

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
International Comparison and Consumer	)	GN Docket No. 09-47
Survey Requirements in the Broadband	)	
Data Improvement Act	)	

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**REPLY COMMENTS OF AT&T INC.**

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## I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies (collectively, AT&T) respectfully submit the following reply comments to address two arguments raised by XO and NextLink (collectively, XO) in response to the Commission's public notice seeking comment on how it should implement the provisions of the Broadband Data Improvement Act (BDIA) regarding international comparisons and consumer surveys.<sup>1</sup> *First*, XO's suggestion that the Commission should structure the international comparisons to focus particular attention on countries that have implemented broadband unbundling regimes is contrary to the plain language of the BDIA and would obscure the multiplicity of other factors that may affect broadband deployment in any given country. *Second*, XO's proposal to collect broadband data from providers disregards the BDIA's clear directive that the Commission conduct "surveys of consumers" and, in all events, is entirely unnecessary because the Commission already collects the data in question from broadband providers through its Form 477 broadband data collection program.

## II. DISCUSSION

### A. The Commission Should Not Bias its International Comparisons Toward Countries that Have Adopted Broadband Unbundling Regimes.

The legal framework for unbundling in the U.S. is set forth in section 251 of the Act, which requires the Commission to consider both the benefits *and the burdens* of any unbundling obligations it imposes.<sup>2</sup> As the DC Circuit has explained, "unbundling is not an unqualified good" because it deters both incumbents and competitors from investing in the underlying

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<sup>1</sup> See Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (Oct. 10, 2008) (BDIA); *Comment Sought on International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, Public Notice, DA 09-741 (March 31, 2009); Comments of XO Communications, LLC and NextLink Wireless, Inc., GN Docket No. 09-47 (April 10, 2009).

<sup>2</sup> See *USTA v. FCC*, 290 F.3d 415 (DC Cir. 2002) (*USTA I*); *USTA v. FCC*, 359 F.3d 554 (DC Cir. 2004) (*USTA II*); *Covad v. FCC*, 450 F.3d 528 (DC Cir. 2006).

network facilities that support broadband services,<sup>3</sup> which conflicts with the Act's goals of promoting facilities-based competition and the deployment of advanced services.<sup>4</sup> In eliminating most (though not all) unbundling requirements for broadband networks during the past six years, the Commission has faithfully adhered to the text and purpose of section 251, as well as the other goals of the Act, and the courts have repeatedly affirmed the Commission's broadband decisions.<sup>5</sup> These decisions have "encourage[d] the innovation and investment that come from facilities-based competition" and have "made it easier for companies to invest in equipment and deploy the high-speed networks that consumers desire."<sup>6</sup> As a result, broadband investment, service capabilities, facilities-based competition, and subscribership have all dramatically increased over the last six years. Indeed, according to the Commission's most recent data, broadband providers activated more than 100 million new broadband connections between June 2003 (20.6 million) and December 2007 (121.2 million).<sup>7</sup>

Despite the pro-investment, pro-competition and pro-consumer results of the Commission's adherence to the text and goals of the Act, XO urges the Commission to focus particular attention on "network unbundling policies implemented by other countries" when conducting the international comparisons required by the BDIA.<sup>8</sup> XO cites the Netherlands,

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<sup>3</sup> *USTA I* at 429.

<sup>4</sup> *USTA II* at 579-80.

<sup>5</sup> *See supra* n.2.

<sup>6</sup> *See Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, FCC 04-290 ¶ 2 (released Feb. 4, 2005).

<sup>7</sup> *See High-Speed Services for Internet Access: Status as of June 30, 2007*, Wireline Competition Bureau, Table 3 (March 2008) (June 2003 data); *High-Speed Services for Internet Access: Status as of June December 31, 2007*, Wireline Competition Bureau, Table 3 (Jan. 2009) (December 2007 data).

<sup>8</sup> XO Comments at 3.

which has the highest per capita broadband penetration among OECD countries,<sup>9</sup> as an example of a country where unbundling policies have purportedly been responsible for increased deployment of DSL-based broadband. Based on the alleged success of unbundling in the Netherlands, XO asserts that the Commission should focus its international comparison on “countries that regulate broadband services pursuant to a similar pro-competition mandate.”<sup>10</sup>

AT&T does not object to the Commission examining the unbundling policies of the Netherlands or any other country as part of the international comparisons required by the BDIA. When the Commission conducts that analysis, AT&T is confident the Commission will conclude that excessive unbundling policies favored by certain carriers, such as XO, will only diminish facilities-based investment and competition.<sup>11</sup> But in directing the Commission to make international comparisons, Congress did not want the Commission to focus myopically on countries that have pursued aggressive unbundling policies. To the contrary, Congress instructed the Commission to examine a wide variety of technical, economic, demographic, regulatory and

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<sup>9</sup> See Broadband Growth and Policies in OECD Countries, Figure 1.6 (June 2008). As explained in AT&T’s Comments, numerous parties have documented flaws in the OECD’s broadband reporting methodology. AT&T Comments at 2.

