2014).

⁴⁷ Netflix, Inc., Petition to Deny, MB Docket No. 14-57, at 45-46 (Aug. 25, 2014) (“Netflix Comcast/TWC Petition”); Cogent Communications Group, Inc., Petition to Deny, MB Docket No. 14-57, at 2-3 (Aug. 25, 2014) (“Cogent Comcast/TWC Petition”).

transit providers) who transport its traffic to the interconnection point and into Verizon's network.

Just as Comcast did, the Applicants cite to *Global Crossing* for the assertion that peering and transit can be obtained from an increasing number of providers.⁴⁸ However, reliance on this precedent is misplaced. In *Global Crossing*, no backbone provider exclusively served larger terminating access networks, so an edge provider could reach an end user without going through the merging backbone providers' networks. But this feature of the transit market does not apply to large terminating access networks. There is no way to reach a Verizon broadband subscriber other than through Verizon. No matter how many routes there are to Verizon's network, Verizon's broadband customers are "single homed."⁴⁹ And the Applicants' argument that "customers can (and surely will) switch to another provider if any anti-competitive conduct were to occur" is false. As DISH and many other stakeholders have repeatedly shown, customers rarely switch providers due to the lack of alternative providers available, high switching costs, and the lack of information about who is to blame for service degradation.⁵⁰ As such, customers are captive to their broadband provider and whatever harmful practices it may employ.

In any event, consolidation of the market over the past decade makes Verizon's purchase of the independent XO Communications more significant, not less. Although no source

⁴⁸ Purchase Opposition at 19.

⁴⁹ See William B. Norton, *The 21st Century Peering Ecosystem*, DrPeering International, at 138 (2014), available at <http://drpeering.net/core/chl0.2-The-21st-Century-Internet-Peering-Ecosystem.html> ("Some in the industry call these customers 'captive' since there is no alternative path to reach them.").

⁵⁰ DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at 3 (Oct. 13, 2015); DISH Network Corp., Petition to Deny, MB Docket No. 14-57, at 2-3 (Aug. 25, 2014); Netflix Comcast/TWC Petition at 37-42; Cogent Comcast/TWC Petition at 20-22.

definitively enumerates Tier 1 ISPs, Verizon remains one of ten or fewer Tier 1 ISPs.⁵¹ As the number of Tier 1 ISPs decreases, each provider becomes more powerful. Further, Tier 1 ISPs like Verizon who are also terminating access networks already control two important links in the vertical chain between a content provider and a consumer. By acquiring a transit provider like XO Communications, Verizon expands its hold over nearly the entire route to the customer.

XO Communications serves as a significant, independent alternative path into at least some of Verizon's U.S. network. As a terminating access network, Verizon has the power to "de-peer" transit providers or CDNs that they interconnect with on a settlement-free basis, cutting off access to customers inside its network. Verizon has an incentive to de-peer independent transit providers like XO Communications to extract access fees; when Verizon is both the transit provider and the terminating ISP, Verizon has no incentive to engage in such harmful interconnection practices. This is what is unique about "independent" transit providers. Increased use of CDNs does not eliminate the need for independent transit providers when it is these transit providers' networks over which CDNs must operate. To properly understand the scope of the harm that Verizon may be able to cause post-transactions, Verizon should provide information about the extent to which Verizon's and XO Communications' fiber networks can substitute each other for transit services.

⁵¹ A 2014 source counts only 7 Tier 1 ISPs in the United States. *See The Tier 1 ISP Report*, DrPeering International (2014), <http://drpeering.net/FAQ/Who-are-the-Tier-1-ISPs.php>. Verizon is wrong when it alleges that DISH uses outdated data regarding the number of Tier 1 providers. DISH cites to 2012 data, which reports that there are ten Tier 1 networks, DISH Petition at 21 n.69, and references earlier proceedings for their legal standards. *See, e.g.*, DISH Petition at 22 n.75, 76.