<sup>10</sup> XO Comments at 4. *But see Is Mandatory Unbundling the Key to Increasing Broadband Penetration in Mexico? A Survey of International Evidence*, Robert W. Crandall and J. Gregory Sidak (June 2007) (“Countries with strong unbundling policies, such as those in the EU, have much lower incumbent network investment than countries that have much less aggressive wholesale unbundling policies, such as Canada and the United States.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996065](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996065); *Do Unbundling Policies Discourage CLEC Facilities-Based Investment*, Robert W. Crandall, Allan T. Ingraham, Hal Singer, (2004) (concluding that unbundling decreases facilities-based competition), available at [http://www.brookings.edu/~media/Files/rc/articles/2004/04business\\_crandall/20040429.pdf](http://www.brookings.edu/~media/Files/rc/articles/2004/04business_crandall/20040429.pdf).

<sup>11</sup> See, e.g., *Is Mandatory Unbundling the Key to Increasing Broadband Penetration in Mexico? A Survey of International Evidence*, Robert W. Crandall and J. Gregory Sidak (June 2007) (“Countries with strong unbundling policies, such as those in the EU, have much lower incumbent network investment than countries that have much less aggressive wholesale unbundling policies, such as Canada and the United States.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996065](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996065); *Do Unbundling Policies Discourage CLEC Facilities-Based Investment*, Robert W. Crandall, Allan T. Ingraham, Hal Singer, (2004) (concluding that unbundling decreases facilities-based competition), available at [http://www.brookings.edu/~media/Files/rc/articles/2004/04business\\_crandall/20040429.pdf](http://www.brookings.edu/~media/Files/rc/articles/2004/04business_crandall/20040429.pdf).

other factors that may affect broadband deployment. It also specifically instructed the Commission to “identify relevant similarities *and differences* in each community, including . . . the regulatory model under which broadband service capability is provided.”<sup>12</sup> Thus, the BDIA expressly contemplates that the Commission would compare communities with a variety of regulatory models – in addition to a variety of other demographic, economic, technical and other attributes – rather than skew its analysis toward only those countries that have pursued unbundling, as XO proposes.

Indeed, XO’s focus on unbundling in the Netherlands ignores many other factors that may play a role in that particular nation’s OECD ranking.<sup>13</sup> For example, the Netherlands is a relatively small, very densely populated country (393 persons per square km.) with flat terrain and few, if any, remote or insular areas.<sup>14</sup> These characteristics make it an ideal place to deploy DSL-based broadband services, the speeds and economics of which benefit from shorter loop lengths and high population density. The U.S., by contrast, is a relatively large and far less densely populated country (31 persons per square km.), with a substantial amount of mountainous terrain and numerous remote and insular areas,<sup>15</sup> which makes DSL-based broadband less feasible in a significant portion of the nation. The Netherlands is also the landing

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<sup>12</sup> BDIA § 103(b)(3) (emphasis added).

<sup>13</sup> See *supra* n.9 (discussing flaws in OECD rankings).

<sup>14</sup> See Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2008 Revision* at <http://esa.un.org/unpp/>; CIA World Fact Book, Netherlands, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html#Comm>. See also *The Netherlands Broadband Market Report 2005*, Broadband Wales Observatory (“The Netherlands is a small, very flat country . . . . It is one of the most densely populated countries in the world with a population of 16.3 million people living in 7 million households and a population density of 395 inhabitants per square kilometre.”), available at <http://www.bbwo.org.uk/broadband-3052>.

<sup>15</sup> See Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2008 Revision* at <http://esa.un.org/unpp/>; CIA World Fact Book, United States, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>.

point for many of the fiber-optic submarine cables that provide Internet connectivity between North America and Europe and it is home to the Amsterdam Internet Exchange, which is reportedly the largest Internet exchange point in the world in terms of member companies and traffic volume.<sup>16</sup>

Of course, the primary objective in the present proceeding is not to *decide* whether and how these and other variables affect broadband service capabilities in the Netherlands or any other country – that exercise will come later when the Commission initiates its next broadband inquiry pursuant to section 706 of the Act.<sup>17</sup> Rather, the point here is to ensure that the Commission develops an objective methodology for conducting the international comparisons required by the BDIA, without gerrymandering those comparisons to achieve pre-ordained conclusions about a regulatory regime preferred by a particular broadband provider. Accordingly, the Commission should reject XO’s proposal to bias the international comparisons toward countries with unbundling regimes.