V. Verizon Has Failed to Show That Eliminating an Independent Network Benefits Other Cellular Providers That Require Increasing Amounts of Backhaul

Verizon also dismisses DISH's concern about the implications for the cellular backhaul market from the elimination of an independent network.⁵² But Verizon's dismissal rests almost entirely on the assumption that, because XO Communications' current services do not include backhaul from cell sites to wireless carriers, they will not include such services in the future. This assumption is contrary to what limited information the Applicants have submitted to the Commission to date, belies market realities, and cannot reasonably be utilized to support the Applicants' burden of demonstrating that the eliminating of XO Communications as an independent network benefits other cellular providers that compete with Verizon.

Backhaul services are necessary inputs to the deployment of mobile broadband.⁵³ Indeed, Verizon's and others' 5G deployment will depend on backhaul, both fiber and wireless.⁵⁴ Without adequate access to backhaul, carriers cannot manage the predicted 1000-fold increase in wireless traffic projected for the next decade.⁵⁵

This enormous expected increase suggests that, although XO Communications does not currently provide mobile backhaul in the general market, it was positioning itself to do so in

⁵² See Purchase Opposition at 23.

⁵³ Jon Sallet, General Counsel, FCC, Remarks at INCOMPAS 2016 Policy Summit, Newseum Washington, D.C., at 8 (Feb. 10, 2016) ("Sallet Remarks") ("[T]he structure and efficient performance of the market for dedicated business data services may be fundamental to the deployment of 5G mobile broadband, which will require many more cell sites and thus much greater demand for the business data services generally referred to as backhaul. Control of a necessary input can impact the competitiveness of the downstream market, in this case mobile broadband.").

⁵⁴ DISH Petition at 11; Opposition at 4 ("deploy[ing] 5G technology...will involve small cell deployment and require widely available backhaul capability to connect those small cells to Verizon's core network").

⁵⁵ DISH Petition at 13.

conjunction with the rollout of 5G. Indeed, XO Communications and Nextlink Wireless together have both the fiber and the spectrum to do so.⁵⁶ The Applicants also acknowledge XO Communications' current role as a provider of a "variety of private data and network transport services to other carriers over its fiber assets,"⁵⁷ suggesting a natural pathway into the backhaul market. Before the announcement of the transaction, XO Communications had even gone public about its intentions to "develop a 5G business plan for its LMDS and 39 GHz licenses" that are particularly well-suited for backhaul.⁵⁸

XO Communications has also positioned itself as a competitive player, providing backhaul and transit capacity to anyone who needs it, including companies that compete with Verizon, or companies that turn to XO Communications to avoid having to negotiate with Verizon.⁵⁹ The proposed transactions would eliminate XO Communications' independent and neutral presence, replace it with increased Verizon market power, and leave very few remaining independent service providers with an expansive geographic footprint. As such, XO Communications currently serves as a substantially larger competitive threat in the backhaul marketplace than the fiber that is located 0.1 miles away from the buildings that XO Communications currently services, and which is owned by some third-party provider that the Applicants have to date refused to disclose.

⁵⁶ See Purchase Opposition at 11 (acknowledging XO Communications' control of dark fiber that "exerts competitive force in the marketplace"); DISH Petition at 1-2. Further, the effect that XO's sale of these fiber and spectrum assets, through both the proposed acquisition of XO Communications and the proposed long-term lease of spectrum from Nextlink Wireless, would have on reducing competition in the backhaul market demonstrates why the Commission should combine the review of these transactions. See DISH Petition at 4-6.

⁵⁷ Purchase Opposition at 23.

⁵⁸ DISH Petition at 15 (citing XO Communications' Comments in the *Spectrum Frontiers NPRM* proceeding).

⁵⁹ *Id.* at 4.

Finally, given this and the other continued failures by the Applicants to disclose critical information relevant to the Commission's public interest analysis, the Commission should require that the Applicants provide, among other things, XO Communications' own documents relating to its intention to enter the backhaul marketplace, as well as its intentions to compete against Verizon with regards to 5G services.

VI. Conclusion

For the foregoing reasons, the Commission should set both Applications for a hearing, and deny them.

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DECLARATION

The foregoing has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing, except for those facts for which official notice may be taken, is true and correct to the best of my information, knowledge and belief.

Executed on June 6, 2016

A handwritten signature in black ink, appearing to read 'J. Blum', is written over a light gray rectangular background. Below the signature is a solid black horizontal line.

Jeffrey H. Blum
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CERTIFICATE OF SERVICE

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