**B. XO’s Proposal for Carrier Data Surveys is Both Contrary to the BDIA and Entirely Unnecessary.**

Section 103(c)(1) of the BDIA states that “the Commission shall conduct and make public periodic surveys of *consumers* in urban, suburban, and rural areas” to determine the

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<sup>16</sup> See *supra* *The Netherlands Broadband Market Report 2005* (“The Netherlands holds a strategic position on the fringe of mainland Europe which has made it a landing point for submarine cables from North America. This has resulted in a higher than expected telecommunications infrastructure build for a country of its size and has led to the Amsterdam Internet Exchange (AMS-IX) becoming one of the major European exchanges. According to the International Telecommunications Union (ITU), The Netherlands had the second highest level of international bandwidth per inhabitant in the world in 2004, with over 20Mbps per person.”); AMS-IX - Amsterdam Internet Exchange Website, available at <http://www.ams-ix.net/>; Amsterdam Internet Exchange, Wikipedia Entry, available at [http://en.wikipedia.org/wiki/Amsterdam\\_Internet\\_Exchange](http://en.wikipedia.org/wiki/Amsterdam_Internet_Exchange).

<sup>17</sup> See BDIA 103(b)(1) (requiring the Commission to conduct the international comparison “[a]s part of the assessment and report required by section 706 of the Telecommunications Act of 1996”).

capabilities of their broadband services and the uses they make of those services.<sup>18</sup> Despite Congress's clear and unambiguous directive for the Commission to conduct consumer surveys, XO asserts that Congress really meant for the Commission to conduct consumer *and carrier* surveys because "carriers are more likely than their residential and business customers to know whether the broadband service at a particular address is delivered over fiber, DSL, Ethernet over copper, or another copper-based technology."<sup>19</sup> According to XO, such data is necessary to give the Commission "a better understanding of the competitive harm cause by [ILECs'] ongoing, unchecked retirement of copper plant."<sup>20</sup>

Contrary to XO's bald assertions, there is nothing in the plain language of the BDIA or its legislative history to support XO's expansive reading of section 103(c)(1). Indeed, XO makes no attempt to demonstrate otherwise and its argument should be seen – and rejected – for what it is: a brazen attempt to hijack the consumer survey section of the BDIA to serve its own regulatory agenda with respect to a pending CLEC petition regarding the Commission's rules for the retirement of copper loops.<sup>21</sup>

Moreover, even if the Commission were inclined to obtain the provider data XO describes, there is absolutely no reason for the Commission to interpret section 103(c)(1) as XO proposes because the Commission *already* collects the data in question. As part of its long-running Form 477 broadband data collection program, the Commission requires broadband

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<sup>18</sup> BDIA § 103(c)(1) (emphasis added).

<sup>19</sup> XO Comments at 6

<sup>20</sup> XO Comments at 5.

<sup>21</sup> See *Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, RM-11358, Public Notice, DA 07-209 (Jan. 30, 2007). AT&T filed comments opposing the petition, in which we described the petition's numerous factual and legal defects. See *AT&T Opposition*, RM-11358 (March 1, 2007).

providers to report the number of broadband connections they serve, broken down into specific technology categories, including separate categories for “Fiber,” “ADSL,” “SDSL,” and “Traditional Wireline,” which the Commission defines as “all copper-wire based technologies other than xDSL,” such as “Ethernet over copper and T-1[s].”<sup>22</sup> The Commission also recently increased the granularity of this data collection by requiring providers of fixed broadband services to report connections at the Census Tract level.<sup>23</sup> XO fails to acknowledge the existence of the Commission’s broadband data collection program, let alone explain why the Commission would need to re-invent the wheel by duplicating that program under the auspices of section 103(c)(1) of the BDIA. Accordingly, XO’s proposal should be summarily rejected.

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<sup>22</sup> FCC Form 477, Instructions for March 1, 2009 Filing, at 7. The Commission’s Form 477 Instructions refer to this category as “other wireline,” while its broadband reports refer to the category as “traditional wireline.” *See supra* n.7.

<sup>23</sup> *Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89, ¶ 10 (released June 12, 2008).

### **III. CONCLUSION**

The Commission should reject XO's proposals regarding unbundling and provider surveys for all of the reasons discussed above.

Respectfully Submitted,

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